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# Music Piracy in the Pacific Rim: Applying a Regional Approach towards the Enforcement Problem of International Conventions

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# MUSIC PIRACY IN THE PACIFIC RIM: APPLYING A REGIONAL APPROACH TOWARDS THE ENFORCEMENT PROBLEM OF INTERNATIONAL CONVENTIONS

## I. INTRODUCTION

The importance of protecting intellectual property rights is an increasing concern in the international arena. Expanding patterns in trade and technology have caused an escalation of the "piracy"<sup>1</sup> problem.<sup>2</sup> Intellectual property is a leading component of United States intellectual trade and international competitiveness. The production of intellectual property is becoming increasingly expensive.<sup>3</sup> This is mainly attributable to high research and development costs which require "large-scale production, open international markets, and protection against free-riding imitators to recoup costs of production."<sup>4</sup> Unfortunately, original artists are discouraged because new reproduction techniques for intellectual products lower copying costs, while legal enforcement costs continue to rise.<sup>5</sup> Problems associated with pirated goods have caused a divisive debate between developing countries, such as Pacific Rim countries, and industrialized countries, such as the United States.<sup>6</sup>

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1. See *What is Piracy?*, THE STRAITS TIMES, June 14, 1994, at 7. This Comment defines piracy of music recordings as the "misappropriation of original recordings by those engaged in the production of unauthorized copies." *Id.* Three types of piracy are basic, counterfeit, and bootleg. Basic piracy is the duplication of original recordings without the original producer's or the successor in title's permission. The pirate copy is packaged differently. The inlay cards, if included with the product, are made of cheap materials and printed poorly with noticeably poor color separation. Pirated CDs or cassette tapes are usually much cheaper than the original. On the other hand, counterfeits are produced and packaged exactly like the original recording. Trademarks and logos are also copied to make them look like originals. Lastly, bootlegs are illegal recordings of artists' performances. They are pressed and sold without authorization from the artists, the song composers, or the recording company. *Id.*

2. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 275 (1991).

3. *Id.*

4. *Id.*

5. *Id.*

6. Preeti Sinha, *Special 301: An Effective Tool Against Thailand's Intellectual Property Violations*, 1 PAC. RIM L. & POL'Y J. 281 (1992).

In 1993, American companies lost approximately \$800 million<sup>7</sup> in revenues to copyright piracy.<sup>8</sup> In the same year compact disc ("CD") piracy amounted to 30% of the total piracy sales worldwide.<sup>9</sup> This amounts to \$1.9 billion in pirated materials.<sup>10</sup> Additionally, worldwide sales of sound recordings in 1994 reached \$30.5 billion, an increase of 5.6% from 1993.<sup>11</sup>

Governments of industrialized countries, such as the United States, are eager to see stricter intellectual property laws enacted in developing countries, especially in certain Asian countries such as China and Thailand. The United States wants to prevent the unauthorized production and sale of products originally created in industrialized countries.<sup>12</sup>

Given that the United States is one of the world's largest producers of copyrighted material, it has a substantial stake in the establishment and enforcement of international copyright laws.<sup>13</sup> In addition, businesses in the United States and other industrialized nations have a significant concern for increased regulation of copyrighted works because research and development of products is expensive.<sup>14</sup> These enterprises demand recovery of their initial production costs, as well as any profits from their inventions and innovations.<sup>15</sup> In contrast, developing countries are reluctant to invest funds toward enacting and enforcing intellectual property legislation.<sup>16</sup> Developing countries consider the domestic sale of pirated goods beneficial to their economies.<sup>17</sup> These countries benefit from increased consumer spending on pirated goods.<sup>18</sup>

With new technological advancement in reproduction, opportunities for piracy are limitless. However, pirates are gaining sophistication in reproduction.<sup>19</sup> For example, an audio pirate achieves a competitive edge

7. All figures are in United States dollars unless otherwise noted.

8. Joseph Lo, *CD Tagging System Gets Cool Reception*, S. CHINA MORNING POST, June 19, 1994, Money, at 2.

9. Rebecca Lim, *One Third of World Piracy Sales are CDs*, THE STRAITS TIMES, June 14, 1994, Life, at 7.

10. *Id.*

11. *Id.*

12. Sinha, *supra* note 6, at 281.

13. Valerie L. Hummel, *The Search for a Solution to the U.S.-Caribbean Copyright Enforcement Controversy*, 16 FORDHAM INT'L L.J. 721, 723 (1993).

14. *Id.* at 728.

15. *Id.*

16. *Id.* at 734.

17. *Id.*

18. Hummel, *supra* note 13, at 728.

19. James W. Peters, *Toward Negotiating a Remedy to Copyright Piracy in Singapore*, 7 NW. J. INT'L L. & BUS. 561, 564 (1986).

over legitimate importers and dealers by offering underpriced recordings of high quality at an earlier date.<sup>20</sup>

The pirating process usually originates in London or Los Angeles, where, for example, an employee of an international airline receives a copy of the latest album.<sup>21</sup> Within twenty-four hours, that album is transported to a foreign production plant.<sup>22</sup> However, legitimate importers "must either ship in the records — taking up to two months — or air freight the records at great expense in order to gain, at most, a twenty-four hour edge over the pirates."<sup>23</sup> As a result, the international trading community has stressed the importance of copyright and intellectual property ownership protection.<sup>24</sup>

United States trade negotiators at the General Agreement on Tariffs and Trade ("GATT")<sup>25</sup> conference estimated that intellectual property counterfeiting, including words, music, computer software, and trademark violations, total \$60 billion annually.<sup>26</sup>

This Comment discusses the growing problem of music piracy in Pacific Rim nations. It also considers the protection afforded by multilateral copyright treaties and proposes an alternative regional-based solution to the enforcement problem. Part II discusses the problem of music piracy in various Pacific Rim countries. Part III examines the protection available to the United States to combat music piracy through multilateral copyright treaties and agreements. Part IV analyzes the problem of enforcing these international conventions. Finally, Part V proposes solutions to music piracy, including a regional trade-based agreement between the United States and Pacific Rim nations, similar to the Caribbean Basin Initiative.<sup>27</sup>

## II. PIRATING PROBLEMS IN THE PACIFIC RIM

The problem of piracy of records, tapes, motion pictures, videos, books, and computer programs is growing in many parts of Asia.<sup>28</sup>

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 565.

24. Ian Verrander, *The Thought Police*, SYDNEY MORNING HERALD, Mar. 26, 1994, at 4A.

25. See discussion *infra* part III.B.

26. Verrander, *supra* note 24, at 4A.

27. Caribbean Basin Initiative, 19 U.S.C. §§ 2701-2706 (1988). See discussion *infra* part V.A.2.

28. Alan S. Gutterman, *International Intellectual Property: A Summary of Recent Developments and Issues for the Coming Decade*, 8 SANTA CLARA COMPUTER & HIGH TECH.

However, in the future, Asia is expected to emerge as the world's most dynamic economic region.<sup>29</sup> The economic growth rate in Asia is more than seven percent, while Western countries remain stagnant or grow at slow rates.<sup>30</sup> Further, the Organization of Economic Cooperation and Development ("OECD") estimates Asia's world trade to grow by three percent per year.<sup>31</sup>

Asia's economic growth, coupled with increased consumer spending, is evident in the music industry. Asia has the fastest growth in record sales.<sup>32</sup> Therefore, it is only natural that many recording artists want to enter the Asian market. Graeme Nesbitt, a spokesperson for Frontier Entertainment, stated:

[N]ew groups are looking for a new territory to sell their music and promote themselves. Also, there are artistes who have toured Europe and America but have never been to Asia. There is a fascination and curiosity about Asia. . . . Moreover, there are more younger people to tap in South-east Asia than in Western countries.<sup>33</sup>

In addition, audiences in Pacific Rim countries such as Singapore are willing to pay more for concerts.<sup>34</sup> In 1991, the highest priced ticket for a sold-out show was \$125 for Paul Simon.<sup>35</sup> In 1993, tickets for a sold-out Elton John concert for were \$200.<sup>36</sup> Julius Ng, Assistant Marketing Manager of Polygram Records, estimated that sales in Singapore increased by 25% to 35% percent in 1993, three times more than in Europe.<sup>37</sup> In 1993, Singaporeans alone spent \$112 million on music, a 13.5% increase from 1991.<sup>38</sup> Ng stated: "a sale figure of half a million units in the region — including Singapore, Indonesia and Hong Kong — it's enough to convince an artiste that he has a following here."<sup>39</sup>

Piracy keeps pace with the world's music industry technology and sales development. China is considered the biggest violator, selling

J. 335, 346 (1992).

29. *S-E Asia is New Market for Western Artistes*, THE STRAITS TIMES, Sept. 15, 1993, Life, at 7.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *S-E Asia is New Market for Western Artistes*, *supra* note 29, at 7.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *S-E Asia is New Market for Western Artistes*, *supra* note 29, at 7.

approximately forty-five million pirated CD units in 1993.<sup>40</sup> CD piracy's alarming growth rate is incomparable to more traditional forms of piracy.<sup>41</sup> A significant amount of pirated CDs are produced in China because of China's inadequate copyright protection and the rapid growth of CD plants.<sup>42</sup>

### A. China

China has become the world's largest pirate market; from 1992 to 1993, CD piracy operations grew almost five times.<sup>43</sup> United States copyright owners suffer greater trade losses from piracy in China than in any other country in the Pacific Rim.<sup>44</sup>

In October 1992, China joined the Berne Convention<sup>45</sup> as well as the Universal Copyright Convention.<sup>46</sup> China's first copyright law was adopted in 1990 but contained many provisions inconsistent with the Berne Convention.<sup>47</sup> Since China has become a signatory to the Berne Convention, these inconsistencies will be removed so that the copyright law will comply with the Berne Convention.<sup>48</sup>

American officials accused China of allowing one of the world's worst music piracy operations to develop.<sup>49</sup> In 1993, the International Federation of the Phonographic Industry ("IFPI") estimated there were \$380 million a year in sales of pirated recordings, while there were only \$70 million a year in sales for legitimate recordings in China.<sup>50</sup> In 1992, worldwide music pirate operations profited by \$2.1 billion.<sup>51</sup> In the

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40. Lim, *supra* note 9, at 7.

41. *Id.*

42. *Id.*

43. *Id.*

44. *China, Thailand, Indonesia Among Countries Criticized for Inadequate Protection of Intellectual Property*, E. ASIAN EXECUTIVE REP., Mar. 15, 1991, at 8 [hereinafter *Inadequate Protection*].

45. See discussion *infra* part III.A.1. The "Berne Convention was established in 1886 at a diplomatic conference by the Swiss Federal Council as a union of states for the protection of literary and artistic works." Leaffer, *supra* note 2, at 293 n.95.

46. David C. Buxbaum & John Y. Lo, *Intellectual Property Issues Get Protection in China*, CHI. DAILY L. BULL., Apr. 6, 1993, at 6. See discussion *infra* part III.A.2.

47. Buxbaum & Lo, *supra* note 46, at 6.

48. *Id.*

49. *China Update*, 6 J. PROPRIETARY RTS. 33 (1994).

50. *Id.*

51. *Id.*

United States, industry officials estimate losses of almost \$1 billion each year from copyright piracy in China.<sup>52</sup>

China now has twenty-nine factories<sup>53</sup> producing CDs, whereas only three factories existed in 1992.<sup>54</sup> These factories have an annual production capacity of over seventy-five million CDs, while China's domestic demand is only five million CDs.<sup>55</sup> The remaining seventy million are believed to be pirated copies of popular albums that are exported and sold for a fraction of their legitimate price.<sup>56</sup>

Liu Xiliang, Vice-Minister of the Ministry of Radio, Film and Television of China stated:

China is supporting the fight against piracy of phonographic products. . . . China's record and video companies are paying great attention to the protection of phonographic copyrights in both domestic and international terms. . . . More Chinese record companies will become members of IFPI [International Federation of the Phonographic Industry],<sup>57</sup> following the footsteps of the China Record Company [CRC], which joined the organization last year . . . [a]nd this will bring China's anti-piracy activities in line with international norms.<sup>58</sup>

The CRC is China's largest national firm that manufactures and reproduces phonographic products.<sup>59</sup> The CRC's membership in IFPI provided China with its first seat in the IFPI, and also gave China an opportunity to hold the regional council meeting.<sup>60</sup>

### B. Hong Kong

Pirated CDs made in China are exported into Hong Kong and to other markets worldwide. In Hong Kong, the piracy level increased from only three percent in 1992 to over twenty percent in 1993; the increase is mainly

52. *Trade With China: Hearing Before the House Ways and Means Comm. Trade Subcomm.* (Mar. 9, 1995), in FED. NEWS SERVICE, at 3, available in LEXIS, News Library, FEDNEW File [hereinafter *Trade With China*].

53. *Id.*

54. Lim, *supra* note 9, at 7.

55. *Trade With China*, *supra* note 52, at 3.

56. *China Update*, *supra* note 49, at 33.

57. See discussion *infra* part III.C.

58. *Crack Down on Pirated Recordings Planned*, BBC Summary of World Broadcasts, Nov. 2, 1993, available in LEXIS, World Library, BBCSWB File.

59. *Id.*

60. *Id.*

attributed to pirated CDs produced in China.<sup>61</sup> In 1993, Hong Kong customs officials confiscated 95,671 pirated CDs, 85,554 more than in 1992.<sup>62</sup> Legal officials are concerned that to combat increased checks by Hong Kong Customs and Excise on motor vehicles and ships distributors are paying travelers to bring pirated goods by hand from China through the crowded Shenzhen railway border.<sup>63</sup>

In Hong Kong, pirated English language CDs cost approximately HK\$25,<sup>64</sup> which is equivalent to approximately US\$3.00. Pirated Cantonese language CDs cost HK\$60 to HK\$70 less than legitimate CDs in Hong Kong's music stores.<sup>65</sup> Due to the advancement of digital recording, the sound quality of pirated CDs is as pure and clear as the original recording. However, the packaging covers are obviously fake, often with blurred photos and misspelled titles.<sup>66</sup> For example, a Madonna CD features song titles such as "Marerial Girl," "Crzy for You," and "Jastify My Love."<sup>67</sup> An Eagles CD lists a song as "One of These Hights."<sup>68</sup>

In China, provincial governments own partial interests in piracy factories. The Chinese administration in some poorer areas utilizes pirated CD sales as its main source of revenue.<sup>69</sup> Between 400,000 and 500,000 pirated CDs enter Hong Kong each month, and eighty percent are sold locally.<sup>70</sup> The IFPI estimated that sales of pirated CDs cost the Hong Kong music industry about HK\$360 million annually.<sup>71</sup>

### C. Taiwan

Copyright protection of sound recordings continues to be a serious problem in Taiwan.<sup>72</sup> There are alarming reports of emerging manufacturing of pirate CDs in Taiwan's CD facilities. The recording industry's

61. Lim, *supra* note 9, at 7.

62. Catherine Field, *CD Pirates Thrive in "Marerial" World*, THE TIMES (London), July 26, 1994, Overseas News, at 10.

63. *Id.*

64. HK\$ denotes Hong Kong dollars.

65. Field, *supra* note 62, at 10.

66. *Id.*

67. *Id.* The correct titles are *Material Girl*, *Crazy for You*, and *Justify My Love*.

68. *Id.* The correct title is *One of These Nights*.

69. *Id.*

70. Field, *supra* note 62, at 10.

71. *Id.*

72. Gutterman, *supra* note 28, at 338.



anti-piracy personnel continue to face personal danger at work.<sup>73</sup> Losses remain at about \$15 million per year.<sup>74</sup>

#### D. Korea

Korea's enforcement of intellectual property has improved somewhat since the submission of International Intellectual Property Alliance ("IIPA")<sup>75</sup> in February 1990, to the United States Trade Representative ("USTR").<sup>76</sup> Pressure from the industry and the United States government finally propelled the Korean government to prosecute cases aggressively and advocate for higher penalties, including jail terms.<sup>77</sup> Its willingness to prosecute first occurred in the fall of 1989, when the President of Tower Press, Korea's largest book pirate, received a jail sentence.<sup>78</sup> Nevertheless, music piracy still remains a problem. Many pirated tapes still exist in Seoul and losses from piracy are still about \$30 million.<sup>79</sup>

Korea is listed as one of the original Priority Watch List countries by the USTR.<sup>80</sup> The USTR suggested a specific plan requesting the following: improved enforcement of intellectual property laws by Korean enforcement entities, proper documentation of a decrease in the sale of pirated and counterfeit items, and active participation in negotiations of multilateral intellectual property issues.<sup>81</sup>

#### E. Malaysia

Although Malaysia adopted a new copyright law in December 1987, trade association representatives repeatedly criticize Malaysia's unwillingness to take a number of necessary actions to alleviate the increasing levels of piracy.<sup>82</sup> Specifically, Malaysia refuses to enter into copyright relations with the United States or to sign an agreed-upon bilateral

73. For example, the Executive Director of a local record association was attacked by assailants hired by tape pirates and was hospitalized from the attack for some time. *Inadequate Protection*, *supra* note 44, at 21.

74. *Id.*

75. *Id.* at 8. IIPA, a coalition of eight trade associations, represents motion picture, music, record, book, and computer software industries in the United States. *Id.*

76. *Id.*

77. *Id.* at 20.

78. *Inadequate Protection*, *supra* note 44, at 20.

79. *Id.* at 21.

80. Gutterman, *supra* note 28, at 371.

81. *Id.*

82. *Id.* at 379.

copyright treaty.<sup>83</sup> Instead, Malaysia announced that it would abide by the copyright laws of the Berne Convention.<sup>84</sup> However, Malaysia will face the same enforcement problems as other signatories of the Berne Convention.

#### F. Philippines

In the Philippines, losses due to copyright infringement were approximately \$117 million in 1988.<sup>85</sup> Government officials in the Philippines had promised copyright amendments to comply with the copyright laws of the Berne Convention; however, officials have done little.<sup>86</sup> In the Philippines, sound recordings are protected under copyright law only if the recordings are registered.<sup>87</sup> Since registration is practically unavailable to foreign producers, enforcement takes place under unfair competition laws, which results in ineffective protection.<sup>88</sup> As of 1991, United States copyright owners were faced with a closed market in the Philippines.<sup>89</sup>

#### G. Indonesia

In 1988, Indonesia adopted a new copyright law and entered into a bilateral copyright agreement with the United States.<sup>90</sup> Admiral Sudomo, Indonesia's Coordinating Minister for Political and Security Affairs, assisted and sponsored the Indonesian Recording Association's ("ASIRI") reduction of music piracy in Indonesia.<sup>91</sup> IIPA estimated total piracy losses in Indonesia to be approximately \$50 million per year, which is just \$5 million above IIPA's 1988 estimation.<sup>92</sup>

#### H. Thailand

Trade associations are concerned with the level of piracy in Thailand.<sup>93</sup> Specifically, Thai enforcement agents failed to prosecute a

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83. *Id.*

84. *Id.*

85. Gutterman, *supra* note 28, at 381.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Inadequate Protection, supra* note 44, at 19.

90. Gutterman, *supra* note 28, at 382.

91. *Inadequate Protection, supra* note 44, at 19.

92. *Id.* Music piracy loss is negligible. *Id.*

93. Gutterman, *supra* note 28, at 382.

number of music pirates and imposed burdensome requirements for documenting piracy claims.<sup>94</sup> Moreover, fines levied against retailers selling pirated records and tapes have had little effect, and private sector enforcement agents reportedly have received personal threats of violence.<sup>95</sup> In the area of copyright law, ineffective Thai enforcement has led to significant losses for the United States' music industry.<sup>96</sup>

The current round of GATT negotiations attempted to strengthen loose piracy laws. For example, for copyright infringement cases in Thailand, the original copyright holder must personally appear in court.<sup>97</sup> Therefore, if a Bruce Springsteen tape were copied and sold illegally, Bruce Springsteen must appear as complainant.<sup>98</sup> This is an overly burdensome requirement.

### III. AVAILABLE INTERNATIONAL COPYRIGHT PROTECTION

#### A. Multilateral Copyright Treaties

##### 1. Berne Convention

The Berne Convention,<sup>99</sup> adopted in 1886, is the first multilateral treaty for international copyright law, which originally afforded ten countries copyright protection beyond their physical boundaries.<sup>100</sup> The United States, the Russian empire, several prominent European nations, including several Portuguese republics, as well as countries in Africa, Asia, and the Middle East remained outside the Berne Convention.<sup>101</sup> Prior to the Berne Convention, each country protected its own authors through

94. *Id.*

95. *Id.* at 382-83.

96. *Id.* at 383.

97. John M. Broder, *Hollywood Opposes Trade Pact*, L.A. TIMES, Jan. 11, 1993, at D1.

98. *Id.*

99. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 331 U.N.T.S. 217, Hein's No. KAV 2245 [hereinafter Berne Convention]. The Berne Convention was originally opened for signature on Sept. 9, 1886, and most recently revised at Paris on July 24, 1971.

100. James J. Merriman, *Battling Motion Picture Pirates in Turbid International Waters*, 23 CASE W. RES. J. INT'L L. 623, 625 (1991); see also Ancel W. Lewis, *Recent Developments in Copyright Law: The Berne Convention*, 22 COLO. LAW. 2525 (1993). The Berne Convention was originally signed by Britain, Belgium, Haiti, Germany, Spain, Italy, Liberia, Tunisia, France, and Switzerland. Hummel, *supra* note 13, at 737 n.114. Since 1886, the Berne Convention has been revised in 1908, 1928, 1948, 1967, and 1971. *Id.*

101. Merriman, *supra* note 100, at 625.

domestic copyright laws, but each country also allowed its citizens to use foreign works as they wished.<sup>102</sup>

The United States used to enforce registration, term, and notice requirements as a necessary part of its copyright laws.<sup>103</sup> However, the Berne Convention originally did not include these “formality” requirements.<sup>104</sup> Even though the United States sent representatives to several of the original Berne conferences, it was not an original signatory to the Berne Convention in 1886.<sup>105</sup> Therefore, the United States’ only protection under the Berne Convention was through the Rome Act’s “back door.”<sup>106</sup>

The Rome Act provided that United States nationals could receive Berne Convention protection by publishing their works in a member country first or simultaneously.<sup>107</sup> The World Intellectual Property Organization (“WIPO”)<sup>108</sup> administers the Berne Convention in Geneva, Switzerland. WIPO assumed these duties from the Bureau of the Union after the Stockholm Conference.<sup>109</sup>

The Berne Convention bases copyright protection on national treatment, meaning that foreign works should enjoy, in each member country, the same protection given works of that member country’s nationals.<sup>110</sup> The Berne Convention “guarantees authors the exclusive right to authorize the reproduction, translation, and public performance (including broadcasting) of their works.”<sup>111</sup> However, no protection is afforded to producers of sound recordings for two reasons: “(1) producers of sound recordings are not considered ‘authors’; and (2) sound recordings are not considered ‘literary [or] artistic works.’”<sup>112</sup>

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102. Deborah Ross, *The United States Joins the Berne Convention: New Obligations for Authors’ Moral Rights?*, 68 N.C. L. REV. 363, 365 (1990).

103. Merriman, *supra* note 100, at 625.

104. *Id.* at 625-26.

105. *Id.* at 626.

106. *Id.*

107. *Id.*

108. See discussion *infra* part III.A.3.

109. Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC’Y 121 (1994).

110. Berne Convention, *supra* note 99, art. 4(1), 331 U.N.T.S. at 223.

111. David Edward Agnew, *Reform in the International Protection of Sound Recordings: Upsetting the Delicate Balance Between Authors, Performers and Producers or Pragmatism in the Age of Digital Piracy?*, 13 LOY. L.A. ENT. L.J. 219, 221-22 (1993).

112. *Id.* at 222.

Consequently, the Berne Convention did not stop extensive worldwide trade loss caused by counterfeiting and music piracy.<sup>113</sup> The fact that the Berne Convention contains no effective dispute settlement provisions demonstrates that its framers never intended it as an enforcement mechanism for intellectual property rights.<sup>114</sup> The Berne Convention did not create transnational rights for intellectual property, nor did it include a system of enforcement of copyright laws.<sup>115</sup> It only conferred national protection with minimum rights.<sup>116</sup> As a result, the Berne Convention is ineffective when countries do not enforce their domestic copyright laws or ignore their international obligations.<sup>117</sup>

## 2. Universal Copyright Convention

The Universal Copyright Convention ("UCC"),<sup>118</sup> adopted in Geneva, Switzerland, on September 6, 1952, afforded international copyright protection without requiring its signatories to relinquish any "formality" requirements.<sup>119</sup> The UCC is administered by the Copyright Law Division of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") in Paris, France.<sup>120</sup> One similarity between the Berne Convention and the UCC is that both embrace national treatment as their primary feature.<sup>121</sup>

Unlike the Berne Convention, the UCC allows the United States to enter a multilateral copyright treaty without relinquishing its "notice" requirements. In a UCC nation, a national's creative works or works published are afforded national treatment.<sup>122</sup> This means that member nations must provide the same protection to the nationals of other member nations as they provide to their own nationals.<sup>123</sup> Currently, various texts of the UCC are in force in eighty-two countries.<sup>124</sup>

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113. Clark W. Lackert, *International Efforts Against Trademark Counterfeiting*, 1988 COLUM. BUS. L. REV. 161, 170 n.37 (1988).

114. *Id.*

115. Leaffer, *supra* note 2, at 294.

116. *Id.*

117. *Id.*

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

119. Hummel, *supra* note 13, at 740.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Hummel, *supra* note 13, at 739-40.

The UCC has several defects as well. The UCC affords the copyright owner only the protection given by the country in which the copyright is obtained.<sup>125</sup> Due to the lack of adequate minimum standards, the UCC is considered a weak convention.<sup>126</sup> This inadequacy is due to the UCC's goal of obtaining the widest number of adherents, as opposed to achieving the maximum copyright protection possible among the member states.<sup>127</sup> To achieve this goal, the UCC gives members wide discretion in the amount of protection each member chooses to extend.<sup>128</sup>

The UCC also permits countries with inadequate copyright laws to become member states, further weakening the purpose of the UCC.<sup>129</sup> Although Pacific Rim countries can now gain membership to the UCC with only minor changes to their domestic laws, membership will not solve the piracy problem.<sup>130</sup>

Furthermore, even if the United States would have a better forum in which to pursue its intellectual property rights, membership in the UCC would not lead to adequate copyright protection for Pacific Rim countries.<sup>131</sup> This anomaly flows from the drafting of UCC laws. The UCC would obligate the United States to use its trade advantage to encourage other member countries to upgrade their copyright laws.<sup>132</sup>

The UCC and the Berne Convention are not mutually exclusive; however, the Berne Convention is farther reaching in its scope and protection. Recently, the United States acceded to the Berne Convention while retaining its membership in the UCC. The United States' accession to the Berne Convention produced five major effects:

1. As of March 1, 1989, U.S. copyrights [are] automatically . . . protected in over seventy-nine of the Berne Union nations;
2. Berne Union countries . . . provide U.S. copyright holders the agreed minimum level of protection;
3. Berne members . . . treat U.S. nationals like their own nationals for copyright purposes;

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125. Dawn Jordan, *Software Piracy: The United States Needs to Utilize the Protection Provided by the Berne Convention in the Pacific Rim*, 3 EMORY J. INT'L DISP. RESOL. 135, 147 (1988).

126. *Id.* at 148; see also Hummel, *supra* note 13, at 740.

127. Jordan, *supra* note 125, at 148.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Jordan, *supra* note 125, at 148.

4. more effective combat of piracy of U.S. works abroad; and
5. as of March 1, 1989, foreign nationals whose works were first published in another Union country are afforded automatic protection in the United States.<sup>133</sup>

### 3. World Intellectual Property Organization

WIPO has governed international intellectual property since its creation in 1967.<sup>134</sup> WIPO is a specialized agency of the United Nations ("UN") and is headquartered in Geneva.<sup>135</sup> The General Assembly of WIPO is a representative body consisting of delegates from each of the UN's 116 member states.<sup>136</sup> WIPO's objectives are the promotion of worldwide intellectual property protection and implementation of international intellectual property conventions, such as the Berne Convention and Paris Convention.<sup>137</sup>

The four major unions that WIPO administers are the Paris Convention,<sup>138</sup> the Berne Convention, the Madrid Agreement, and the Rome Convention.<sup>139</sup>

#### *B. Multilateral Trade-Based Agreement/General Agreement on Tariffs and Trade*

Beginning in the 1980s, the United States faced increasing problems with copyright infringement coupled with ineffective solutions to combat that infringement. Although the United States held membership in several world conventions, it began to seek solutions to the piracy problem in multilateral trade-based resolutions. Developed nations, including the United States, classify the lack of international copyright protection as a

133. Merriman, *supra* note 100, at 628.

134. Cordray, *supra* note 109, at 121.

135. *Id.* at 122.

136. *Id.*

137. *Id.*

138. The Paris Convention is over 100 years old with 103 members. *Id.* at 122-23. Its provisions relate to "inventions, trade names, trademarks, industrial designs, utility models, indications of source, appellations of origin, and the repression of unfair competition." *Id.* at 122-23.

139. Cordray, *supra* note 109, at 122.

trade issue with defined economic effects.<sup>140</sup> Within this context, the United States considered GATT.<sup>141</sup>

The Uruguay Round of GATT included intellectual property protection provisions for the first time.<sup>142</sup> The current GATT proposal is called Trade Related Aspects of Intellectual Property ("TRIPs").<sup>143</sup> TRIPs seeks to integrate minimum world standards for the protection of intellectual property into GATT.<sup>144</sup> In addition, TRIPs attempts to clarify existing GATT rules bearing upon intellectual property protection by promulgating new rules, as appropriate, to reach adequate and effective protection and enforcement of intellectual property rights.<sup>145</sup> The enforcement aspect of the proposal includes refined implementation of border ordinances designed to catch pirated goods before they reach the country's markets, as well as increased international surveillance and notification.<sup>146</sup>

Today, developed nations prefer the GATT option to protect international intellectual property rights.<sup>147</sup> As an additional solution to the international copyright problem, GATT provides a dispute resolution mechanism as well as a forum for negotiations, which other approaches lack.<sup>148</sup> The dispute resolution mechanism operates when the aggrieved party files a complaint after a disagreement arises over any trade issue covered by GATT.<sup>149</sup> Permanent GATT committees and third party panels of experts investigate the claim and reach a conclusion.<sup>150</sup> The panel members, acting independently from their representative governments, report the panel's conclusions and recommendations to all contracting

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140. Peter Gakunu, *Intellectual Property: Perspective of the Developing World*, 19 GA. J. INT'L & COMP. L. 358, 359 (1989).

141. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 3, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1947) [hereinafter GATT].

142. Anthony McDermott, *Ambitious GATT Round*, FIN. TIMES, Oct. 14, 1991, at 26.

143. A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57, 59 (1987).

144. *Id.*

145. *Id.*

146. Cordray, *supra* note 109, at 136.

147. William Alonzo Stanback, *International Intellectual Property Protection: An Integrated Solution to the Inadequate Protection Problem*, 29 VA. J. INT'L L. 517, 523 (1989).

148. Leaffer, *supra* note 2, at 300. International intellectual property agreements currently do not have provisions for dispute settlement other than a provision to bring disputes to the International Court of Justice. GATT provides effective dispute settlement mechanisms to international intellectual property issues. *Id.* at 300-02.

149. GATT, *supra* note 141, arts. XXII-XXIII, 61 Stat. at A64-65, 55 U.N.T.S. at 266-68.

150. Leaffer, *supra* note 2, at 301.



parties.<sup>151</sup> The contracting parties then review and rule on the matter, often agreeing with the panel recommendations.<sup>152</sup>

The GATT option to international copyright infringement offers legally binding obligations which differ from the options offered by the conventions previously discussed.<sup>153</sup> Under GATT, unlike the Berne Convention and the UCC, a signatory country cannot openly disregard its obligations without the threat of sanctions imposed by the GATT mechanism.<sup>154</sup> An offended copyright owner's nation can threaten the noncomplying state with the imposition of the GATT dispute settlement provisions, which, if ignored, can lead to trade sanctions.<sup>155</sup>

However, GATT needs substantial reform. The dispute settlement resolution mechanism in GATT is, at times, ineffective and inefficient.<sup>156</sup> GATT cases are known for endless hearings, which average at least forty-five months for a complaint from a United States copyright owner, and severe politicalization by member nations.<sup>157</sup> In addition, those responsible for the GATT dispute mechanism simply lack the expertise in international intellectual property necessary to make informed decisions.<sup>158</sup>

### C. *International Federation of the Phonographic Industry ("IFPI")*

The IFPI is an international organization that represents producers and distributors of sound recordings.<sup>159</sup> The IFPI has approximately one thousand members in sixty-five countries worldwide.<sup>160</sup> In China, the IFPI has created three offices to combat the piracy problem.<sup>161</sup>

The IFPI proposed a set of solutions to combat CD pirating:

- [1.] Press for legislation calling for tougher criminal penalties in countries worldwide.

151. *Id.*

152. *Id.*

153. Mark L. Damschroder, *Intellectual Property Rights and the GATT: United States Goals in the Uruguay Round*, 21 VAND. J. TRANSNAT'L L. 367, 390 (1988).

154. *Id.*

155. Stanback, *supra* note 147, at 549.

156. Leaffer, *supra* note 2, at 301.

157. *Id.*

158. Stanback, *supra* note 147, at 550.

159. Phua Kok Kim, *Singapore's Tough Copyright Rules Cut US Firms' Losses From US\$ 450m to US\$ 20m*, THE STRAITS TIMES, Jan. 29, 1993, Money, at Back.

160. *Id.*

161. Lim, *supra* note 9, at 7.

- [2.] Involve members of other related industries that are also affected, like the computer software industry.
- [3.] Lobby to put the CD piracy issue on the agenda of international trade organizations.
- [4.] Monitor CD plants and educate owners on such matters as the placing of orders and plant inspections.
- [5.] Set up cooperation with international custom authorities.
- [6.] Use both hidden and visible identifiers for legitimate CDs.<sup>162</sup>

The IFPI estimated that sales of pirated CDs around the world doubled from 1992, increasing to seventy-five million units in 1993, mainly due to the pirates in China.<sup>163</sup> The IFPI expects a further increase in CD piracy in the future unless China takes aggressive action to enforce copyright laws.<sup>164</sup>

IFPI claimed that pirates are receiving less money for their pirated recordings.<sup>165</sup> Outside China, the cost for a pirated cassette fell ten percent from 1992 to approximately \$2.70 in 1993.<sup>166</sup> In addition, the price for a CD fell from just under thirteen dollars in 1992 to just under twelve dollars in 1993.<sup>167</sup> However, the United States was still the biggest market for pirated materials in 1993.<sup>168</sup>

#### IV. ENFORCEMENT PROBLEMS

Even if countries become members of the international copyright conventions, the Berne Convention and the UCC, enforcing the provisions of these conventions poses another problem. Many signatories to these conventions inadequately enforce copyright laws.<sup>169</sup>

Technology has quickly furthered the economic growth of many Pacific Rim countries. Previously, these countries received technology through licensing arrangements with Western firms.<sup>170</sup> These countries create similar products with the same technological ideas and resell them

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162. *Id.*

163. Michael Skapinker, *Pirate Disc Sales Double to 75m*, FIN. TIMES, June 2, 1994, World Trade News, at 4.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Skapinker, *supra* note 163, World Trade News, at 4.

169. Gutterman, *supra* note 28, at 353.

170. *Id.* at 371.

back into other markets.<sup>171</sup> The governments of these countries emphasize the importance of technological advancement and de-emphasize the importance of intellectual property protection.<sup>172</sup>

Pacific Rim countries are expanding research and development. Thus, they recently recognized the need for enforcement of intellectual property rights.<sup>173</sup> Furthermore, the United States requires improvement in the enforcement of intellectual property rights in ongoing bilateral trade discussions.<sup>174</sup>

Traditionally, United States copyright holders looked to international treaties to protect their intellectual property rights.<sup>175</sup> However, for intellectual property owners, these treaties do not provide effective protection because they do not have the power to enforce rights or settle disputes.<sup>176</sup> Although member countries of the Berne Convention must provide minimum levels of copyright protection, developing countries have not enforced such copyright protection.<sup>177</sup>

The incidence of piracy outside the United States increased exponentially in the 1980s.<sup>178</sup> "This trend will continue in large part because reproductive technologies have improved and become more cost efficient."<sup>179</sup> Technological advances in piracy continue to disadvantage the creator of original information as compared to the unlicensed user.<sup>180</sup> This problem is exacerbated because United States copyright laws do not apply to acts of infringement occurring outside the United States.

This problem is illustrated by the recent Ninth Circuit case *Subafilms, Ltd. v. MGM-Pathé Communications Co.*<sup>181</sup> In 1988, Subafilms and Hearst Corporation sued MGM/UA Warner and its respective subsidiaries, contending that the videocassette distribution of a film, both foreign and domestic, constituted copyright infringement.<sup>182</sup> The court held that a claim for infringement cannot be brought under the Copyright Act<sup>183</sup> when the asserted infringement consists solely of the authorization within

171. *Id.*

172. *Id.*

173. *Id.*

174. Gutterman, *supra* note 28, at 371.

175. Leaffer, *supra* note 2, at 275.

176. *Id.* at 275-76.

177. *Id.* at 276.

178. *Id.* at 280.

179. *Id.*

180. Leaffer, *supra* note 2, at 280.

181. 24 F.3d 1088 (9th Cir. 1994).

182. *Id.* at 1089.

183. 17 U.S.C. § 101 (1988).

the territorial boundaries of the United States for acts that occur entirely abroad.<sup>184</sup>

Developing countries, as consumers of Western intellectual property products, "d[id] not perceive the need for strong protection to provide an incentive to create" intellectual property works.<sup>185</sup> "[D]eveloping countries, however, desperately need[ed] access to these intellectual products for their economic development."<sup>186</sup> This need created a noncommittal attitude towards enforcement of intellectual property laws and spawned an ideal location for intellectual property piracy.<sup>187</sup>

The problem of inadequate intellectual property protection in developing countries exists at two different levels: "the meager or nonexistent governmental enforcement of the law and the deficient coverage of intellectual property protection in the law itself."<sup>188</sup> Even though substantive laws for intellectual property exist in some of these developing countries, these governments hinder the efforts through ineffective enforcement of those laws.<sup>189</sup> Enforcement problems are creating administrative delays that discriminates against foreign litigants.<sup>190</sup>

Presently, pirates and nations involved in piracy find that the relaxed attitude towards enforcing intellectual property rights facilitates a high return on their investments.<sup>191</sup> Intellectual property pirates receive benefits of lower production costs and are in a better position to meet the demands of consumers in developing countries than are legitimate producers.<sup>192</sup> The production costs are lower because pirates do not have to develop their own products and do not pay royalties to the originator or creator of the product.<sup>193</sup> Instead, by copying products, pirates avoid market risks and ensure profits by pirating only successful and popular products.<sup>194</sup>

In essence, since enforcement and regulation are ineffective, pirates receive high returns on their investments with little risk.<sup>195</sup> Pirates, and

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184. *Subafilms, Ltd.*, 24 F.3d at 1098.

185. Leaffer, *supra* note 2, at 281.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 281-82.

190. Leaffer, *supra* note 2, at 282.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Leaffer, *supra* note 2, at 282.

the countries in which they operate, reap short term economic benefits. "Through piracy, developing countries can procure needed goods and services at little cost, while industries that specialize in producing counterfeit goods employ thousands of workers."<sup>196</sup> Since these economic gains are tangible and required for further development of a country, the intangible threat of withdrawing Western investment is of little concern.<sup>197</sup>

Developing countries rationalize the lack of enforcement of intellectual property with the need for economic development. Pirated goods provide immediate access to intellectual property, which is critical for the growth of developing countries; thus, there is no incentive to enforce burdensome intellectual property laws.<sup>198</sup> Consequently, governments do not allocate even minimal resources for intellectual property right enforcement.<sup>199</sup> "As with the importation of capital, the importation of intellectual property often is viewed as a tool to dominate and exploit the economic potential of the importing countries."<sup>200</sup> Paying royalties or import fees creates economic burdens and furthers negative trade balances.<sup>201</sup>

In addition, developing countries provide ineffective or nonexistent protection of intellectual property for a simpler reason. There is no tradition of international intellectual property protection because intellectual property is a relatively new area.<sup>202</sup> Western countries differ from developing countries because Western countries have "strong lobbies of investors, authors, or companies that benefit from strong intellectual property laws."<sup>203</sup>

Lost revenues from piracy continue to increase as foreign enforcement fails to defeat piracy.<sup>204</sup> The United States cannot effectuate foreign enforcement because of increasing sophistication in electronics technology, limited jurisdiction over piracy occurring abroad, and procedural constraints of foreign courts and tribunals.<sup>205</sup>

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Leaffer, *supra* note 2, at 282.

201. *Id.*

202. *Id.*

203. *Id.*

204. Merriman, *supra* note 100, at 635.

205. *Id.*

In addition, when foreign companies receive redress in court, the resulting fines are often minimal. For example, in 1991, Microsoft sued state-owned Shenzhen Reflective Materials Institute in China for trademark infringement, after determining that the Institute had made at least 650,000 fake holograms similar to those on Microsoft packages.<sup>206</sup> Microsoft argued the holograms produced by Shenzhen Reflective Materials Institute were used on counterfeit software packages sold overseas, valued between \$20 million and \$150 million.<sup>207</sup> In 1993, however, the Chinese court awarded Microsoft a mere several hundred dollars in damages and fines.<sup>208</sup> The penalty was later increased to \$5000.<sup>209</sup> On appeal, Microsoft is requesting \$20 million dollars.<sup>210</sup>

CD piracy crosses international borders. There are several reasons for this sudden increase in bootlegging, back catalogue piracy, and counterfeiting.<sup>211</sup> First, the recording industry for the first time does not control a large part of international sound recording production.<sup>212</sup> Many CD production companies ignore exclusive licenses of original artists and cannot distinguish between legitimate orders to produce CDs and pirate orders.<sup>213</sup> Second, CD pirates need not own their own production plants, therefore they do not have to physically handle the goods.<sup>214</sup> Third, there is stiff competition among CD pressers and producers because there is a surplus of CD production plants, approximately double the industry's demands.<sup>215</sup> This causes production plants to be less strict in adhering to copyright laws when taking orders.<sup>216</sup> Finally, the level of sound quality and packaging of pirate music recordings are improving.<sup>217</sup> This makes it difficult for consumers to detect fake CDs, and pirates can therefore sell their products at prices close to that of legitimate products.<sup>218</sup>

The "mobility of pirates" creates another problem in eradicating piracy.<sup>219</sup> The piracy problem "is diffused over the entire Pacific Rim

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206. Amy Borrus et al., *Will China Scuttle its Pirates?*, BUS. WK., Aug. 15, 1994, at 41.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Lim, *supra* note 9, at 7.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. Lim, *supra* note 9, at 7.

217. *Id.*

218. *Id.*

219. Peters, *supra* note 19, at 567.

region.<sup>220</sup> Erasing piracy in one country simply forces pirate operations to move to another location.<sup>221</sup> Establishing agreements with each country creates varied standards of protection throughout the region.<sup>222</sup> The problem of varying standards suggests that a regional approach would be more successful.<sup>223</sup>

## V. ALTERNATIVE SOLUTIONS

### A. Regional Approach

The Berne Convention and the UCC provide solid groundwork for the protection of international intellectual property through a concrete body of international copyright laws.<sup>224</sup> Moreover, signatories to these conventions are expected to adhere to the copyright laws approved by the member nations and set forth in these conventions. In addition, signatories to the conventions generally adhere to the provisions because these conventions and treaties legally bind them.<sup>225</sup>

Many problems still exist for countries that rely on these conventions to protect their intellectual property rights. The major problem is that these conventions do not provide any power to enforce their laws.<sup>226</sup> The United States contends that a nation can conspicuously violate its responsibilities under the copyright conventions without any legal repercussions of sanctions, because no enforcement mechanisms exist.<sup>227</sup> Multilateral copyright conventions are not effective against large-scale copyright infringement in developing countries.<sup>228</sup>

Rather than relying on large multinational conventions such as the Berne Convention or the UCC, the United States should apply a regional approach to the Pacific Rim. A regional policy would be more effective because attempts to enforce laws in one country would merely shift piracy operations to another country.<sup>229</sup> Regional tactics were very successful

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220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Hummel, *supra* note 13, at 748.

225. *Id.*

226. Leaffer, *supra* note 2, at 275-76.

227. *Id.* at 300.

228. *Id.* at 276.

229. *Oversight on International Copyrights: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Jud.*, 98th Cong., 2d Sess. 1 (1984)

in the Caribbean Basin Initiative where, for the first time, trade benefits and economic assistance were conditioned on copyright protection.<sup>230</sup> The Caribbean Basin Initiative reinforced the efforts and further developed the ideas from the Treaty Establishing the Caribbean Community ("CARICOM").<sup>231</sup>

### 1. The Treaty Establishing the Caribbean Community

For several decades, Caribbean countries struggled with various integration models.<sup>232</sup> The Caribbean Free Trade Association ("CARIFTA") was created in 1968 after the collapse of several economic and trade associations.<sup>233</sup> However, smaller states in the Caribbean formed their own customs union called the East Caribbean Common Market ("ECCM") because they were apprehensive about joining CARIFTA.<sup>234</sup> Due to the need to integrate these countries, CARICOM was developed.<sup>235</sup>

In an attempt to improve their situation, Caribbean countries reached a regional agreement, CARICOM, with goals of social, cultural, and technological development.<sup>236</sup> CARICOM was founded on July 4, 1973, and is composed of thirteen Caribbean nations.<sup>237</sup> The purpose of CARICOM includes "the economic integration of the Member States by the establishment of a common market regime. . . ."<sup>238</sup> CARICOM "is

[hereinafter *Oversight*].

230. *Id.* at 127.

231. William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001, 2011 (1994). Treaty Establishing the Caribbean Community, July 4, 1973, 946 U.N.T.S. 17, 12 I.L.M. 1033 (Aug. 1, 1973) [hereinafter CARICOM]. See discussion *infra* part V.A.1.

232. Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127, 145 (1995).

233. *Id.*; Agreement Establishing the Caribbean Free Trade Association [hereinafter CARIFTA], Apr. 30, 1968, 772 U.N.T.S. 2, 7 I.L.M. 935.

234. O'Hop, *supra* note 232, at 145; Agreement for the Establishment of an Eastern Caribbean Common Market (ECCM), June 9, 1968, *cited in* HANS J. GEISER ET AL., LEGAL PROBLEMS OF CARIBBEAN INTEGRATION: A STUDY OF THE LEGAL ASPECTS OF CARICOM 14, 55-56 (1976).

235. O'Hop, *supra* note 232, at 145.

236. The internal structure of CARICOM is composed of two elements, the Caribbean Community and the Common Market. CARICOM provides a viable forum and infrastructure through which Caribbean nations can negotiate collectively with the United States regarding international intellectual property. Hummel, *supra* note 13, at 758.

237. CARICOM, *supra* note 231. The community presently consists of Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago. *Id.*

238. *Id.*



noteworthy because it is the longest existing successful regional integration agreement.<sup>239</sup> The Conference of Heads of Government manages the financial affairs of CARICOM, sets the policies of the Caribbean community, and enters into treaties for the community.<sup>240</sup> The Caribbean Common Market, established as part of CARICOM, eliminates trade barriers within the subregion and establishes a common external tariff.<sup>241</sup> CARICOM provides special concessions to less developed countries within the subregion.<sup>242</sup> The principal organ of the Common Market, the Common Market Council, consists of one minister from each state.<sup>243</sup> The Council conducts annual reviews of the progress of the Common Market mechanisms and makes proposals to the Conference.<sup>244</sup> Additionally, the Council may postpone benefits to those countries that do not comply with the copyright enforcement agreements.<sup>245</sup>

## 2. The Caribbean Basin Initiative

The Caribbean Basin Initiative ("CBI") was formed after President Reagan signed the Caribbean Basin Recovery Act into law on August 5, 1983.<sup>246</sup> The main objectives of this initiative are: (1) to increase trade, (2) to increase private sector investment in non-traditional sectors, thereby diversifying the economic bases of the beneficiary countries, and (3) to encourage host country governments to adopt the reforms necessary to create business environments essential to attract and hold long term capital investment.<sup>247</sup>

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239. Richard Bernal, *Perspectives of the North American Free Trade Agreement: Regional Trade Arrangements in the Western Hemisphere*, 8 AM. U. J. INT'L L. & POL'Y 683, 703 (1993).

240. Gary Carpentier & James R. Holbein, *Trade Agreements and Dispute Resolution Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531, 551 (1993).

241. CARICOM, *supra* note 231, art. 4(a), Annex, arts. 15, 31.

242. *Id.* at Annex, art. 52.

243. *Id.* at Annex, art. 5.

244. *Id.* at Annex, art. 7.

245. *Id.* at Annex, art. 11.

246. William H. Cavitt, *Western Hemisphere Free Trade Initiatives*, 18 WM. MITCHELL L. REV. 271, 285-86 (1992).

247. *Id.* at 286.

The CBI provides freer access to the United States market for its twenty-seven beneficiary countries.<sup>248</sup> The beneficiary countries may export a wide range of duty-free products to the United States.

The CBI is considered to be an "unqualified success."<sup>249</sup> The CBI was created over twelve years ago and "has emerged as an important stimulus of economic development in the Caribbean Basin and of trade linkages throughout the region."<sup>250</sup> The CBI has succeeded in "the development of the countries in the region and for [the] security and economic interest[s] of the United States."<sup>251</sup> Furthermore, the CBI has been vital for the "economic growth and political stability" of the Caribbean nations.<sup>252</sup>

The CBI has resulted in an almost 25% growth of annual exports from the Caribbean.<sup>253</sup> Meanwhile, United States exports to the Caribbean have increased over 100% since the mid-1980s.<sup>254</sup> Through the CBI, a trade partnership of more than \$20 billion a year has developed between the United States and the Caribbean.<sup>255</sup>

The CBI is a great incentive for the Caribbean nations involved to enforce copyright laws and deter copyright infringement. If a country does not comply with the intellectual property criteria, that country can lose its beneficial status.<sup>256</sup> In exchange for more stringent copyright laws, Caribbean nations can export tariff-exempt products under the CBI.<sup>257</sup>

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248. The beneficiary countries are: Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, Saint Lucia, St. Vincent and the Grenadines, Surinam, Trinidad and Tobago, Cayman Islands, Montserrat, Netherlands, Antilles, St. Christopher and Nevis, Turks and Caicos Islands, and the British Virgin Islands. 19 U.S.C. § 2702(b) (1988).

249. Alexander F. Watson, *The Caribbean Basin Trade Security Act, Statement Before the Subcomm. of Trade of the Senate Finance Comm.* (May 15, 1995) reprinted in U.S. DEP'T OF STATE DISPATCH vol. 6, no. 22 at 460 (May 29, 1995).

250. *Prepared Testimony of Mr. Anthony Hylton Parliamentary Secretary in the Ministry of Foreign Affairs of Jamaica Before the House Ways and Means Trade Subcomm.* (Feb. 10, 1995), in FED. NEWS SERVICE, available in Westlaw, 1995 WL 6621641, at 2 [hereinafter *Anthony Hylton*].

251. *Id.*

252. *Prepared Testimony of Howard A. Vine United States Representative Before the Subcomm. on Trade House Ways and Means Comm.* (Feb. 10, 1995), in FED. NEWS SERVICE, available in Westlaw, 1995 WL 6621660, at 3.

253. Watson, *supra* note 249.

254. *Anthony Hylton, supra* note 250.

255. *Id.*

256. James E. Stamps, *Caribbean Basin Initiative: Ten Years of Trade Preference*, 3 J. TRANSNAT'L L. & POL'Y 149, 151 (1994).

257. Maricel Sequeira, *Costa Rica: Business Sector Fears Modern Version of "Big Stick,"* INTER PRESS SERVICE, May 24, 1995, available in Westlaw, 1995 WL 2261290.

For example, eighty-five percent of Costa Rica's melons are exported duty free to the United States.<sup>258</sup> Without the CBI, a thirty-five percent tariff would be imposed on Costa Rica for the same exports.<sup>259</sup> Thus, these incentives encourage enforcement of copyright laws.

Countries in the CBI are evaluated on certain statutory criteria to obtain benefits.<sup>260</sup> One important criterion is that a Caribbean country may not allow reproduction of United States' copyrighted material through a government-owned entity without the copyright holder's consent.<sup>261</sup> The CBI uses trade concessions as incentives to curtail unauthorized duplication of United States' works, while also encouraging Caribbean countries to enforce their own copyright protection laws.<sup>262</sup>

The CBI has two main provisions to ensure the protection of intellectual property rights. The first provision, § 2702(b),<sup>263</sup> states that a beneficiary status may not be granted by the President if the country violates United States copyrights.<sup>264</sup> Section 2702(b) states in part:

[t]he President shall not designate any country a beneficiary country . . . if such country . . . has nationalized, expropriated or otherwise seized ownership or control of property owned by a United States citizen . . . or has taken steps to repudiate or nullify . . . any patent, trademark, or other intellectual property of a United States citizen.<sup>265</sup>

The second provision, § 2702(c),<sup>266</sup> requires the President to review intellectual property issues in his decision to grant beneficiary status to Caribbean countries.<sup>267</sup> Section 2702(c) states in part: "[i]n determining whether to designate any country a beneficiary country . . . the President shall take into account . . . the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights . . . ."<sup>268</sup>

258. *Id.*

259. *Id.*

260. *Oversight, supra* note 229, at 127.

261. *Id.*

262. *Id.* at 128.

263. 19 U.S.C. § 2702(b) (1988).

264. *Proposed Renewal of the Generalized System of Preferences — 1984: Hearing Before the Senate Subcomm. on International Trade of the Comm. on Fin., 98th Cong., 2d Sess. 170, 198 (1984) [hereinafter Proposed Renewal].*

265. 19 U.S.C. § 2702(a)(2), (b)(2)(B)(ii) (1988).

266. *Id.* at § 2702(c).

267. *Proposed Renewal, supra* note 264, at 198.

268. 19 U.S.C. § 2702(c)(9) (1988).

With these provisions, the United States has bargaining power to enforce copyright issues with Caribbean nations involved with the CBI. In addition, Caribbean nations have an incentive to enforce copyright issues, since a country which does not enforce copyright laws may lose its valuable beneficiary status with the United States.

The Caribbean countries face the same obstacles as the Pacific Rim countries. Both are developing areas of the world and both have continuing problems with copyright infringement.

In the Caribbean, rather than a lack of substantive copyright law, nonexistent or weak enforcement of copyright laws accounts for deficient protection of intellectual property.<sup>269</sup> However, a regional copyright treaty provides both the Caribbean and the United States with specificity, which is not possible with large multilateral conventions such as the Berne Convention and the UCC.<sup>270</sup> The United States should follow the same approach toward the Pacific Rim countries.

### 3. The Argument for a Regional Approach

As discussed earlier, there are many problems with enforcing copyright laws in developing countries, even though many of these countries are signatories to the Berne Convention and the UCC. These large conventions do not provide adequate protection for music artists. If there is inadequate copyright law enforcement, a country is, in effect, not granting rights at all.<sup>271</sup> A regional arrangement with Pacific Rim nations, modeled after the CBI with Caribbean nations, is a more viable solution to the music piracy problem in the Pacific Rim. The United States could fashion a similar tariff incentive as in the CBI to enforce copyright laws in Pacific Rim countries.

As evidenced in the Caribbean, countries in a particular area usually find that a regional approach to their copyright problems is more beneficial than multilateral treaties. This is attributable to the fact that countries in a particular region are concerned with similar issues. Since multilateral

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269. United Nations Educational, Scientific and Cultural Organization, the ABC of Copyright (1981), at 68 [hereinafter UNESCO], cited in Hummel, *supra* note 13, at 733 n.82. The enactment of copyright laws does not lead directly to protection of copyrighted material. In addition to implementation of the laws, public education is also necessary to explain rights and liabilities to those affected by such laws. *Id.*

270. Hummel, *supra* note 13, at 758.

271. *Id.* at 727. See also Richard A. Morford, *Intellectual Property Protection: A United States Priority*, 19 GA. J. INT'L & COMP. L. 336, 340 (1989) (observing that "the best law in the world will have little effect on . . . pirates, if they know that the police never raid, the courts never issue injunctions, or that the penalties are easily absorbed as a cost of doing business.").

treaties involve many countries, a regional treaty between the United States and the Pacific Rim countries may be specific and more effective. A regional treaty can concentrate on the concerns unique to both parties.

The Berne Convention and the UCC are ineffective because they do not provide mutual gain. For instance, one party usually has more bargaining power. However, with a regionally based agreement, Pacific Rim nations could have equal bargaining power with the United States. This would result in an agreement which is more equitable and representative of the interests and concerns of both the United States and the Pacific Rim countries. In addition, the United States and the Pacific Rim countries could address more fully the most problematic areas and search for more viable solutions.

Large conventions address the needs of many countries from varying areas of the world. Thus, these conventions tend to be very general, and never address the real problem of copyright infringement, which is enforcement. A smaller arena comprised mostly of nations with similar problems can more effectively address the unique characteristics and circumstances affecting developing countries.

For example, developing nations, such as those in the Pacific Rim, desperately need intellectual property for their advancement in the world, but do not have adequate capital to pay for it. Similarly, the United States needs to guarantee compensation to its copyright owners for their intellectual property. Piracy does "incalculable damage to indigenous authors and publishers, for those honest individuals cannot compete against the pirates. . . ."<sup>272</sup>

A regional agreement tends to be more flexible than large multilateral treaties. For example, because Pacific Rim nations find complying with the copyright laws of these large treaties very difficult, they can negotiate for looser guidelines and more feasible standards. The higher standards set forth in the UCC or the Berne Convention make it practically impossible for developing nations to comply with these conventions.

Furthermore, since fewer parties would be involved, negotiations and procedures within the regional treaty would be more effective, thus meeting the needs of all sides within an acceptable time frame.<sup>273</sup> This situation could be achieved without one of the major drawbacks of bilateral treaties, namely, fragmentation of the international trading structure into a series of

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272. *Proposed Renewal*, *supra* note 264, at 170.

273. Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 *CORNELL INT'L L.J.* 1, 7-8 (1989).

individual countries that must compete with each other to reach a beneficial agreement with the United States.<sup>274</sup>

The United States' main concern is the inadequate and ineffective enforcement of copyright laws that currently exist between countries. A regional agreement signed by the United States and the Pacific Rim countries would legally bind all of the signatories as a matter of international law.<sup>275</sup> A dispute resolution settlement mechanism similar to the one specified in GATT could be included for enforcement.<sup>276</sup> This type of mechanism can be used as a bargaining chip with a non-complying country.<sup>277</sup>

Despite the aggressive efforts of many Pacific Rim countries to eradicate music piracy, the problem still exists. Once a country has developed or learned to enforce its laws, then music pirates will merely shift to another country in the region. For example, the recent increase in pirate operations in China is a result of other Asian countries' efforts to purge pirate operations.<sup>278</sup> Factories producing illicit products simply move to nearby countries with less stringent laws or enforcement mechanisms. These products are then shipped to other countries in the area. Therefore, the problem never really disappears, it simply changes location.

## B. Other Alternatives

### 1. Copyright Tribunal

One alternative for the enforcement problem is a copyright tribunal. A Law Reform Commission in China proposed the establishment of a Copyright Tribunal to settle disputes between royalty collecting associations and copyright users.<sup>279</sup> These royalty collecting associations "currently issue licenses to prospective users, enforce the rights of their members by legal action, and distribute royalties to the copyright owners after deducting administrative fees."<sup>280</sup> In addition, the Commission recommended that

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274. See generally *id.*

275. Hummel, *supra* note 13, at 759.

276. *Id.* at 760.

277. *Id.*

278. *China Update*, *supra* note 49, at 34.

279. *Id.*

280. *Id.*

the Tribunal have power to assess interim monetary awards to licensing associations.<sup>281</sup>

Realizing that pirating practices have increased heavily, Chinese officials have concentrated on efforts to suppress intellectual property rights infringement, including establishing special courts to deal with the problem.<sup>282</sup>

In addition, foreign trademarks registered in China, like Chinese trademarks, can receive protection from China's administrative management and judicial authorities.<sup>283</sup> The State Administration for Industry and Commerce has selected six offices to examine complaints from foreign copyright owners, including: the Patent and Trademark Agency under the China Council for the Promotion of International Trade, China Trademark Agency, Shanghai Patent Agency, China Patent Agent (Hong Kong) Ltd., NOD Patent and Trademark Agent Ltd., and China Sinda Intellectual Property Agent Corporation.<sup>284</sup>

## 2. Establishment of an Enforcement Department

As a result of criticism from the United States for failing to take action against music pirates, China is also considering various measures to increase its enforcement of laws against pirated copies of CDs. These measures include the establishment of specific enforcement departments.<sup>285</sup> This has aroused world-wide alarm among members of the music recording industry.<sup>286</sup> Pirated CDs are difficult to distinguish from legitimate CDs because pirated CDs utilize the digital transmission of music and therefore can be of very high quality.<sup>287</sup> In addition, pirated CDs are readily exported because China's local market can absorb a limited number of fake CDs.<sup>288</sup> Therefore, it is only logical that pirated CDs produced in China will eventually penetrate other countries.<sup>289</sup>

This alternative can be effective only if the enforcement department is willing to prosecute pirates. If the only purpose of the enforcement

281. *Id.*

282. Tony Walker, *US Seeks to Dog Chinese Copy Cats — Tony Walker on Moves to Halt Copyright Infringements*, *FIN. TIMES*, Feb. 16, 1994, at 8.

283. Bian Hongwei, *China: State Clamps Down on Fake Products*, *CHINA DAILY*, May 19, 1994, at 4.

284. *Id.*

285. *China Update*, 6 *J. PROPRIETARY RTS.* 26, 27 (1994).

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

department is to appease the music recording industry and not to adequately enforce pirating, then it is useless.

### 3. Source Identification Code

Another option is the Source Identification Code ("SID"). "SID is an anti-piracy breakthrough because it makes counterfeits readily identifiable."<sup>290</sup> Presently, a pirated product is indistinguishable from the original. "SID puts a physical mark on every disc, consisting of the IFPI name, and a four digit code that is unique to every CD-producing plant."<sup>291</sup>

Philips, a Dutch electronics company, developed this new CD tagging system.<sup>292</sup> "Philips, the inventor and license owner of CD technology, . . . developed a unique four-digit code which is impressed on to the inner ring of each CD."<sup>293</sup> This code is just barely large enough to read.<sup>294</sup> This allows customs officials to confiscate pirated discs which do not carry the code.<sup>295</sup>

The more popular CDs are pressed by different plants and bear different SID codes. This means that the pirate would have to ensure that the copied CDs have the right code as well. This entails having to change each mold. Every mold costs \$80,000 "to ensure that the codes match, a time consuming and expensive procedure."<sup>296</sup> With the code in force, any record company suspecting the CDs in a shipment to be pirated copies need only check the SID code. Customs could then impound any CDs with mismatched numbers.

This alternative is only effective in seizing already pirated CDs. It does not prevent those pirates who do not get caught by the customs officials. It is only a matter of time before pirates can find a way to perfect these SID codes on their own pirated CDs.

## VI. CONCLUSION

Since Asia is a strong market for big international record companies, music piracy is draining billions of dollars in profits. The Berne Conven-

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290. Matthew Pereira, *Watchdog Body Promotes System to Beat CD Piracy*, THE STRAITS TIMES, Apr. 17, 1994, at 24.

291. *Id.*

292. Lo, *supra* note 8, at 2.

293. *Id.*

294. Pereira, *supra* note 290, at 24.

295. Lo, *supra* note 8, at 2.

296. Pereira, *supra* note 290, at 24.



tion and the UCC provide solid substantive protection. However, enforcement of the laws of these conventions is a major problem. In order to improve enforcement in Pacific Rim countries, the United States should follow the CBI in proposing a regional agreement unique to the Pacific Rim, allowing more effective enforcement of substantive laws.

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