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Worldwide Copyright Protection Under the TRIPS Agreement

Eric H. Smith*

ABSTRACT

The author begins by analyzing the purposes of the TRIPS Agreement. He then discusses piracy losses on a regional and global basis, emphasizing industry-based variations and the economic impact of these losses. Mr. Smith then examines several of the key implementation problems surrounding TRIPS, including the use of transition phase-in periods for developing countries, and the availability of civil and criminal sanctions. Finally, he highlights other specific portions of the TRIPS Agreement that may engender future controversy.

When the American Association of Law School's Intellectual Property Section met in San Antonio, Texas, four days had passed since the TRIPS Agreement¹ had come into force around the world. It was much too soon to say anything definitive about its

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1. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 [hereinafter Final Act], reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 2-3 (GATT (Secretariat ed., 1994) [hereinafter RESULTS OF THE URUGUAY ROUND]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter WTO Agreement], Apr. 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS Agreement], reprinted in RESULTS OF THE URUGUAY ROUND, *supra*, at 6-19, 365-403. For U.S. congressional approval, see Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 101-103, 108 Stat. 4809 (1994) [hereinafter URAA] (authorizing the President to accept the Uruguay Round Agreements and implement the WTO Agreement, but denying treaty status and domestic legal effect to the Uruguay Round Agreements as such, and excluding private actions under those agreements).

impact, but a few observations were in order. The General Agreement on Tariffs & Trade (GATT, now the World Trade Organization (WTO)), is first and foremost a political process. Of course, copyright practitioners and academics have been concerned for some time about combining or converging intellectual property protection and trade. Some fear that the trade discipline will either undermine the strength of the existing international conventions or will in some manner pervert intellectual property (IP) law generally.

The marriage between the trade and the IP process has been and will continue to be very beneficial to both trade and to IP protection. This is true not only for the developed world but for developing countries as well. To begin, one must examine not the strictly legal implications of TRIPS but what it has meant and will continue to mean for the creators, publishers, and producers of copyrighted material around the world and the national economies that support them.

One must look at where the world currently stands in providing protection for copyrighted material. TRIPS was designed to deal with the scourge of worldwide piracy and the trade losses suffered by all trading nations from the failure to protect intellectual property. About ten years ago, the International Intellectual Property Alliance (IIPA) started collecting statistics from its members regarding the impact of piracy on the U.S. economy. At that time, there were only about sixty members of the Berne Convention. Dozens of countries failed to provide virtually any protection for either domestically created or foreign intellectual property. Piracy levels in Asia, for example, hovered about the ninety percent level.² There were whole areas of the world, such as the Middle East, in which there was no copyright protection at all.

The situation has improved substantially since then. This is principally due to the impetus of the U.S. government in driving reform at the bilateral level, through Special 301³ and similar trade programs,⁴ and at the multilateral level through TRIPS.

2. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, *PIRACY OF U.S. COPYRIGHTED WORKS IN TEN SELECTED COUNTRIES* (1985).

3. The "Special 301" provisions (originated in the Omnibus Trade and Competitiveness Act of 1988) call on the U.S. Trade Representative to identify countries which, *inter alia*, "deny adequate and effective protection" to U.S. intellectual property or deny "fair and equitable market access" to U.S. persons who rely on intellectual property protection. 19 U.S.C. § 2242 (Supp. 1995).

4. Several other U.S. trade programs also include provisions requiring high levels of IP protection: the Generalized System of Preferences (19 U.S.C. § 2462(c)(5)), the Andean Trade Preferences Act (19 U.S.C. §§ 3202(c)(5), 3202(d)(9), 3202 (d)(10) (1994)), and the Caribbean Basin Initiative (19 U.S.C. §§ 2702(b)(4), 2702(c)(9), 2702(c)(10) (1994)).

Today, as a result of this process, Berne Convention membership has virtually doubled⁵ in ten years. Even before TRIPS came into force, there were very significant improvements. Government leaders around the world came to understand that trade in intellectual property is critical to the development of their own countries' economies. These leaders also anticipated TRIPS coming into force in their countries.

But there is a great deal left to do. Whether improvements can be achieved will be due in large part to the effective implementation of the TRIPS Agreement. For example, U.S. copyright owners must address the practical levels of protection they receive around the world. These industries are vital to the U.S. economy. In 1993 (the most recent year for which data is available), the core copyright industries accounted for approximately 3.7% of the United States Gross Domestic Product (GDP), employed close to three million people (2.5% of the U.S. workforce), and accounted for close to four times the rate of job growth in the economy as a whole.⁶ Represented in these figures are not only major multinational corporations but also small book, music, and software publishers that represent hundreds of thousands of authors, composers, and programmers in the international marketplace for copyrighted works.

5. According to the World Intellectual Property Organization, there were 117 members of the Berne Convention as of January 1, 1996. *WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], INDUSTRIAL PROPERTY AND COPYRIGHT*, 14 (1996).

6. STEPHEN SIWEK & HAROLD FURCHGOTT-ROTH, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: 1977-1993* (Feb. 1995) (a study prepared for the International Intellectual Property Alliance, on file with author).

TABLE 1

ESTIMATES OF 1994 U.S. TRADE LOSSES DUE TO PIRACY IN ASIA⁷
(in millions)

| | Motion Pictures | Records & Music | Computer Programs | Books | Total |
|----------------------------|-----------------|-----------------|-------------------|--------------|---------------|
| Australia | 34 | 12 | 88 | 1.5 | 135.5 |
| Hong Kong | 7 | 35 | 87 | 2 | 131 |
| India | 40 | 40 | 57 | 25 | 162 |
| Indonesia | 10 | 12 | 92 | 40 | 154 |
| Japan | 156 | N/A | 1106 | 3 | 1265 |
| Korea | 20 | 3 | 313 | 20 | 356 |
| Malaysia | 30 | 8 | 59 | 6 | 103 |
| New Zealand | N/A | N/A | 73 | N/A | 73 |
| Pakistan | 21 | 5 | 6 | 30 | 62 |
| People's Republic of China | 50 | 345 | 351 | 120 | 866 |
| Philippines | 20 | 4 | 25 | 70 | 119 |
| Singapore | 1 | 3 | 33 | 2 | 39 |
| Taiwan | 21 | 6 | 152 | 10 | 189 |
| Thailand | 26 | 12 | 100 | 30 | 168 |
| Vietnam | N/A | N/A | 0.2 | 5 | 5.2 |
| TOTAL | 436 | 485 | 2542.2 | 364.5 | 3827.7 |

N/A: Estimate of trade losses not available.

TOTALS rounded to nearest million.

Table 1 shows trade losses suffered by U.S. copyright industries due to piracy in Asia during 1994. The table covers the four main sectors making up the copyright industries.⁸ The high losses in the area of computer programs are particularly striking. These numbers cover not only piracy of the typical kind (*i.e.*, sale of unauthorized copies of programs, either alone or loaded on a computer hard disk and sold with the computer) but also cover the unauthorized duplication of software in business environments. For instance, a company may purchase one copy of a program and load that copy, without a license, on to all of its

7. Statistical data on file with the International Intellectual Property Alliance.

8. These sectors are computer software, music and sound recordings, audio-visual works, and book and journal publishing. In the area of computer programs, the loss data cover only applications programs used in business. In 1996, IIPA will begin to assess losses in the rapidly growing entertainment software industry, including video games.

computers. The highest losses are currently in Japan and in China. This data does not include piracy of operating systems, like Windows or OS-2, or educational or entertainment software.

This data obscures the significant improvements in many Asian countries. In Singapore, the estimated loss due to piracy in 1984 was over \$350 million. Today, losses are less than \$40 million. However, the size of the loss does not always correlate directly with improvements in the level of protection in a country. As significant improvements are made, losses may even increase. This is due to growing penetration of new copying technology in the market (*e.g.*, VCRs, audiocassette players, photocopiers, computers, etc.) and to the overall growth in the size of the market itself. This is why actual losses in some developed countries with low piracy rates can exceed actual losses in smaller or less developed countries with far higher piracy rates.

Tables 2, 3, 4, and 5 cover Western Europe, Central and Eastern Europe, the Middle East and Mediterranean regions, and the Americas and the Caribbean, excluding the United States. Table 6 shows a grand total of losses in 1994 estimated at close to \$15 billion, with nearly \$3 billion lost in the largest market for copyrighted material in the world, the United States.

These tables do not show the damage that high losses and high levels of piracy inflict upon national economies. Pirated foreign works drive out domestic creativity. Cheap foreign pirated products unfairly compete with local products, making it virtually impossible for local authors, publishers, and producers to make a living or earn an acceptable return on investment. Domestic works are usually the first to be pirated, depriving local authors, songwriters, programmers, publishers, and producers of their ability to earn a living from their creativity and depriving governments of the tax revenue that pirates rarely pay.

These tables only show actual dollar losses. They do not reflect the fact that in "developed countries" the level or rate of piracy may be as low as one percent of the market, whereas in some key "developing countries" the piracy level may approach 100 percent. For example, the high dollar losses due to software piracy in the United States reflect the vastness of the U.S. market and the very high penetration of personal computers in the business environment. The rate of piracy, however, is among the very lowest in the world—thirty-five percent. While this is unacceptable, it is quite a different story from the piracy rate figures reflected in some developing countries.

TABLE 2

**ESTIMATES OF 1994 U.S. TRADE LOSSES DUE TO PIRACY IN
WESTERN EUROPE⁹**
(in millions)

| | Motion Pictures | Records & Music | Computer Programs | Books | TOTAL |
|-------------------|--------------------|--------------------|----------------------|-----------|-------------|
| Austria | 10 | 2.5 | 43.8 | N/A | 56.3 |
| Belgium | 6.2 | 9 | 57 | N/A | 72.2 |
| Denmark | N/A | 1.5 | 59 | N/A | 60.5 |
| Finland | 1 | 1 | 32 | N/A | 34 |
| France | 50 | 22.7 | 506 | N/A | 578.7 |
| Germany | 53 | 70 | 1076 | 2 | 1201 |
| Greece | 55 | 15 | 45 | 3 | 118 |
| Ireland | 7 | 0.3 | 26 | N/A | 33.3 |
| Italy | 321 | 38 | 232 | 20 | 611 |
| Netherlands | 15 | 20 | 134 | N/A | 169 |
| Norway | N/A | 3 | 53 | N/A | 56 |
| Portugal | 10 | 0.3 | 38 | N/A | 48.3 |
| Spain | 87 | 1.5 | 176 | 10 | 274.5 |
| Sweden | N/A | 6.3 | 105 | N/A | 111.3 |
| Switzerland | 11 | 8 | 62 | N/A | 81 |
| United Kingdom | 78 | 22.3 | 356 | N/A | 456.3 |
| TOTAL | 704 | 221 | 3001 | 35 | 3961 |

N/A: Estimate of trade losses not available.

TOTALS rounded to nearest million.

9. Statistical data on file with the International Intellectual Property Alliance.

TABLE 3

**ESTIMATES OF 1994 U.S. TRADE LOSSES DUE TO PIRACY IN
CENTRAL & EASTERN EUROPE¹⁰**
(in millions)

| | Motion Pictures | Records & Music | Computer Programs | Books | TOTAL |
|----------------------------|----------------------------|--------------------------------|------------------------------|--------------|--------------|
| Bulgaria | 10 | 126 | 18 | 0.5 | 154.5 |
| CIS (other than Russia) | 40 | N/A | 6 | 2 | 48 |
| Croatia | 4.5 | N/A | N/A | N/A | 4.5 |
| Czech Republic | 16 | N/A | 62 | 6 | 84 |
| Estonia | N/A | N/A | N/A | N/A | 0 |
| Hungary | 27 | 12 | 75 | 6 | 120 |
| Latvia | N/A | N/A | N/A | N/A | 0 |
| Lithuania | N/A | N/A | N/A | N/A | 0 |
| Poland | 39 | 15 | 132 | 15 | 201 |
| Romania | 20 | N/A | 12 | 2 | 34 |
| Russia | 145 | 300 | 310 | 50 | 805 |
| Slovakia | 5 | N/A | N/A | N/A | 5 |
| Slovenia | 2 | N/A | 4 | N/A | 6 |
| TOTAL | 309 | 453 | 619 | 82 | 1462 |

N/A: Estimate of trade losses not available.

TOTALS rounded to nearest million.

10. Statistical data on file with the International Intellectual Property Alliance.

TABLE 4

**ESTIMATES OF 1994 U.S. TRADE LOSSES DUE TO PIRACY IN
MIDDLE EAST & MEDITERRANEAN¹¹**
(in millions)

| | Motion Pictures | Records & Music | Computer Programs | Books | TOTAL |
|--------------|--------------------|--------------------|----------------------|-------------|------------|
| Bahrain | 30 | 10 | 5 | 1 | 46 |
| Cyprus | 15 | 4 | 3 | 15 | 37 |
| Egypt | 10.8 | 4 | 24 | 17 | 55.8 |
| Israel | 12 | 9 | 19 | 0.7 | 40.7 |
| Jordan | 4 | N/A | 2 | 1 | 7 |
| Kuwait | 10 | N/A | 10 | 2 | 22 |
| Lebanon | 10 | N/A | 1 | 2 | 13 |
| Malta | 8 | N/A | 2 | N/A | 10 |
| Oman | 10 | N/A | 7 | 2 | 19 |
| Qatar | 6 | N/A | 6 | N/A | 12 |
| Saudi Arabia | 100 | 29 | 75 | 7 | 211 |
| Turkey | 44 | 15 | 117 | 16 | 192 |
| U.A.E. | 5 | 72 | 29 | 2 | 108 |
| TOTAL | 265 | 143 | 300 | 65.7 | 774 |

N/A: Estimate of trade losses not available.

TOTALS rounded to nearest million.

11. Statistical data on file with the International Intellectual Property Alliance.

TABLE 5

**ESTIMATES OF 1994 U.S. TRADE LOSSES DUE TO PIRACY IN
THE AMERICAS & CARIBBEAN¹²**
(in millions)

| | Motion Pictures | Records & Music | Computer Programs | Books | TOTAL |
|-----------------------|----------------------------|--------------------------------|------------------------------|--------------|--------------|
| Argentina | 54 | 21.6 | 154 | 5 | 234.6 |
| Bahamas | N/A | N/A | N/A | N/A | 0 |
| Bolivia | 2 | 0.8 | 7 | 5 | 14.8 |
| Brazil | 39 | 30 | 339 | 30 | 438 |
| Canada | N/A | N/A | 167 | N/A | 167 |
| Chile | N/A | 3.5 | 46 | 3 | 52.5 |
| Colombia | 45 | 11 | 60 | 5 | 121 |
| Costa Rica | 0.8 | 0.6 | N/A | 1 | 2.4 |
| Dominican Republic | 1.7 | N/A | N/A | 5 | 6.7 |
| Ecuador | 1.8 | 0.6 | 5 | 3 | 10.4 |
| El Salvador | 0.9 | 3.6 | 8 | 3 | 15.5 |
| Guatemala | 1 | 0.5 | 6 | 2 | 9.5 |
| Honduras | 0.4 | 0.5 | 3 | 1 | 4.9 |
| Jamaica | N/A | N/A | N/A | N/A | 0 |
| Mexico | 74 | 68 | 162 | 30 | 334 |
| Nicaragua | 0.4 | 0.4 | 4 | 0.5 | 5.3 |
| Panama | 1.6 | 0.5 | 3 | 2 | 7.1 |
| Paraguay | 2 | 3 | 10 | 2 | 17 |
| Peru | 2 | 7 | 11 | 10 | 30 |
| Uruguay | 1 | 0.5 | 12 | 2 | 15.5 |
| Venezuela | 20 | 6 | 77 | 20 | 123 |
| TOTAL | 248 | 158 | 1074 | 130 | 1609 |

N/A: Estimate of trade losses not available.

TOTALS rounded to nearest million.

12. Statistical data on file with the International Intellectual Property Alliance.

TABLE 6

**ESTIMATES OF 1994 U.S. TRADE LOSSES DUE TO PIRACY
TOTALS¹³
(in millions)**

| | Motion Pictures | Records & Music | Computer Programs | Books | TOTAL |
|---------------------|----------------------------|--------------------------------|------------------------------|--------------|--------------|
| Outside the U.S. | 1962 | 1460 | 7536 | 678 | 11636 |
| U.S. | 250 | 300 | 2358 | N/A | 2908 |
| TOTAL | 2212 | 1760 | 9894 | 678 | 14544 |

N/A: Estimate of trade losses not available.

TOTALS rounded to nearest million.

Table 7 presents an across-the-board look at piracy losses compared to piracy rates in key regions around the world. This data is quite preliminary, but does provide some initial notion of the task facing WTO members, including the United States, in their efforts to enforce the TRIPS Agreement and significantly increase trade in copyrighted products by reducing piracy around the world.

13. Statistical data on file with the International Intellectual Property Alliance.

TABLE 7
ESTIMATES OF 1994 U.S. RECORDING INDUSTRY LOSSES
DUE TO PIRACY AND LEVELS OF PIRACY¹⁴

| REGION | U.S. LOSSES (in millions) | PIRACY LEVEL ¹⁵ | PIRACY LEVEL (excludes PRC & Russia) |
|---|------------------------------|-------------------------------|---|
| ASIA | 485 ¹⁶ | 36% | 26% |
| WESTERN EUROPE | 221 ¹⁷ | 5% | 5% |
| CENTRAL & EASTERN EUROPE | 453 | 71% | 42% |
| MIDDLE EAST & MEDITERRANEAN | 143 | 37% | 37% |
| THE AMERICAS & CARIBBEAN ¹⁸ | 158 | 36% | 36% |
| UNITED STATES | 300 | 3% | 3% |
| TOTAL | 1760 | | |

TOTALS: Rounded to nearest million.

Table 7 looks at the only data currently available for the recording industry. The first column lays out the estimated trade losses to U.S. record companies in the key regions of the world, as developed in the previous tables. The second column estimates the piracy levels, namely the proportions of the entire sound recordings market that consist of pirate recordings. The piracy level data from 1994 includes both tape cassettes and CDs and covers not only U.S. recordings but also recordings from all record companies operating in the region, including local, U.S., and multinational companies. Since China and Russia represent such a huge factor in the Asia and Eastern Europe markets, a third column measures these rates excluding these two countries.

The piracy rate in the United States is the lowest (three percent), followed by Western Europe (five percent). There are some key problem countries that skew the data, including Italy

14. Statistical data on file with the International Intellectual Property Alliance (based on statistics by the International Federation of the Phonographic Industry (IFPI) and the Recording Industry Association of America (RIAA)).

15. Based on data for the world's recording industry, not just the U.S. industry. These numbers were calculated on a unit basis.

16. Loss data not available for Japan.

17. Estimated losses for the worldwide recording industry were \$473.6 million in 1994.

18. Includes Canada, but not the United States.

and Greece, which maintained a thirty-two percent piracy rate in 1994. In contrast, the rates in the other regions range from twelve times to over twenty times higher than the lowest rate. Eastern and Central Europe (seventy-one percent) are the worst regions, reflecting the astronomically high piracy rates in Russia (seventy-nine percent) and Bulgaria (eighty-seven percent). Even excluding China and Russia, the regional rates range from eight times (twenty-six percent in Asia, excluding Japan and China) to fourteen times the U.S. rate (forty-two percent in Central and Eastern Europe).

The piracy rate for the Americas and the Caribbean are also instructive. For the most part, this region of the world (unlike the Middle East or Asia) has a long copyright tradition. Yet, the piracy rate for the region is high (thirty-six percent) relative to other regions. Virtually all of the larger and more economically important countries in this region have amended their copyright laws recently to bring them up to, or close to, TRIPS standards. What is missing, of course, is effective enforcement. This is one of the fastest growing regions in the world for the copyright-based industries. But growth in these sectors, both for domestic copyright owners and for foreign owners, is severely hampered by the unacceptable lack of effective enforcement throughout the region. This will be a key element of TRIPS implementation.

TABLE 8

**ESTIMATES OF 1994 U.S. COMPUTER SOFTWARE INDUSTRY
LOSSES DUE TO PIRACY AND LEVELS OF PIRACY¹⁹**

| REGION | U.S. LOSSES (in millions) | PIRACY LEVEL ²⁰ |
|---|------------------------------|----------------------------|
| ASIA | 2542 | 78% |
| WESTERN EUROPE | 3001 | 52% |
| CENTRAL & EASTERN EUROPE | 619 | 92% |
| MIDDLE EAST & MEDITERRANEAN | 300 | 93% |
| THE AMERICAS & CARIBBEAN ²¹ | 1074 | 86% |
| UNITED STATES | 2358 | 35% |
| TOTAL | 9894 | |

TOTALS rounded to nearest millions.

Table 8 reflects piracy rates for the computer software industry and shows even higher rates of piracy for these same regions. The very high losses due to software piracy reflect not only the higher price of software but also the fact that the lion's share of piracy occurs inside commercial companies. Such companies pay full price for their computer hardware, but, in the absence of effective laws and enforcement, they often load copies of software onto all their computers in use without permission or payment. Legal protection is also of later vintage at the international level and the business software industry's enforcement efforts did not begin at all until 1989.

While the losses and the rates of piracy are far higher in the software industry, the regional pattern is very similar to that of the recording industry. The lowest rate is in the United States (thirty-five percent), followed by Western Europe (fifty-two percent), Asia (seventy-eight percent), the Americas and the Caribbean (eighty-six percent), and then Eastern Europe and the Middle East (with rates over ninety percent). Effective

19. Statistical data on file with the International Intellectual Property Alliance (based on statistics by the Business Software Alliance (BSA)).

20. Includes data for the world's business software industry, not just the U.S. industry.

21. Includes Canada, but not the United States.

enforcement can make a very significant difference in these piracy rates and, in turn, provide a major boost in sales to the worldwide software industry, including sales of software developed locally.

A recent Price Waterhouse study of software piracy in Western Europe²² noted that if piracy levels could be reduced to the level now existing in the United States (from 52 percent to 35 percent) by the year 2000, it would create 87,000 new jobs in Europe and create new tax revenues of \$2.3 billion. If the rate had been 35 percent in 1994, 56,000 jobs and \$1.4 billion in tax revenues would have been created. Thus, it is clear is that a significant reduction in piracy rates will mean substantial job growth both within the local market and in the United States.

The Price Waterhouse report outlined a five-step plan to reduce the levels of piracy in Europe.²³ Four out of five recommendations dealt with improved enforcement, including stronger criminal penalties, full recovery of damages and costs in civil proceedings, wider and easier availability of ex parte search and seizure authority, and more efficient court procedures at both the civil and criminal level. All of these issues are dealt with in the TRIPS enforcement text.²⁴

Virtually all of the countries represented in these tables have substantive copyright laws that are substantially similar to the standards of protection mandated in TRIPS. Those that fail to comply are deficient in areas that, as a general matter, probably do not have a major impact on the losses being suffered by local or U.S. copyright owners. While IIPA is in the process of surveying substantive compliance, most of the problems exist in a few limited areas. These areas include: inadequate duration of protection; failure to provide retroactive protection to foreign works and sound recordings; failure to protect performers against bootlegs of their performances; and absence of a rental right. Most other substantive law requirements of TRIPS have been fulfilled by the vast majority of countries. For example, computer programs receive protection for the full panoply of exclusive rights in virtually all these countries, including countries such as Russia and China in which the levels of piracy are among the highest in the world.

Because critical amendments have already been made in virtually all countries, it is important to recognize that reducing trade losses due to traditional copyright piracy will depend not on

22. BUSINESS SOFTWARE ALLIANCE, CONTRIBUTION OF THE PACKAGED BUSINESS SOFTWARE INDUSTRY TO THE EUROPEAN ECONOMIES (Sept. 1995) (on file with author).

23. BUSINESS SOFTWARE ALLIANCE, REDUCING EUROPEAN SOFTWARE PIRACY TO U.S. LEVELS WOULD CREATE 87,000 NEW JOBS AND BOOST TAX REVENUES BY \$2.3 BILLION, NEW REPORT REVEALS (Press Release of Sept. 28, 1995).

24. TRIPS, *supra* note 1, arts. 41, 42, 45, 50, and 61.

whether substantive copyright law amendments are made but on whether the TRIPS standards of enforcement are implemented in accordance with their letter and spirit. Whether countries implement their enforcement obligations under TRIPS will, in turn, depend on the domestic political pressures from other WTO members, particularly from the United States, which will almost certainly take an aggressive stance toward proper implementation of the TRIPS enforcement provisions.

The TRIPS enforcement obligations entered into force for all WTO developed country members on January 1, 1996. Under Articles 65 and 66 of TRIPS, WTO members that qualify as "developing countries" (or as countries "in the process of transformation from a centrally-planned economy into a market, free enterprise economy")²⁵ have until January 1, 2000, and "least developed" countries have until January 1, 2006, before they are legally obligated to bring their enforcement practices into compliance with the text. This is subject, however, to an exception spelled out in both articles, requiring all WTO members to provide national treatment and most-favored-nation status to foreign rightholders beginning on January 1, 1996. Thus, if enforcement activities take place in a country on behalf of domestic rightholders, a country must extend this regime on a nondiscriminatory basis to all rightholders from WTO member countries. Of perhaps even greater importance, this national treatment obligation operates as a legal "point of attachment," requiring countries otherwise qualifying as "developing," "in transition to a market economy," or "least developed," and therefore able to take advantage of the transition periods, to extend protection to foreign works, performances and sound recordings. This requirement applies even though such countries have not yet joined the appropriate international convention, whether it be Berne²⁶ or the Universal Copyright Convention (UCC),²⁷ or, in the case of U.S. sound recordings, the Geneva

25. The transition period for formerly centrally-planned economies, however, is not automatically available. Each country must show that it is "undertaking structural reform of its intellectual property system" and is "facing special problems in the preparation and implementation of intellectual property laws." TRIPS, *supra* note 1, art. 65(3). It is definitely arguable that countries like Poland, whose IP reform is over two years old, do not qualify for the transition period.

26. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 14, 1967, 102 Stat. 2853, 828 U.N.T.S. 221.

27. Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

Phonograms Convention.²⁸ For example, some key trading countries (*e.g.*, Poland) have not yet extended protection to foreign performances or sound recordings, but do protect domestic performances and sound recordings. As of January 1, 1996, these countries must extend such protection to the performances and sound recordings of all WTO members. Under the domestic laws of most of these countries, domestic works, performances, or sound recordings receive substantive protection that is equivalent to TRIPS. Therefore, the countries *must* extend the same protections to WTO-member-origin works, performances, and sound recordings.

Because piracy losses and rates remain unacceptably high in many countries that arguably qualify for lengthy transition periods, the question is: should adversely-affected domestic and foreign rightholders simply wait until the year 2000 or later when the TRIPS Agreement becomes fully binding on these countries? The U.S. Congress has made clear, through its Uruguay Round implementing legislation, that the administration should work to encourage and leverage "acceleration" of Uruguay Round implementation.²⁹ Of course, members of the developing world can argue that it is in their own domestic interests to bring their substantive and enforcement regimes into compliance as early as possible. Such compliance would accelerate domestic and foreign investment into these areas, enhance domestic economic growth, and importantly, position these countries for the anticipated information revolution in which protected content will be shipped around the world instantaneously through advanced networks like the Internet.

Many of the more advanced countries, which also claim to be in the "developing" category, should take the action that will provide the massive investments necessary to build in the next few years telecommunications networks and integrate their economies into the global information infrastructure. Ensuring strong protection for intellectual property is a keystone catalyst for such integration. Even in countries that are unlikely to participate in these developments in the near term, strong copyright protection will encourage the development of domestic cultural and high-tech industries in their more traditional forms (the music, recording, television, video, film, print publishing, and software industries).

28. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67.

29. Uruguay Round Agreement Act, tit. III, § 315, Pub. L. No. 103-465, 108 Stat 4809 (1994) (also known as the URAA).

Many countries are taking heed of these arguments and are planning to bring their domestic copyright laws into TRIPS compliance prior to the year 2000. Brazil had promised the United States that its copyright and software laws would be in compliance by the end of 1995. Although that deadline was not met, Brazil's promise is likely to be fulfilled sometime in 1996. The ASEAN³⁰ countries, those most likely to benefit immediately from high levels of protection, have been moving strongly in this direction. Most of them have indicated that they will bring their laws into compliance by the end of 1997. Taiwan and South Korea have announced intentions to amend their substantive laws by the end of 1995 and came close to meeting that deadline.³¹

Two extremely important questions remain, however. First, will developing countries "accelerate" improvements in their enforcement regimes to reduce the high levels of copyright piracy now endemic in their economies? On this point, the jury is still out. What the United States and the European Union do on this issue will be important in determining whether piracy levels decrease significantly due to improved enforcement.³² Second, as these countries come into compliance, will they agree to subject themselves to WTO dispute settlement mechanisms prior to the transition deadline date? On this point, it seems unlikely that countries will submit themselves to dispute settlement at an earlier date than required. While this would be the clearest indication to the rest of the world that IP investments are safe in that particular country, it is likely that WTO politics, which tend to force countries to use transition as a lever with the developed world, will win out in the end. This answer is purely speculative, however, because so far little international attention has been paid to TRIPS compliance.

Another compliance problem is that both the TRIPS Agreement and the WTO Agreement fail to provide a firm legal definition of "developing" country. It is unclear, therefore, whether countries such as Singapore, South Korea, and the Gulf states should be able to define themselves as "developing," despite

30. Association of Southeast Asian Nations.

31. Nevertheless, neither country is arguably in compliance with its obligation to protect preexisting sound recordings (and in the case of South Korea, "works" as well) pursuant to Article 18 of the Berne Convention and Article 14(6) of TRIPS. Taiwan, however, has indicated a willingness to proffer the appropriate amendment early in 1996. (Texts of the proposed amendments on file with the International Intellectual Property Alliance).

32. See Guy de Jonquières, *Britain Attempts to Map out WTO's Agenda*, *FIN. TIMES*, Oct. 24, 1995, at 6.

their relatively high per capita income and other indicia of a relatively advanced stage of development.³³ Most WTO experts consider this a "political" question, but many also agree that the issue can be brought to and adjudicated by a dispute settlement panel. Many countries probably would not want to risk an adverse decision on this question because of other international implications that they regard as being far more important than IP protection. Therefore, it may be possible to "negotiate" a settlement that involves some acceleration. However, it is still too early to tell whether one of the developed countries, particularly the United States, would be willing to bring such a case.

The enforcement obligations in TRIPS will occupy center stage during the TRIPS implementation process. From the standpoint of the copyright industry, there are likely to be two major focal points of effort: criminal and civil remedies. The first challenge will be to ensure the proper implementation of Article 61 of the text, which establishes the obligations with respect to criminal enforcement. Effective criminal enforcement has two major elements: (a) effective searches and seizures of pirate product by the police without notice to the infringer (raids), and (b) the existence in statutory law of deterrent criminal penalties and their imposition by judges in practice.

While civil remedies are less important in dealing with classic piracy, they play a key role in dealing with "end-user" software piracy—piracy in business environments, where criminal remedies may not be easily available. Civil remedies against corporate end-users of unauthorized copies of business software will be important in many countries. Implementation issues that will bear watching are: (1) the availability of civil *ex parte* searches under Article 50; (2) measure of civil damages issues in civil law countries, and ensuring that full compensation is received from infringers (Articles 41 and 45); (3) recovery of costs and expenses (Article 45); and (4) ensuring against unduly protracted proceedings, either in seeking provisional remedies or in proceedings on the merits (Article 41). Areas of substantive law reform that may give rise to dispute settlement under TRIPS

33. GNP per capita income may be one measure to guide such classifications, but should not be the only factor. The World Bank has classified national economies by GNP as low-income, middle-income (subdivided into lower-middle and upper-middle), or high-income. THE WORLD BANK, WORLD TABLES 1995, 763-66 (1995). Low-income and middle-income economies are sometimes referred to as developing countries. *Id.* at 764. The GNP per capita figures (using 1993 data) for these economies are as follows: low-income, \$695 or less; lower-middle-income, \$696-\$2,785; upper-middle-income, \$2,786-\$8,625; and high-income, \$8,626 or more. *Id.* For example, Kuwait, Qatar and the United Arab Emirates are considered to be "high-income" economies by the World Bank. See *id.* at 764.

include: (1) implementation of Articles 9(1) and 14(6) (incorporating Article 18 of the Berne Convention) to require protection for preexisting works, performances, and sound recordings, and (2) implementation of Article 14(1), requiring WTO members to afford protection for performers with respect to the unauthorized fixation on phonograms of their live performances (*i.e.*, protection against "bootlegging").

The IPA and USTR have been particularly active in monitoring countries' implementation of their Berne Convention Article 18 obligations. Several problem areas are already apparent. Japan protects foreign sound recordings created after 1971, because in that year Japan first began to protect domestic sound recordings; to comply with TRIPS, Japan must afford a full fifty-year term of protection, starting in 1946. Similarly, South Korea recently passed amendments, designed to bring it into compliance with TRIPS by the end of 1995, which fail to protect works, performances, and sound recordings created before 1957 or whose authors died prior to 1957. These laws also violate TRIPS requirements. Other countries that may take advantage of the transition period (*e.g.*, Turkey) or countries desiring to be WTO members (*e.g.*, Taiwan, Russia, and Ukraine) have so far failed to provide adequate protection for either preexisting foreign works or sound recordings.

Other substantive areas that might give rise to implementation disputes and, if necessary, dispute settlement could include: (1) the scope of protection for computer programs as literary works under Article 9(2) and Article 10;³⁴ (2) the scope of the broadcast, public performance, and public communication right, particularly as it relates to the definition of "public";³⁵ and (3) the compatibility of blanket "private copying" exemptions with the Berne Article 9(2) test, as incorporated in TRIPS Articles 13 and 14(6).³⁶

34. Article 10 provides that "copyright protection shall extend to expression and not to ideas, procedures, methods of operation or mathematical concepts as such." TRIPS, *supra* note 1, art. 9(2). Article 10 protects "computer programs, whether in source or object code, . . . as literary works under the Berne Convention (1971)." TRIPS, *supra* note 1, art. 10.

35. The United States sought a definition of "public" in TRIPS, but was unsuccessful. Such a definition, however, was incorporated in the North American Free Trade Agreement (NAFTA). See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., art. 1721, 32 I.L.M. 605, 698 (entered into force Jan. 1, 1994). Disputes on the scope of these Berne Convention exclusive rights may arise more often in the future, particularly in the context of transmissions of protected works over advanced networks.

36. This issue will become increasingly important as protected works and sound recordings are transmitted on advanced networks, and unauthorized

The TRIPS Agreement was negotiated and concluded in a context that focused attention on the problem of piracy as it impacts the production and distribution of "traditional" works and "traditional" means of exploiting them. The TRIPS Agreement also will be of great relevance in adopting protection standards for the digital reproduction and transmission of works, performances, and sound recordings on advanced digital networks. This directly results from the fact that TRIPS incorporates the substantive text of the Berne Convention, thereby including computer programs and databases within TRIPS purview and extending exclusive rights to commercial rentals. Like the U.S. Constitution and the constitutions of other countries, the Berne Convention and TRIPS texts are sufficiently flexible to cover many, though perhaps not all, of the issues involving the digital future that are only recently being discussed in the developed world. It will be interesting to see if the WTO process, as a fully political entity and new, quasi-judicial dispute settlement mechanism, can adapt to the reality of new technology.

copying by the recipient—arguably justified under a private copying exemption—is challenged by copyright owners as incompatible with the "normal exploitation" of the work or sound recording.