

Digital Commons  
@ LMU and LLS

Loyola Marymount University and Loyola Law School  
Digital Commons at Loyola Marymount  
University and Loyola Law School

---

Loyola of Los Angeles Entertainment Law Review

Law Reviews

---

6-22-2010

# Recorded Music is an Incredibly Tough Business in China - But, It Should Be Incredible

Lindsay Neinast

---

## Recommended Citation

Lindsay Neinast, *Recorded Music is an Incredibly Tough Business in China - But, It Should Be Incredible*, 30 Loy. L.A. Ent. L. Rev. 577 (2010).

Available at: <http://digitalcommons.lmu.edu/elr/vol30/iss3/7>

This Writing Competition is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

## **“RECORDED MUSIC IS AN INCREDIBLY TOUGH BUSINESS IN CHINA”<sup>1</sup>—BUT, IT SHOULD BE INCREDIBLE**

China’s market offers more potential consumers for recorded music than any other market worldwide.<sup>2</sup> At the same time, China’s market provides easy access to pirated CDs as well as illegal downloads of music.<sup>3</sup> Moreover, China’s legal system currently does not offer much deterrence through legal repercussions.<sup>4</sup>

Part I of this paper examines the problem China’s market creates for American record companies. Part II examines the causes of those piracy problems. Finally, Part III offers a solution to prevent the millions of dollars lost to China’s piracy market each year.

### I. THE PROBLEM

Although China represents the largest market for potential consumers, 99% of the online music accessed in China is unlicensed or infringing.<sup>5</sup> That amounts to losses that, as modestly estimated by the copyright industry, reached approximately \$7 billion in 2008.<sup>6</sup> Additionally, out of that \$7 billion, over \$500 million in revenues were lost to Internet music piracy.<sup>7</sup>

Further, looking beyond the direct harm to music revenue sales, economists and policy reformers have demonstrated that, as a consequence

---

1. Physorg.com, Analysis: Baidu's Legal Woes in China, Sept. 22, 2005, <http://www.physorg.com/pdf6680.pdf> (quoting Duncan Clark, China-based telecommunications and Internet consultant).

2. As of July 2009, the CIA estimates China's population at 1,338,612,968. CIA, *East & Southeast Asia: China*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited Mar. 5, 2010).

3. Physorg.com, *supra* note 1 (“Offline piracy is so bad in China . . . [and] [r]ecorded music is an incredibly tough business in China. Some labels . . . put their own restrictions on CDs, so that you can't 'rip and burn' to a PC/CD-ROM. But copies are bound to get out somehow.”).

4. See *infra* Part C and accompanying notes.

5. Loretta Chao, *China Sets New Rules for Music Sold Online*, WALL ST. J., Sept. 7, 2009, at B1.

6. Press Release, Office of the U.S. Trade Rep., U.S.-China Joint Commission on Commerce and Trade (Oct. 29, 2009), available at <http://www.ustr.gov/about-us/press-office/factsheets/2009/october/us-china-joint-commission-commerce-and-trade>.

7. *Id.*

of global piracy of sound recordings, the United States economy loses \$12.5 billion in total output annually.<sup>8</sup> Indeed, economists estimate that the United States economy has lost 71,060 jobs in the industry.<sup>9</sup> Annually, United States workers are estimated to lose \$2.7 billion in earnings.<sup>10</sup> Further, United States federal, state, and local governments have lost, at minimum, \$800 million in tax revenues annually, according to policymakers' and economists' estimates.<sup>11</sup>

Indeed, most record studios and producers are American-based companies.<sup>12</sup> Acts of piracy in China, therefore, directly and devastatingly harm the United States economy.<sup>13</sup> While the exact dollar amount for losses may vary by a couple million or billion depending upon the source, according to all numbers and estimates, there is no refuting that a piracy problem exists. The question thus becomes: what causes piracy to run rampant in China?

## II. WHAT CAUSES THE PIRACY PROBLEM IN CHINA?

### A. China's Market Provides Access

"Some labels put their own restrictions on CDs, so that you can't 'rip and burn' to a PC/CD-ROM. But copies [in China] are bound to get out somehow."<sup>14</sup>

The United States recorded music industry is losing sales to Chinese users not only from physical piracy, but also from illegal downloads of recorded music, such as songs downloaded from peer-to-peer (P2P) networks.<sup>15</sup> China's market offers unlimited access to both.<sup>16</sup>

---

8. RIAA.com, Piracy: Online and on the Street, <http://www.riaa.com/physicalpiracy.php> (last visited Apr. 3, 2009).

9. Of the 71,060 jobs estimated to be lost as a result of piracy, 26,860 jobs would have been added in the sound recording industry or in downstream retail industries, while 44,200 jobs would have been necessary for other United States industries. *Id.*

10. *Id.*

11. Of the estimated \$422 million annual losses in tax revenues, \$291 million represents lost personal income taxes, while \$131 million is lost corporate income and production taxes. *Id.*

12. *See generally*, UltimateSongwriting.com, Recording Studios List, <http://www.ultimatesongwriting.com/recording-studios-list.html> (last visited April 18, 2010); *See also*, Frank Ahrens, *Hollywood Says Piracy Has Ripple Effect*, WASH. POST, Sept. 29, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092801640.html>.

13. *See generally*, RIAA.com, Piracy: Online and on the Street, <http://www.riaa.com/physicalpiracy.php> (last visited Apr. 3, 2009).

14. Physorg.com, *supra* note 1.

15. Peer-to-peer network file sharing of MP3s is the sharing of music files on a public network without the copyright-holder's permission. Peer-to-peer users are increasingly responsible for recent declines in the number of legitimate CD sales in the United States. Kevin J.

First, China's market provides easy access to physically pirated goods. For example, in larger cities, such as Shanghai and Beijing, most Chinese CDs and DVDs are purchased from street vendors for between \$0.80 to \$1.00.<sup>17</sup> In addition, Chinese Internet users, through Chinese companies like Baidu, can take advantage of the MP3 Search and illegal peer-to-peer downloads at the click of a button (literally).<sup>18</sup> Indeed, "[t]he Chinese can easily access music and video for free through file-sharing sites, particularly when they have high-speed broadband connections, as many Chinese now do."<sup>19</sup> Accordingly, if you have access to street vendors or the Internet in China, you have quite a few options (likely more than finding a legitimate copy of the song) for illegal downloading or pirating songs.<sup>20</sup>

### *B. China's Trade Restrictions Prevent Legitimate Alternatives*

Many in the copyright industry blame China's trade barriers on imports for the easy access to illegitimate and illegal songs.<sup>21</sup> China imposed import restrictions on CDs and DVDs that, according to certain media companies, prevented legal alternatives from entering the market.<sup>22</sup> Fewer companies and goods were allowed entry into China's market, restricting the number of companies producing legitimate CDs and educating China's market on legal alternatives to purchasing music.<sup>23</sup>

Pointing to those import restrictions, many United States entertain-

---

O'Brien, *Plan to Curb Internet Piracy in France*, N.Y. TIMES, Apr. 8, 2009, <http://www.nytimes.com/2009/04/09/business/global/09net.html>.

16. See Physorg.com, *supra* note 1 (discussing Baidu, China's largest search engine that provides thousands of links to unauthorized songs for streaming and downloading).

17. Mary-Anne Toy, *Hollywood takes on China's fake DVDs*, SYDNEY MORNING HERALD, Jan. 27, 2007, <http://www.smh.com.au/news/world/hollywood-takes-on-chinese-fake-dvds/2007/01/26/1169788693472.html>.

18. See Physorg.com, *supra* note 1 (noting that Baidu.com is China's largest search engine and provides thousands of links to unauthorized songs for streaming and download).

19. *Id.*; Ryan Nakashima, *China Trade Ruling Helps U.S., But Piracy Still a Problem*, ABC NEWS, Aug. 14, 2009, <http://abcnews.go.com/Technology/wireStory?id=8330530>.

20. See Facts and Details, *Pirating and Counterfeiting in China*, <http://factsanddetails.com/china.php?itemid=356&catid=9&subcatid=61> (last visited Apr. 3, 2009); Nakashima, *supra* note 19.

21. See, e.g., Physorg.com, *supra* note 1; Nakashima, *supra* note 19.

22. *Id.*

23. See generally, WAYNE M. MORISSON, CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, IB91121: CHINA-U.S. TRADE ISSUES (2001), available at <http://ncseonline.org/NLE/CRSreports/Economics/econ-35.cfm?&CFID=1255395&CFTOKEN=96369856>.

ment and media companies lobbied for the restrictions to be removed.<sup>24</sup> The trade groups agreed with Xiao Wei, manager of the FAB music and movie store in Beijing, arguing, “[c]onsumers buy pirate[d] copies maybe because it’s very slow for legitimate copies to enter the Chinese market.”<sup>25</sup> They advocated for the removal of restrictions preventing legitimate alternatives to China’s market and helping pirates profit and proliferate.<sup>26</sup>

However, a recent World Trade Organization (WTO) decision lifted those barriers to foreign investment in online music ventures.<sup>27</sup> As it turns out, China’s trade barriers were not wholly responsible for the piracy. After the trade barriers were lifted, legitimate alternatives entered China’s marketplace, offering options for purchasing legitimate music.<sup>28</sup> The Wawawa Music Store, for example, launched an online subscription service in October 2008.<sup>29</sup> In an effort to entice Chinese consumers away from the illegal download and piracy market, Wawawa Music Store even offered subscribers eighty-eight song downloads from independent artists every month for merely twenty Yuan, or approximately \$2.90.<sup>30</sup> Even at three cents per song, however, “‘piracy has been an impediment’ to legitimate companies hoping to make money,” said Mathew Daniel, Vice President at Wawawa’s Chinese distribution partner, R2G.<sup>31</sup>

Another Chinese company, Top100.cn, has partnered with Google to provide free, licensed music downloads on its website to users in China, attempting to promote a legitimate music industry.<sup>32</sup> Additionally, United States firms—such as Warner Brothers and 20th Century Fox—have teamed up with local Chinese firms to compete with the market for pi-

---

24. Ting Wang, *Hollywood’s Pre-WTO Crusade in China*, JUMP CUT, <http://www.ejumpcut.org/archive/jc49.2007/TingWang> (last visited Mar. 18, 2010).

25. Nakashima, *supra* note 19 (“For example, pirate[d] copies of the movie ‘Slumdog Millionaire’ were available right after it won the Oscar award, but we [China] just started to sell the legitimate copies recently, half a year later.”).

26. *See generally*, Nakashima, *supra* note 19; Wang, *supra* note 24.

27. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Jan. 26, 2009) at 134.

28. *See, e.g.* Chao, *supra* note 5 at B1.

29. *Id.*; Nakashima, *supra* note 19.

30. Nakashima, *supra* note 19.

31. *Id.*; *see generally* Press, Release, IODA Alliance, IODA and R2G Partner to Launch Wawawa Music Store, Bringing Independent Music to China’s 253 Million Internet Users (Aug. 1, 2008), available at [http://www.iodalliance.com/press.php?press\\_release\\_id=61#61](http://www.iodalliance.com/press.php?press_release_id=61#61).

32. Loretta Chao, *Nokia Sets Hope to Free Music in China*, WALL ST. J. DIGITAL NETWORK: CHINA REAL TIME REPORT, Apr. 9, 2010, <http://blogs.wsj.com/chinarealtime/2010/04/09/nokia-sets-hope-to-free-music-in-china>; *see also* Chao, *supra* note 5 at B1.

racy.<sup>33</sup> These companies have developed business plans, in which the firms sell DVDs and CDs for much less than they sell in the United States—fifteen Yuan, or approximately \$2.50—and release the DVDs and CDs in China before they are released in the United States.<sup>34</sup> Still, despite these efforts, legitimate alternatives have not gained much popularity in China—“[r]ecorded music [remains] an incredibly tough business in China.”<sup>35</sup>

Why has no business plan offering Chinese consumers lower prices and earlier releases of legitimate alternatives to the pirated goods proven fruitful? Well, if given the option to pay nothing or markedly less than retail for a good without fear of repercussions *or* pay something or more for the legitimate CD or song, which would you choose? The answer to that question indicates the free marketplace theory is not going to prevail in the context of China’s recorded music industry.<sup>36</sup>

### C. China’s Lack of Legal Deterrent Is the Cause of Its Piracy Problem.

The recording industry agrees that stricter legal standards are necessary in China.<sup>37</sup> Indeed, the Recording Industry Association of America (RIAA), for example, lobbied on a bill to limit copyright violations overseas, spending as much as \$2.8 million on its efforts in 2007.<sup>38</sup> For the RIAA’s lobbying efforts and the millions of dollars its constituents are losing, the United States government placed the piracy problem in China on its agenda and has put some pressure on China in this regard.<sup>39</sup>

The United States recently brought multiple claims against China before the World Trade Organization (WTO), alleging deficiencies in China’s copyright law.<sup>40</sup> The WTO—in which both the United States and

---

33. Toy, *supra* note 17.

34. *Id.*

35. Physorg.com, *supra* note 1.

36. Especially considering that while in the United States, some consumers purchase music to support local musicians, there is less incentive to purchase a legitimate copy of music when your action harms artists and companies across seas.

37. *RIAA Spends \$2.8 Mil on Lobbying in '07*, ASSOCIATED PRESS, Apr. 17, 2008, available at [http://www.hollywoodreporter.com/hr/content\\_display/business/news/e3i91323da4b3be14d](http://www.hollywoodreporter.com/hr/content_display/business/news/e3i91323da4b3be14d).

38. *Id.*

39. *China, Russia on U.S. 'priority watch list' on Copyright Piracy*, ASIAN ECONOMIC NEWS, May 4, 2009, available at <http://business.highbeam.com/435556/article-1G1-200799069/china-russia-us-priority-watch-list-copyright-piracy>.

40. James Bacchus, *China in the Dock*, FORBES.COM, Aug. 13, 2009, <http://www.forbes.com/2009/08/13/china-united-states-wto-copyright-dvd-counterfeit-opinions-contributors-james-bacchus.html>.

China are members—lowers barriers to international trade.<sup>41</sup> In exchange for trade benefits, China (along with all other WTO members) must adhere to certain trade obligations.<sup>42</sup>

The trade obligations concerning international intellectual property protection are contained in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.<sup>43</sup> That Agreement mandates minimum standards that each WTO member must meet for foreign intellectual property protection.<sup>44</sup> The United States attached one alleged deficiency of the Agreement concerning China's criminal procedures and enforcement of its copyright piracy.<sup>45</sup>

Article 61 of the TRIPS Agreement mandates that China must provide a floor for criminal procedures and enforcement for copyright infringement.<sup>46</sup> Specifically, that Article states:

Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. . . . Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.<sup>47</sup>

China's law provides for criminal prosecution only where the circumstances prove serious, "the amount of sales is relatively large," or "the

---

41. WTO.org, What is the WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited Mar. 5, 2010).

42. *Id.*

43. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter *TRIPS*], available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

44. *Id.*

45. Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 2.2, WT/DS362/R (Jan. 26, 2009) [hereinafter IP Rights Panel Report].

46. Those standards also require certain minimum criminal procedures and enforcement for trademark infringement. For the scope of this paper, however, only copyright infringement is discussed.

47. *IP Rights Panel Report*, *supra* note 45, at 7.502.

amount of illegal gains are huge.”<sup>48</sup> Courts in China have interpreted those standards as a threshold for criminal prosecution of not less than 500 copies (of DVDs, CDs, etc.) *and* not less than 50,000 Yuan (which is equivalent to roughly \$7,000) in counterfeit or pirated goods.<sup>49</sup>

The United States argued China’s thresholds for criminal prosecution was inadequate under Article 61 because (among other reasons) the threshold created a safe harbor for piracy.<sup>50</sup> If an individual or company merely kept less than 500 copies of pirated goods or kept the amount of the pirated goods under \$7,000, criminal prosecution would be avoided.<sup>51</sup> Thus, the United States argued, China’s safe harbor encouraged a market for piracy by removing fear of criminal prosecution and enforcement.<sup>52</sup>

The WTO Panel, however, responded on January 26, 2009 with its decision. Disagreeing with the United States’ account of China’s insufficient criminal procedures, the WTO Panel found that China’s thresholds did not create a safe harbor for piracy, noting that, “administrative sanctions, including fines, are available for intellectual property infringement falling below the criminal thresholds in China.”<sup>53</sup> Thus, to the Panel, China’s administrative agencies, available to handle piracy cases below the criminal prosecution threshold, would dissuade an individual from relying on a safe harbor.<sup>54</sup>

After the Panel issued its decision, China voluntarily announced that, as part of its campaign in deterring illegal downloads, the government would have more control over the online distribution of foreign songs.<sup>55</sup> Particularly, China’s recent regulations require that online music providers submit to the Ministry of Culture Chinese translations of the lyrics of each foreign song, along with evidence proving they have permission from the copyright owners to sell and distribute the songs.<sup>56</sup>

After the Panel issued its decision, China voluntarily announced that, as part of its campaign in deterring illegal downloads, the government

---

48. *Id.* at 7.242, 7.399, 7.403.

49. *Id.* at 7.182.; Press Release, Office of the U.S. Trade Rep., WTO Adopts Panel Report in China-Intellectual Property Rights Dispute (Mar. 20, 2009), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2009/march/world-trade-organization-adopts-panel-report-china-i>.

50. *IP Rights Panel Report*, *supra* note 45, at 2.2.

51. *Id.* at 7.747.

52. *Id.*

53. *Id.* at 7.478.

54. *Id.*

55. Chao, *supra* note 5, at B1.

56. *Id.*



would have more control over the online distribution of foreign songs.<sup>57</sup> Particularly, China's recent regulations require that online music providers submit to the Ministry of Culture's Chinese translations of the lyrics of each foreign song, along with evidence proving they have permission from the copyright owners to sell and distribute the songs.<sup>58</sup>

After China announced the Ministry of Culture's new review process, on October 28–29, 2009, the United States–China Joint Commission on Commerce and Trade met to discuss problems with China's intellectual property enforcement and implementation.<sup>59</sup> At that meeting, China “gave assurances that it will impose maximum administrative penalties on Internet infringers and has begun a four-month campaign to clamp down on Internet piracy.”<sup>60</sup> Additionally, “China agreed that it will work closely with the United States to resolve U.S. concerns about a new Ministry of Culture circular relating to online music distribution that is creating serious problems for the U.S. music industry.”<sup>61</sup>

But many are skeptical that the Ministry of Culture will have any effect in deterring piracy.<sup>62</sup> The RIAA, for example, expressed its concerns as to how “effective the new rules will be in curbing China's rampant online music piracy, especially if the rules are only applied to legitimate providers.”<sup>63</sup> Further, Neil Turkewitz, the RIAA's Executive Vice President, stated in a public statement: “We understand that China has particular sensitivities about the distribution of content, but introducing new controls on the legitimate delivery of music will do little to address these sensitivities.”<sup>64</sup>

The industry should indeed be skeptical about the effects of China's new control system; it is not the solution for deterring piracy. The administrative review process does little to create fear of repercussions for down-

---

57. *Id.*

58. *Id.*

59. See generally U.S.–China Joint Commission on Commerce and Trade, <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/october/us-china-joint-commission-commerce-and-trade> (last visited Mar. 8, 2010).

60. *Id.*

61. *Id.*

62. Chao, *supra* note 5, at B1 (stating that it is “unclear how much of the initiative is targeted at cracking down on piracy.”).

63. Juan Carlos Perez, *Update: China Tightens Rules for Online Music Providers, Report Says*, COMPUTER WORLD, Sept. 5, 2009, [http://www.computerworld.com/s/article/9137600/Update\\_China\\_tightens\\_rules\\_for\\_online\\_music\\_providers\\_report\\_says](http://www.computerworld.com/s/article/9137600/Update_China_tightens_rules_for_online_music_providers_report_says).

64. *Id.*

loading illegal songs or purchasing pirated goods.<sup>65</sup> Rather, by attempting to control the delivery of music, China is attempting to limit access to illegal downloads.<sup>66</sup> China's market, however, has access to legitimate alternatives, thanks to the WTO's removal of trade barriers.<sup>67</sup> Moreover, there is (and will always be) access to illegal downloads and/or pirated copies of CDs and songs in China's market.<sup>68</sup> Chinese non-consumers do not desire to pay more for the legitimate alternative that has entered the marketplace. Can you blame them?

Without fear of consequences for illegally downloading or the selling or purchasing of pirated goods, there is no incentive to pay more for legitimate goods. In the United States, for example, when Napster, the pioneer for illegal downloading, first emerged in the United States, millions of Americans were willing to participate in building databases of songs for which they paid nothing.<sup>69</sup> Despite the harm their actions may have had on the music industry, American consumers were willing to commit the act. Why? Because taking something of commercial value on the web seems less intuitively wrong than physically removing a product from a physical store. As illegally downloading songs fell into a more grey area, Congress, with a bit of encouragement from the music industry's lobbying dollars, reacted.<sup>70</sup>

Indeed, the United States copyright law is written to dictate harsh consequences for the act of illegally downloading or pirating music.<sup>71</sup> For example, if caught downloading songs illegally, United States Copyright Law calls for a minimum penalty of \$750 up to \$30,000 per infringement.<sup>72</sup> Thus, if you illegally download 10 songs—for simplicity's sake, an unreasonably low number for the scenario—you are looking at a minimum of a \$7,500 penalty.<sup>73</sup> Further, if the violation is "willful," damages can be up

---

65. See Chao, *supra* note 5, at B1.

66. See *generally, id.*

67. See Press Release, World Trade Org., WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), *available at* [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm).

68. *Affecting IP Rights*, *supra* note 45, at 7.182 (stating that China lacks criminal procedures and penalties that apply in certain instances of willful copyright piracy).

69. See, e.g., Joseph Menn, *Steal This Record and Millions Like It*, S.F. CHRONICLE, Apr. 27, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2003/04/27/RV106502.DTL>.

70. See *generally* 17 U.S.C. § 504(c) (2000).

71. *Id.*

72. *Id.*

73. See *id.*

to \$150,000 per infringement and, if someone is making copies and reselling those copies for a profit, higher fines and even a jail sentence is permitted.<sup>74</sup>

The harsh consequences created by U.S. Copyright Law allows the American public to fully recognize the less-intuitive harm underlying their actions—i.e., the effects on the record industry, lost jobs, and overall devastating effects of the U.S. economy, detailed above. The application of such severe consequences has led to significant publicity, both in the States and abroad.<sup>75</sup> Newspapers have headlines that read: “Minn. Woman to Pay for Illegal Music Downloads,”<sup>76</sup> and contain stories, such as:

[F]ederal judge ordered a Minnesota woman to ante up thousands of dollars for violating copyright laws by sharing music illegally downloaded, marking the first time such a suit against an individual had gone to trial.

Jammie Thomas has to pay \$222,000 for the dozens of songs she pulled from the Internet.

"This does send a message, I hope, that downloading and distributing our recordings is not OK," said Richard Gabriel, the lead attorney for the music companies that sued Thomas.<sup>77</sup>

Admittedly, the publicity did not all portray the recorded music industry in the most positive light or paint the industry as sympathetic.<sup>78</sup> However, the publicity educated the American public that it was, in fact, illegal to download music and that they could, indeed, become the ones in the headlines.<sup>79</sup> Litigation, according to Mitch Bainwol, RIAA Chairman, was successful in raising the public's awareness that file sharing is illegal.<sup>80</sup>

74. *Id.*

75. See generally *Minn. Woman to Pay for Illegal Music Downloads*, NPR, Oct. 5, 2007, <http://www.npr.org/templates/story/story.php?storyId=15037223> [hereinafter *Illegal Music Downloads*]; *12-Year Old Sued for Music Downloading*, FOX NEWS, Sept. 9, 2003, <http://www.foxnews.com/story/0,2933,96797,00.html> [hereinafter *Music Downloading*].

76. *Illegal Music Downloads*, *supra* note 75.

77. *Id.*; *Music Downloading*, *supra* note 75.

78. The RIAA received much publicity for suing a deceased woman, and a 12-year old girl. See, e.g., Andrew Orłowski, *RIAA Sues the Dead*, THE REGISTER, Feb. 5, 2005, [http://www.theregister.co.uk/2005/02/05/riaa\\_sues\\_the\\_dead](http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead).

79. *Illegal Music Downloads*, *supra* note 71; *Music Downloading*, *supra* note 71.

80. Paul Resnikoff, *RIAA Chief Offers Pro-DRM, Pro-litigation Message*, DIGITAL MUSIC NEWS, Apr. 11, 2010, <http://www.digitalmusicnews.com/stories/042407bainwol>.

The publicity instilled fear in the public; before you downloaded the next illegal song, you would think: I could be the one who is prosecuted for benignly downloading that one additional song.<sup>81</sup> The industry hoped that the legal consequences for the action, which created publicity and stirred public interest and knowledge, would deter copyright piracy and illegal downloads.<sup>82</sup>

### III. THE SOLUTION

China must create criminal procedures and sanctions that deter piracy. As previously mentioned, the WTO is the vehicle through which the United States can affect China's copyright requirements. In its recent decision, the WTO Panel indicated that China's administrative agencies, available to regulate piracy under China's criminal prosecution requirements, were sufficient to deter piracy.<sup>83</sup> This is not so.

Even if China has efficient administrative agencies, administrative sanctions do not pique public interest and, consequently, do not welcome publicity.<sup>84</sup> Accordingly, China's market is not educated about potential risks in buying pirated CDs or illegally downloading music. Rather, the threat of criminal sanctions or other severe consequences may create publicity. That publicity might create headlines reminding the marketplace that downloading that additional song without paying will warrant severe penalties.

Without fear of consequences for illegally downloading or selling/purchasing pirated goods, there is no deterrence. Legitimate alternatives to music, thus, will not be able to compete in China's marketplace. The WTO should, therefore, mandate that China (and other members of the WTO) create criminal procedures, with teeth to cause an individual to think twice before downloading or purchasing the song for a fraction of the price or nothing at all.

It is appropriate for the WTO to mandate that China deter piracy with its criminal procedures. First, Article 61 of the TRIPS Agreement requires that members make "[r]emedies available [that] shall include im-

---

81. See *Illegal Music Downloads*, *supra* note 71; *Music Downloading*, *supra* note 71.

82. See Loretta Chao, *China Sets New Rules for Music Sold Online*, WALL ST. J., Sept. 7, 2009, at B1; *Illegal Music Downloads*, *supra* note 75; *Music Downloading*, *supra* note 75.

83. See *supra* Part II.C.

84. Rarely does an administrative agency issue an opinion, which, if enforceable after going through a higher review process, will subject the copyright infringer to established administrative sanctions. Moreover, although China may have an efficient administrative process, it still lacks the deferent effect that harsher punishment such as criminal sanctions with possible jail time would provide.

prisonment and/or monetary fines *sufficient to provide a deterrent . . .*<sup>85</sup> Though China is a member of the WTO, China's imprisonment and monetary fines are insufficient deterrents, evidenced by its marketplace for piracy. Second, since becoming a member in 2001, China's economy has benefited significantly.<sup>86</sup> In exchange for those benefits, China must adhere to trade obligations.

In conclusion, China must strengthen its criminal procedures to deter piracy, illegal downloading, and the millions in losses its marketplace takes from the United States recorded music industry.

*Lindsay Neinast*

---

85. *TRIPS*, *supra* note 43 (emphasis added).

<sup>86</sup> In 2001, the world trade volume dropped 1.5% compared to the previous year. Yet, in 2002, China's gross domestic product grew 7.9%. Furthermore, in the first three quarters of 2002, China's exports increased by 19.4%. In 2001, before joining the WTO, China's average tariff was cut from 15.6% to 12% in 2002. *WTO Entry Boosts China's Economy*, CHINA DAILY, Nov. 18, 2002, <http://www.china.org.cn/english/49058.htm>. As a result of its WTO membership, China's economy has experienced an increase in exports and an increase in efficiency across all industries. See generally Wen Hai, *China's WTO Membership: Significance and Implications*, CHINA CENTER FOR ECONOMIC RESEARCH, Sept. 9, 2000, at 25, available at <http://www.ccer.edu.cn/download/513-1.doc>.