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Draft International AntiCounterfeiting Code: Neo-Realism as a Vehicle for Analyzing the Effect of Nonsignatories' Perceptions on the Development of an Anticounterfeiting Norm

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NOTE

DRAFT INTERNATIONAL ANTICOUNTERFEITING CODE: NEO-REALISM AS A VEHICLE FOR ANALYZING THE EFFECT OF NONSIGNATORIES' PERCEPTIONS ON THE DEVELOPMENT OF AN ANTICOUNTERFEITING NORM

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I. INTRODUCTION

Heralding a new 12,000 kilometer guarantee, a laconic advertisement reads: "Harley-Davidson gives the competition yet another chance to imitate."¹ This advertisement is less an example of Madison Avenue wizardry than a sardonic statement about a problem of international scope and pervasive significance—counterfeiting brand name merchandise (commercial counterfeiting). Although Levi Strauss & Company Chairman Walter A. Haas, Jr. quipped "[i]mitation is the highest form of

1. Kaikati & LaGarce, *Beware of International Brand Piracy*, HARV. BUS. REV., Mar.-Apr. 1980, at 53, 58.

flattery . . .,"² the dangers posed to legitimate manufacturers³ and the consuming public⁴ by counterfeit items has promoted heroic, albeit uncoordinated efforts to eliminate the problem.⁵ These efforts have recently coalesced through the promotion by various international corporations of an international anticounterfeiting code.⁶ The United States, the European Common Market (EEC), Canada, and Japan are currently considering a draft convention entitled "Agreement on Measures to Discourage the Importation of Counterfeit Goods"⁷ (hereinafter referred to as the Anticounterfeiting Code or Code) which is designed to minimize the international problem posed by counterfeit merchandise. This Note highlights the international legal significance of the counterfeiting problem. Previous attempts to confront the problem provide the backdrop for a tripartite analysis which treats the following issues in the proposed Code: workability questions evident from an initial examination of the Code; the Code as a norm-creating vehicle; and, aside from the normative properties of the Code, the practical import of the Code for the international business community.

If the Code is to have more than chimerical value, it must either possess independent significance as a norm-creating vehicle or help to coordinate the public and private international law aspects of the counterfeiting problem. If the Code rules are perceived to be efficacious, it will attract enough signatories to have norm-creating potential. If nonsignatories then perceive the Code to be a sufficiently authoritative source of workable rules, they will integrate those rules into their national and legal value structures. Even if the Code does not succeed in creating international norms, it may popularize efficient methods of dealing with counterfeiters. Although both nations and businesses will benefit from adoption of the Code, only nations can ratify the Code or embrace its rules. Their perceptions of the efficaciousness of the

2. *How Levis Cracked a Ring of Counterfeiters*, Bus. Wk., Sept. 5, 1977, at 27 [hereinafter cited as *Ring of Counterfeiters*].

3. See *infra* notes 34-62 and accompanying text.

4. See *infra* notes 63-74 and accompanying text.

5. See *infra* notes 92-157 and accompanying text.

6. See *infra* notes 98-139 and accompanying text.

7. Telephone Interview with Ms. Kathryn Flynn, Office of the United States Trade Representative—General Agreement on Tariffs and Trade (GATT) Affairs (Feb. 4, 1982) [hereinafter cited as Flynn Interview I]. For further discussion of potential Code signatories, see *infra* notes 168-73 and accompanying text.

Code will thus determine whether the Code develops into customary rules of commercial interaction.

Unfortunately, most formalist theory lacks an adequate jurisprudential approach for ascertaining the perceptions which the Code will evoke among nonsignatories. A group of neo-realists including Myres McDougal, the late Harold Lasswell, and Michael Reisman have developed a contextual analysis of the decision making process. Because this multidisciplinary, contextual approach requires consideration of the same elements which influence political decision making, it provides the framework for ascertaining nonsignatory decisionmakers' perceptions of the Code. This Note concludes that the practical considerations which militate against the workability of the Code will also minimize any norm-creating properties which the Code might possess. The Code represents a unique confluence of public and private international activities. Its significance is not dependent upon its norm-creating properties alone, but also upon the cooperation which the Code promotes among private international entities.

Commercial counterfeiting is the counterfeiting of brand name, trademarked merchandise. The Code is designed to minimize trade in counterfeit goods.⁸ A counterfeit good is defined in article one of the Code as "any good with a false representation of a trademark that is entitled to protection under the laws of the country of importation and which is legally registered where re-

8. Agreement on Measures to Discourage the Importation of Counterfeit Goods, preamble, cls. 5, 6 [hereinafter cited as Code]. Although the definition of "counterfeit goods" in § 1.2.1 of the Code is skeletal at best, many agree with its definition: counterfeiting is infringement upon a manufacturer's trademark. Pfaff, *Imitators Hot for Things 'haute,'* ADVERTISING AGE, May 15, 1978, at 1, col. 1. Compare BLACK'S LAW DICTIONARY 315 (5th ed. 1979) (Counterfeiting is defined as "[t]o forge; to copy or imitate, without authority or right, and with a view to deceive or defraud. . .") with Yarnell, *Recording Piracy is Everybody's Burden: An Examination of its Causes, Effects and Remedies*, 20 BULL. COPYRIGHT Soc'y 234 (1973) (Piracy is defined as "[t]he unauthorized duplication for commercial purposes of sound recordings which are then sold in pirate packaging."), cited in Note, *Unauthorized Duplication of Sound Recordings: Transnational Problem in Search of a Solution*, 14 VAND. J. TRANSNAT'L L. 399, 400 (1981).

Occasionally, "piracy" is defined to include the abuse of another's trademark rights, which would make counterfeiting a form of "piracy." See Kaikati & LaGarce, *supra* note 1, at 54. More commonly, however, "piracy" is a term used to describe the copying of sound or video recordings. See Note, *supra*, at 400. It is thus appropriate that this Note excludes, as does the Code, the problem of piracy.

quired in accordance with the laws of that country.”⁹ Thus, the counterfeiting described in this paper runs the gamut from luxury items to common fertilizer. Pirated records,¹⁰ pirated films,¹¹ and counterfeited currency¹² are beyond the scope of this analysis. This Note also does not discuss counterfeiting problems in video game¹³ and other high technology industries, or in industries in which the primary source of protection is copyright law.¹⁴

Two other concepts help delimit the term “counterfeit.” “Knockoffs” are items which are slightly different from the original products but are not sold as genuine articles.¹⁵ Thus, producing knockoffs is neither a crime under current trademark statutes nor covered by the new Code. Savvy counterfeiters use this nu-

9. Code, *supra* note 8, § 1.2.1. “Trademark” is further defined to include certification and collective marks. *Id.* § 1.2.2.

10. An annual piracy loss in the record and tape industries equivalent to 20% of total sales represents a problem of international significance. Walker, *The Pirating of Brand Goods*, N.Y. Times, Mar. 3, 1981, § 4 at 2, col. 1. In certain areas of Europe and Asia, sales of legitimate tapes are running behind sales of counterfeit tapes. Fenby, *Boom in Brand Name Fakes*, READERS DIG., Sept. 1981, at 135, 136. For an excellent discussion of international record piracy, see generally Note, *supra* note 8. Since publication of that Note, the problem of record piracy has reached epidemic proportions. Alarmed, industry groups are organizing to upgrade their attack on record piracy. Horowitz, *MIDEM Call For Artists To Join Piracy Struggle*, BILLBOARD, Jan. 23, 1982, at 1, 72. Because copyright laws are the major vehicle through which record pirates are prosecuted, the record piracy problem is beyond the trademark orientation of the Code, *supra* note 8, and thus outside the scope of this Note.

11. See, e.g., *The Crackdown on Movie Pirates*, Bus. Wk., Apr. 7, 1975, at 86.

12. See, e.g., *Treasury, Postal Service and General Government Appropriations for Fiscal Year 1982, Appropriations Hearings*, Part 1, 97th Cong., 1st Sess. 338 (1981) [hereinafter cited as *Appropriations Hearings*]; N.Y. Times, Aug. 13, 1981, § 1, at 4, col. 4.

13. See, e.g., Kristof, *A New Line in Video Games: Battle of the ‘Pirates’*, Wash. Post, Aug. 17, 1981, at A17, col. 3.

14. The reproduction of copyrighted books is an example of counterfeiting activities which fall within the ambit of copyright and not trademark protections. See, e.g., Parish & Groskopf-Markley, *Counterfeit! L.A.’s hot status crime for the ‘80’s*, L.A., Feb. 1979, at 128. The use of a name similar to that previously registered by another is also outside the scope of this Note: A Tel-Aviv owner of a McDavid’s restaurant went so far as to translate a McDonald’s worker’s manual into Hebrew for his employees. Kaikati & LaGarce, *supra* note 1, at 54. The field of computer programming is rife with opportunities for unscrupulous technicians. See NEWSWEEK, Feb. 22, 1982, at 50, 55.

15. Parish & Groskopf-Markley, *supra* note 14, at 131.

ance to circumvent customs inspections. After all, infringement does not occur when shipments of Cimega (Omega),¹⁶ Aseikon (Seiko),¹⁷ Hormilton (Hamilton),¹⁸ Longune (Longines),¹⁹ and Bulovia (Bulova)²⁰ watches cross national borders. The enterprising retailer simply removes or changes the "unnecessary" letter(s) to create a true counterfeit. Foreign purchasers who cannot tell the difference between a "loom" and a "moon" proudly sport knockoff "Fruit of the Moon," "Fruit of the Gum," and "Fruit on the Tee-Shirts" tee shirts.²¹ A second and related term is "imitation."²² In merchandising lexicon, an imitation is a copy of an original which is not sufficiently similar to constitute a counterfeit.²³ A "bubbling entrepreneur" in Mexico sold local bubbly under the same name and label used to identify a premier French champagne, but added enough Spanish words so that he was only imitating the product, not counterfeiting.²⁴ Although imitation is not a crime,²⁵ these examples illustrate that the distinction between imitation and counterfeit goods is more form than substance. Thus, a significant element in determining the efficacy of the proposed Code is its ability to minimize the problems caused by knockoff and imitation products.

16. Zapalski, *La Contrefaçon: une activité en expansion*, *Le Figaro*, Avril 22, 1980; see also Kaikati & LaGarce, *supra* note 1, at 54.

17. Fenby, *supra* note 10, at 137.

18. Kaikati & LaGarce, *supra* note 1, at 54.

19. *Id.*

20. *Id.*

21. Hansen, *The Capital of Counterfeiting*, *DUNS REV.*, Oct. 1978, at 68.

22. Pfaff, *supra* note 8, at 1, col. 1.

23. *Id.*

24. *Id.* The manufacturer of Power-Bilt golf clubs, Hillerich & Bradsby Company, has accused a Taiwanese operation of producing "Power Bolt" golf clubs on which "Power Bolt" is printed boldly in script identical to the script Hillerich uses to identify its Power-Bilt clubs. *U.S. NEWS & WORLD REP.*, Sept. 7, 1981, at 57. French perfumes are another popular target for imitation. See Pfaff, *supra* note 8, at 24, col. 1.

25. Pfaff, *supra* note 8, at 1, col. 1. The Union of Manufacturers for the International Protection of Industrial and Artistic Standards has suggested that France, Switzerland, and Sweden are the only European nations offering manufacturers adequate protection from imitations. *Id.* at 24.

II. THE PROBLEM: COMMERCIAL COUNTERFEITING

A. An Historical Perspective on Commercial Counterfeiting

A brief examination of commercial counterfeiting history demonstrates the need for a new approach to deal with the counterfeiting problem. Because counterfeiting is defined as infringement upon the trademark of another,²⁶ trademark legislation is intimately connected with the age-old²⁷ problem of counterfeiting. Ancient cattle brands were the first trademarks.²⁸ Compulsory guildmarks evolved during the Middle Ages.²⁹ Large scale enactment of trademark legislation did not occur until the mid-1800s.³⁰ Nonetheless, the problems continued. Extensive counterfeiting of French pharmaceuticals in the 1870s precipitated an 1872 congress in Vienna.³¹ The 1881 Madrid Convention and the 1883 Paris Convention for the Protection of Industrial Property (Paris Convention) were evidence of the need for unified action. Nevertheless, consumers were purchasing fake Kodak film as early as 1900³² and "[t]he prewar Latvians managed to bottle something called 'natural imitation Eau de Vichy.'"³³

B. Commercial Counterfeiting: The Problem Today

The two most outstanding characteristics of counterfeiting today are the overwhelming financial significance and international

26. Code, *supra* note 8, § 1.2.1.

27. Lewis, *A Show of Fraud*, Int'l Herald Tribune, Apr. 13, 1979. The Musée de la Contrefaçon contains a fascinating collection of ancient counterfeits, including an original Roman wine displayed next to a wine bottled by "illiterate Gauls." *Id.*

28. Patel, *Trademarks and the Third World*, 7 WORLD DEV. 653, 653 (1979).

29. Two types of marks used by manufacturers during the Middle Ages are predecessors of current trademarks: Merchants' (proprietary) marks and production (guild) marks. *Id.* at 654. The compulsory use of marks to assist consumers in tracing the origin of a product did not begin until the advent of cutlery marks during the eighteenth century. *Id.* Penalties for failure to comply with these guildmarks were severe. In Flanders, a fabric maker could lose a hand for failure to affix the requisite mark to his tapestries. Kaikati & LaGarce, *supra* note 1, at 53.

30. Most notable among this legislation are the early laws enacted by France (1857), the United Kingdom (1862), and the United States (1870). Patel, *supra* note 28, at 654.

31. Lewis, *supra* note 27.

32. *Id.*

33. *Id.*

scope³⁴ of the problem. Estimates are plentiful: counterfeiting is "a multimillion pound business";³⁵ losses to legitimate producers exceed one hundred million dollars annually³⁶ (considered a conservative estimate by some);³⁷ there exists a multibillion dollar worldwide counterfeit fashion problem.³⁸ Puritan fashions (makers of Calvin Klein jeans) lost an estimated fifteen to twenty million dollars in wholesale revenues due to counterfeits.³⁹ The makers of Levis jeans and Cartier watches both estimate recent losses at fifteen million dollars per year.⁴⁰ British motor part manufacturers lost an estimated 100 million pounds in trade to sellers of counterfeit parts.⁴¹ The Swiss watch industry lost 253 million pounds in potential sales to the vendors of ten million counterfeit watches.⁴² French firms estimate their losses at 180 million pounds per year, a figure which does not include the value of the 20,000 jobs lost because of counterfeit goods.⁴³

These shocking losses plague manufacturers worldwide. The French luxury goods industry has suffered especially serious damage.⁴⁴ Unfortunately, counterfeiting is no longer limited to tradi-

34. Walker, *A Program to Combat Commercial Counterfeiting*, 70 TRADE-MARK REP. 117, 118 (1980).

35. Fenby, *supra* note 10, at 135.

36. *Locking Out the Product Poachers*, INT'L MGMT., June 1979, at 14 [hereinafter cited as *Product Poachers*].

37. Walker, *supra* note 34.

38. Kalbacher, *Counterfeiters*, THE PLAYBOY GUIDE TO FASHION FOR MEN, Fall 1980, at 38, 40.

39. Nagy, *Those Prestige Goods: Have You Been Had?*, U.S. NEWS & WORLD REP., Sept. 7, 1981, at 57.

40. Parish & Groskopf-Markley, *supra* note 14, at 128.

41. Fenby, *supra* note 10, at 137.

42. *Id.* at 137-38.

43. *Id.* at 137.

44. For example, at least 40,000 counterfeit Tank watches exist—but internationally renowned watchmaker Cartier says that only 50,000 of the original were produced. Zapalski, *supra* note 15. Cartier expects that its losses from counterfeiting will triple this year. *Escroqueries: Montres: mefiez-vous des contrefaçons*, Le Quotidien de Paris, Juillet 18, 1980. After watching helplessly as counterfeiters cut into Cartier's profits by establishing "Cartier" stores in Mexico City, Cartier opened a "real" Cartier store in Mexico City in 1980 and began to compete with the counterfeiters for customers. Fenby, *supra* note 10, at 137. In any price war, however, the counterfeiters have a keen advantage. An original Cartier watch can cost as much as 8,000 francs; its counterfeit counterpart may sell for a mere 500 francs. Zapalski, *supra* note 16. Stymied investigators discovered that "every second boutique" in Milan, Rome, and Florence sells imitations

tional luxury goods.⁴⁵ Designer denims are now *haute couture*, and, predictably, counterfeits comprise ten percent of the market.⁴⁶ Levis jeans are a prime target for counterfeiters.⁴⁷ Tom Tusher, executive vice president of Levi Strauss & Co.'s International Division, stated, "We believe more counterfeit 'Levis,' or Levis illegally diverted to the market are sold in Italy than we sell through our affiliate located in Milan."⁴⁸ Not content to exploit the industry on one level, counterfeiters now sell kits to help other counterfeiters counterfeit Levis!⁴⁹ Once again, the list is endless: counterfeit Playboy ties in Canada;⁵⁰ Apple Computers in the Far East;⁵¹ British Milford door locks in Africa;⁵² and even the lowly Vicks inhaler.⁵³ Incredibly, the familiar red can of Coca-Cola may not contain "the real thing."⁵⁴

of chic Louis Vuitton suitcases and bags. Pfaff, *supra* note 8, at 24. French perfume is another popular target for counterfeiters. The problem is so extensive that La Fédération Française de Parfumerie has established a museum to display confiscated counterfeit perfumes. *Id.* The list of counterfeited French luxury products is simply endless. The following is only a partial list of products that are counterfeited incessantly: Moët & Chandon Champagne; Louis Vuitton cloth and bags; Nini Ricci, Chanel, and Givenchy perfumes; Hennessy Brandy, French Pernod, Dubonnet, Bordeaux, and Bourgogne wines (all "made" in Mexico). *Id.* at 1, col. 1. For a general discussion of how foreign trademarks harm developing countries, see Soberanis, *The Need to Establish a Policy Restricting the Use of Foreign Trademarks in Developing Countries: The Case of Mexico*, 7 *WORLD DEV.* 713 (1979).

45. Walker, *supra* note 34, at 117.

46. Kalbacher, *supra* note 38, at 38.

47. Counterfeit Levis are produced in Israel and Paraguay, nations not commonly known as major centers of counterfeiting activities. See Lewis, *supra* note 27.

48. Endicott, *Latest International Intrigue: Dealers in Denim*, *ADVERTISING AGE*, Sept. 12, 1977, at 10, col. 10.

49. Product Poachers, *supra* note 36, at 14; Salmans, *The Pirating of Brand Goods*, *N.Y. Times*, Mar. 3, 1981, at D2, col. 1. The beleaguered best seller can take comfort in the knowledge that in some parts of the world Levis are the best selling jeans—fake Levis run a close second. *TIME*, July 14, 1980, at 15.

50. Kalbacher, *supra* note 38, at 41.

51. *Asian Orchards*, *TIME*, May 24, 1982, at 68. In the Far East, "knockoff" Apple Computers sell for \$325.00 while the genuine item sells for \$1,530.00. And many "Apolo" computers are sold to potential "Apple" purchasers. *Id.*

52. Fenby, *supra* note 10, at 136.

53. Carroll, *Manufacturers Waging War on Counterfeits*, *San Francisco Examiner*, May 15, 1981, at C1.

54. *A Crackdown on Fake Brand Name Products*, *Bus. Wk.*, Oct. 23, 1978, at 53. Most Coca-Cola infringement actions involve a restaurant offering "Coke"

Although counterfeiting occurs in every country, certain countries are counterfeiting havens. Current estimates indicate that Taiwan produces sixty percent of all counterfeit products,⁵⁵ and Hong Kong, Singapore, the Philippines, Korea, Italy, Thailand, India, and Japan⁵⁶ are also well known counterfeiting centers.

C. More Harm Than Simple Financial Loss

The counterfeiting explosion has created two levels of harm: harm to the legitimate producer and harm to society. As discussed, shocking revenue losses occur when counterfeit products are passed off to the consumer.⁵⁷ Lost revenues, however, are only the tip of the iceberg; a valuable property right is also lost. Trademarks protect and increase a corporation's goodwill,⁵⁸ which is a measure of a corporation's long-term advertising⁵⁹ and marketing investments.⁶⁰ Consumer confidence, predictably, "wan-

but actually serving another cola beverage. Basset, *Trademark Attorneys Get Tough*, NAT'L L.J., Dec. 21, 1981, at 1, 9.

55. Fenby, *supra* note 10, at 135; see also Spaeth, *Hong Kong Counterfeits Arouse Genuine Ire*, Wall St. J., Oct. 29, 1980, at 33, col. 1. For a discussion of Taiwanese legislation in this area, see *infra* notes 117-38 and accompanying text.

56. See generally Salmans, *supra* note 49 at D2, col. 1. Each nation, of course, has its specialities. Hong Kong counterfeiters are known for their counterfeit luxury goods. See Spaeth, *supra* note 55, at 33, col. 1. Hong Kong, however, has been replaced by Italy as the leading counterfeiting center for certain products. Shiro, *Keeping Jeans Honest*, N.Y. Times, Apr. 4, 1981, at 21, col. 2 (statements of Mike Fehr, Assistant Director of Corporate Security, Levi Strauss).

57. See *supra* notes 43-53 and accompanying text.

58. See, e.g., 87 C.J.S. *Trademarks* § 3 (1954). The goodwill function is evidenced by the sheer extent of trademark registration. Nearly four million trademarks are in force throughout the world. Patel, *Editor's Introduction*, 7 WORLD DEV. 649, 650 (1979) [hereinafter cited as Patel, *Introduction*]. An estimated 100,000 trademarks receive new protection each year. *Id.* Seventy percent of these marks are in developed countries, three percent are in socialist countries, and 27% are in developing countries. Patel, *supra* note 28, at 653. Over one-half of the trademarks registered in these developing countries are owned by foreigners. *Id.* The extent of this system of protection is impressive; in 1977 trademark legislation was in force in 119 countries, 83 of which were developing countries. Wassermann, *UNCTAD: Trademarks and Developing Countries*, 14 J. WORLD TRADE L. 80, 81 (1980).

59. See Patel, *Introduction*, *supra* note 58, at 649.

60. Many products have received trademark protection over a long period of time: Baker's Chocolate (prior to 1800); Colgate (1806); Gordon's Gin (1769); Ivory Soap (1879); Quaker Oats (1895); Bicycle Playing Cards (1885); Vaseline Petroleum Jelly (1878); Kodak (1888); Waterman (1884); Singer (1851); Camp-

as the aped product literally comes apart at the seams."⁶¹ Nowhere is the significance of goodwill more clearly illustrated than in corporate expenditures for the protection of trademarks. Hundreds of thousands of dollars are spent annually to protect the trademarks "Coca-Cola" and "Coke"; it is no surprise that the Coca-Cola Company valued these trademarks as intangible assets worth three billion dollars.⁶²

Although producers may assume the risk of counterfeiting as part of an initial marketing decision, society should bear no similar risk. Counterfeiting harms society in several ways. First, it may have disastrous economic consequences. Ineffective counterfeit pesticides are estimated to have caused approximately ten percent of the fifteen percent decrease in Kenya's largest foreign export crop.⁶³ The problem perpetuated itself when Kenyan farmers, afraid that the ineffective counterfeit pesticides were particularly dangerous, became reluctant to use any pesticides.⁶⁴ The [Kenyan] Weekly Review summed up the situation:

It may be planned economic sabotage, or just an international ring of greedy and unscrupulous businessmen trying to make a fast buck. Whichever the case, the end result is the same—the economies of Kenya, Uganda and Tanzania, that depend to a large extent on coffee as their main cash crop, are threatened with ruin by the proliferation of ineffective substandard agro-chemicals that have been dumped in those countries [and several other countries in the eastern Africa region] from European sources, in the past three years or so.⁶⁵

bell & Kelloggs (1915); Coca-Cola (1886). Lunsford, *Consumers and Trademarks: The Function of Trademarks in the Market Place*, 64 TRADE-MARK REP. 75, 76 (1974).

61. Endicott, *supra* note 48, at 10, col. 1; cf. Allen, *Designer Jeans Fakers Pocket Profits*, Pittsburgh Press, Jan. 17, 1982, at B1. Mr. Allen claims that counterfeit jeans often sell at designer prices. Allen, *supra*, at B1. Indeed, a luxury bag maker is rumored to be worried because the counterfeits of its products sold in Europe are better than the original product. Spaeth, *supra* note 55, at 33.

62. Lunsford, *supra* note 60, at 81. The importance of trademark protection is heightened because trademarks are the only aspect of nonprice competition that receives specific legal protection. Patel, *Introduction*, *supra* note 58, at 649.

63. These estimates were made by the Kenyan Coffee Board based upon the 1979-1980 season. *East African Economies Threatened with Ruin*, [KENYAN] WEEKLY REV., Feb. 20, 1981, at 21, 22 (hereinafter cited as *East African Economies*).

64. *Id.* at 22.

65. *Id.* at 21.

Second, the presence of a counterfeiting industry endangers sociological development. In Taiwan, lynchpin for the East Asian counterfeiting market,⁶⁶ some argue that "counterfeiting retards innovation."⁶⁷ Other well-documented problems present disastrous scenarios that have, and will, occur. A Federal Trade Commission (FTC) report cautioned that there is a "clear and present danger of a disastrous [plane] crash caused by bogus bolts."⁶⁸ Evidence from the industry mounted. In 1981 Jonathan Fenby reported that counterfeit helicopter parts may have caused or contributed to two crashes.⁶⁹ Medical technology is another area in which counterfeit products pose unconscionable dangers. Counterfeit pacemakers are widely used and may have contributed to some deaths; it is difficult to cull information on this subject because doctors fear liability for failing to recognize counterfeit products.⁷⁰ Counterfeit prescription drugs also worry industry and government officials; over-regulation is not a major concern of counterfeiters.⁷¹ Finally, counterfeiting deceives consumers. Rational consumer choice is premised on the ability to acquire product information: trademarks are a prime source of that information.⁷² The visual component of a trademark evokes identifica-

66. See *supra* note 55 and accompanying text.

67. Tanzer, *Out for the Counterfeit*, FAR E. ECON. REV., July 10, 1981, at 46.

68. Spaeth, *supra* note 55, col. 1. In the autumn of 1979 the Los Angeles regional office of the Federal Trade Commission (FTC) issued a report on counterfeit bolts used in many planes. This source did not suggest that the counterfeit bolts had caused any crashes, but a Freedom of Information Act request by the Wall Street Journal yielded interesting information. Harris, *Report of Bogus or Altered Aircraft Bolts Leads to FAA Alert and Coding Proposal*, Wall St. J., July 7, 1980, at 2, col. 3. "[T]he greater likelihood of harm comes from the possibility that bogus fasteners will accumulate in the same system over time and then jointly lead to a serious crash resulting in fatalities." *Id.*

69. Fenby, *supra* note 10, at 137.

70. Hansen, *supra* note 21, at 74.

71. Cf. Lewis, *supra* note 27.

72. Mangini, *Competition and Monopoly in Trademark Law*, 11 INT'L REV. INDUS. PROP. & COPYRIGHT L. 591, 592 (1980). This argument, however, presupposes a certain initial level of consumer knowledge. The argument that trademarks help the consumer identify quality merchandise is premised on the existence of an expert buyer (1) able to appreciate quality; (2) aware of all his purchase alternatives; and (3) able to calculate the marginal gains and losses resulting from his choices to yield the highest possible benefit. Green, *Benefits and Costs of Trademarks: Lessons for the Developing Countries*, 7 WORLD DEV. 683, 684 (1979). These considerations have led some scholars to question the role trademarks play in helping consumers identify quality items. Wassermann,

tion among those who cannot, or do not, read the more detailed label information.⁷³ Counterfeiters act on the knowledge that consumers rely on these trademarks. As Mr. Bikoff of Cartier, Inc., lamented, counterfeiters are "counterfeiting products we don't even make" such as chocolates, calculators, and a Singapore house of ill repute.⁷⁴ Clearly, counterfeiting is a problem of financial significance, international scope, and devastating consequences.

D. Causes of the Counterfeiting Explosion

Identifying the causes of the counterfeiting explosion is a crucial step in evaluating the Code. Many suggest that product shortages create a fertile environment for counterfeiting.⁷⁵ This demand analysis crumbles in the face of the counterfeiters' inge-

supra note 58, at 84. Indeed, a Canadian government study concluded:

This [quality information] function has not been served as well as it might [T]he predominant emphasis in the law has been related to the producers or sellers interests, which only indirectly serve the business interests [T]he trademark itself is only a very abbreviated way of expressing the full set of qualities of a product or service

Patel, *supra* note 28, at 655, (citing ECONOMIC COUNCIL OF CANADA, REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY 143 (1977)).

73. This identification function has special significance:

The late Henry C. Link stressed that there is more active competitive democracy in our trademark system than in our political democracy because people vote for or against trademarked articles not once a year, but every day This noted authority summarized his reasoning in the following language: "More people elect Campbell Soup every four weeks than elect the president every four years; more people vote for Maxwell House Coffee and Colgate Dental Cream, etc., every few weeks than vote for Congress every two years. And as for the international scene, people throughout the world have more faith in Coca-Cola and Camel Cigarettes than they do in national treaties or the United States foreign policy. Coca-Cola, for example, is a typical product of the free enterprise system which makes a brotherhood of man possible. Its use represents an act of faith in which all men, regardless of nationality, are friends."

Lunsford, *supra* note 60, at 90-91. (quoting Link, *The Social Significance of Trade-Marks*, 38 TRADE-MARK REP. 622, 625 (1948) (footnote omitted)).

74. Basset, *supra* note 54, at 1, 9. Joining in the refrain, a Playboy executive emphasized that Playboy does not license the right to use its rabbit on jeans. "Playboy" rabbit jeans are counterfeits. Kalbacher, *supra* note 38, at 41.

75. See, e.g., Kaikati & LaGarce, *supra* note 1, at 52; Kalbacher, *supra* note 38, at 38; *East African Economies*, *supra* note 63, at 19 (agro-chemicals); *Keeping Jeans Honest*, N.Y. Times, Apr. 4, 1981, at 21, col. 2 (blue jeans) [hereinafter cited as *Jeans*].

nity and greed. In 1977 a spokesperson for Levi Strauss & Company indicated that the company could have doubled its jeans sales.⁷⁶ Company officials indicated that their actions to fill world demand for Levis would decrease the market for counterfeit jeans.⁷⁷ Today, however, sales of fake Levis in some nations outstrip sales of the real product by a factor of two to one.⁷⁸ Demand analysis also fails to account for spot shortages. In Eastern Europe shortages forced the price of jeans as high as \$80 per pair.⁷⁹ A denim glut in other markets will not equalize the supply; the low price tag on the counterfeit good allows it to absorb the existing market for designer merchandise and to attract an entirely new clientele unable to afford the price of designer jeans.

Social and legal attitudes also encourage counterfeiting.⁸⁰ As the fashion capitals of the world frantically define, refine, and design current *haute couture*, social pressure to wear the latest labels mounts. Ineffective local laws⁸¹ impede legal redress and coddle counterfeiters in an environment conducive to their criminal activity. The odds that a counterfeiter will not be penalized are increased because imitating products is not illegal.⁸² Furthermore, the success of any counterfeiting investigation depends on local police cooperation⁸³ and payoffs are not uncommon.⁸⁴

The world economic structure further perpetuates the counterfeiting problem. One significant element in this process is "the greater industrial capability of developing nations with supplies of cheap and abundant labour."⁸⁵ In addition, "highly fragmented"⁸⁶ markets lacking the presence of major chain stores facilitate the distribution of counterfeit products.

76. Endicott, *supra* note 48 at 10, col. 1.

77. *Id.* at 95.

78. *Id.*

79. *Id.*

80. Mr. Godart-Bagy of the Comite Colbert explained, "[T]oday everyone wants to be part of the elite." Pfaff, *supra* note 7, at 1, col. 1. The problem has taken an interesting twist: "[I]n certain chic circles in Italy, it's much more fashionable to wear the fake." Hansen, *supra* note 21, at 68.

81. *See infra* notes 129-54.

82. *See* Pfaff, *supra* note 8, at 1, col. 1.

83. *Id.* at 24.

84. This corruption has many outward manifestations. For example, investigators are amazed that many counterfeiters are protected by a reliable pre-bust warning system. *See generally* Zapalski, *supra* note 16.

85. *Product Poachers*, *supra* note 36, at 14.

86. Endicott, *supra* note 48, at 10, col. 1.

The inherent nature of these economic and social counterfeiting "causes" ensures that the problem will continue. William Walker highlights five considerations indicating that counterfeiting will increase absent more effective responses: (1) counterfeiting is lucrative; (2) compared with other illegal enterprises, counterfeiting is a relatively low risk operation; (3) large corporations are losing their ability to protect their trademarks because international respect for the concept and practice of trademark registration is decreasing; (4) developing countries may eventually sanction counterfeiting because it provides much needed cash flow; and (5) brand names have increasing international appeal.⁸⁷

Counterfeiting has become a profession. Many suggest that organized crime⁸⁸ is involved.⁸⁹ A New York detective familiar with garment counterfeiting explained the organized crime link: "Denim in quantity is gonna [sic] cost and counterfeiters aren't gonna [sic] get loans at the bank."⁹⁰ Start up costs are nonexistent: factories that produce legitimate goods during the day are

87. Walker, *supra* note 34, at 117-18.

88. The author is sensitive to the negative connotations evoked by use of generalized terms like "organized crime." A 1951 United States report indicated the existence of a nationwide crime syndicate. SPECIAL SENATE COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, 3D INTERIM REPORT, S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951). This report, however, must be reevaluated in light of a 1977 report admitting that no commonly agreed upon definition of "organized crime" exists. UNITED STATES GENERAL ACCOUNTING OFFICE, WAR ON ORGANIZED CRIME FALTERING (1977). Evidence exists, however, that certain criminal activity is characterized by a high level of sophistication and planning. Unfortunately, both in the United States and abroad this professional criminal activity is labeled far too loosely. See, e.g., Schwidrowski, *Italy's Mafia Blight*, 27 WORLD PRESS REV. 56 (1980) (comparing international operations of the "Mafia" to those of a multinational corporation and discussing the Italian "Mafia"). What separates counterfeiting from many other types of crime is that either the process by which the product is counterfeited or the manner in which the counterfeit product is distributed requires the resources of a more sophisticated criminal enterprise. Accord A. BLOCK & W. CHAMBLIS, ORGANIZING CRIME 118 (1981) (citing McIntosh, *New Directions in the Study of Criminal Organization*, in DEVIANCE AND CONTROL IN EUROPE: PAPERS FROM THE EUROPEAN GROUP FOR THE STUDY OF DEVIANCE AND SOCIAL CONTROL (1975)).

89. See, e.g., Kalbacher, *supra* note 38, at 38 (French and Italian counterfeiting arrest records point to organized crime involvement in counterfeiting); Parish & Groshopf-Markley, *supra* note 14, at 134 (Cartier attorney Bikoff says organized crime is involved); Bus. Wk., Oct. 23, 1978, at 53-54 (International Anticounterfeiting Coalition attorney William Walker indicates his suspicion that organized crime is involved).

90. Kalbacher, *supra* note 38, at 38.

often nighttime netherworlds of counterfeit production.⁹¹

III. PREVIOUS ATTEMPTS TO CONFRONT THE PROBLEM

A. Symbiotic Interaction Between the Public and Private Sectors

Private sector, governmental, and intergovernmental entities are responding to the commercial counterfeiting problem. These sectors act symbiotically. The private sector seeks governmental reforms while governmental efforts depend upon private sector cooperation and private sector development of new anticounterfeiting technology. The Code is a joint effort by these sectors to confront a problem of public and private international legal significance. This dual legitimization of Code goals enhances the international norm-creating properties of the Code.

B. Private Corporate Action in Response to the Counterfeiting Problem

The counterfeiting problem has engendered a flurry of concerted activity in private industry. Industry vigilance is most dramatically displayed in the formation of anticounterfeiting groups. The most vocal and well-publicized of these groups is the International Anti-Counterfeiting Coalition (Coalition).⁹² Under the direction of attorney William Walker, the Coalition has lobbied for new United States customs laws⁹³ and for the initial draft version of the proposed Code.⁹⁴ Future Coalition plans demonstrate simi-

91. Allen, *supra* note 61, at B-1.

92. Peter T. Jones, Levi Strauss Senior Vice-President and General Counsel, is president of the Coalition. Sacramento Bee, May 15, 1981, at B4, col. 1. Coalition members include such corporate giants as Levi Strauss & Company, Walt Disney Productions, The V.F. Corporation (Lee Jeans), Cartier of France, see Basset, *supra* note 54, at 8, Puma (West German shoe manufacturers), the Distillers Company Limited (Johnny Walker Scotch), see Salmons, *supra* note 49, at D2, col. 1, Samsonite Corporation, Helene Curtis Limited, Munsinger, Incorporated, see Kaikati & LeGarce, *supra* note 1, at 54, General Mills Incorporated, General Electric Company, Cross Pens, Moet-Hennessey, see Parish & Groskopf-Markley, *supra* note 14, at 128, Charles of the Ritz Group, Limited, Caterpillar Tractor Company, see Basset, *supra* note 54, at 8, Avon Products, British Bank Wole Company, and Genetech and Monsanto Company. See Sacramento Bee, May 15, 1981, at B4, col. 1.

93. *Product Poachers*, *supra* note 36, at 16.

94. For a general discussion of the Coalition's lobbying efforts, see Walker, *supra* note 34, at 21; N.Y. Times, Mar. 3, 1981, § IV, at 2, col. 1. According to

lar ambition: (1) monitoring implementation efforts under the proposed Code; (2) cultivating close relationships with the international surveillance group established under the proposed Code; (3) expanding Coalition membership and activities to cover other types of intellectual property;⁹⁵ (4) confronting the problem of counterfeiting in developing countries;⁹⁶ (5) encouraging diplomatic action to combat counterfeiting;⁹⁷ (6) developing an information exchange;⁹⁸ and (7) popularizing criminal sanctions as appropriate penalties for counterfeiters.⁹⁹

Other cooperative organizations complement Coalition activities.¹⁰⁰ In Paris, the Union des Fabricates (Union) guards the trademarks of its 1200 member corporations.¹⁰¹ Representatives from two hundred luxury goods firms from twenty countries met in 1980. This group now has a computer record of 500,000 internationally known counterfeiters.¹⁰² Great Britain also has an anticounterfeiting group.¹⁰³

Coalitions and organizations are merely one manifestation of corporate concern about counterfeiting. Individual corporations are engaged in a wide variety of activities designed to eradicate the common enemy. Until recently, corporations took a "hands off" approach to the counterfeiting problem because of the often ruinous publicity, prohibitive costs, and futile lawsuits in-

Coalition President Peter T. Jones, the Coalition's "two highest . . . objectives . . . are to get Canada and Japan to sign the international counterfeiting code." Carroll, *supra* note 53, at C1.

95. Walker, *supra* note 34, at 128-30.

96. The Code was designed to garner the signatures of developed nations as opposed to the support of developing nations. *Id.* at 131.

97. Walker, *supra* note 34, at 131.

98. *Id.* at 132.

99. *Id.*

100. Although outside the scope of this Note, the Amusement Device Manufacturers Association is another organization which has responded to the counterfeiting problem. Kristof, *supra* note 13, at A17, col. 3.

101. Kalbacher, *supra* note 38, at 40. Additionally, in 1954 the Comite Colbert was established by French companies to protect famous trademarks. Pfaff, *supra* note 8, at 1, col. 1. The Union recently hired a former Scotland Yard detective to assist in its search for counterfeiters. *Id.*

102. Fenby, *supra* note 10, at 138. Approximately 1000 new names are added to the list each year. *Id.*

103. *Id.* The group is composed of well-known British manufacturers including Dunlop, Lucas Industries, Parker Pen, the Wellcome Foundation, and Ronson Products. *Id.*

volved.¹⁰⁴ Spurred on by the extent of the counterfeiting problem and the *esprit de corps* among affected industries, corporations have developed strategies to fight back. Many corporations now prosecute offenders.¹⁰⁵ Prior to suit, however, investigations must be conducted and suspects identified. Cartier spends over one million dollars each year investigating and suing counterfeiters.¹⁰⁶ Included among its activities is a program for training customs inspectors to detect counterfeit products.¹⁰⁷ Informal cooperation has been a boon to identification efforts. For example, Blue Bell, Incorporated's security force aided Levi Strauss & Company in a recent European anticounterfeiting investigation.¹⁰⁸ Much of the information about counterfeiting, however, is acquired by chance. Pfizer Incorporated, a United States drug and chemical company, discovered a counterfeiting problem when it received orders for 450-litre tubs of a product that it sold only in 225-litre containers.¹⁰⁹

The most frustrating aspect of investigating counterfeiting is the futility of prosecution. Despite recent notable successes,¹¹⁰ na-

104. Kaikati & LaGarce, *supra* note 1, at 58. The rationale for this laissez faire policy was that counterfeiting could be deterred by not publicizing the counterfeiter's activities. Kalbacher, *supra* note 38, at 38.

105. Kaikati & LaGarce, *supra* note 1, at 58.

106. U.S. NEWS & WORLD REP., Sept. 7, 1981, at 57. Similar sums are expended by Gucci Shops, Incorporated, Levi Strauss & Company, and by the makers of Spaulding Sporting Goods. *Id.* Indeed, most French luxury goods firms have special divisions to deal with this problem. Pfaff, *supra* note 8, at 24. Jordache spends \$500,000 per year investigating counterfeiting and employs private detectives and a full-time investigator. *Jeans*, *supra* note 75, at 21, col. 2. Levi Strauss & Company established an internal security force in 1970 which eventually shifted its focus from general theft to product imitation problems. Endicott, *supra* note 48, at 95. Monies are expended in a variety of ways to halt counterfeiting. Levi's Director of Corporate Security explained that Levi's battle against counterfeiters includes conferring with suppliers, conferring with other companies, and paying for information about counterfeiters. *Ring of Counterfeiters*, *supra* note 2, at 27. Playboy Enterprise officials claim that Playboy does not have to employ as many investigators as do other manufacturers because Playboy magazine readers provide voluminous tips regarding the potential copying of Playboy products. Kalbacher, *supra* note 38, at 40.

107. Kalbacher, *supra* note 38, at 40.

108. Endicott, *supra* note 48, at 95. Extensive inter-corporation cooperation designed to combat counterfeiting has occurred. *Product Poachers*, *supra* note 36, at 14.

109. *Product Poachers*, *supra* note 36, at 14-15.

110. Levi Strauss & Company, for example, recently squashed "the most so-

tional laws, attitudes, and finances have doomed most prosecution attempts from their inception.¹¹¹ United States law exemplifies this problem: on the federal level, no law specifically criminalizes counterfeiting.¹¹² The hapless corporate plaintiff must structure its case to prove either mail fraud or violation of other federal statutes. Otherwise, it must rely on unsatisfactory state¹¹³ unfair competition laws. Although new United States customs laws¹¹⁴ give customs authorities who have seized goods¹¹⁵ the option to destroy, reexport, or donate the goods to charity, customs officials usually decide to reexport the goods.¹¹⁶ Counterfeit-

phisticated counterfeiting operation" with which it has dealt. Fenby, *supra* note 10, at 140. In Antwerp, DuPont de Nemours is suing Reinstra, an alleged participant in the African agro-chemical scandal, *see supra* notes 63-65 and accompanying text, and four of his corporations for infringement of DuPont's Belgian patents. *The Dutch-Israeli Connection*, [KENYAN] WEEKLY REV., Feb. 20, 1981, at 19, 23-24.

111. Manufacturers generally sue offenders under the trademark or unfair competition law of the jurisdiction in which the offender is located. The relief granted is often unsatisfactory because large penalties are seldom imposed and criminal prosecutions are rare. Walker, *supra* note 34, at 119-20.

112. U.S. NEWS & WORLD REP., Sept. 7, 1981, at 57.

113. *But see* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Goldstein v. California, 412 U.S. 546 (1973); McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADE-MARK REP. 305, 339 (1979). Goldstein and Kewanee overruled *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day Brite Lighting, Inc.*, 376 U.S. 234 (1964). *Sears and Compco* stood for the proposition that state unfair competition laws were preempted by federal copyright and patent laws. Goldstein and Kewanee, however, have been interpreted "as breathing new life into state unfair competition laws." McClure, *supra*, at 339. State laws generally treat counterfeiting as a misdemeanor. U.S. NEWS & WORLD REP., Sept. 7, 1981, at 57.

114. The effectiveness of the law is largely dependent on the United States Customs Service, which is "responsible for the investigation of acts in violation of the Customs and related laws." Appropriations Hearings, *supra* note 12, at 266.

115. Although confiscation is mandated under the new customs law, the confiscation can occur only after the companies have reported violations. Salmans, *supra* note 49, at D2, col. 1.

116. Under the new customs law, an importer is given an opportunity to prove that the seized goods are not counterfeit. If the trademark owner continues to pursue his complaint, he has the right to post bond and to redouble his efforts to prove that the goods are counterfeit. BUS. WK., Oct. 23, 1978, at 54. Goods ultimately proven to be counterfeit can be kept by the Government, given to a charitable institution, or auctioned off after one year. *Id.* The major problem with the former United States law is that it allowed the counterfeiter to retrieve the goods after removal of the bogus trademark. Current law in many

ers thus get another chance to perpetrate their fraud.

The likelihood of success in prosecuting counterfeiters declines drastically in other countries.¹¹⁷ The Taiwanese system is particularly frustrating because of the extent of counterfeiting on the island¹¹⁸ and the weakness of Taiwanese laws.¹¹⁹ For example, the "owner of a foreign trademark, not registered or in use, has no standing to sue for infringement [in Taiwan]."¹²⁰ Prison sentences are easily converted to minimal fines.¹²¹ Furthermore, recent Taiwanese court decisions show that Taiwanese courts will focus on the Taiwanese consumer,¹²² not the foreign trademark owner.

other nations permits that same problem. The counterfeiter is thus free to re-label his goods and ship them into another country. *Id.*; Walker, *supra* note 33, at 120. United States customs officials first took advantage of the 1978 law allowing them to destroy counterfeit goods in October of 1981. See *TIME*, Oct. 26, 1981, at 67.

117. Among the trouble spots in Europe, France alone is reputed to have workable laws for prosecuting counterfeiters. Pfaff, *supra* note 8, at 24.

118. The Taiwanese counterfeiting connection is extraordinary. The Director of the Taiwanese National Bureau of Standards, C.O. Kuo, says that his office reviews approximately 20 counterfeiting complaints each day. One-third of these complaints are from foreign manufacturers. Upon investigation, 80% of those complaints proved to be legitimate. Kuo "admitted that Taiwan is one of the leading violators of trademarks." Tanzer, *supra* note 67, at 46.

119. Taiwanese laws for prosecuting counterfeiters are so lax that some European businessmen want to retaliate by boycotting Taiwanese goods. *Id.* There are indications, however, that concerted pressure on Taiwanese officials will prove fruitful. A joint complaint from several United States, United Kingdom, and French cosmetics manufacturers spurred the Taiwanese government to raid 52 firms suspected of counterfeiting and to prosecute the firms' officers for criminal fraud. *Product Poachers*, *supra* note 36, at 16.

120. Hoffman & Brownstone, *Protection of Rights Acquired by International Reputation without Use or Registration*, 71 *TRADE-MARK REP.* 1, 37 (1981).

121. Cf. Fenby, *supra* note 10, at 140 (prison sentences can be commuted to £15 fines); Tanzer, *supra* note 67, at 46 (Taiwanese trademark lawyer emphasizes that sentences of six months or less may be converted to fines); King, *Car Parts Counterfeiting: West Hopes for Taiwan Curb*, *FIN. TIMES*, June 15, 1981 (prison sentences can be commuted to £40 fines); San Francisco Examiner, May 15, 1981, at C1 (low penalties converted to fines).

122. Hoffman & Brownstone, *supra* note 120, at 32 (citing Puma Sports Shoe Mfg. Co. v. Nan Hung Garments Indus., No. 67-Pan-217 (Taiwan Admin. Ct. Apr. 14, 1978) (unreported) (translated from Chinese)). In *Puma*, possessors of the widely registered trademark for "Puma" products began opposition proceedings against a Taiwanese firm which attempted to register that name in Taiwan. The Taiwanese Administrative Court cited art. 37(6) of the Taiwan Trademark Law: "A trademark design may not be applied for registration if [it is] likely to

It is thus not surprising that Taiwanese trademark lawyer C.C. Yao concludes that a successful counterfeiting prosecution in Taiwan nets only legal fees and a published apology.¹²³ After much debate,¹²⁴ in 1981 the Taiwanese enacted Measures for the Prevention of Imitation of Trademarks and False Indication of Place of Origin.¹²⁵ Although this legislation is a step in the right direction, it will have little suasive power because it does not provide penalties for counterfeiting. The Taiwanese Judicial Yuan is working on a new law which would provide stiff mandatory prison sentences for counterfeiters, but Far East analysts estimate that passage of this bill is at least two years away.¹²⁶ Other Far Eastern nations present a similarly discouraging scenario. In Japan counterfeiters can be prosecuted under the Trademark Law and the Unfair Competition Prevention Law.¹²⁷ Damages, however, are difficult to collect.¹²⁸ In the Philippines there is no clear penalty for manufacturing or producing counterfeit products.¹²⁹ Singapore, despite persistent reports of intensified counterfeiting activities within its borders,¹³⁰ may not recognize the significance of the problem.¹³¹ Italy, the main site of European counterfeiting ac-

disturb public order or corrupt good morals or to deceive the public or cause the public to have a misbelief." *Id.*

123. Tanzer, *supra* note 67, at 46.

124. Original plans called for a task force to announce a new counterfeiting law on April 25, 1981, but the proposed law did not take effect until August 1981. *Id.*

125. For a general outline of the new Taiwanese law, see King, *supra* note 121.

126. Tanzer, *supra* note 67, at 46.

127. Japan Times, Oct. 21, 1978, at 2. The Trademark Act of 1959 was enacted on April 13, 1959, and became effective on April 1, 1960 (Law No. 127). Yamada, *Japan: Trademark Law & Practice*, in 1 DIGEST OF COMMERCIAL LAWS OF THE WORLD: PATENTS AND TRADEMARKS (rev. ed. 1982).

128. Japan Times, May 13, 1981, at 5.

129. TIME, July 14, 1980, at 15 (explanation by a Manila attorney). Prosecutions in the Philippines are pursued under the Philippine Trademark Law, Republic Act No. 166, which became effective on June 20, 1947. Republic Acts Nos. 638 (June 11, 1951), 681 (May 9, 1952), 865 (June 16, 1953), 623 (June 5, 1951) are amendments to this law. The Philippine bureau of printing publishes the Revised Rules of Practice before the Philippines Patent Office in Trademark Cases for 1962, which serves to supplement the law. Ferrer, *Philippines: Trademark Law & Practice*, in 1 DIGEST OF COMMERCIAL LAWS OF THE WORLD: PATENTS AND TRADEMARKS (rev. ed. 1982).

130. See *supra* note 59.

131. In a letter to the author dated June 14, 1982, Laurence Ang, for the

tivities, offers only limited prospects for the successful prosecution of counterfeiters.¹³² In the myriad developing nations which lack trademark statutes, successful prosecution is fortuitous.¹³³

Product withdrawal is another method of combating counterfeiters. Brash Italian counterfeiters forced designer Louis Vuitton to cease all Italian sales of his coveted handbags.¹³⁴ Other corporations have adopted a warning strategy, admonishing offenders that legal action will result unless their counterfeiting ceases immediately.¹³⁵ Given the farcical nature of many counterfeiting prosecutions, such admonishments are taken lightly.

Manufacturers' anticounterfeiting research and development activities have proven more fruitful than many other corporate attacks on counterfeiting. Polaroid Corporation's "Polaprof"¹³⁶ and Minnesota Manufacture & Mining's "Confirm" tapes are applied to product tags producing "noncounterfeitable" patterns of colors.¹³⁷ Other producers attempt to educate the consumer about

Attorney General of Singapore, responded to questions regarding counterfeiting in Singapore. Mr. Ang indicated that he did feel counterfeiting was a serious problem in Singapore. He indicated that he did not have statistics on the success of counterfeiting prosecutions in Singapore. Under § 69A of the [Singapore] Trade Marks Act, imprisonment not exceeding two years is the maximum penalty that can be imposed on counterfeiters. Singapore is now in the midst of drafting new legislation to curb counterfeiting. Letter from Lawrence Ang to Shari Olenik (June 14, 1982).

132. See generally *Product Poachers*, *supra* note 36, at 15. For example, Pfizer, Inc. prosecuted an Italian doctor selling counterfeit "Pfizer" drugs. The doctor, however, received only a 45 day suspended sentence.

133. The absence of trademark legislation does not totally destroy all hope for a successful prosecution. As a passage from a Dubai (United Arab Emirates) decision indicates, the success of counterfeiting prosecutions is fortuitous:

The court is of the view that the non-existence of a law regulating the registration of trademarks in Dubai [United Arab Emirates] does not indicate an absence of protection for the owner of a trademark against the imitation of such trademark . . . or trade in imitated goods . . . irrespective of its registration in other countries.

Bigger, *Notes from Other Nations*, 69 TRADE-MARK REP. 169, 170 (1979) (citing *Beecham Group, Ltd. v. Mohammed Ahmed Zamin Pima & Co.*, 1979 Fleet Street Rep. 121 (Ct. of Emir of Dubai, June 24, 1978)).

134. *Kaikati & LaGarce*, *supra* note 1, at 58.

135. *Id.*

136. *Sacramento Bee*, May 15, 1981, at B4, col. 1.

137. These products are not designed to stop counterfeiters; rather they merely make it easier for sales representatives to spot counterfeit products. *San Francisco Examiner*, May 15, 1982, at C2, col. 1. Other devices designed to safeguard product integrity include inventions which identify people based on their

the differences between real and counterfeit products—a difference which the legitimate manufacturer is often unable to discern.¹³⁸ Although well-intentioned, these efforts are sometimes ridiculous: “Bona fide Izod Lacoste shirts sport well-bred alligator emblems that are securely sewn around the perimeter. Fake alligators tend to look emaciated and may be glued on or stitched through the center.”¹³⁹

C. Government Action in Response to the Counterfeiting Problem

Intergovernmental efforts to minimize counterfeiting and other trademark violations, once the province of developed nations alone, are now influenced by the complaints and concerns of the lesser developed nations.¹⁴⁰ The Paris Convention for the Protection of Industrial Property¹⁴¹ provides an example of the influence of the lesser developed nations. Representatives at an 1883 Paris meeting agreed to a multilateral treaty which established a framework for the Paris Union.¹⁴² Approximately eighty nations,

voices, signatures, fingerprints, etc. *Product Poachers*, *supra* note 36, at 16.

138. One manufacturer discovered that a counterfeit version of the headlight it manufactured differed from the original by only one rivet. Fenby, *supra* note 10, at 137. Levi Strauss & Company discovered counterfeit jeans made of such high quality material that it almost passed Levi's stringent inspection standards. Kalbacher, *supra* note 38, at 41.

139. *Spotting the Fakes*, THE PLAYBOY GUIDE TO FASHION FOR MEN, Fall 1981, at 40.

140. The author makes no attempt to define “developed” or “lesser developed” nations. She proposes that the reader not be concerned with the validity of any of the current definitions. For the purposes of this Note, the distinction is significant only to indicate that national attitudes toward the proposed Code may vary depending upon the particular nation's level of development.

141. Convention of Paris for the Protection of Industrial Property, Mar. 20, 1883, reprinted in 2 DIGEST OF THE COMMERCIAL LAWS OF THE WORLD (rev. ed. 1980) (cumulative changes and additions to Convention of Paris) [hereinafter cited as Convention]. The Convention was revised at Brussels (1900), Washington (1911), the Hague (1925), London (1934), Lisbon (1958), and Stockholm (1967). For a list of nations bound by these revisions, see Lucas, *Convention of Paris*, in 2 DIGEST OF THE COMMERCIAL LAWS OF THE WORLD (rev. ed. 1980) (cumulative changes and additions to Convention of Paris). Another example is the General Inter-American Convention for Trademark and Commercial Name Protection. Kaikati & LaGarce, *supra* note 1, at 60.

142. The Convention is an open multilateral treaty. Cansser, *Violations of the Paris Convention for the Protection of Industrial Property*, 11 INT'L REV. INDUS. PROP & COPYRIGHT LAW 1, 1-2 (1980).

half of which are developed nations,¹⁴³ now adhere to the Convention.¹⁴⁴ The Convention covers patents, industrial designs, commercial names, and trademarks. It prohibits the registration and use of confusing trademarks,¹⁴⁵ proscribes unfair competition,¹⁴⁶ and provides for the seizure of counterfeit items.¹⁴⁷ Not surprisingly, the seizure provision¹⁴⁸ was extensively debated in the early years of the Paris Union,¹⁴⁹ and the original text which mandated the seizure of counterfeit goods was modified with precatory language. Efforts to update the Paris Convention¹⁵⁰ have not been directed specifically at counterfeiting problems. Lesser developed nations have requested revisions¹⁵¹ to the Paris Convention which

143. Kaikati & LaGarce, *supra* note 1, at 60.

144. *Id.*

145. Convention, *supra* note 141, arts. 6, 9, 10.

146. *Id.* art. 6.

147. *Id.* art. 9.

148. The seizure provision in the Paris Convention provides:

1. All goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or name has a right to legal protection.

2. Seizure shall likewise be effected in the country where the unlawful application occurred or in the country into which the goods bearing it have been imported.

3. Seizure shall take place at the request either of the public prosecutor or of any other competent authority or of any interested party, whether a natural or a juridical [sic] person, in conformity with the domestic law of each country.

4. The authorities shall not be bound to effect seizure in transit.

5. If the law of the country does not permit seizure on importation, such seizure shall be replaced by prohibition of importation or by seizure within such country.

6. If the law of a country permits neither seizure on importation nor seizure with[in] the country, then until such time as the law is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of such country.

Id. art. 9. Article 9 was revised by Act of the Hague, Nov. 6, 1925, reprinted in 2 DIGEST OF THE COMMERCIAL LAWS OF THE WORLD 7 (rev. ed. 1980) (cumulative changes and additions to Convention of Paris).

149. See 2 S. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS § 692 (1975).

150. The Trademark Registration Treaty of 1973 has been drawn up within the Paris Convention. It has not yet been ratified. Wassermann, *supra* note 58, at 83.

151. In the October 1977 Declaration of Governmental Experts from Developing Countries, the developing nations requested that the Paris Convention be amended to

are antithetical to Western concepts of trademark protection. The perception among lesser developed nations that trademark protection perpetuates colonial domination¹⁵² presages a negative response to any anticounterfeiting Code promoted by the developed nations. Thus, it is doubtful that the Paris Convention will evolve as a significant forum for the battle against counterfeiters.

Other specialized intergovernmental organizations provide assistance in combating counterfeiting. In 1950 the eighty-one member Customs Cooperation Council was formed to study questions and circulate customs information.¹⁵³ Article 9 of the Treaty

explicitly recognize member countries' rights for revocation or forfeiture of trademarks for reason[s] of public interest . . . when the owner or licensee of the mark has speculated or misused price-wise or quality-wise a product protected by the trademark to the detriment of the public or the national economy of a member country.

Declaration of Governmental Experts from Developing Countries Members of the Groups of 77 on the role of the Industrial Property System in the Transfer of Technology, Oct. 1977, *reprinted in* 7 *WORLD DEV.* 751, 752 (1979) (Annex II) [hereinafter cited as Declaration].

152. This perception is fueled by several historic and economic facts. Foreign trademarks played a substantial role in the development of the trademark systems in the lesser developed nations during their early periods of industrialization. Chadnovsky, *Foreign Trademarks in Developing Countries*, 7 *WORLD DEV.* 663, 666 (1979). Second, products bearing foreign trademarks often carried higher price tags. *See id.*; Wassermann, *supra* note 58, at 84. Third, sales of products bearing foreign trademarks often prevented sales of products more suited to the needs of the developing country. *Id.* Fourth, it is feared that advertisements for products bearing foreign trademarks result in the imposition of nonindigenous cultural values. *Id.*; *see also* Declaration, *supra* note 151. Last, foreign trademarked products may drive unbranded native products from the market. In 1960, for example, the Mexican soft drink market consisted of 50% Mexican beverages and 50% foreign beverages. Chadnovsky, *supra*, at 666. Today, only 25% of the market consists of Mexican beverages while 75% of the market has been captured by foreign products. *Id.* The power of foreign trademarks is surely one reason why 42% of the Mexican market is dominated by Coca-Cola. *Id.* Hostility of the lesser developed nations towards foreign trademarks is now manifested in legislation. Some nations are pushing for the abolition of trademarks in certain sectors of the market (specifically, pharmaceuticals), while others are militating for combination trademarks in which foreign manufacturers would only be allowed to display their trademark in conjunction with a local mark. Wassermann, *supra* note 58, at 85. Little research, however, has been done regarding the benefits and costs of trademarks to developing countries. Greer, *The Economic Benefits and Costs of Trademarks: Lessons for the Developing Countries*, 7 *WORLD DEV.* 683 (1979).

153. 1978 Y.B. INT'L ORGANIZATIONS Entry A0462 (Union of International Associations).

of Rome proclaims that the European Economic Community shall be based on a customs union¹⁵⁴ designed to unify tariff levels, unify interpretations of customs matters, and, significantly for counterfeiting investigations, to harmonize community customs provisions.¹⁵⁵ In 1962 an EEC Committee produced a draft European Patent Convention. Two years later the committee produced a draft Convention for a European Trademark. A European Patent Convention is now in force¹⁵⁶ and work is underway on a final European Trademark Convention.¹⁵⁷

IV. THE AGREEMENT ON MEASURES TO DISCOURAGE THE IMPORTATION OF COUNTERFEIT GOODS (CODE)

A. History of the Code

International commercial support and the confluence of public and private energies distinguishes the Code from other intergovernmental anticounterfeiting efforts. An overview of past anticounterfeiting efforts illustrates the groundswell of support for this legislation. Industrial and intergovernmental efforts to protect trademarks began in the mid-1800s.¹⁵⁸ After World War II, several nations attempted to establish the International Trade Organization (ITO). While officials were awaiting ratification of the ITO, the General Agreements on Tariff and Trade¹⁵⁹ (GATT) became effective. ITO ratification never occurred. Thus, GATT "institutionalized" itself;¹⁶⁰ it became "de facto if not de jure an

154. Treaty Establishing the European Economic Community (EEC), Mar. 25, 1957, art. 9, reprinted in OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITY, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 229 (1978) [hereinafter cited as *Treaties*].

155. P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (3d ed. 1980).

156. For a historical discussion of the process, see *Towards an EEC Trade Mark*, 11 J. WORLD TRADE L. 197 (1977).

157. *Need for a European Trademark*, 11 INT'L REV. INDUS. PROP. & COPYRIGHT L. 174-89 & n.61, 581-87 (1980). Whether the United States will be accorded full or partial participatory status has yet to be determined. Kaikati & LaGarce, *supra* note 1, at 60.

158. See *supra* notes 92-157 and accompanying text.

159. See General Agreements on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT].

160. J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 1084 (2d ed. 1981).

international trade organization."¹⁶¹ Given its munificent objectives,¹⁶² the GATT inevitably spotlighted the counterfeiting problem.

Because of the tremendous explosion of international counterfeiting during the early 1970s, the first large-scale discussions of an anticounterfeiting code occurred at the 1973 GATT negotiations (the Tokyo Round).¹⁶³ The ninety-nine participating nations¹⁶⁴ discussed six groups of problems;¹⁶⁵ the agenda covering nontariff measures specifically included customs problems. William Walker¹⁶⁶ began promoting an anticounterfeiting code early in 1978.¹⁶⁷ Drafts circulated during the fall of 1978, but a final anticounterfeiting code was not among the agreements signed by the Tokyo Round negotiators in April 1979.¹⁶⁸ Following additional negotiations, the United States, the Common Market nations, New Zealand, and Australia tentatively agreed on a draft of

161. G. CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY—THE GATT AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES* 34 (1975). GATT members strove to "enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade . . ." GATT, *supra* note 159, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (preamble, III).

162. See GATT, *supra* note 159, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (preamble, III).

163. Since the end of World War I, seven multilateral meetings have been held to negotiate GATT matters. Prior to the Tokyo Round, the Kennedy Round ran from 1962 until 1967. Walker, *supra* note 34, at 121. The United States, Japan, and the EEC were the entities originally supporting the new (Tokyo) round of negotiations. *GATT: A Legal Guide to the Tokyo Round*, 13 J. WORLD TRADE L. 436 (1979) [hereinafter cited as *Tokyo Round*]. The Tokyo Round was an ideal forum for discussion of the counterfeiting problem. The Kennedy Round had resulted in massive efforts to lower tariffs and there was a general feeling that the Tokyo talks should be oriented towards nontariff barrier problems. Walker, *supra* note 34, at 121.

164. The participants included 70 GATT members, three provisional members, and 26 nonmembers. See *Tokyo Round*, *supra* note 163.

165. The six topical groups included: (1) tropical products; (2) tariffs; (3) nontariff measures (with special subgroups on quantitative restrictions, technical barriers to trade, customs matters, subsidies and countervailing duties, and government procurement); (4) agriculture; (5) sector approach; and (6) safeguards. *Id.*

166. Mr. Walker is an attorney for the Coalition. See *supra* text accompanying notes 92-93.

167. Fenby, *supra* note 10, at 140.

168. Walker, *supra* note 34, at 122.

the Code.¹⁶⁹ By February 1982 the United States, the Common Market nations, and Japan had reached a consensus on a specific draft of the Code.¹⁷⁰ A few technical problems still prevent agreement between Japan and the Common Market nations.¹⁷¹ Additionally, the Canadians have submitted comments on the proposed text.¹⁷² Australia's extensive Asiatic trade with nations that are the source of much counterfeited merchandise may make the Australians skittish about signing any anticounterfeiting agreement.¹⁷³ Negotiations over draft versions of the Code are continuing with a view to presenting a draft version of the Code for consideration at the GATT administrative meeting scheduled for November 1982.¹⁷⁴

B. The Code Provisions

The Code consists of a preamble, nine articles, and several notes. According to article 6, the notes are to be used to interpret their respective articles.¹⁷⁵ The preamble discusses the need for the Code,¹⁷⁶ the goals of the signatories,¹⁷⁷ and the authority

169. Fenby, *supra* note 10, at 140.

170. Flynn Conversation I, *supra* note 7.

171. Under Japanese law, the government cannot act on behalf of an individual trademark owner because the government's mandate is to act "in the public interest." *Id.* The Japanese originally felt that the emphasis in the proposed Code on aiding the individual trademark owner was not "in the public interest." *Id.* Ms. Flynn, however, believes that the Japanese now realize that because counterfeiting poses such a detriment to the consumer, actions taken to minimize the problem fall within the ambit of "the public interest." *Id.* The Japanese also demand assurances that all ten EEC nations can comply with the Code; they are particularly concerned with compliance by Belgium and Luxembourg. *Id.*

172. *Id.*

173. *Id.*

174. Conversation with Ms. Kathryn Flynn, Office of the United States Trade Representative—General Agreement on Tariff and Trade (GATT) Affairs (Sept. 9, 1982).

175. Code, *supra* note 8, § 6.1.

176. Clause five of the preamble indicates that trade in counterfeit goods harms purveyors of legitimate products. Clause six acknowledges that counterfeit merchandise deceives consumers. *Id.* preamble, cls. 5 & 6.

177. These goals include deterring counterfeiting, *id.* cls. 2, 3, & 4; increasing international cooperation to solve the counterfeiting problem, *id.* cl. 7; and bringing counterfeiting under "more effective" control. *Id.* cl. 10. Article XX of the GATT empowers the parties to enact procedures to protect trademarks. *Id.* cls. 1, 2.

under which the Code is to be enacted. Article 1 delineates the scope of the Code: parties will discourage trade in counterfeit goods "that are in the process of being, or are likely to be imported in a manner that deprives the persons involved of the economic benefits of the transaction *and* deters international trade in such goods."¹⁷⁸ The Code excludes "nominal quantities of goods intended for personal use and not for sale."¹⁷⁹ Article 1 also defines "counterfeit goods,"¹⁸⁰ "trademarks,"¹⁸¹ and "country of importation."¹⁸² Article 2 sets forth the parties' obligations. Parties must allow aggrieved entities to submit written requests for investigations to "appropriate authorities of the country of importation."¹⁸³ The burden to provide "satisfactory evidence" that counterfeit goods are involved is then placed upon the entity requesting investigation.¹⁸⁴ Article 2 authorizes "the detention or seizure . . . or the taking of other appropriate measures to retain jurisdiction over . . . the goods,"¹⁸⁵ and also allows for "alternative procedures consistent with the objectives" of the Code.¹⁸⁶ Additional sections discuss the process for determining whether goods are counterfeit.¹⁸⁷

The article 3 disposal provisions are central to the effectiveness of the Code. Section 3.2 provides that "[t]o the greatest extent possible, counterfeit goods should be subject to forfeiture and should be disposed of outside the channels of commerce in a manner that minimizes harm to the owner of the trademark right" ¹⁸⁸ Alternative methods of disposal are allowed if they effectively deter trade in the counterfeit goods.¹⁸⁹ Appeal rights of the parties are covered by article 4.¹⁹⁰ Article 5 contains information exchange provisions.¹⁹¹

178. *Id.* § 1.1.

179. *Id.*

180. *Id.* § 1.2.1.

181. *Id.* § 1.2.2.

182. *Id.* § 1.2.3.

183. *Id.* § 2.1.

184. *Id.* § 2.2.

185. *Id.* § 2.3.1.

186. *Id.* § 2.3.2.

187. *Id.* §§ 2.6-.7

188. *Id.* § 3.2.

189. *Id.*

190. *Id.* § 4.1.

191. *Id.* §§ 5.1-.3.

The enforcement provisions of article 7 are critical both to the day to day workability of the Code and to its functioning as a source of international norms. This article establishes an oversight committee¹⁹² and requires the parties to enter into mutual consultations at the request of any other party.¹⁹³ If this method of dispute settlement is unsatisfactory, the committee will meet to resolve the matter¹⁹⁴ and may refer the matter to a panel.¹⁹⁵ In cases of serious violations, the committee is empowered to authorize a party to suspend application of the Code.¹⁹⁶

The Code specifically provides for "Special and Differential Treatment" for developing countries.¹⁹⁷ The final provisions enumerated in article 9 include Acceptance and Accession,¹⁹⁸ Reservations,¹⁹⁹ Entry into Force,²⁰⁰ National Legislation,²⁰¹ Review,²⁰² Amendments,²⁰³ Withdrawal,²⁰⁴ Non-Application of the Agreement Between Certain Parties,²⁰⁵ Secretariat provisions,²⁰⁶ Deposit provisions,²⁰⁷ and Registration provisions.²⁰⁸

C. Workability of Various Code Provisions

1. *The Code as a Deterrent*

The preamble of the Code indicates that the drafters' major goal is the deterrence of counterfeiting.²⁰⁹ Thus, attention must

192. *Id.* § 7.1.1. This committee is to be composed of representatives of the signatory nations.

193. *Id.* § 7.2.1.

194. *Id.* § 7.3.1.

195. *Id.* § 7.3.2. Details are provided regarding the actions of and membership on the panels. *Id.* §§ 7.3.2.1. to 3.2.3, 7.3.3 to 3.7, 7.4.1. to 4.4.

196. *Id.* § 7.5.1.

197. *Id.* §§ 8.1-2.

198. *Id.* §§ 9.1.1 to 1.5.

199. *Id.* § 9.2.1.

200. *Id.* § 9.3.1.

201. *Id.* §§ 9.4.1-2.

202. *Id.* §§ 9.5.1-3.

203. *Id.* § 9.6.1.

204. *Id.* § 9.7.1.

205. *Id.* § 9.8.1.

206. *Id.* § 9.9.1.

207. *Id.* § 9.10.1.

208. *Id.* § 9.11.1.

209. *Id.* preamble, cls. 2, 3, 4. The Code does not define the term "deterrence." In the preamble, the drafters refer to depriving "parties to the importation of counterfeit goods of the economic benefits." *Id.* cl. 8. In article 3, section

be focused on whether deterrence is a valid goal, whether counterfeiting can be deterred, and whether the Code will provide the requisite deterrence. Two scenarios suggest that deterrence is not a panacea. First, if counterfeiters are deterred from selling their products only in the signatory state markets,²¹⁰ the many non-signatory nations will still provide ready markets in which counterfeiters can peddle their wares.²¹¹ Second, if the Code is only

1, however, the drafters discuss the elimination of economic incentives to counterfeiting and the need for deterrence as two separate concepts. The general scheme of the Code suggests that it aims for economic deterrence, since the Code's main threat to counterfeiters is seizure of their products.

210. Taiwan, for example, is the source of approximately 60% of all counterfeited goods. *See supra* note 55 and accompanying text. Three of Taiwan's four major trading partners are potential Code signatories: The United States, Japan, and the Federal Republic of Germany. 1980-1981 STATESMAN'S Y.B. 351 (1981). Two of Singapore's three main trading partners are considering signing the Code: the United States and Japan. *Id.* at 1055. Singapore is yet another major source of counterfeit merchandise. *See supra* note 56 and accompanying text. Italy, Thailand, Korea, India, and Japan are also counterfeiting centers. Significantly, many of their chief trading partners are possible Code signatories. Italy's main trading partners are the EEC and the European Free Trade Association nations. HAMMOND ALMANAC 597 (1982). The United States, Japan, Malaysia, and Hong Kong are among Thailand's main trading partners. *Id.* at 675. South Korea's major trading partners include the United States and Japan. *Id.* at 607.

211. Although consumer preferences in developing nonsignatory nations may differ from preferences in the more developed economies of the signatory nations, the economic realities, legal structures, and government attitudes in these nonsignatory nations guarantee ripe markets for counterfeit goods. The demand for consumer goods in developing countries often outstrips the existing supply. As a result, substandard products are often marketed. Wassermann, *United Nations Consumer Protection Survey*, 13 J. WORLD TRADE L. 776-80 (1979) (description of June 8, 1978 survey entitled *Consumer Protection: A Survey of Institutional Arrangements and Legal Measures*, U.N. Doc. E/1978/81). This survey was based upon the replies of 19 nonsocialist nations. *Id.* at 85. United Nations organizations are often the only source of consumer protection in these nations. These organizations—UNIDO (industrial standardization), WHO (safe water supplies and food additives), and FAO (food additives)—tend to focus on physical health as opposed to consumer rights aspects of consumer protection. *Id.* at 82. Not surprisingly, these sociological undercurrents are reflected in the patent and trademark protection offered by these nations. For example, the Third World's principal objection to the Paris Convention is that it was established by industrialized nations to protect patent holders—not to help the lesser developed countries in which many of these patents are used. *See generally* J. SWEENEY, C. OLIVER & N. LEECH, *supra* note 160, at 1048 (citing Joint Declaration of the Developing Countries of Nov. 11, 1963, reprinted in UNCTAD BASIC DOCUMENTS 8, 10 (1963)).

minimally effective in deterring counterfeiting, the signatory nations will be committed on paper to fight commercial counterfeiting but not required to constantly update their anticounterfeiting technology. Thus, they may regard Code-mandated activities as pro forma. The periodic meetings of signatory nations may not maintain industry interest. The current attack on the counterfeiting problem is motivated by industrial self-preservation. Perhaps it is syllogistic to suggest that industry will place too much reliance on the Code if it provides respite from counterfeiting activities. Yet this argument is provocative; it would be fatal for industry to relax its vigil because the governments of the signatory nations—the enforcers of the Code—will depend on private industry for technology necessary to identify increasingly sophisticated counterfeiting operations.

Even if deterrence is a valid goal, it may be unworkable. All deterrence theories are based on the notion that "human behaviour can be influenced by incentives."²¹² But counterincentives also exist. Counterfeiting is lucrative,²¹³ is a low risk enterprise,²¹⁴ and is not difficult. In short, these tremendous incentives will outweigh all but the most severe sanctions. Thus, it is doubtful whether the Code will substantially deter counterfeiting.

The structure of the counterfeiting community also militates against deterrence. Authorities admit that organized crime is involved in counterfeiting.²¹⁵ Legions of prosecutors have tracked alleged organized crime involvement in drug traffic,²¹⁶ gambling,

212. NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 19 (1978). For a general discussion about the application of deterrence theory in various contexts see J. ANDENAES, PUNISHMENT AND DETERRENCE 84-109 (1952) (deterrence of specific types of offenses); L. DAVIS, LIMITED NUCLEAR OPTIONS: DETERRENCE AND THE NEW AMERICAN DOCTRINE (1976) (deterrence from a political science perspective); J. SINGER, DETERRANCE, ARMS CONTROL & DISARMAMENT (1962) (arms control); F. ZIMMING & G. HAWKINS, DETERRENCE (1973) (crime control—general).

213. See *supra* notes 34-43.

214. See *supra* note 87 and accompanying text.

215. See *supra* notes 87-89 and accompanying text.

216. See generally UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT: THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 187 (1967) [hereinafter cited as REPORT BY THE PRESIDENT'S COMMISSION]; *FBI's War on Mafia - Better Luck this Time* U.S. NEWS & WORLD REP., Feb. 25, 1980, at 25; Kohn, *Let's Take the Profit out of Organized Crime*,

and myriad other activities²¹⁷—largely to no avail. Decisions by a handful of nations to apply the Code will not render counterfeiting significantly less lucrative in a world of ripe markets. Thus, organized crime will remain involved.

Other structural aspects of the counterfeiting community suggest that counterfeiting will never be deterred. A trademark manager for Beecham Products noted that a raid in Taiwan slowed down the counterfeiting of their product, but may have caused the counterfeiters to shift their focus to the products of companies that are less aggressive in their approach to the counterfeiting problem.²¹⁸ The trademark manager's concern would remain under the proposed Code: the Code requires aggrieved companies to initiate customs investigations.²¹⁹ This shift from one illegal enterprise to another is common. Lawrence I. Kaplan of the Recording Industry Association of America, testifying at the Criminal Code Review hearings, highlighted a similar problem in the record industry: "As more and more states enacted laws against [record] piracy, illicit manufacturers turned to consumer deception. Unknown artists would be hired to imitate the singing styles of famous singers"²²⁰ Nations which are unable to marshal needed manpower, resources, and technology to detect shipments of counterfeit goods should be loathe to push counterfeiters to greater heights of deception.

Even if counterfeiting could be deterred, the key definitions in article 1 of the Code are not responsive to the current counterfeiting problem. As discussed earlier,²²¹ the grey area between imitated and counterfeited goods allows many counterfeiters to circumvent anticounterfeiting laws by arguing that they merely imitated the original product. The note to article 1 specifically states that the scope of the Code is limited to "imported goods with false trademarks that are identical or substantially indistin-

READER'S DIG., May 1979, at 145.

217. REPORT BY THE PRESIDENT'S COMMISSION, *supra* note 216, at 189-90.

218. *Product Poachers*, *supra* note 36, at 15.

219. Code, *supra* note 8, § 2.

220. *District of Columbia Criminal Code Revisions: Hearings Before the Subcomm. of the Judiciary Comm. on the District of Columbia House of Representatives in Conjunction with the Judicial Comm. of the Council and the Law Revision Comm. of the District of Columbia*, 95th Cong., 1st Sess. 191 (1977) (statement of Lawrence I. Kaplan of the Recording Industry Association of America).

221. See *supra* notes 15-25 and accompanying text.

guishable from the legally protected mark and not lesser infringements."²²² The Code does not cover imitations. The inclusion of a status quo definition of "trademark" merely perpetuates the current problem of "imitated" counterfeit goods.

Other counterfeiting problems are also excluded from the scope of Code protection. Nations applying the Code will have no mandate to stop the importation of products bearing slightly altered trademarks (*e.g.*, Aseikon).²²³ This problem is exacerbated because popular recognition—the quality that renders a trademark valuable—depends more upon the general visual image of the trademark than upon the exact positioning of specific words or letters.²²⁴

Internal corporate corruption poses an additional barrier to the complete deterrence of counterfeiting. This corruption creates problems which even an ambitious Code cannot counter. For example, Fioricci, the Italian jeans manufacturer, was charged with counterfeiting and marketing its own product!²²⁵ Corporations often inadvertently hire unscrupulous individuals to serve as official dealers. These dealers have ready access to the legitimate product and are able to counterfeit that product at their leisure.²²⁶ Just as the United States Model Business Corporations

222. Code, *supra* note 8, note to art. 1.

223. See *supra* notes 16-21 and accompanying text.

224. See Chadnovsky, *supra* note 152, at 679 & n.11. As a United States Trade Commissioner traveling in the beginning of this century through the developing world incisively commented:

Against a 50% literacy in Chile, there is less than a 20% literacy in Peru. However, even the Peruvian Indian, who constitutes the bulk of the population, has learned to ask for things that he identifies by primitive symbols . . . A manufacturer of 'machetes' . . . had been doing an excellent business throughout interior Peru. Perhaps his machete was no better than other makes, but the Indians thought so. The name on the blade meant little or nothing to them, for they could not read. Its distinguishing feature was its bright blue paper wrapper. When the dealer sent a duplicate order, he either forgot to specify the color of the wrapper or the manufacturer decided that any color of paper would do. But the Indians firmly refused to buy until the dealer had sent all the way to Lima for a supply of the familiar blue paper and had wrapped the knives himself. Then the Indians recognized the distinguishing mark that to them indicated a certain quality or brand.

Id.

225. Hansen, *supra* note 21, at 72. Fiorucci was also caught shipping counterfeit Levis and Wrangler jeans through their distribution process. *Id.*

226. See Kaikati & LaGarce, *supra* note 1, at 54.

Act exhaustively specifies every aspect of corporate life except the quality of the people filling corporate positions, the Code is unable to control the "human factor" in the counterfeiting problem.

2. General Workability Problems

Five areas of the Code present workability problems. First, the Code attaches insufficient importance to the involvement of skilled people in national enforcement. The drafters envisioned "administrative action, such as intervention by the customs authorities . . ." ²²⁷ But the drafters were caught between Scylla and Charybdis. Nations deal with trademark infringements in three ways: enforcement through court actions, enforcement through the actions of customs officials, or enforcement through administrative organizations such as trademark offices. ²²⁸ Under these circumstances, mandating that only customs officials deal with counterfeiting questions would have presented an unworkable framework. Under the permissive language of the Code, a nation may appoint "appropriate" noncustoms personnel to whom requests for inspections of incoming merchandise are to be submitted. This proviso presents the danger that insufficiently skilled personnel will be required to perform the section 2.3.1 functions. On the other hand, placing an additional burden on national customs personnel is also an unsatisfactory solution. In this period of economic uncertainty and growing international unrest, customs appropriations suffer. Despite an expected eighteen percent increase in the number of entries in fiscal year 1982, ²²⁹ United States customs officials planned to eliminate 625 full time positions ²³⁰ and requested \$8,467,000 less for fiscal year 1982 than they had received in the previous year. ²³¹ Suffering, but aware of political realities, William T. Archey, Acting Commissioner of

227. Code, *supra* note 8, note to art. 2.1.

228. Flynn Conversation I, *supra* note 7.

229. *Id.* at 304 (remarks of Mr. William T. Archey, Acting Commissioner of Customs). In fiscal year 1980 cargo valued at \$238 billion was processed at over 10,000 checkpoints at more than 300 ports of entry. *Id.* at 259.

230. *Id.* at 274. Note that General Accounting Office reports consistently have recommended improving cargo-selection systems—the procedure by which customs officials decide which incoming cargo to inspect. *Id.* at 304 (comments of Mr. Roybal, Committee Chairperson).

231. *Appropriations Hearings*, *supra* note 12, at 252 (remarks of Mr. John P. Simpson, Acting Assistant Secretary of Enforcement and Operations, United States Customs Service).

Customs, referred to "a major work load/resources imbalance problem."²³² In other countries the question is not whether customs officials have the funding needed to pursue anticounterfeiting activities, but rather whether they have adequate authority to do so.²³³

Second, national authorities are required by the Code to "take the necessary steps to provide for the detention or seizure of such goods or the taking of other appropriate measures;"²³⁴ forfeiture is required "[t]o the greatest extent possible."²³⁵ Walker argues that this recognizes that nations may employ differing procedures²³⁶ and emphasizes the need for strong monitoring provisions.²³⁷ The review provisions in section 9.5, however, are merely advisory. Lack of resources and authority thus critically limit the efficacy of the Code.

Third, the burden placed on individual corporations, coupled with the vague description of national responsibilities, offers minimal improvement over the status quo. The Code requires individual corporations to assume responsibility in three areas: they must initiate the investigative process by submitting a written request;²³⁸ they must accompany the request with "satisfactory evidence that counterfeit goods are in the process of being or are likely to be imported";²³⁹ and they may be required to provide a security bond.²⁴⁰ Because the Code does not require nations to

232. *Id.* at 261-62. To combat this "workload/resources imbalance," a new customs computer, an automated broker interface system, and a regulatory audit program are being tested. *Id.*

233. William Walker explained the differences in the various procedures:

The kind of procedures adopted under United States law, which delegate significant administrative discretion to the Customs Service, are not suitable for most European Governments whose legal systems are organized upon civil codes and where administrative discretion is much more narrowly circumscribed. Generally in these countries, customs officials are authorized only to detain suspect merchandise for a very short period of time . . . and the trademark owner must . . . [seek] an injunction. . . . Governments have been reluctant to limit judicial discretion in such cases. . . .

Walker, *supra* note 34, at 129.

234. Code, *supra* note 8, § 2.3.1.

235. *Id.* § 3.2.

236. Walker, *supra* note 34, at 129.

237. *Id.*; see Code, *supra* note 8, §§ 7.4.4, 9.5.1, 9.5.3.

238. See Code, *supra* note 8 § 2.1.

239. *Id.* § 2.2.

240. *Id.* § 2.5.

pursue detection of counterfeit merchandise, it shifts the burden of action to private corporations. As indicated by the desperate organizational²⁴¹ efforts and massive financial²⁴² expenditures of the world's largest companies, these entities already assume a lion's share of the burden. Thus the Code neither redistributes nor adequately redefines the course of action needed to minimize the counterfeiting problem.

Fourth, the disposal provisions in article 3 also raise several workability problems. Although forfeiture of the illicit goods is suggested in "special circumstances," "other measures" are permitted.²⁴³ The Code mandates that the laws of the member nation into which the product is imported²⁴⁴ will govern counterfeiting questions. The current complaint, however, is that local laws are ineffective and allow counterfeited products to reenter the stream of commerce.²⁴⁵ Furthermore, although the Code can dictate common goals, it cannot change national judicial practices or attitudes. Nations with less than optimal commitment to the Code are free to choose "other measures" and thus perpetuate the status quo. Indeed, should these nations wish to institute forfeiture provisions, they can follow the United States example and do so without the Code. Ineffective national laws also negate the value of the appeal provisions in article 4. The right to appeal means little if the aggrieved party's rights will be determined under local laws which fail to deter counterfeiters.²⁴⁶ Furthermore, the parties are only required to provide this right of appeal to persons with a "legitimate interest"²⁴⁷—an undefined class of persons.

Last, article 7 of the Code presents several enforcement problems. Given the universal perception that nations have been lax in complying with GATT,²⁴⁸ compliance with an instrument

241. See *supra* notes 92-139 and accompanying text.

242. See *supra* note 106.

243. Code, *supra* note 8, § 3.2.

244. See *id.* § 1.2.2.

245. See *supra* notes 110-35 and accompanying text.

246. *Id.*

247. Code, *supra* note 8, § 4.1.

248. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1, 2 (1979) (concern about lax GATT procedures and enforcement so great that the United States Congress added a request that United States representatives to GATT work on upgrading the GATT "decision-making procedures"); *id.* at 2 & n.9. (concern of

promulgated under GATT should not be taken for granted. The dispute settlement process described in section 7.3, however, may increase compliance. Under this process, any party can request consultations concerning common problems.²⁴⁹ If necessary, these issues should be referred up to the Committee for further consideration.²⁵⁰ If the Committee is unable to reach a satisfactory conclusion, it should establish a panel to examine the matter.²⁵¹ If this panel is unable to reach a satisfactory solution, it has recourse to the Committee²⁵² which "may authorize a Party or Parties to suspend in whole or in part, for such time as may be necessary, the application of this Agreement to any other Party or Parties, as is determined to be appropriate in the circumstances."²⁵³ Compliance is achieved at a relatively high cost. Section 9.8.1 provides that the Code will not apply between two parties if, at the time of acceptance, either of the parties does not consent to application of the Code vis-a-vis the other.²⁵⁴ Questions of reciprocity often arise between nations, but agreeing to suspend the Code in certain circumstances is antithetical to Code goals. Although there is symbolic value in having a nation committed on paper to Code goals, the price of the commitment may be too high. If nations are allowed to pick and choose with whom they intend to cooperate, achievement of the Code's deterrence and cooperation goals will be hindered.

other officials about noncompliance with GATT); *id.* at 2 & n.8 (concern of GATT officials about noncompliance with GATT).

249. Code, *supra* note 8, § 7.2.1.

250. *Id.* § 7.3.1.

251. *Id.* § 7.3.2.

252. *Id.* § 7.3.6.

253. *Id.* § 7.5.1. Kathryn Flynn explained that this clause tracks dispute settlement mechanisms in other GATT agreements. Flynn Conversation I, *supra* note 6. Under the Code, *supra* note 7, if country X and country Y are engaged in a dispute, and the Commission makes a recommendation which country Y refuses to follow, the Commission can authorize country X to suspend its application of the Code vis-a-vis country Y. United States officials, however, feel that this provision will be invoked only in the rarest of circumstances. Flynn Conversation I, *supra* note 6. Ms. Flynn emphasized that only once in the 33 year history of GATT has a provision similar to this one been invoked. *Id.* Normally, consensual discussion provides an optimal dispute settlement mechanism. *Id.*

254. Code, *supra* note 8, § 9.8.1.

V. ANALYSIS OF THE NORM-CREATING PROPERTIES OF THE CODE

A. Introduction

Code proponents are hopeful that the Code will gain currency in international law through the normative process. William Walker, a chief proponent of the Code, explains that, "[a]s discouragement of counterfeiting becomes an accepted international norm, under the influence of the international code, nations which now countenance the practice may be induced by diplomatic action to do more about preventing it."²⁵⁵ Determining the meaning Walker attributed to the phrase "discouragement of counterfeiting becomes an international norm," and whether he was correct, requires a multipartite analysis designed to ascertain nonsignatories' perceptions.

Although the Code is widely acclaimed as a breakthrough in the battle against counterfeiting,²⁵⁶ its significance is largely dependent on the responses of nonsignatories. Because three of the potential Code signatories account for one-half of all world trade, the initial normative power of the Code is impressive. Any further "normative pressure"²⁵⁷ of Code-created rules depends upon the perceptions and consequent reactions of nonsignatories. If nonsignatories join the movement toward accepting the Code, the sheer extent of this governmental commitment will extend the force of Code-created norms. Nevertheless, nonsignatories may not embrace the Code in its entirety. If they find only a few Code-created rules or procedures palatable, their incorporation or adaptation of these rules will lend a suasive, quasi-normative force to the Code. The following contextual analysis attempts to determine which perceptions the Code will engender among nonsignatories.

255. Walker, *supra* note 34, at 131.

256. It is a credit to private industry that it has been able to draw attention to the problem and rally behind the Code as a potential solution. *See, e.g., id.* at 119. Walker highlights the potential impact of the Code, *supra* note 8: (1) providing economic deterrence; (2) encouraging assistance from local authorities in counterfeiting prosecutions; (3) eliminating situations in which local authorities allow the reexportation of counterfeit goods; (4) creating both national and international anticounterfeiting policies and attitudes. *Id.* at 124-25.

257. A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 33 (1971).

B. The Code as a Norm-Creating Vehicle

1. *International Legal Norms Defined and Described*

a. The Code as a norm-creating vehicle

The Code can promote an anticounterfeiting norm because it is presented in a type of document which can serve as a norm-creating vehicle. Initially, the Code must be differentiated from other codes of conduct. Viewed on a continuum describing the legal character of agreements, the Code falls somewhere between "[c]onventions embodying definite legal obligations"²⁵⁸ and codes which are not legally binding. Nonbinding codes have several distinguishing characteristics. A nonbinding instrument may be created when a governing entity uses something less than its most official normative pronouncements as a vehicle to approve the new instrument.²⁵⁹ A nonbinding instrument may also be created if compliance with the agreement is merely voluntary.²⁶⁰ The Code certainly does not fall within this second category. GATT Article XX empowers GATT members to enact this type of code²⁶¹ and the language of the Code is neither precatory nor generalized. Thus, the Code is something more than a nonbinding document.

At the other end of the spectrum, the Code is similar to multilateral conventions which compose "the top layer of 'hard' international law."²⁶² This convention is one of the three sources of international law described in article 38 of the Statute of the International Court of Justice.²⁶³ Yet many current codes of conduct are not viewed as "hard" international law. This is not because codes are improper means by which to create binding law, but rather because nations do not choose to enact these codes via

258. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 1979 GERMAN Y.B. INT'L L. 11, 14.

259. A code to which the EEC foreign ministers agree, absent issuance of a normative regulation or directive, is an example of a nonbinding code. The EEC central organs have the power to use these normative vehicles; a code deriving EEC authorization through anything less than a regulation or directive would not have the same binding nature. *Id.* at 14.

260. *Id.* at 14-15.

261. Code, *supra* note 8, preamble, cl.2.

262. Baade, *supra* note 258, at 14.

263. The three sources of international law are international conventions, international custom, and the general principles of law recognized by civilized nations. Statute of the International Court of Justice, art. 38(1)(a)-(c) (1947).

conventions.²⁶⁴ The proposed Code, however, is to be signed as an exercise of the parties' article XX rights. Although not completed during the most recent round of GATT negotiations, the Code is modeled after other GATT agreements.²⁶⁵ Thus, in the hierarchy of international law sources, the Code may assume the suasive force of a convention, and its signatories will accord it appropriate dignity as a source of international obligations. Nonsignatories then will perceive the authority of the vehicle chosen to articulate this anticounterfeiting goal.

b. Norms and the law formation process

Many theorists have pondered the relationship of norms to the law creating process.²⁶⁶ The law or legal order is essentially the systemic interaction of norms.²⁶⁷ Thus "[r]ules of law are distinct from legal norms which are described by rules of law."²⁶⁸ The terms "norms," "customs," and "principles" are interchangeable;²⁶⁹ legal customs, norms, and principles are described by rules of law. The creation of a norm is a multipartite process:

1. The formulation and designation of a requirement as to behavior in contingent circumstances;
2. An indication that that designation has been made by persons recognized as having the competence (authority or legitimate role) to perform that function and in accordance with procedures accepted as proper for that purpose;
3. An indication of the capacity and willingness of those concerned to make the designated requirement effective in fact;
4. The transmittal of the requirement to those to whom it is addressed [the target audience];
5. The creation in the target audience of responses—both psychological and operational—which indicate that the designated requirement is regarded as authoritative . . . and as likely to be complied with in the future in some substantial degree.²⁷⁰

264. Baade, *supra* note 258, at 14.

265. Walker, *supra* note 34, at 122.

266. For a comparison of regular social norms and legal norms, see Kelsen, *THE PURE THEORY OF LAW* (pts. 1 & 2), 50 *LAW. Q. REV.* 474 (1934), 51 *LAW. Q. REV.* 517 (1935).

267. *See id.* at 517-22; *see also* H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 6 (1952).

268. Kelsen, *supra* note 266, at 517-22.

269. 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* (1963).

270. Schachter, *Towards a Theory of International Obligation*, in *THE*

The process by which a norm develops is the same assimilative process by which customary international law evolves. Therefore, if the Code creates norms it will also create customary international law.

c. The evolution of Code-created norms

(i) *The significance of usage and opinion.*—Because the customary law creation process is the norm creation process, analyzing the evolution of Code rules requires identifying the assimilative steps in the customary international law formation process. Because this Note analyzes the future normative potential of the Code, it would be analytic legerdemain simply to assert that customary international law evolves. Professor Anthony D'Amato approaches the law formation problem through the two elements of custom: usage and *opinio juris seu necessitatas*.²⁷¹ "Usage" is repeated practice—the material aspect of customary international law. The second element expresses the psychological aspect of the law formation process: the formation of customary international law requires the actual exercise of a right. This Note suggests that the element of usage will occur when nations adopt the Code.

(ii) *Usage and customary international law formation.*—The norm creating function of the Code depends on whether the Code expresses extant or nascent norms. Ratification of the Code will not bring norms into existence as if by fiat. Although there is no current anticounterfeiting norm,²⁷² the Code may function as a norm creating vehicle if it speeds the process by which anticounterfeiting sentiment develops into customary international law. Traditionally, a rule or proscription qualified as "customary international law" because it had developed over a long period of time.²⁷³ Under this analysis, the Code could only create norms if (1) an anticounterfeiting norm was extant prior to adoption of the

EFFECTIVENESS OF INTERNATIONAL DECISIONS 9, 17 (S. Schwebel ed. 1971).

271. A. D'AMATO, *supra* note 257, at 49.

272. See *supra* notes 55-56 and accompanying text.

273. Time is not the only indicator of the existence of customary international law. The number of times a rule is adhered to or supported and the actual continuity of usage also characterize the customary law formation process. A. D'AMATO, *supra* note 257, at 59-60. *But cf. id.* at 66 ("repetition, duration, constancy and generality surely serve to make any given rule more visible, but writers have not given any concrete evidence for the loose statements sometimes made that these elements are necessary for the actual formation of a rule of customary law.").

Code; or (2) if, in the distant future and by virtue of the long period of time since its enactment, the Code came to be viewed as representing a universally applied principle. No anticounterfeiting norm is currently extant. In the distant future, however, cumulative usage of the Code may create an anticounterfeiting norm. This development of Code norms is contingent upon non-signatories' perceptions that Code rules are sufficiently workable to warrant adoption.

The Code may also create an international norm in the near future. The argument that only a long period of time can galvanize a Code-promulgated rule into an international norm is based on traditional analysis which is currently under challenge. The "hierarchy" of international law established in the Statute of the International Court of Justice, however, is itself a product of customary international law. In other words, custom defines customary international law.²⁷⁴ Significantly, there is considerable debate²⁷⁵ about whether the traditional, laborious development of customary international law appropriately reflects international behavior in an era of rapid scientific, technological, and political advancements. Indeed, referring to the development of the equidistance principle, the International Court of Justice noted in the *North Sea Shelf Cases*²⁷⁶ that

treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. . . . [T]his process is a perfectly possible one and does from

274. Baade, *supra* note 258, at 21.

275. See, e.g., *The South West Africa, Second Phase, Judgement*, 1966 I.C.J. 4, 250 (Tanaka, J., dissenting). D'Amato cites the work of Sir Humphrey Waldock, Gilberto Amado, James Brierly, and Helen Silving for the proposition that the time needed to create customary international law may vary according to the subject of the custom. A. D'AMATO, *supra* note 257, at 58. One explanation is particularly illustrative: "The establishment of custom required a long period of time in the past when international life was slower and communication primitive, but today custom may be formed rapidly since every event of international importance is universally immediately known." *Id.* at 59 (quoting Karol Wolfke).

276. *The North Sea Continental Shelf Cases (Den. v. Neth.)* 1969 I.C.J. 3, reprinted in 63 AM. J. INT'L L. 591. In an 11-6 decision, the court held that the use of the equidistance principle was not obligatory.

time to time occur."²⁷⁷

The *North Sea Shelf* case emphasized that "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference."²⁷⁸ This underscores how modern forums speed the norm creation process. Although the court rejected this contention, it pointed out that it is "perfectly possible" that a rule or proscription promulgated in a document may quickly become a binding norm for nonsignatory nations. Similarly, an instrument like the Code, signed in the manner of a multilateral treaty, could speed the traditionally slow international norm formation process. Once again, the transformation of Code rules into international norms depends upon nonsignatories' perceptions that Code-created rules would be to their benefit.

(iii) *Opinion and customary international law formation.*—The role of the Code as a norm creating vehicle is largely dependent upon the willingness of nations to exercise rights under the Code. Although the usage required to solidify the Code as customary international law is a function of time, identifying the *opinio juris sive necessitatis* requires difficult psychological analysis. The signatory nations will commit themselves to the Code because it is in their self-interest to do so; this commitment forms the basis from which any customary anticounterfeiting norm could develop. First, although nations may accept Code-created rights they will not exercise these rights unless they perceive that the Code has suasive force. Second, nonsignatories will not incorporate Code values unless they perceive that the signatories are willing to exercise rights under the Code. Three perceptions are necessary: (1) that the Code is an authoritative source; (2) that the Code commands member state commitment; and (3) that the Code promotes efficacious rules.

2. *The Significance of Nonsignatories' Perceptions of the Code for the Norm-Creating Process: Perceptions Which the*

277. *Id.* at 620.

278. *Id.* at 616-17. The embryonic custom, according to one party, was "crystallized in the adoption of the Continental Shelf Convention by the Conference."). *Id.*

Code Must Engender to Qualify as a Norm-Creating Vehicle

a. Perception of the Code as an authoritative source

Nonsignatories will not sign the Code or adopt its premises unless they perceive its suasive power. A key jurisprudential question is whether the suasive force of a norm creating vehicle must flow from the text of the agreement itself or from nontextual (political, social, or economic) origins. At one extreme are the theorists who argue that the absence of sanctions renders international law something less than law.²⁷⁹ Conceding the validity of this theory would, of course, render moot the issue of the Code as a norm creating vehicle. Other theorists find that natural law or positive enactment validate international law.²⁸⁰ Positive enactment, however, will only occur when nations find that this enactment is in their self-interest. Enactment is only in a nation's self-interest when it perceives that the Code is effective. Two elements can create that perception: strong sanctions in the Code or nontextual principles of international interaction.

The rich legacy of centuries of commercial interaction indicate that the nations of the world—like the individuals in a community—interact in accordance with certain uncodified principles: cooperation, good faith, custom, and righteousness.²⁸¹ The significance of these customary principles is illustrated by recent patterns of international interaction. As Philip C. Jessup importuned,

Why have the nations been willing for nearly twenty years to subscribe to a budget of over half a million dollars for the mainte-

279. See generally L. OREFIELD & E. RE, *INTERNATIONAL LAW: CASES AND MATERIALS* 10 (1965). Austin argued that absent sanctions there can be no international law. See, e.g., Schachter, *supra* note 270.

280. Stone, *Legal Controls of International Conflict*, *liii*, reprinted in J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM, CASES AND MATERIALS* 1171 (1973).

281. See *supra* notes 258 & 279. Proponents of the efficacy of these customary principles of international interaction assume a maximalist stance: member states will be legally committed to inducing compliance with the Code or to avoiding the creation of obstructions to its functioning. Baade, *supra* note 258, at 30. Minimalists reach an opposite conclusion. A code may be binding, but minimalists cite the Lotus and Nuclear Tests cases to argue that any document limiting a state's sovereignty must be restrictively interpreted. See *Nuclear Tests* (Austl. v. Fr.), 1973 I.C.J. 99 (Interim Protection Order of June 22); *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 5 (Judgment of Sept. 7). See generally Baade, *supra* note 258, at 31.

nance of the Permanent Court of International Justice? Why did the German Government bother to make a legal argument in support of its refusal to accept the demand of the United States that it assume the obligation to pay the bonded obligations of Austria? . . . Why has the United States Supreme Court, like the courts of most other countries, asserted that "international law is part of our law?"²⁸²

Over 20,000 international agreements have been concluded since 1945.²⁸³ These agreements are testimony to the pervasive perception that nations will cooperate in accordance with certain uncodified principles to facilitate international commercial interaction.

b. Perception that the Code commands member state commitment

Nonsignatories' willingness to incorporate Code values is also dependent upon their perception that the Code commands the signatories' obedience. Customary nontextual principles of international interaction indicate both that member nations will obey the Code and that nonsignatories will be aware of this commitment. One customary rule of international interaction is the duty of good faith.²⁸⁴ The terms of an instrument ratified by a state represent national policy; the state cannot in good faith contravene the principles of that instrument.²⁸⁵ Other foundations of international obligations also induce compliance with agreements. Among these foundations are the following: consent, custom, righteousness, national law, social necessity, international consensus, direct institutions, common purpose of participants, effectiveness, sanctions, shared expectations regarding authority, and rules of recognition.²⁸⁶ Nonsignatory nations cannot fail to perceive a strength of purpose flowing from acts of ratification evidencing the signatories' shared expectations that counterfeiting

282. Jessup, *THE REALITY OF INTERNATIONAL LAW*, 18 FOREIGN AFF. 244, 245-46 (1940).

283. Sohn, *The Effectiveness of International Law*, in *ESSAYS ON INTERNATIONAL LAW* 58, 59 (M. Nowaz, ed. 1976). For a discussion of the myriad conferences spawning these agreements, see *id.* at 161.

284. Baade, *supra* note 258, at 28.

285. *Id.* at 38.

286. Schachter, *supra* note 270, at 9-10.

must, as a matter of righteousness and social necessity, be deterred.

Minor Code violations will not necessarily weaken nonsignatories' perceptions of the Code as a norm creating vehicle. Professor Louis Sohn points out that crimes occur despite our system of penal law and that strikes occur despite our system of labor law.²⁸⁷ Nevertheless, few would champion the elimination of criminal and labor regulations. Similarly, minor Code violations will be viewed, not as an insurmountable difficulty, but rather as an inherent part of the regulatory process.

c. Perception that the Code promotes efficacious rules

The efficacy of Code rules is closely linked to the normative potential of the Code. Because many political, social, and economic considerations will influence the signatory and non-signatory decision makers who evaluate the desirability of accession to Code-created rules, contextual analysis is needed to determine whether these decision makers will perceive the Code as creating efficacious rules. The argument is twofold: nations will not ratify the Code or exercise rights thereunder unless the Code rules are perceived to be effective; and nonsignatories will not perceive the Code as a potential source of international law unless the Code rules are perceived to be effective.

3. *The Impact of Nonsignatories' Perceptions of the Code on the Development of an International Anticounterfeiting Norm.*

a. The McDougal-Lasswell approach: neo-realistic functional analysis

The "policy-oriented"²⁸⁸ contextual jurisprudence developed by Professors Myers McDougal and Harold Lasswell provides an ideal approach for determining whether nations will perceive Code-created rules as efficacious. Although the McDougal-Lasswell approach is designed to optimize decision making, their emphasis on the communication of shared values is uniquely suited to analysis of the nonsignatories' perceptions of the Code as a norm creating vehicle. In essence, the question is whether nations with differing values, legal systems, social structures, trade prac-

287. Sohn, *supra* note 283.

288. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 349 (1976).

tices, customs organizations, import needs, export practices, trademark systems, and perceptions of the counterfeiting problem will decide that counterfeiters are a common enemy and that integrating Code rules into their national value structures is an effective way to address the problem.

Harmonization of these disparate systemic and structural values will not spring, like Terpsichore, directly from the text of the Code. Harmonization is a function of the shared communications emphasized by the McDougal-Lasswell approach. Nonsignatories will determine whether Code rules express their goals and whether those rules can be applied in their particular legal systems. Similarly, the signatory nations will have to determine the extent to which they wish to exercise their rights under the Code (e.g., they may demand forfeiture of captured counterfeit goods or merely bar the entry of those goods). In making these decisions, it would be unwise for decision makers to limit themselves to a textual analysis of the Code. Appropriately, McDougal and Lasswell shift the analytical focus from the codified law to the process by which these decisions are made, allowing the analyst to consider whether it is in the political self-interest of that nation to accept Code-promoted values.

Understanding contextual analysis involves acknowledging the jurisprudential legacy upon which McDougal and Lasswell built, and from which they dissented. Their formalist predecessors espoused²⁸⁹ an inherently tenacious discipline which "defines legal

289. Wallace & Fiocco, *Recent Criticisms of Formalism in Legal Theory and Legal Education*, 7 *ADEL. L. REV.* 309 (1980). Reduced to a basic set of propositions, the earlier formalist legal theory can be characterized as:

- (a) A conception of law as an autonomous discipline with its own methodology, rationality and history. Typical devices of the discipline to control cognition are legal logic, a system of hierarchical rules, dichotomous definitions, and an entrenched concentration of analysis on the appellate court judge.
- (b) A pattern of evaluation of law and legal institutions which is coloured heavily by these cognitive controls and which principally measures the internal consistency of rules and their sources to the exclusion of their substantive content and social effect.
- (c) A failure to examine the relationship between formal theories of law and the structural devices which underpin the operation of law. These structural devices include the use of a highly trained legal profession, a complex hierarchy of decision-making authorities, an anachronistic language and a high degree of mysticism in the apparatus of law.
- (d) A precise and narrow demarcation of the legal form from the non-legal,

thinking . . . any alternative [to which was to] be treated as prima facie non-law and hence ignored by the main stream [sic] of the discipline."²⁹⁰ Pound's criticisms of the pre-realist schools is applicable: formalist jurisprudence "sought to construct a science of law solely in terms of and on the basis of the law itself."²⁹¹

Neo-realistic jurisprudence challenges formalist theory. Although several schools of neo-realism developed, all share certain common characteristics.²⁹² Specifically, neo-realists emphasize the myriad considerations influencing decision makers. Neo-realists challenge formalism precisely because modern world interaction and the concomitant development of international law-making processes require a cross-disciplinary, not an intradisciplinary, perspective. T. Olawale Elias characterizes modern international law²⁹³ as a "reflection of contemporary social, economic, scientific and technological needs."²⁹⁴ In a political milieu bursting with

requiring limited appraisal of the social, political and economic realities and a striking inability to theorise about purposes and effects of law. *Id.*

290. *Id.* at 312.

291. 1 R. POUND, JURISPRUDENCE § 12 (1959).

292. Wallace & Fiocco, *supra* note 289, at 251. For example, proponents of economic determinism/realism argue that law making and decision making processes are determined by the assertions of an economically dominant group. *Id.* at 255. Psychological realists suggest that law is the decisions of judges, but emphasize the nonrational element in the decision making process. *Id.* at 264-65. Another shared characteristic is their cross-disciplinary perspective. As two Australian legal scholars noted, "[b]uilding on the pragmatism of Holmes, sociological jurisprudence of Pound, the 'realist' theories and the Law, Science and Policy Approach of Lasswell and McDougal, the demand for cross-disciplinary work has become the most important attack on formalism." *Id.* at 316-17.

293. Elias views this as the third stage in the development of international law. Elias, *Modern Sources of International Law*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY 34 (1972).

294. *Id.* at 67. Compare the concept of formalist legal thought, which is divorced from political and social reality, with Elias' view. Formalism is divorced from political reality because its precepts are applicable in a world in which all decision making occurs in an apolitical, hierarchical environment. Politicians, however, are not legal analysts. Their goal is not discovery of a true rule or ultimate law. The problem is that "formal theory contains an inadequate version of human decision-making. It constructs an abstract system by concentrating on instrumental and structural constraints . . . without consideration of the very fragile psychological internalization of their meaning which effectuates the constraints." Wallace & Fiocco, *supra* note 289, at 314. Formalist legal thought is also divorced from social reality. Scholars have identified several social functions which law represents: (1) actual behavior; (2) power allocation—the expression of consensus values; (3) a tool through which certain behaviors are classified as

aphorisms such as "arms race," "first strike power," "chemical stockpiling," "brinkmanship," "imperialism," "four-year plans," "five-year plans," and "zero-sum games" and where *détente* is merely a stepping stone to an unknown *dénouement*, political longevity is determined by a decision maker's ability to identify and promote national self-interest. Unlike the formalist emphasis on the creation of a framework of hierarchical rules, the McDougal-Lasswell approach focuses on the decision making process.

Because the McDougal-Lasswell approach rejects formal, textual analysis in favor of a functional, contextual approach, it is uniquely suited to evaluate whether individual decision makers will perceive adoption of Code rules or values as being in their national self-interest. These perceptions are key predictive elements in the law formation process. A nation's laws are those rules that are perceived to be effective²⁹⁵ and in the national interest. As Reisman explains:

In virtually every situation, the criterion of a "good decision" is its degree of conformity to the preferences of the evaluator [L]aw, at least in the past century, has been reluctant to admit complicity in such criteria, but has insisted that its criterion is in conformity with certain communications of the past.²⁹⁶

Thus, the nonsignatory decision maker's contextual perception that Code rules are effective is an important indicator of the likelihood that the nonsignatory will assimilate those rules. By the same token, a signatory decision maker's contextual determination that Code rules are effective will prompt additional exercises of rights under the Code.

McDougal and Lasswell have established a framework to guide decision makers. The decision in question must be evaluated as a process of shared communication. Communication, in turn, must be examined contextually. Signs are central to the communication

deviant; (4) a mechanism for providing symbolic reinforcement of norms and opinions. *Id.* at 315. Formalists can escape criticism that their analysis of law is too limited. By defining law, they define the limited parameters of their analysis; but this does not obscure others, in various disciplines, who have identified myriad sources and functions of law. Thus, like a doctoral candidate defending his dissertation to a multidisciplinary panel, legal scholars can best validate their theories by testing them in light of all the social roles of the law making process.

295. M. REISMAN, *A Theory About Law From the Policy Perspective*, in *LAW AND POLICY* 75, 81 (D. Weisstub ed. 1976).

296. *Id.*

process: signs are "materials or energies that are specialized to the task of mediating between the subjective events of two or more persons."²⁹⁷ Signs evoke certain subjective events which are called symbols,²⁹⁸ and signs communicate symbols in forums.²⁹⁹ It is necessary to identify the objectives³⁰⁰ and base values³⁰¹ of forum participants because they impact on the communication process.

In McDougal's lexicon, interpretation is the alter ego of communication. Interpretation is necessary to discover the "shared expectations"³⁰² of the communicators.³⁰³ The act of interpretation involves identifying the parties involved, identifying the shared objectives of the parties, examining the context of the confrontation, and considering the "whole world social process,"³⁰⁴

297. S. MCDUGAL, H. LASSWELL & J. MILLER, *INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* xv, xii (1967) [hereinafter cited as S. MCDUGAL & H. LASSWELL].

298. *Id.* at xii.

299. *Id.*

300. *Id.*

301. *Id.* at xiv.

302. McDougal acknowledges that "[s]ince the subjectivities of the parties are never open to direct observation, bona fide efforts at interpretation can only be directed toward signs and acts of collaboration from which the subjectivities may be inferred." *Id.* at 29.

303. *Id.* at xvi. Interpretation is a "responsible effort to ascertain the degree and content of the genuine shared expectations of the parties to an international agreement." *Id.* at 29. Interpretation is differentiated from other phases of the decision making process. Interpretation involves "designating the shared subjectivities of communicators." *Id.* at xix. The prescriptive phase examines the assumptions about the allocation of authority in the decision making process. The promotional phase is the process of reaching consensus. *Id.* Interpretation involves analysis of content and procedures. Content analysis consists of "arrang[ing] the manifest content of the statements that appear in relevant texts—including more than a putatively final text—according to harmony or contradictions, and abstractness." *Id.* at xviii. Analysis of procedure involves "examin[ing] each pertinent expression in the order in which it was made and also in relation to any information that helps to establish the perspectives of the communicator and his audience." *Id.* This twofold process creates "an agenda of experiences that aid in modifying the initial picture of the subjectivities of the parties." *Id.*

304. *Id.* at 15-21. Although it is beyond the scope of this Note, McDougal also suggests that the decision in question be appraised for compatibility with goal values. J. SWEENEY, C. OLIVER & N. LEECH, *supra* note 160, at 1220 (citing McDougal, *International Law, Power & Policy: A Contemporary Conception*, 1 *RECEUIL DES COURS* 137 (1953) [hereinafter cited as *International Law, Power &*

the context of the agreement. How the Code communicates to, and shapes the perceptions of, nonsignatories requires analysis of (1) the parties; (2) the objectives of the parties; (3) the context of the confrontation; and (4) the context of the agreement.

b. Application of functional analysis to test nonsignatories' perceptions of the Code as an authoritative vehicle for creating efficacious rules

(i) *Identifying the parties to the Code.* — The parties to the Code will be the potential signatories. According to the United States Trade Representative's Office,³⁰⁵ the nations most likely to sign the Code are the United States, the Common Market nations,³⁰⁶ Japan, Canada, and New Zealand. A common characteristic of these parties is that, with the exception of Italy, these nations are not major sources of counterfeiting goods.

(ii) *The shared objectives of the parties.* — McDougal and Lasswell suggest that the shared objectives of parties to a document can be identified by examining certain signs (materials devoted to solving a problem) and symbols (subjective events evoked by the signs). The analyst is not limited to the signs and symbols contained in the text of the document. Because the text of a document is merely "a set of signs," "it is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs—the text of a document—the role of serving as the exclusive index of the parties' shared expectations."³⁰⁷ Contextual interpretation, however, does not preclude textual interpretation:³⁰⁸

The approach which seeks genuine shared expectations does not neglect any initial version of their relation to shared expectations as provisional, and requires that the interpreter engage in a course of

Policy]). This last step involves "the invention and evaluation of new alternatives of policy—prescriptions and institutions—designed for the better securing of such goal values." *Id.* at 1221. The context of the confrontation includes "[t]he description of trends in decision, in terms of effects upon values, and the identification in the greatest degree possible of the variables, predispositional and environmental, that affect particular decisions." *Id.* at 1220.

305. The Common Market nations are: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom.

306. S. McDUGAL & H. LASSWELL, *supra* note 297, at xvii.

307. *Id.* at xviii.

308. *Id.*

sustained testing and revision of preliminary inferences about the pertinent subjectivities. And of course this calls for a scrutiny of the whole context of communication.³⁰⁹

Many nontextual sources exist from which inferences can be drawn about the parties' objectives. For example, inferences about shared objectives can be drawn from the following signposts which aid in treaty interpretations:

- (1) the general purpose of the treaty;
- (2) the historical background of the treaty;
- (3) *travaux préparatoires*;
- (4) the circumstances of the parties at the time the treaty was entered into;
- (5) the change in these circumstances sought to be effectuated;
- (6) later documents showing efforts at applying the treaty; and
- (7) prevailing conditions at the time the interpretation is occurring.³¹⁰

Combining these general aids with a modicum of textual analysis provides a cross-disciplinary picture of the parties' shared expectations. This, in turn, helps to delimit the perceptions which the Code will invoke. The Code itself is an important sign of the parties' common objectives: the deterrence of counterfeiting through cooperation, information exchanges, and the minimization of economic incentives to counterfeiting. Although the Code's title suggests that the common objective is deterring the importation of counterfeit goods, "prevailing conditions" and the "circumstances at the time" suggest that the parties share a broader goal: deterring all facets of counterfeiting activity. Another nontextual signpost, "the character of the language involved,"³¹¹

309. *Id.* at 120-21 & n.6 (citing Harvard Research in International Law, Draft Convention on the Law of Treaties, comment 946 (1935)). Similarly, the following may also be considered:

[T]he character of the language employed, historical facts relating to the subject matter in question, kindred arrangements showing the practice of nations in using like terms in other agreements, the general purpose as deduced from the various aspects of the instrument as a whole, comparisons and contrasts drawn from other parts of the treaty or related agreements, prior negotiations, contemporary declarations, as well as practical constructions by the parties.

Id. at 120 & n.5. (citing Y. CHANG, *THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNE* 182-83 (1933)).

310. See *supra* note 309 and accompanying text.

311. See *supra* notes 15-21 and accompanying text.

must be examined in light of specifically delineated Code goals. Code language is not consistent with the objective of deterring all facets of counterfeiting. Because the Code adopts status quo definitions, it does nothing to address the current problem created by knockoffs³¹² and imitations.³¹³ Whether by oversight or by intention, the Code does not indicate an objective to eliminate these simpler forms of counterfeiting.

A third nontextual signpost is the historical background of the Code. Because the *travaux préparatoires* have not been published, they cannot identify the shared objectives of the parties. The United States Trade Representative's Office, however, has identified two major problems encountered in the drafting of the Code that help to delimit the parties' shared expectations: coverage and enforcement. Original United States plans to include all intellectual property rights under Code protection were stymied by a lack of available technology to run copyright checks at border entry points. Enforcement mechanisms also caused extensive debate during the drafting of the Code. Because trademark rights currently are enforced through court action (*e.g.*, court orders to stop imports), action by customs officials, or action by administrative organizations (*e.g.*, trademark offices), any code mandating a single enforcement method would be unworkable. Thus, the Code allows individual nations to appoint "appropriate authorities" to enforce the provisions.³¹⁴ It is thus clear that the parties did not intend to cover all intellectual property rights. Furthermore, they intend to achieve their objectives by a flexible system which accounts for differing governmental structures.

(iii) *The context of the confrontation.* — Trends, predispositional indicators, and environmental variables can shape nonsignatories' perceptions of the Code. One important environmental variable is government ability. As discussed above, the validity of deterrence theory in the instant situation is highly questionable.³¹⁵ Italy provides a perfect case in point. Although the wording of the Code may commit the Italian government to the fight against counterfeiting, intentions and capability are two separate issues. As one author noted, "[T]he problem in Italy will continue, whatever the law on the books, until the Italian govern-

312. See *supra* notes 22-25 and accompanying text.

313. Flynn Conversation I, *supra* note 7.

314. See *supra* notes 227-39 and accompanying text.

315. Hansen, *supra* note 21, at 74.

ment is politically, bureaucratically and economically able to do something about it."³¹⁶ Any Italian commitment pales in comparison with "credible estimates" which suggest that twenty to twenty-five percent of the Italian gross national product is derived from illegal activities³¹⁷ and which indicate that up to 2.5 million Italians work in the illegal sector of the economy.³¹⁸

Another significant environmental factor is the existence of unprotected national borders. Because the Code focuses upon catching counterfeited products at the borders, the ersatz goods will either flow into unprotected markets or circulate within national borders. Thus, use of a functional analysis has uncovered a major workability problem involving this particular Code objective.

Police attitudes are an important predispositional variable which shape nations' perceptions of the counterfeiting problem. Police officials may be prone to bribery;³¹⁹ there is no reason to assume that the Code can change these attitudes. Bausch & Lomb officials annually lose seven to eight million dollars in sales because of Italian counterfeiting; that company finally accused the Italian police of failing to enforce trademark laws.³²⁰ The general attitude in Italy, according to Bausch & Lomb officials, was that "the companies being ripped off are rich and can afford it."³²¹

Organized criminal activity is another environmental variable influencing perceptions of the Code as a norm-creating vehicle. As long as counterfeiting remains lucrative, organized crime will not be deterred by increased vigilance at the point of importation. The Code is not designed to eliminate the sources of counterfeit items. Organized crime will continue to produce them, either circumventing the system totally or choosing unprotected markets in which to sell the counterfeited products.³²²

Examination of past trends enhances any multidisciplinary analysis of the parties' goals. For example, the information ex-

316. *Id.* at 68.

317. *Id.* at 70. In Hansen's words, "[T]he borders are so open that Italy could be mistaken for a free port." *Id.* Undaunted, he continues: "In fact, judged by official figures, the continued survival of the Italian economy is a miracle on the order of flying rocks and snow on the Fourth of July." *Id.*

318. *See supra* note 84.

319. Hansen, *supra* note 21, at 68.

320. *Id.*

321. *See supra* notes 88-91.

322. *See supra* notes 110-35.

change goal is premised upon the notion that an exchange of information will increase counterfeiting prosecutions. There is a serious danger that this will not occur. First, even if information exchanges disclose the emergence of a new mode of counterfeiting, local authorities may be powerless to stop importation of the product if it is shipped in a non-infringing condition. Thus, Aseikon watches and blank tee-shirts may still cross the border. Second, strong environmental barriers militate against the information exchange goal. Because the Code does not change local laws, ineffective³²³ local laws will be used to prosecute those hapless counterfeiters who are caught.

Governmental ability, the existence of unprotected borders, police attitudes, the presence of organized crime, and currently ineffective local laws are but a few examples of the trends, predispositional indicators, and environmental variables which form the context of the current confrontation. This is the political environment in which national decision makers will evaluate the desirability of incorporating Code-created norms into their own national value systems. These variables help to establish the parameters of nonsignatories' perceptions of the Code. The weaknesses highlighted by these variables decrease the chance that Code-created rules will be absorbed as customary international law. It is simply not in a nonsignatory's self-interest to adopt a set of rules premised upon potentially unworkable goals.

(iv) *The context of the agreement.* — Because all nations do not share the signatories' trademark protection ethic, it is unlikely that they will perceive the Code as an authoritative source of efficacious rules. McDougal's admonishment to examine the context of an agreement refers to the whole world process as it relates to the agreement. The most obvious example of the Code's role in the world process is the line of demarcation between the developed, industrialized nations and the lesser developed nations. As discussed above, lesser developed nations often place different values on trademark rights than do the developed nations.³²⁴ Code proponents admit that the Code was not drafted with the intent of luring lesser developed nations to ratify the document. If the Code is premised upon a trademark protection ethic not shared by the nonsignatories, they will not incorporate Code rules into their national value systems. It is simply not in

323. See *supra* notes 117-33, 151-52, 316-18 and accompanying text.

324. A. D'AMATO, *supra* note 257, at 32.

their self-interest to do so.

VI. SIGNIFICANCE OF NONSIGNATORIES' PERCEPTIONS OF THE CODE ASIDE FROM THE NORM-CREATING PROCESS

A. Introduction

Nonsignatories' perceptions of the Code are important even if they are not sufficient to persuade those nations to sign the Code. If nonsignatories adopt or acknowledge any Code principles or procedures, the Code will have encouraged the most effective national practices. Professor D'Amato analogizes this quasi-normative process to a roadside stop sign.³²⁵ In D'Amato's hypothetical community, automobile drivers do not bring their vehicles to a full stop at the familiar red octagon; instead, they shift into low gear to slow their vehicles. The stop sign simply does not evoke compliance. It does, however, have significance because it "functions as kind of 'pressure' upon drivers to *slow down*."³²⁶ This slowing down is important because the purpose of the law is to curb the number of accidents. Similarly, the Code may create psychological pressure on nonsignatories to improve their anticounterfeiting practices. These improvements will aid both private and governmental entities in investigating and prosecuting counterfeiters.

B. The Code as a Source of Quasi-Normative Pressure

The Code may cause nations to "slow down" and examine their anticounterfeiting procedures because it will be politically expedient for national decision makers to adopt efficacious Code rules. All national decision makers engage in self-interest analyses. A decision maker may perceive no benefit in adopting the full panoply of Code rules. Nevertheless, specific rules may be perceived as offering benefits which far exceed the costs. For example, a nation may find it desirable from a record keeping standpoint to adopt a procedure similar to the article 2.1 requirement that counterfeit investigations be triggered only through written requests. Furthermore, a nation may find it useful to follow the article 3.2 suggestion that counterfeiters forfeit their goods: charity can begin at home when nations choose not to export their problems. Informal

325. *Id.*

326. *Id.*

information exchanges modeled on article 5.2 may be a valuable aid in prosecutions. A developed nation which discovers that it is receiving an unusual number of counterfeiters from one particular nation may find it desirable to provide the exporting country with article 8.2 assistance such as the training of personnel, or with assistance in preparing and implementing anticounterfeiting measures. The Code may simply encourage national decision makers to consider new legislation which is in general accordance with the Code. Thus, the Code offers nations ample reasons to "slow down" even if they do not want to "stop" to ratify the Code.

The Code may thus be imbued with quasi-normative qualities. If nations "slow down" and adopt Code-created practices, their activities will be a boon to private international entities. Currently stymied by ineffective international laws, private support for the Code indicates that it will welcome nations adopting even a few Code-created rules and procedures. In short, these entities may benefit from the same Code procedures that can benefit the public international community. Putting an end to the re-exportation problem would eliminate one major complaint. The Code will supplement existing private information exchanges by requiring nations to do the same. Businesses can only benefit when signatories help nonsignatories in areas such as customs personnel training.

V. CONCLUSION

It is unlikely that the Code will lead to the development of an international anticounterfeiting norm in either the near or distant future. First, the concept that customary international law can develop over a short period of time is too new to be applied in any but the clearest of cases. Furthermore, severe questions about the probability that nonsignatories will perceive the Code as a source of workable rules engendering a high level of member state commitment weaken the normative potential of the Code.

Because nonsignatories assume that status is a matter of self-interest, arguing that a norm might develop is tantamount to arguing that nations will find it in their self-interest to appropriate Code-created rules. Barring the development of a world government, however, there is no reason to believe that the future political milieu will differ from the present: a conglomeration of nations with disparate social and economic values, each at a different stage of development. Consequently, nations will be unable uni-

formly to label various anticounterfeiting activities "lawful" or "normative." It is thus unlikely that an international anticounterfeiting norm will develop in even the distant future.

Even if Code-created rules are relatively unworkable and the Code is not a norm creating vehicle, it still will play a significant role in international transactions. First, if the Code comports with political realities, it represents "law." Terms like "law" and "norm" are merely labels used to identify shared expectations. Code rules may not rise to that position of preeminence denoted by the label "normative." These labeling problems should not disturb one who has accepted a functional approach to the discipline. Only in the most extreme schools of jurisprudential thought is law "law" because it is labeled as such. Recent juristic thought indicates that ascertaining the "law" is a multidisciplinary foray which both proceeds from and leads the analyst to a clear description of economic and political reality. This reality exists independent of the customary international law formation process. In short, if nonsignatories do not actively circumvent the Code, it will be internationally significant law simply because it represents what nations *do*.

Second, the unique juxtaposition of public and private interest in the counterfeiting problem imbues the Code with special value to private business, even absent any norm creating capabilities. By virtue of the practical, business-oriented aspect of the private international community, these corporations have a keen interest in what nations do. The questions confronted by private international business transcend excursions along theory laden, label strewn paths. Private business is concerned with ledgers, balance sheets, investigator's reports, customs activities, and all the sources of information about commercial counterfeiting; it is goal, not label, oriented. The goal of private business is not to create an international anticounterfeiting norm, but rather to determine methods by which that problem can be eradicated.

The slight difference in the orientation of the public and private international legal and business communities imbues the Code with a new significance. Even if it is not accorded any public international law labels, the Code can serve as a springboard for achievement of the private international community's goals. The Code symbolizes joint public and private commitment to exterminate a common enemy. On a practical level, the Code establishes information exchange provisions and requires minor changes in internal customs procedures. Even if the Code is not

labeled "norm creating," it will bridge the gap between public and private international law and facilitate private businesses' battle against counterfeiters.

The self-interest analysis in which all decision makers engage promises a third level of international significance for the Code. The simple existence of the Code will create normative pressure in the international community. To borrow Professor D'Amato's analogy, even if the Code does not "stop" the problem, it may be perceived as a sign that anticounterfeiting programs are needed to "slow down" counterfeiting.

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