

STEPPING IT UP AND TAKING IT TO THE STREETS: CHANGING CIVIL & CRIMINAL COPYRIGHT ENFORCEMENT TACTICS

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I. INTRODUCTION

At first glance, copyright law appears straightforward. The United States Copyright Act grants copyright owners a set of exclusive rights to their works.¹ Copyright infringement occurs when anyone, from a student in their dorm to the CEO of a Fortune 500 company, violates one or more of those exclusive rights.² However, for both copyright industries and law enforcement, attempting to actually enforce these rights in the face of infringement is not so straightforward. In the face of domestic and international challenges to copyright enforcement, industry groups and law enforcement are employing new tactics. These tactics range from civil suits against individual direct infringers to potential trade sanctions against foreign nations.

Part II of this Note explores how copyright holders, particularly those represented by the Recording Industry Association of America (RIAA), are using several different methods to enforce their copyrights against direct infringers through civil suits. Part III outlines the ways in which these copyright owners are working with law enforcement officials and government agencies to crack down on large-scale infringement on the criminal front. Lastly, Part IV examines the problems of copyright enforcement outside the United States, especially in China. The particular focus on China reflects both the importance of China to copyright holders and illus-

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1. 17 U.S.C. § 106 (2000). The exclusive rights are: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. *Id.*

2. 17 U.S.C. § 501(a) (2000).

trates the methods that copyright owners and industry associations use to pursue direct infringers on the international front.

II. CIVIL ENFORCEMENT

Copyright owners such as record labels typically earn revenue from legal and authorized uses of their copyrighted works by the public. When the exclusive rights set forth in 17 U.S.C. § 106 are infringed, the Copyright Act entitles owners to institute civil copyright infringement actions.³

This Part examines civil enforcement efforts, focusing on the actions of the Recording Industry Association of America (RIAA), a leading entity in the copyright enforcement fight. Section II.A reviews the basic framework of civil copyright enforcement and the growing industry focus on direct liability. Section II.B introduces the RIAA and its use of civil suits to pursue direct infringers. Lastly, Section III.C assesses the RIAA's goals and likelihood of success.

A. Direct Liability Versus Secondary Liability

Copyright owners in the music, software, and movie industries face challenges in enforcing their exclusive rights. While infringement and piracy rapidly increase, technology becomes more sophisticated to evade infringement detection.⁴ Enforcement is further complicated by simple economics, as it is cost-prohibitive to sue the large population of individual infringers, given the costs of litigation.⁵

As a result, copyright owners have previously responded to rising infringement by focusing copyright enforcement on secondary liability, targeting easily identifiable organizations with greater confidence and hopes of compensation. Owners and groups with stakes in copyright enforcement initially focused their civil suits on infringement facilitators, such as Nap-

3. 17 U.S.C. § 501(b) (2000). These claims are subject to the defense of fair use, codified in section 107 of the Copyright Act of 1976. 17 U.S.C. § 107 (2000).

4. See Peter Biddle et al., *The Darknet and the Future of Content Distribution*, in PROCEEDINGS OF THE 2002 ACM WORKSHOP ON DIGITAL RIGHTS MANAGEMENT (2002), available at <http://crypto.stanford.edu/DRM2002/darknet5.doc>; see also Jordan S. Hatcher, *Mesh Networks: A Look at the Digital Future*, 11 J. Internet L. 1, 16 (2007) (discussing wireless mesh networks encrypted so as to be virtually impenetrable to RIAA or MPAA "detectives.").

5. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1373-77 (2004) (noting that "suing even a fraction of end users could bankrupt the content industries" given the costs of taking even a low-stakes case to trial).

ster or Grokster, under theories of secondary liability.⁶ In *MGM v. Grokster*, Justice Souter acknowledged this fact:

The argument for imposing indirect liability . . . is . . . a powerful one, given the number of infringing downloads that occur every day When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go . . . for secondary liability.⁷

Despite the perceived impracticality of suing direct infringers, copyright owners have recently escalated their enforcement actions against direct infringers through a variety of means in the civil, criminal, and international arenas. Copyright owners are turning to civil actions against direct infringers to change societal norms by sending the message that infringement is a real crime with real consequences.⁸ To prove direct infringement, an owner must show: (1) that she owned a valid copyright, and (2) that a defendant copied original elements of her copyrighted work.⁹ For registered works, statutory damages obviate the need to show actual loss of revenue stemming from the infringement.¹⁰ In fact, recent research suggests that actual damages may be minimal.¹¹ As part of their civil enforcement efforts, industries are targeting infringers with sophisti-

6. See *Grokster*, 545 U.S. at 929-30; *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

7. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30 (2005).

8. See Motion Picture Association of America, Educational Outreach, http://www.mpa.org/Issues_EduOutreach.asp (last visited Apr. 6, 2008) (“An important part of [the Motion Picture Association’s] mission and responsibility is to educate . . . consumers . . . about the importance of intellectual property rights . . . and the consequences of breaking the law.”); Business Software Alliance, Copyright, <http://www.bsa.org/country/Public%20Policy/Copyright.aspx> (last visited Apr. 6, 2008) (stating that educational outreach regarding copyright law is a basis for the BSA’s copyright public policy agenda); see also Committee on Intellectual Property Rights, Computer Science & Telecommunications Board, *The Digital Dilemma: Intellectual Property in the Information Age—Executive Summary*, http://www.nap.edu/html/digital_dilemma/exec_summ.html (last visited Apr. 6, 2008) (“A better understanding of the basic principles of copyright law would lead to greater respect for [it] and greater willingness to abide by it . . .”).

9. *Feist Pub. v. Rural Tel. Serv.*, 499 U.S. 340, 361 (1991).

10. 17 U.S.C. § 501(c) (2000).

11. While there is still much debate on how big of an impact illegal file sharing on P2P networks has had on album sales, researchers from Harvard University and the University of Kansas recently published a study that illegal downloads have only reduced CD sales by 0.7 percent. Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 36 (2007).

cated surveillance tactics, pressuring ISPs and universities to help identify infringers, and filing lawsuits in which individual users are confronted with high legal bills and the potential for statutory liability far in excess of actual damages.

B. Direct Infringement Actions by the Recording Industry Association of America

The Recording Industry Association of America (RIAA) is leading the campaign against direct infringers. The RIAA is a trade group consisting of U.S. recording companies, such as Epic, Sony BMG, and Universal, which collectively control approximately ninety percent of all American sound recordings.¹² To achieve its mission, the RIAA began to use the Copyright Act's civil enforcement provisions against direct infringers in September 2003.¹³

1. Early Tactics in Direct Infringement Actions

The first hurdle the RIAA faced was identifying infringers. Under its initial strategy, the RIAA employed companies like MediaSentry, and its parent company SafeNet, to search peer-to-peer (P2P) networks for infringing files;¹⁴ this approach uses packet "sniffers" and users' IP addresses to identify alleged infringers.¹⁵ The Digital Millennium Copyright Act (DMCA), passed with RIAA support in 1998, allowed the RIAA to directly subpoena Internet Service Providers (ISPs) for the identities of

12. RIAA, Who We Are, <http://www.riaa.com/aboutus.php> (last visited Mar. 7, 2008) [hereinafter RIAA FAQ]. Formed in 1952, the RIAA's mission is to support a business and legal climate that protects its members' "intellectual property rights worldwide and the First Amendment rights of artists; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies." *Id.*

13. *Id.*

14. RIAA FAQ, *supra* note 13.

15. As described by a MediaSentry Vice President, the company is hired by the motion picture, music, and software industries to engage in a process whereby MediaSentry (1) is provided with a list of copyrighted works believed to be available on P2P networks; (2) connects to various P2P networks and conducts a search for those works; (3) obtains the IP address of users offering those works for download via use of a packet "sniffer;" (4) searches that user's publicly available directory for other files that may match copyrighted works; (5) downloads at least one copyrighted work being offered by the user; and (6) logs all of this evidence and any other information about the user MediaSentry is able to obtain. Declaration of Thomas Mizzone In Support Of Miscellaneous Administrative Request for Leave to Take Discovery Prior to Rule 26 Conference, *Twentieth Century Fox Film Corp. v. Does 1-12*, No. 3:04CV0486, at 2-4 (N.D. Cal. Nov. 16, 2004). A user's IP address is unique and is automatically assigned to her by her Internet Service Provider when she logs on.

infringing subscribers.¹⁶ This was an efficient way for the RIAA to identify direct infringers because the DMCA subpoena does not require a formal complaint and has no proof requirement. However, a problem with this particular subpoena process is that it lacks substantial judicial oversight because it takes place outside of the context of a formal complaint and is issued by a clerk rather than a judge.¹⁷ Shortly after the RIAA began using this tactic, a federal appeals court held that ISPs that route material through their servers fall under the safe harbor provision of the DMCA and are not subject to the subpoena provision.¹⁸

2. *Recent RIAA Tactics in Direct Infringement Actions*

a) John Doe Suits

In January 2004, the RIAA pursued a new tactic, announcing over 500 “John Doe” lawsuits.¹⁹ The RIAA initiates these lawsuits by filing suit against unnamed defendants who use P2Ps and whose computer IP addresses have been flagged by SafeNet’s software.²⁰ A subpoena is then issued by the court via Rule 45 of the Federal Rules of Civil Procedure to obtain the identities of the defendants from their ISPs.²¹ The John Doe subpoenas are an improvement on the DMCA subpoenas in that they ensure there is some judicial oversight of the due process and privacy rights of Internet users because, unlike the DMCA subpoenas, the John Doe subpoenas are issued only within the context of pending litigation and are su-

16. 17 U.S.C. § 512(h)(1) (2000) (“A copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer . . .”).

17. *Id.*; Susanna Frederick Fisher, *An Update on the Current State of the File Trading War for Universities: Legal Uncertainty and Educational Opportunity*, Catholic University Counsel of America Online (Spring 2004), <http://counselonline.cua.edu/archives/frontpage/filetrading.cfm> (last visited Mar 7, 2008).

18. *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003).

19. John Schwartz, *Recording Industry Is Accusing 532 People of Music Piracy*, N.Y. TIMES, Jan. 21, 2004, available at <http://www.nytimes.com/2004/01/21/business/21WIRE-MUSIC.html>.

20. Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 203 (2006).

21. *Id.*

pervised by a judge.²² As of October 2007, the RIAA has filed, settled, or threatened John Doe lawsuits against over 20,000 individuals.²³

Capitol Records, Inc. v Thomas,²⁴ decided in October 2007, was the first of these John Doe lawsuits to go to trial.²⁵ Jammie Thomas, the defendant, was a thirty-year-old Native American, single mother of two, and resident of Brainerd, Minnesota.²⁶ Seven of the major record companies, all RIAA members, brought suit against Thomas alleging copyright infringement seeking punitive, but not actual damages.²⁷ During trial, the plaintiffs sought to link Thomas to the user account "Tereastarr" on the Kazaa file-sharing network based on her computer's IP address and the IP address identified by SafeNet's software on the night of February 21, 2005.²⁸ After brief deliberations, the federal jury found Thomas liable and ordered her to pay \$9,250 in penalties for each of twenty-four songs, for a total of \$222,000.²⁹ Thomas has since moved and is currently litigating for a new trial based on a claim that the penalty levied against her "is excessive and in violation of the Due Process Clause of the United States Constitution."³⁰

b) Letters to Colleges and Universities

In addition to the use of John Doe lawsuits to fight infringement, the RIAA has increased efforts to address infringement at the college level.³¹ In February 2007, the RIAA began a deterrence program to encourage col-

22. Fisher, *An Update on the Current State of the File Trading War*, *supra* note 17.

23. Susan Decker & Tom Wilkowske, *Vivendi, Music Industry Win First Downloading Trial*, Bloomberg.com, Oct. 4 2007, http://www.bloomberg.com/apps/news?pid=20601101&sid=a_GKOLbNs5Zs.

24. *Capitol Records, Inc. v. Thomas*, No. 06-cv-1497, 2007 WL 3054014 (D. Minn. Oct. 4, 2007).

25. Posting of Ray Beckerman to Recording Industry v. The People, First RIAA Jury Trial to Start Tuesday October 2nd in Duluth, Minnesota, in *Virgin v. Thomas*; Motion for "Summary Adjudication" Denied, <http://recordingindustryvspeople.blogspot.com/2007/09/first-riaa-jury-trial-to-start-monday.html> (Sept. 27, 2007, 10:42:00 a.m. EST)

26. David Kravets, *RIAA Rips Defendant in Nation's First Filesharing Jury Trial*, WIRED, Oct. 2, 2007, <http://blog.wired.com/27bstroke6/2007/10/riaa-rips-defen.html>.

27. Complaint at para. 18, *Capitol Records Inc. v. Thomas*, No. 06-CV-1497, 2006 WL 1431921 (D. Minn. Apr. 19, 2006); 17 U.S.C. § 504(c) (2006).

28. Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, at C1.

29. *Id.*

30. Defendant's Motion For New Trial, Or In the Alternative, for Remittitur, *Capitol Records Inc. v. Thomas*, No. 06-CV-1497, 2007 WL 4586690 (D. Minn. Oct. 15, 2007).

31. RIAA FAQ, *supra* note 12.

lege students to abide by copyright laws.³² Instead of initiating lawsuits, the RIAA first identified infringing university users according to their IP addresses. Then, in July 2007, the RIAA sent out 408 pre-litigation settlement letters to twenty-three universities it had identified as providing Internet access to infringing users.³³ The letters informed the universities of a forthcoming copyright infringement suit against the infringing user and requested that the school forward the letter to that user, who at that point was only identified by her IP address.³⁴ Because the RIAA's software only identifies the IP address of the supposed infringer, the RIAA depends on the use of the universities' own resources to match each IP address with its students or personnel.³⁵ These pre-litigation settlement letters offered the student twenty days "to resolve copyright infringement claims against them at a discounted rate" of \$3,000-\$6,000 before a formal lawsuit was filed.³⁶ According to RIAA officials, most infringers settled for \$4,000.³⁷ On August 16, 2007, the RIAA sent out another wave of 503 pre-litigation letters to fifty-eight universities.³⁸ As of January 2008, RIAA has sent a total of approximately 4,557 pre-litigation settlement letters to schools.³⁹

Responses from universities have varied. Some universities, such as the University of Kansas, Ohio University, and Stanford University, have adopted one-strike policies where, upon receipt of a pre-litigation letter, the university will disconnect the allegedly infringing user's internet access.⁴⁰ While Stanford and the University of California, Berkeley will re-

32. Press Release, Recording Industry Association of America, RIAA Launches New Initiatives Targeting Campus Music Theft (Feb. 28, 2007), http://www.riaa.com/news_room.php

33. Press Release, Recording Industry Association of America, 23 New Schools to Receive Latest Round of RIAA Pre-Lawsuit Letters (July 18, 2007), http://www.riaa.com/news_room.php.

34. *Id.*

35. RIAA FAQ, *supra* note 12.

36. Recording Industry Association of America, 23 New Schools to Receive Latest Round of RIAA Pre-Lawsuit Letters, *supra* note 33.

37. Leeds, *supra* note 28.

38. Press Release, Recording Industry Association of America, Music Theft at 59 Campuses Targeted in Latest Wave of Deterrence Program (Aug. 16, 2007), http://www.riaa.com/news_room.php.

39. Eric Bangeman, *RIAA Sees a 99.6% Capitulation Rate From Students at UT*, ARS TECHNICA, Jan. 29, 2008, <http://arstechnica.com/news.ars/post/20080129-less-than-1-of-u-of-tennessee-students-hold-out-against-riaa.html> (last visited Mar. 16, 2008).

40. University of Kansas, ResNet and Illegal Downloading, <http://www.resnet.ku.edu/newpolicy.jsp> (last visited Mar. 16, 2008); Ohio University, Ohio University Announces Changes in File-Sharing Policies, Apr. 25, 2007, <http://www.ohio.edu/students/filesharing.cfm> (last visited Mar. 16, 2008); Stanford University Office of the General

connect students to the university network after they pay a hefty fine, the University of Kansas permanently disconnects its students from the network for the duration of their on-campus residence.⁴¹ Others, like the University of Wisconsin and the University of Maine, have refused to forward the pre-litigation letters.⁴² According to a University of Maine official, the University adopted this policy because it did not see it as the university's role to "serve papers on [its] students for another party," nor did it "feel that it is [its] obligation to be the [enforcement] arm of the RIAA."⁴³

Universities that do not pass along the settlement letters are then subpoenaed for the identities of their students.⁴⁴ The University of Oregon, represented by the Oregon Attorney General Hardy Myers, is fighting against such a subpoena for the identities of seventeen of its students.⁴⁵ In a reply brief, Myers argued that under the Family Educational Rights and Privacy Act (FERPA)⁴⁶ only students' directory information could be turned over short of a court order. He further argued that connecting an IP address to a student is personally identifiable information and that the student's privacy would be violated if the university were to identify the students at issue.⁴⁷ Moreover, Myers stated that the RIAA's investigative tactics might have allowed it to obtain "private, confidential information unrelated to copyright infringement."⁴⁸ It is doubtful that Myers' arguments will be successful, as similar privacy arguments have met with little suc-

Counsel, Student DMCA Complaint Policy & Reconnection Fee, http://www.stanford.edu/dept/legal/Recent/DMCA_Reconnect_fee_Final1007.pdf (last visited Mar. 16, 2008).

41. University of Kansas, *supra* note 40; Gil Kaufman, *Campus Crackdowns: Universities Imposing Harsh Penalties For Illegal Downloaders*, MTVNEWS.COM, Aug. 21, 2007, <http://www.mtv.com/news/articles/1567539/20070821/index.jhtml> (last visited Mar. 16, 2008).

42. Nick Penzenstadler, *UW Warns Music Sharers*, BADGER HERALD, Mar. 19, 2007, available at http://badgerherald.com/news/2007/03/19/uw_warns_music_share.php; Tony Reaves, *UMS Refuses To Hand Student Info To RIAA*, MAINE CAMPUS, Mar. 26, 2007, available at <http://media.www.mainecampus.com/media/storage/paper322/news/2007/03/26/News/Ums-Refuses.To.Hand.Student.Info.To.Riaa-2792041.shtml>.

43. Reaves, *supra* note 42.

44. See, Duke University Dean of Students - Division of Student Affairs, Filesharing, <http://deanofstudents.studentaffairs.duke.edu/filesharing/index.html> (last visited Mar. 16, 2008).

45. Adam Liptak, *In the Heated Fight Over Music Piracy, a Rare Stand for Privacy*, N.Y. TIMES, Dec. 31, 2007, at A11.

46. See 20 U.S.C. § 1232(g) (2006).

47. *Oregon Attorney General Fires Back at RIAA P2P Tactics*, CONSUMER ELECTRONICS DAILY, Dec. 3, 2007, 2007 WLNR 24030233.

48. Liptak, *supra* note 45.

cess in other cases.⁴⁹ In another recent case, a University of Tennessee student invoked a similar privacy argument to quash an RIAA subpoena.⁵⁰ However, the District Court in Tennessee denied the student's motion on the grounds that the student's name, address, and telephone number were defined by the University of Tennessee's FERPA policy as directory information and did not need the student's consent to be released to third parties.⁵¹

C. Prospects of Success

Despite its aggressive tactics, no clear set of statistics or signs indicates that the RIAA's efforts against direct infringers have been effective in fulfilling its mission to "bring [infringement] to a level of manageable control so a legitimate marketplace can really flourish."⁵² The RIAA states that it prefers to sue businesses, not individuals, who profit from facilitating copyright infringement, but has turned to suits against individuals to educate and drive home the fact that music piracy is illegal.⁵³ Although these tactics might clearly express this view, they have come at a cost to the RIAA's reputation. The RIAA's suits against direct infringers have resulted in negative publicity because of the general unpopularity of the suits, especially those against innocent and deceased individuals, and the outcry of civil rights organizations and public interest groups.⁵⁴

49. *Id.*

50. Eric Bangeman, *U of Tennessee Student Says RIAA Subpoena Violates Federal Privacy Law*, ARS TECHNICA, Aug. 23, 2007, <http://arstechnica.com/news.ars/post/20070823-uof-tennessee-student-says-riaa-subpoena-violates-federal-privacy-law.html> (last visited Mar. 16, 2008).

51. *Virgin Records Am., Inc., et al. v. Does 1-33*, No. 3:07-CV-235, 2007 U.S. Dist WL 3145838, at *2-3 (E.D. Tenn. Oct. 24, 2007). For a more detailed look at the implications of intellectual property enforcement on privacy rights, see Sonia K. Katyal, *Privacy v. Piracy*, 7 YALE J. L. & TECH. 222 (2004-2005).

52. RIAA FAQ, *supra* note 12. Critics of the RIAA argue that its tactics are merely fueling the development of new darknet technologies such as private P2P circles and other technologies that are harder for the RIAA to monitor and infiltrate. ELECTRONIC FRONTIER FOUNDATION, *RIAA v. THE PEOPLE: FOUR YEARS LATER* (2007), <http://www.eff.org/riaa-v-people>.

53. RIAA FAQ, *supra* note 12.

54. See Kristina Groennings, Note, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH L.J. 571, 589-590 (2005); see also Eric Bangeman, *I Sue Dead People . . .*, ARS TECHNICA, Feb. 4, 2005, <http://arstechnica.com/news.ars/post/20050204-4587.html> (noting that the RIAA sued a deceased woman for copyright infringement) (last visited Mar. 16, 2008); Jari Ketola, *RIAA Withdraws Charges Against 65-Year Old*, AFTERDAWN.COM, Sept. 26, 2003, <http://www.afterdawn.com/news/archive/4529.cfm> (noting that the RIAA sued an innocent elderly woman for downloading rap songs) (last visited Mar. 16, 2008); Jefferson Graham, *Recording Indus-*

Furthermore, these suits are costly.⁵⁵ The RIAA must pay SafeNet, as well as its own legal team, to investigate infringement and pay the legal fees associated with initiating the lawsuits. During *Capitol v. Thomas*, Jennifer Pariser, head of Sony BMG's litigation department, testified that though record companies are spending millions on lawsuits against direct infringers, they have "lost money on this program."⁵⁶ Furthermore, Pariser testified that Sony BMG has no idea of the actual damages they are suffering due to downloading.⁵⁷ While it may seem counterintuitive that the RIAA, and the record labels and copyright holders it represents, would support the spending and subsequent loss of such large amounts of money, these copyright holders' goals are more than merely stopping people like Jammie Thomas from downloading songs. Ultimately, their long-term goals are to educate and change social norms with regards to copyright infringement and to convey the message that infringement is a wrong with consequences that will be enforced.⁵⁸ In the near term, the RIAA's willingness to take defendants such as Thomas to trial encourages accused infringers to settle with the RIAA upon receiving pre-litigation letters, which cost the RIAA far less than a trial.

Perhaps these efforts are having at least some effect in shaping the next generation of music consumers. A recent survey revealed that increasing numbers of teens are buying music from online services, up eight percent from last year, and that the market share of P2P has fallen by eight

try *Sues Parents*, USA TODAY, Sept. 14, 2003, at 4D, available at http://www.usatoday.com/life/music/news/2003-09-14-riaa_x.htm (noting that the RIAA sued a twelve-year-old girl in New York City housing project).

55. According to a 2003 American Intellectual Property Law Association's (AIPLA) economic survey, the median total costs of copyright infringement suits is as follows:

Low-Stakes Case	(<\$1 million)
Thru Discovery	\$101,000
Thru Trial and Appeal	\$249,000
Medium-Stakes Case	(\$1-\$25 million)
Thru Discovery	\$298,000
Thru Trial and Appeal	\$499,000
High-Stakes Case	(>\$25 million)
Thru Discovery	\$501,000
Thru Trial and Appeal	\$950,000

Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, n.121 (May 2004).

56. Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, ARS TECHNICA, Oct. 2, 2007, <http://arstechnica.com/news.ars/post/20071002-music-industry-exec-p2p-litigation-is-a-money-pit.html> (last visited Mar. 16, 2008).

57. *Id.*

58. RIAA FAQ, *supra* note 12.

percent.⁵⁹ Further, despite the bad publicity and the costly nature of pursuing direct infringers, the RIAA shows no sign of slowing down. Other trade associations, such as the Motion Picture Association of America (MPAA) and the Business Software Association (BSA), have engaged in civil suits against direct infringers but on nowhere near the scale of the RIAA.⁶⁰ But they are sure to be closely monitoring the progress, if any, of these lawsuits in alerting society to the legal consequences of file sharing. While suits against direct infringers may not be the best public relations move, their controversial nature ensures that copyright infringement and its legal consequences receive continual news coverage. Irrespective of how effective these particular tactics turn out to be in the long run, the RIAA, the MPAA, and the BSA are all increasing their copyright enforcement efforts along criminal and international lines.

III. CRIMINAL COPYRIGHT ENFORCEMENT

This Part examines recent activity regarding provisions that allow for criminal enforcement of copyright. Section III.A looks at the relationship between copyright holders and the government agencies charged with pursuing criminal copyright infringers. Section III.B examines various joint efforts between copyright holders and law enforcement, with special detail given to the largest piracy scheme uncovered to date, Operation Remaster. Lastly, Section III.C considers the effectiveness of criminal enforcement tactics and their relation to the civil enforcement tactics discussed in Part II.

A. Basics of Criminal Copyright Enforcement

1. *The Statutory Basis: 17 U.S.C. § 506*

Section 506 of the Copyright Act provides criminal sanctions for willful copyright infringement. According to the statute:

Criminal copyright infringement occurs when someone willingly infringes a copyright:
for commercial advantage or financial gain;

59. Antony Bruno, *Report: Teens Moving From P2P to Paid*, BILLBOARD, Oct. 20, 2007, http://www.billboard.biz/bbbiz/content_display/industry/e3ib81ef268e9ef9966f958b982e713a769.

60. *Compare* Electronic Frontier Foundation, MPAA v. The People, http://w2.eff.org/IP/P2P/MPAA_v_ThePeople/ (last visited Apr. 6, 2008) (documenting twelve suits by the MPAA against individuals), *with* Index of Litigation Documents, Recording Industry v. The People, <http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html> (last visited Apr. 20, 2008) (documenting over 100 suits by the RIAA against individuals).

by the reproduction or distribution, including electronically, during a 180-day period, of one or more copies of a copyrighted work having a total retail value more than \$1,000; or

by distributing a work being prepared for commercial distribution via a computer network, to the general public, if that person knew or should have known the work was meant for commercial distribution.⁶¹

These three copyright crimes have three common factors: 1) there must be a copyright; 2) there must be an infringement; and 3) the infringement must be willful.⁶²

According to the United States Department of Justice (DOJ), while civil enforcement may compensate rights-holders, criminal sanctions for copyright infringement are “warranted to punish and deter the most egregious violators: repeat and large-scale offenders, organized crime groups, and those whose criminal conduct threatens public health and safety.”⁶³ However, the scale of criminal enforcement of copyright crime pales in comparison to civil enforcement efforts. The DOJ only files about 100 criminal cases on intellectual property per year, including the trafficking of FBI Anti-Piracy labels, criminal copyright infringement, and the trafficking of counterfeit CDs and DVDs.⁶⁴

2. *Industry Participation*

A key component of criminal copyright enforcement is the cooperation of companies and trade associations like the RIAA, MPAA, and BSA, in identifying criminal infringers. The BSA uses several techniques to identify and locate infringers, including using software to identify sites selling copyrighted software without authorization⁶⁵ and offering rewards up to \$1 million for employees to anonymously report their employer’s use of unlicensed or counterfeit software.⁶⁶ Similarly, the RIAA employs a team of specialists and a 24-hour automated webcrawler to comb the Internet

61. 17 U.S.C. § 506(a)(1)(A)-(C) (2006).

62. U.S. DEP’T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES 17 (3d ed. 2006), available at <http://www.usdoj.gov/criminal/cybercrime/ipmanual/ipma2006.pdf> [hereinafter DOJ PIPC Manual].

63. *Id.* at 5-6.

64. JOHN GANTZ & JACK B. ROCHESTER, THE PIRATES OF THE DIGITAL MILLENNIUM 207-208 (2005).

65. *Id.* at 215.

66. *Software ‘Police’ Accused of Targeting Small Businesses*, FOXNEWS.COM, Nov. 28, 2007, <http://www.foxnews.com/story/0,2933,312948,00.html> (last visited Mar. 16, 2008).

for websites that make illegal recordings available.⁶⁷ They then turn over large-scale violations to the DOJ.⁶⁸

Once a case is under the control of law enforcement, the DOJ has a three-front approach “to ensure aggressive and effective prosecution.”⁶⁹ First, the DOJ Criminal Division’s Computer Crime and Intellectual Property Section (CCIPS) investigates and prosecutes both national and international copyright infringement.⁷⁰ CCIPS consists of expert IP prosecutors who help develop and execute the DOJ’s IP enforcement strategy and train Assistant U.S. Attorneys.⁷¹ Second, every one of the ninety-four U.S. Attorneys’ Offices has at least one, if not several, Computer Hacking and Intellectual Property (CHIP) Coordinators.⁷² These CHIP Coordinators are Assistant U.S. Attorneys specially trained in IP prosecution. As of 2006, there were 230 such CHIP prosecutors nationwide.⁷³ Third, twenty-five CHIP units have been strategically placed in areas that experience a large number of IP crimes, such as the manufacturing and trafficking of counterfeit CDs, DVDs, and FBI Anti-Piracy labels.⁷⁴ Each unit consists of a concentrated number of Assistant U.S. Attorneys trained in prosecuting high-tech and IP offenses in addition to training regional prosecutors and federal agents.⁷⁵ In all, there are eighty such CHIP Assistant U.S. Attorneys in addition to over 150 CHIP prosecutors in other districts and DOJ divisions.⁷⁶

Notably, the DOJ and the trade associations seem to be pursuing the same goals in copyright enforcement on both the criminal and civil levels. According to the DOJ, the enforcement of IP laws is a high priority both because of the importance of intellectual property to the national economy as well as the scale of intellectual property theft.⁷⁷ Much like the RIAA suing individual infringers, the DOJ cites what it calls “the deterrent effect of prosecution” as another justification for the criminal prosecution of copyright infringement, explaining that the more investigations and prose-

67. DAVID J. MOSER, MUSIC COPYRIGHT FOR THE NEW MILLENNIUM 71 (2002).

68. *Id.*

69. DOJ PIPC MANUAL, *supra* note 62, at 6.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 7.

77. *Id.* at 309.

cutions, the “more individuals will be deterred from committing intellectual property offenses.”⁷⁸

B. Criminal Enforcement Efforts

1. Operation Remaster

A prime example of the collaboration between criminal and civil agencies to enforce copyright owners’ rights is Operation Remaster. After a two-year undercover investigation, federal law enforcement officials raided thirteen California and Texas locations on October 5, 2005, seizing over 494,000 CDs, 1 million CD inserts, thousands of DVDs and stampers capable of producing more than 300 million pirated counterfeit CDs and DVDs.⁷⁹ Operation Remaster shut down the largest piracy scheme uncovered to date⁸⁰ and led to the first prosecution of replicators⁸¹ in the Northern District of California.⁸² The operation was a joint effort between the DOJ, the FBI, the RIAA, Symantec Corp, Adobe Systems, Inc., and the MPAA.⁸³ Court documents show that crucial information leading to the raid was obtained from a cooperating witness who had pleaded guilty to

78. *Id.* at 311.

79. Press Release, U.S. Dep’t of Justice, Remaining Two Defendants Sentenced In Largest CD and DVD Manufacturing Piracy and Counterfeiting Scheme Prosecuted In the United States to Date (Aug. 6, 2007), <http://www.usdoj.gov/criminal/cybercrime/wenSent.htm> (last visited May 25, 2008) [hereinafter Remaining Two Defendants]. Stampers are the molds used to replicate optical discs like CDs and DVDs. Thomas G. Bifano, et. al, *Precision Manufacture of Optical Disc Master Stampers*, 20 PRECISION ENGINEERING 53 (1997), available at <http://www.sciencedirect.com/> (search “Author” for “Bifano”).

80. Press Release, U.S. Dep’t. of Justice, Final Defendant Charged Pleads Guilty in Largest CD Manufacturing Piracy Scheme Uncovered in United States to Date (May 22, 2006), <http://www.usdoj.gov/criminal/cybercrime/zhaiPlea.htm> [hereinafter Final Defendant].

81. According to court documents, piracy conspiracies often involve geographically separate businesses that secretly handle different stages of the pirating process. Brokers solicit the orders of copyrighted works, while replicators have the equipment to manufacture hundreds of thousands of CDs. Printers and packagers are responsible for making the infringing work appear legitimate by assembling the CD case, booklet, and artwork into a completed CD/DVD package that almost exactly resembles the copyrighted work. *Operation Remaster: Grand Jury Indicts Three*, TECH. NEWS DAILY, Oct. 13, 2005, <http://www.technologynewsdaily.com/node/1518> (last visited Mar. 16, 2008).

82. Susan Butler, *Seizures (Legal Matters)*, BILLBOARD, Oct. 29, 2005, available at <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4555134-1.html>.

83. Remaining Two Defendants, *supra* note 79.

criminal copyright infringement the year prior and signed a plea agreement to provide assistance to law enforcement agencies.⁸⁴

The ringleader, Yaobin “Ben” Zhai, and two other participants were indicted in charges of criminal copyright infringement, conspiracy, and aiding and abetting.⁸⁵ Zhai was the principal owner of two companies in Hayward, California where the replication of the copyrighted works occurred.⁸⁶ According to the DOJ, replicators like Zhai are “the leaders and directors of piracy and counterfeiting schemes, [responsible for] the mass reproduction of copyrighted works that are then distributed around the country through retail networks.”⁸⁷ The equipment used by Zhai and other replicators costs hundreds of thousands of dollars and can manufacture CDs or DVDs in the tens to hundreds of thousands extremely quickly.⁸⁸ In August 6, 2007, Zhai was sentenced to thirty-seven months in prison, a three-year term of supervised release, a \$500 mandatory special assessment, and a \$6.9 million bill for restitution.⁸⁹ The remaining two defendants were sentenced to the same amount of prison time and supervised release, but were only assessed \$125,000 in fines.⁹⁰

2. *Other Efforts*

Operation Remaster is only the most recent of several “joint ventures” between federal law enforcement agencies and the RIAA, MPAA, and BSA. An earlier investigation, Operation Fastlink, joined together law enforcement from ten different countries working to dismantle some of the most prolific online piracy organizations.⁹¹ Furthermore, in May 2005, the first criminal enforcement action targeting copyright infringement on P2P networks, Operation D-Elite, involved a joint investigation by Immigration and Customs Enforcement, the MPAA, and the FBI.⁹² The DOJ specially cites the assistance of the BSA, MPAA, RIAA, and the Entertain-

84. *Id.*

85. Final Defendant, *supra* note 80.

86. *Id.*

87. Remaining Two Defendants, *supra* note 79.

88. *Id.*

89. *Id.*

90. *Id.*

91. Press Release, U.S. Dep’t of Justice, Justice Department Announces International Internet Piracy Sweep (June 30, 2005), http://www.usdoj.gov/opa/pr/2005/June/05_crm_353.htm (last visited May 25, 2008).

92. Press Release, U.S. Dep’t of Justice, Federal Law Enforcement Announces Operations D-Elite, Crackdown on P2P Piracy Network (May 25, 2005), http://www.usdoj.gov/opa/pr/2005/May/05_crm_291.htm.

ment Software Association (ESA) for their assistance in these and other operations.⁹³

The MPAA has also worked with local officials to combat the illegal videotaping of films in movie theaters. In May 2007 the city of New York increased the penalty for illegal videotaping from a violation on the same level of “a ‘dirty sidewalk’ ticket from the Department of Sanitation” to a misdemeanor crime.⁹⁴ Part of the City and the MPAA’s new enforcement campaign is an expansion of the “liaison relationship” between the MPAA and the New York City Police Department to include not only the MPAA locating distribution points for infringing works but also the MPAA’s assistance in planning and executing raids on vendors.⁹⁵ Further, the MPAA, NYPD, and other city organizations have worked to identify buildings where suspected DVD piracy operations may be located and taken legal action against the owners of those buildings who knowingly allow the infringement operations to remain on the property.⁹⁶

The Business Software Alliance, for its own part, has pursued large institutional end users, rather than individuals.⁹⁷ The targeting of large institutional infringers, rather than individual home users, is tied to the low value home users put on software, thereby implying much smaller gains from forcing the use of legitimate software in comparison to the larger gains to be obtained from enforcement against large institutions.⁹⁸ Further, the BSA has urged Congress to enact legislation to give the DOJ more funding for its criminal intellectual property enforcement, “treat cyber crime as organized crime,” and increase penalties.⁹⁹

93. Press Release, U.S. Dep’t of Justice, Justice Department Announces International Internet Piracy Sweep: ‘Operation Fastlink’ (Apr. 22, 2004), http://www.usdoj.gov/opa/pr/2004/April/04_crm_263.htm.

94. The City of New York, Mayor’s Office of Film, Television, and Broadcasting, Mayor Bloomberg and MPAA Unveil Anti-Video Piracy Campaign, May 2, 2007, http://www.nyc.gov/html/film/html/news/050107_mayor_bloomberg_mpaa.shtml (last visited Apr. 6, 2008).

95. *Id.*

96. P2P.net, New York City, MPAA, ‘Piracy’, Oct. 30, 2006, <http://www.p2pnet.net/story/10259> (last visited Apr. 6, 2008).

97. Rick Harbaugh & Rahul Khemka, *Does Copyright Enforcement Encourage Piracy?* (Claremont Colleges Working Papers, No. 2000-14, 2001), available at <http://econ.claremontmckenna.edu/papers/2000-14.pdf>.

98. *Id.*

99. Statement of Neil McBride, BSA Vice President, at the DOJ Intellectual Property and Cyber Crime Enforcement Forum, Business Software Alliance, Mar. 28, 2008, <http://www.bsa.org/country/News%20and%20Events/News%20Archives/en-03282008-mcbride-doj.aspx>.

C. The Outlook for Criminal Enforcement

Despite these increased efforts aimed towards criminal copyright enforcement, it is difficult to ascertain success; it is uncertain how many other organized replication syndicates exist within the United States. Increasingly, industry associations are working with law enforcement officials to directly pursue criminal infringers. In recent years, the DOJ's three-front approach "to ensure aggressive and effective prosecution"¹⁰⁰ has led to a 90% increase in the number of individuals prosecuted as well as a 50% increase in convictions for IP offenses.¹⁰¹ Government enforcement officials have cited the rise of IP crime as the reason for increased enforcement.¹⁰² Yet the role of industry associations in facilitating these enforcement efforts and in lobbying for increased penalties raises numerous questions as to whether taxpayers are in effect subsidizing these private associations' enforcement agendas. The collaboration of private industries and public agencies is, in that sense, steering government enforcement efforts towards the issues and crimes the RIAA, the MPAA, and the BSA wish to pursue.

IV. INTERNATIONAL ISSUES: CHALLENGES IN CHINA AND BEYOND

This Part examines international copyright enforcement generally, and then turns to China as a particularly challenging area for enforcement.

100. DOJ PIPC MANUAL, *supra* note 62, at 6.

101. Press Release, Bus. Software Alliance, Government and Industry Collaboration Vital to Crack Down on Criminal Counterfeiting and Piracy (May 23, 2007), <http://www.bsa.org/country/News%20and%20Events/News%20Archives/Government%20and%20Industry%20Collaboration%20on%20Criminal%20Counterfeiting%20and%20Piracy.aspx>.

102. *See, e.g.*, Prepared Remarks of Attorney General Alberto R. Gonzales at the U.S. Chamber of Commerce, June 20, 2006, *available at* http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_0606201.html; *Prosecution of Intellectual Property Crimes and the 'STOP!' Initiative: Hearing Before the Subcomm. on Oversight of Gov't Mgmt, the Fed. Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Gov'tal Affairs*, 109th Cong. (2005) (statement of Laura H. Parsky, Deputy Assistant Attorney General), 2005 WL 1396295, *available at* <http://www.usdoj.gov/criminal/cybercrime/ParskyIPtestimony061405.htm>; Laura H. Parsky, Deputy Assistant Attorney General, Remarks at the Major Challenges of Intellectual Property Protection Conference in Rome, Italy (Oct. 14, 2004) (transcript at <http://www.usdoj.gov/criminal/cybercrime/parskySpeech.htm>); Statement by Attorney General Janet Reno at the Symposium of the Americas: Protecting Intellectual Property in the Information Age (Sept. 12, 2000) (transcript at <http://www.usdoj.gov/criminal/cybercrime/ipsymposium.htm>).

Section IV.A examines the general issues confronting those that wish to enforce U.S.-style copyright protections abroad. Section IV.A.1 examines the difficulties in reliably assessing the scope of international infringement. Section IV.A.2 surveys general issues with civil enforcement, while Section IV.A.3 identifies general issues with international criminal enforcement.

Section IV.B turns to China, an important locus of international copyright enforcement efforts.¹⁰³ Section IV.B.1 examines the scope of infringement activity in China. Section IV.B.2 looks at obstacles to enforcement in China. Section IV.B.3 looks at U.S. government efforts to curb infringement, while IV.B.4 looks at the efforts of industry groups. Finally, Section IV.B.5 assesses the prospects for stemming infringement.

A. Generally

1. *The Uncertain Scope of the Problem*

International copyright enforcement is central to halting the continued losses of the movie, music, and software industries as a result of copyright infringement. According to the BSA, software piracy cost the software industry just over \$39.5 billion globally in 2006.¹⁰⁴ Further, according to the MPAA, in 2005 the worldwide motion picture industry sustained \$18.2 billion in losses due to piracy.¹⁰⁵ However, the accuracy of industry-supplied figures has come into question in the past.¹⁰⁶ Industry associations cite losses to “illegal copying,” yet industry studies include “non-personal commercial backups” in their numbers, thereby inflating the losses they have sustained.¹⁰⁷ The methodology of calculating losses has been based in part on surveys of consumers that are then mapped to domestic and international populations.¹⁰⁸ Further, studies not only count the direct revenues of the content industries but also double- or triple-count

103. An exhaustive, country by country examination of international civil enforcement is outside of the scope of this Note.

104. BUS. SOFTWARE ALLIANCE, FOURTH ANNUAL BSA AND IDC GLOBAL SOFTWARE PIRACY STUDY 12 (2007), <http://www.bsa.org/globalstudy/upload/2007-Global-Piracy-Study-EN.pdf>.

105. Who Piracy Hurts: Economies, Motion Picture Association of America, http://www.mpa.org/piracy_WhoPiracyHurts.asp (last visited Mar. 16, 2008).

106. See *BSA or Just BS?: Software Piracy*, THE ECONOMIST, May 21, 2005, at 93, 2005 WLNR 8026746.

107. Ken Fisher, *The Problem with MPAA's Shocking Numbers*, ARS TECHNICA, May 5, 2006, <http://arstechnica.com/news.ars/post/20060505-6761.html>.

108. *Id.*

the additional revenue that flows to the industry suppliers, and then mischaracterize all of these figures as lost profits.¹⁰⁹

Although the actual losses sustained due to copyright infringement abroad are unclear, international IP protection is a large focus of both private entities and government agencies. Effective international IP protection is seen as allowing investors to recoup money expended on research and development as well as attracting more investment and stimulating economic development.¹¹⁰ Despite the harmonization of intellectual property rights with the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) in 1994, enforcement rates vary from country to country.¹¹¹ In addition not every country is a member of TRIPS. While 151 countries have signed on, as of 2007 there were still some countries that are important global economic participants, including Russia and Ukraine,¹¹² that were not yet members.¹¹³

2. *Civil Enforcement Activities*

International civil enforcement of copyrights is complicated by the numerous different legal regimes across the world. Furthermore, the territorial limits to intellectual property rights require that enforcement efforts are looked at on a country by country basis. The domestic law of each country governs its enforcement of intellectual property rights.

Article 41 of TRIPS sets out the performance requirements for member countries with regards to domestic enforcement of copyright law.¹¹⁴ TRIPS requires that WTO members ensure that enforcement procedures “are available under their [domestic] law so as to permit effective action against any act of infringement of intellectual property rights covered by

109. Posting of Tim Lee to The Technology Liberation Front, Another IPI Piracy Study, <http://techliberation.com/2007/08/25/another-ipi-piracy-study> (Aug. 25, 2007).

110. Chun Hsien-Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People's Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211 (2007).

111. *Id.*

112. In February 2008 Ukraine entered the final stages of ratifying the terms of its accession into the World Trade Organization thereby coming closer to signing onto TRIPs. Press Release, World Trade Organization, WTO Welcomes Ukraine as a New Member (Feb. 5, 2008), available at http://www.wto.org/english/news_e/pres08_e/pr511_e.htm.

113. Understanding the WTO—Members, World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 16, 2008).

114. JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 336 (2001).

[TRIPS].”¹¹⁵ In effect, member countries must establish domestic laws against copyright infringement to be enforced in domestic courts.¹¹⁶ This requirement does not, however, create any obligation to put in a separate judicial system for the enforcement of intellectual property rights distinct from country’s enforcement of law in general.¹¹⁷

Further, there can be a gap between legal obligations imposed by treaties or multilateral institutions, and actual implementation.¹¹⁸ Some countries are not effective at implementing any of their laws.¹¹⁹ The level of importance of IP laws and standards and their practical application will necessarily differ from country to country as a reflection of each country’s “national and legal cultures and historical experiences, languages, religions, economic development and prosperity, and ideologies/private sector-governmental relations.”¹²⁰ As a result, a country’s enforcement of copyright law has to be judged against its enforcement of law generally.¹²¹

Even assuming a country’s domestic laws contain adequate provisions for copyright infringement, copyright holders attempting to enforce their rights abroad run into several issues. Since national laws and practices of each country regarding intellectual property rights can differ despite recent trends toward harmonization, copyright owners seeking to enforce their rights in several international jurisdictions must do so with extreme care, considering the special circumstances of each jurisdiction.¹²² Moreover, there are “major substantive and procedural differences” between countries following the common law tradition, as in the United States, as opposed to countries following a civil law tradition, as in France.¹²³ It can be “quite difficult, expensive, and time-consuming to bring civil copyright

115. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 41, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125, 1213-14 (1994) [hereinafter TRIPS Agreement].

116. Kevin Fayle, *Sealand Ho! Music Pirates, Data Havens, and the Future of International Copyright Law*, 28 HASTINGS INT’L & COMP. L. REV. 247, 251 (2005).

117. JAYASHREE WATAL, *supra* note 114, at 337.

118. G. GREGORY LETTERMAN, BASICS OF INTELLECTUAL PROPERTY IN AN INTERNATIONAL CONTEXT 14-15 (2001).

119. *Id.* at 15.

120. *Id.*

121. JAYASHREE WATAL, *supra* note 114, at 337.

122. LETTERMAN, *supra* note 118, at 16.

123. *Id.* at 68.

infringement cases” considering the need to obtain local legal counsel to navigate unfamiliar court systems far away.¹²⁴

Such costly global policing efforts are being taken up either by very successful artists with the resources to bring suits abroad¹²⁵ or by the collective action of similarly situated IP owners and the private associations representing them. For instance, the International Federation of the Phonographic Industry (IFPI), the RIAA-affiliated global association representing recording industries worldwide,¹²⁶ filed 8,000 lawsuits in seventeen countries in 2006.¹²⁷ These suits, consisting of both civil and criminal actions, targeted Brazil and Mexico, and Poland for the first time, as well as fourteen other countries previously targeted by IFPI suits.¹²⁸ According to the IFPI, Brazil in particular was targeted because of the fall of record company revenues by half since 2000.¹²⁹ These suits against individuals, ranging from “a laboratory assistant in Finland to a German parson”¹³⁰ are in addition to the almost 2,000 suits previously filed by the IFPI against direct infringers outside of the United States in 2005,¹³¹ bringing the total number of suits brought to 13,000.¹³² The IFPI claims that some 2,300 cases have settled for about \$3,030.¹³³ The IFPI modeled its efforts on the

124. Maria Strong, *Copyright Enforcement: Basic Considerations and Strategies to Protect Copyrights Abroad*, in INTERNATIONAL TRADEMARKS AND COPYRIGHTS: ENFORCEMENT AND MANAGEMENT 67 (John T. Masterson, Jr. ed., 2004)

125. See Greg Sandoval, *Prince to Sue The Pirate Bay*, CNET NEWS, http://www.news.com/8301-10784_3-9814504-7.html (last visited Apr. 20, 2008) (discussing music artist Prince’s filing of civil lawsuits against “The Pirate Bay” in the U.S., France, and Sweden).

126. International Federation of the Phonographic Industry, IFPI’s Mission, http://www.ifpi.org/content/section_about/index.html (last visited Apr. 20, 2008).

127. Eric Bangeman, *IFPI Files 8,000 New File-Sharing Lawsuits*, ARS TECHNICA, Oct. 17, 2006, <http://arstechnica.com/news.ars/post/20061017-8001.html> (last visited Apr. 20, 2008).

128. Press Release, Recording Industry Launches Fresh Wave of Actions Against Illegal File-Sharing, International Federation of the Phonographic Industries, Oct. 17, 2006, http://www.ifpi.org/content/section_news/20061017.html.

129. Bangeman, *IFPI Files 8,000 New File-Sharing Lawsuits*, *supra* note 129.

130. Press Release, Recording Industry Launches Fresh Wave of Actions Against Illegal File-Sharing, *supra* note 128.

131. Press Release, Music File-Sharers Face Biggest Round of Legal Actions Yet; Many Are Already Counting the Costs, International Federation of the Phonographic Industries, Apr. 11, 2005, http://www.ifpi.org/content/section_news/20050412.html (stating that as of 2005 there were 11,552 total number of lawsuits internationally with 9,900 of those cases being brought in the U.S.).

132. Press Release, Recording Industry Launches Fresh Wave of Actions Against Illegal File-Sharing, *supra* note 128.

133. Bangeman, *IFPI Files 8,000 New File-Sharing Lawsuits*, *supra* note 127.

RIAA's efforts in the U.S., based upon the IFPI's perception that the RIAA lawsuits are successful in alerting consumers to the consequences of copyright infringement.¹³⁴ Despite the difficulties for individual copyright holders to bring civil suits internationally, civil suits brought by large industry associations with resources like the IFPI's are likely to continue and increase against direct infringers in countries worldwide.¹³⁵

3. *International Criminal Enforcement*

International criminal enforcement of intellectual property crimes is limited. Ronald K. Noble, Secretary General of Interpol, states that "[Intellectual property crime] is a low priority for law enforcement agencies and investigations are poorly resourced" in comparison to high priority issues affecting communities, such as illicit narcotics or counter-terrorism investigations.¹³⁶ These law enforcement agencies also lack generalized expertise "in recognizing and investigating counterfeit and pirated goods."¹³⁷ In a limited number of cases, U.S. law enforcement collaborates with foreign counterparts, providing such expertise; one example is Operation Fastlink, in which the DOJ worked with law enforcement from ten different countries to dismantle online piracy organizations.¹³⁸

In response to a perceived dearth of international enforcement, industry groups and organizations are working hard to make copyright infringement crimes a priority for both foreign law enforcement agencies, and for United States trade negotiators bargaining with foreign governments.¹³⁹

134. Matt Hines, *File-Sharing Lawsuits Go Abroad*, CNET NEWS, Mar. 30, 2004, http://www.news.com/2100-1027_3-5181872.html (last visited Apr. 20, 2008).

135. For a sample breakdown of the IFPI's country by country civil lawsuits, see Press Release, Breakdown of legal cases against illegal file-sharing, International Federation of the Phonographic Industries, Nov. 11, 2005, http://www.ifpi.org/content/section_news/20051115h.html.

136. *Intellectual Property Crimes: Are Proceeds From Counterfeited Goods Funding Terrorism?* H. Comm. on Int'l Relations, 108th Cong. (2003) (testimony of Ronald K. Noble, Secretary General, Interpol), available at <http://www.interpol.int/Public/ICPO/speeches/SG20030716.asp>.

137. *Id.*

138. Press Release, U.S. Dep't of Justice, Justice Department Announces International Internet Piracy Sweep (June 30, 2005), http://www.usdoj.gov/opa/pr/2005/June/05_crm_353.htm.

139. See, e.g., INTERNATIONAL ANTI-COUNTERFEITING COALITION, INC., SUBMISSION OF THE INTERNATIONAL ANTI-COUNTERFEITING COALITION, INC. TO THE UNITED STATES TRADE REPRESENTATIVE: SPECIAL 301 RECOMMENDATIONS (Feb. 12 2007), <http://www.iacc.org/resources/resources.php>.

There are many intellectual property rights agencies and groups focused on international copyright enforcement, including the International AntiCounterfeiting Coalition (IACC), the International Intellectual Property Alliance (IIPA),¹⁴⁰ and the RIAA-affiliated IFPI—whose recent efforts in Brazil, Mexico, and Poland included a criminal component.¹⁴¹ U.S. government agencies that work closely with industry groups include the National Intellectual Property Law Enforcement Coordination Council (NIPLECC),¹⁴² and the Office of the United States Trade Representative, which can apply pressure to countries in which enforcement is a problem.¹⁴³

Some scholars question the increasing role of these IPR agencies and industry associations in pressuring countries to conform to the standards of the industrial world given the “vast diversity of races, cultures, beliefs, ideals, philosophies, societies, and economies in the world.”¹⁴⁴ Furthermore, the increased pressure of these groups focused on ensuring that countries comply with its international obligations can create problems for local enforcement officials who may be pulled away from more pressing local enforcement issues such as counterfeit medicines.¹⁴⁵

140. The International Intellectual Property Alliance is a private coalition representing the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. It is composed of seven trade associations whose members represent 1,900 U.S. companies producing and distributing copyright-protected materials such as software, films, and CDs. Fact Sheet, International Intellectual Property Alliance, <http://www.iipa.com/aboutiipa.html> (last visited Mar. 7, 2008).

141. Press Release, Recording Industry Launches Fresh Wave of Actions Against Illegal File-Sharing, International Federation of the Phonographic Industry, Oct. 17, 2006, http://www.ifpi.org/content/section_news/20061017.html.

142. The NIPLECC is an interagency group created in 1999 by President Clinton. It is responsible for coordinating the United States' domestic and international intellectual property enforcement activities. NIPLECC—National Intellectual Property Law Enforcement Coordination Council Introduction, U.S. Patent & Trademark Office, <http://www.uspto.gov/web/offices/dcom/olia/globalip/niplecc.htm> (last visited Mar. 16, 2008).

143. See SUBMISSION OF THE INTERNATIONAL ANTI-COUNTERFEITING COALITION, *supra* note 139.

144. Jack Bishop, *Building International Empires of Sound: Concentrations of Power and Property in the “Global” Music Market*, 28 POPULAR MUSIC & SOC'Y 443, 465 (2005) (discussing the tension between developing and developed countries with respect to intellectual property rights enforcement).

145. Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491, 511 (2006).

B. Enforcement in China

China is the fourth largest economy in the world,¹⁴⁶ poised to become third largest,¹⁴⁷ and home to more than 1.3 potential consumers.¹⁴⁸ Furthermore, China is the world's second-largest and fastest growing personal computer market.¹⁴⁹ With such growth and opportunity, there is much concern over China's intellectual property enforcement regime. The Anti-Counterfeiting Coalition, NIPLECC and the IIPA have expressed particular concern with the enforcement of intellectual property rights in China.¹⁵⁰

1. Scope of the Problem

Despite anti-piracy campaigns in China and an increasing number of intellectual property rights cases in Chinese courts, overall piracy and counterfeiting levels in China were high in 2006.¹⁵¹ The sale of counterfeit goods in small retail shops like those in Beijing's Silk Street Market, cited by industry sources to be the most notorious market for copyright infringing goods, has increased.¹⁵² The China Small Commodities Market in Yiwu reportedly sells over 410,000 different items and is cited as a center for the wholesaling of infringing goods.¹⁵³ The Office of the United States Trade Representative (USTR) cites industry estimates that, in 2005, piracy was prevalent in eighty-five to ninety-three percent of copyright businesses in China.¹⁵⁴ Furthermore, according to the USTR, the share of intellectual property rights infringing products seized at the U.S. border originating in China increased to eighty-one percent in 2006 from sixty-nine percent in 2005.¹⁵⁵ Significantly, China, when considered together with Hong Kong's share (which the U.S. tracks separately), accounts for over

146. Keith Bradsher, *China Reports Another Year of Strong (or Even Better) Growth*, N.Y. TIMES, Jan. 25, 2006, at C5.

147. Jane Macartney, *China's Economy Heads to Global Third Place*, TIMESONLINE, Oct. 25, 2007, <http://business.timesonline.co.uk/tol/business/economics/article2738339.ece>.

148. Mikhaelle Schiappacasse, Note, *Intellectual Property Rights in China: Technology Transfers & Economic Development*, 2 BUFFALO INTELL. PROP. L.J. 164, 165 (2004).

149. David Kirkpatrick, *Inside China's PC Frenzy*, FORTUNE, Apr. 20, 2007, http://money.cnn.com/2007/04/19/technology/fastforward_china.fortune/index.htm.

150. Birnhack, *supra* note 145, at 511.

151. *Id.*

152. *Id.* at 7.

153. *Id.*

154. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT 18, http://www.ustr.gov/Document_Library/Reports_Publications/2007/2007_Special_301_Review/Section_Index.html. [hereinafter 2007 SPECIAL 301 REPORT]

155. *Id.*

eighty-five percent of infringing goods seized at the border, far more than any other U.S. trading partner.¹⁵⁶

2. *Obstacles to Copyright Enforcement in China*

The 2007 Special 301 report, which is an annual report published by the United States Trade Representative on the effectiveness of international property rights protection and compliance with the Special 301 provisions of the Uruguay Round Agreements Act of countries around the world, cites several key factors as the cause of China's lack of success in copyright enforcement.¹⁵⁷ In addition to China's underutilization of deterrent criminal remedies, which have led to the WTO dispute settlement proceedings, as discussed below, the report cites an absence of criminal penalties for certain infringing acts, as well as the requirement that a profit motive be shown to prove infringement, as additional legal obstacles.¹⁵⁸ Furthermore, the report cites high thresholds for initiating investigations and prosecuting criminal cases, lack of training, complaints by rights holders of corruption and lack of coordination, and an overall inadequate and non-transparent process.¹⁵⁹

a) Local Protectionism, Poor Coordination, and Agency Rivalries

While central Chinese authorities understand the relationship between China's economic development and strong copyright enforcement, effective enforcement is hampered by local protectionism and the limited influence of central Chinese authorities over local officials.¹⁶⁰ Rural communities play a large role in the manufacture, distribution, and consumption of pirated products.¹⁶¹ Local officials have little incentive to dismantle the trade in illegal goods that boosts their region's economic activities and local commerce.¹⁶² Furthermore, the complexity of laws and regulations related to copyright enforcement in China can result in overlapping jurisdiction among agencies.¹⁶³ As a result, two or more agencies with valid claims to jurisdiction in a case will compete for enforcement, resulting in bureaucratic rivalries as each agency attempts to assert its jurisdiction.¹⁶⁴

156. U.S. CUSTOMS AND BORDER PROTECTION, TOP IPR SEIZURES 2007 3-4, http://www.cbp.gov/xp/cgov/trade/priority_trade/ipr/seizure/trading/.

157. 2007 SPECIAL 301 REPORT, *supra* note 154, at 2, 17-19.

158. *Id.* at 19.

159. *Id.* at 19.

160. Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 822-24 (2006).

161. *Id.* at 822.

162. *Id.*

163. *Id.* at 824.

164. *Id.*

Agency rivalries such as these exist because the agency “can reap significant benefits from handling an intellectual property infringement case in the form of increased staffing, increased budgets, and income generated through fines and confiscations.”¹⁶⁵ As a result of this bureaucratic rivalry, there is a lack of cooperation between government agencies.¹⁶⁶

b) High Thresholds for Investigation and Prosecution

The United States has expressed concern that China’s “[e]xcessively high” legal threshold for launching criminal prosecutions, as well as high thresholds for the prosecution and conviction of intellectual property crimes, result in a safe harbor for pirates and counterfeiters.¹⁶⁷ Pirates and counterfeiters must merely structure their operations to fit below China’s threshold amounts for value, profit, or number of counterfeit or pirated copies in order to avoid the possibility of criminal sanctions.¹⁶⁸ These thresholds are so high that pirates and counterfeiters are still able to operate on a commercial scale.¹⁶⁹ Since criminal remedies are effectively circumscribed, China’s enforcement authorities instead rely on its administrative enforcement system.¹⁷⁰ Yet this administrative enforcement system relies primarily on small fines, administrative injunctions, and other minor inconveniences for infringers.¹⁷¹ Further, knowledge of basic IP concepts is lacking at the local enforcement level, and many judges do not have the technical or legal background to properly adjudicate IP cases.¹⁷² For these

165. *Id.*

166. *Id.*

167. Press Release, Office of the United States Trade Representative, Trade Delivers: WTO Case Challenging Weaknesses in China’s Legal Regime for Protection and Enforcement of Copyrights and Trademarks, at 3 (April 2007), http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file908_11061.pdf (last visited Mar. 16, 2008), at 1.

168. *Id.*

169. For instance, while China dropped its quantity threshold for the number of pirated or counterfeit copies from 1000 to 500, the threshold allows a retailer to have 499 counterfeit copies and still not face the possibility of criminal prosecution. *Id.*

170. OFFICE OF THE U.S. TRADE REP., 2006 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 70 (2006), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file688_10223.pdf.

171. *Id.*

172. Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection In the United States, Taiwan, and the People’s Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 245-46 (2007). The lack of a legal background for China’s judges stems from their direct appointment by the Communist Party and the lack of a requirement that these judges have a law degree or legal background. *Id.*

reasons, China lacks an effective criminal deterrent to significant commercial-scale infringement.¹⁷³

c) Lack of Protection for Works Awaiting Censors' Approval

Moreover, China's copyright law denies copyright protection to imported works that are awaiting censorship approval to enter the Chinese market.¹⁷⁴ During this pre-distribution censorship review period, which could potentially become permanent for works that fail the review, pirates and counterfeiters are able to exist legally. Hence, the sale of copies does not infringe copyright or incur civil or criminal copyright liability.¹⁷⁵ The continued maintenance of such import restrictions that reduce and delay market access for legitimate products, especially movies, video games, and books, inadvertently helps to ensure that infringing products continue to dominate those sectors within China.¹⁷⁶

3. *U.S. Government Efforts to Enforce WTO/TRIPS Obligations*

China joined the WTO on December 11, 2001.¹⁷⁷ As a WTO member, China is obligated to adhere to the provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement sets minimum standards for the protection and enforcement of copyrights in administrative, civil, and criminal actions.¹⁷⁸ Since joining the WTO, China has modified its legal regime in order to

173. China's lack of an effective criminal deterrent to commercial-scale piracy and counterfeiting is contrary to its obligations under Articles 41 and 61 of the TRIPS Agreement. Press Release, Office of the United States Trade Representative, Trade Delivers: WTO Case Challenging Weaknesses in China's Legal Regime for Protection and Enforcement of Copyrights and Trademarks, *supra* note 167, at 1.

174. *Id.* at 2.

175. *Id.*

176. 2006 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 170, at 70. Another concern of the U.S. is China's rules for disposal of copyright infringing goods seized by Chinese customs authorities. China's rules appear to permit those goods to be released into commerce once infringing features, such as fake labels, are removed, despite the fact that WTO rules dictate that these goods should be kept out of the market altogether. Press Release, United States Requests WTO Panel in Case Challenging Deficiencies in China's Intellectual Property Rights Laws, Office of the U.S. Trade Rep. (Aug 13, 2007), available at http://www.ustr.gov/Document_Library/Press_Releases/2007/August/United_States_Requests_WTO_Panel_in_Case_Challenging_Deficiencies_in_China's_Intellectual_Property_Rights_Laws.html.

177. Background Information on China's Accession to the World Trade Organization, Office of the United States Trade Representative (Dec. 11, 2001), http://www.ustr.gov/Document_Library/Fact_Sheets/2001/Background_Information_on_China's_Accession_to_the_World_Trade_Organization.html (last visited Mar. 16, 2008).

178. TRIPS Agreement, *supra* note 115, arts. 9-14.

better protect the intellectual property rights of domestic and foreign entities in China.¹⁷⁹ However, the United States has specific concerns that China is not meeting its TRIPS obligations in particular areas and that China is having little success in actually enforcing its laws and regulations in the face of widespread copyright piracy, counterfeiting, and other forms of infringement.¹⁸⁰

Despite cooperative efforts between the two countries to solve these problems, the China Copyright Alliance, an industry coalition including movie studios, producers, and the record industry, lobbied the Bush administration to file a formal legal complaint against China.¹⁸¹ The United States initiated a WTO dispute settlement in April 2007 over these matters.¹⁸² However, the WTO dispute settlement process often takes years to complete.¹⁸³ As such, U.S. government agencies are taking other routes for working with and pressuring China over the need to comply with the TRIPS Agreement.

One such route has been to increase and focus trade talks with China. Under Section 182 of the Trade Act of 1974 and the Special 301 Provisions of the Uruguay Round Agreements Act of 1994, the Office of the United States Trade Representative (USTR) must identify countries that deny adequate or effective protection for intellectual property rights or

179. Press Release, Office of the United States Trade Representative, Trade Delivers: WTO Case Challenging Weaknesses in China's Legal Regime for Protection and Enforcement of Copyrights and Trademarks, *supra* note 167, at 3, http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file908_11061.pdf (last visited Mar. 16, 2008). For a more comprehensive examination of changes to China's legal regime in order to comply with TRIPS, see Kate Colpitts Hunter, Comment, *Here There Be Pirates, How China is Meeting Its IP Enforcement Obligations Under Trips*, 8 SAN DIEGO INT'L L.J. 523 (Spring 2007).

180. 2006 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE *supra* note 170, at 70.

181. Edmund L. Andrews, *Piracy Move on China Seen as Near*, N.Y. TIMES, April 7, 2007, at C1.

182. As of August 2007, Japan, Canada, the EU, and Mexico have joined the dispute settlement, and the United States has initiated the next step in the WTO Dispute Settlement process—a request for the Establishment of a Dispute Settlement Panel. Dispute Settlement, *China—Measures Affecting the Protection & Enforcement of Intellectual Property Rights*, WT/DS362 (Jan. 22, 2008), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

183. Though the WTO sets target figures for the duration of the dispute settlement process, the system is flexible and WTO members are able to “stretch out” the resolution process, from anywhere from three to six years. Policy Statement, International Chamber of Commerce Commission on Trade and Investment, ICC Proposals for Improvements to the WTO Dispute Settlement Understanding, Mar. 7, 2003, <http://www.iccwbo.org/policy/trade/id563/index.html> (last visited Mar. 16, 2008).

deny fair and equitable market access for persons that rely on intellectual property protection.¹⁸⁴ Those countries with the most onerous or egregious acts, policies, or practices, and that have the greatest actual or potential adverse impact on relevant U.S. products, are designated as “Priority Foreign Countries.”¹⁸⁵ Officially categorizing a country, such as China, on the “Priority Watch List” increases the government’s bilateral attention to that country and allows the USTR to monitor that country’s compliance with bilateral IP agreements and apply sanctions for its failure to comply.¹⁸⁶ China remains on the 2007 Priority Watch List.¹⁸⁷ In addition to its WTO dispute settlement consultation with China, the United States also conducted a special provincial review during 2007 to examine China’s intellectual property rights protection and enforcement at the provincial level.¹⁸⁸

4. *Copyright Industry Actions in China*

Recently, copyright holders and the coalitions that represent them are exporting their U.S. copyright enforcement tactics to China in the hopes of making progress. This Section takes a look at their recent efforts.

a) Operation Summer Solstice

Operation Summer Solstice was the first joint investigation by U.S. federal law enforcement agencies and their Chinese counterparts. The operation began in 2005¹⁸⁹ when the FBI (which has had a liaison office in Beijing since 2002) and the People’s Republic of China’s Ministry of Public Security (MPS) became concerned that piracy disputes were putting Chinese-U.S. trade relationships at risk.¹⁹⁰ According to the BSA, counterfeit software accounts for eighty-two percent of the software used in per-

184. OFFICE OF THE U.S. TRADE REP., 2007 SPECIAL 301 REPORT, at 17, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf.

185. *Id.*

186. *Id.*

187. *Id.* at 18.

188. *Id.*

189. Press Release, Federal Bureau of Investigation—Los Angeles Div., International Investigation Conducted Jointly by FBI and Law Enforcement Authorities in People’s Republic of China Results in Multiple Arrests in China and Seizures of Counterfeit Microsoft and Symantec Software (July 23, 2007), <http://losangeles.fbi.gov/pressrel/2007/la072307.htm> [hereinafter FBI International Investigation].

190. Mure Dickie, *China Joins FBI in Piracy Operation*, FINANCIAL TIMES, July 24, 2007, *available at* <http://www.ft.com/cms/s/0/c1407788-3a0e-11dc-9d73-0000779fd2ac.html>.

sonal computers in China.¹⁹¹ In conjunction with the MPS and with the assistance of Microsoft, the FBI launched an investigation of the Ma Ke Pei organization, composed of multinational software pirates who manufacture and distribute copyright infringing software products worldwide.¹⁹² Microsoft's seventy-five-member anti-piracy team had been tracking the Chinese syndicate at the center of Operation Summer Solstice as far back as 2001, after bootleg disks turned up in California.¹⁹³ The MPS, FBI, and Microsoft investigators identified more than fourteen major producers and distributors located in Shenzhen who produced high-quality counterfeit software from several manufacturers, including Microsoft.¹⁹⁴ In China, the operation saw the arrest of twenty-five Chinese individuals, the raid of several businesses and residences in China, the seizure of assets worth over \$7 million dollars, and the seizure of over 290,000 counterfeit software CDs and certifications of authenticity (COAs) in China.¹⁹⁵ The FBI estimates that the counterfeit software seized had an estimated retail value of \$500 million.¹⁹⁶ In addition to the raids and seizures in China, the FBI's Los Angeles Field Office executed twenty-four searches and asset seizure warrants in Southern California seizing approximately another \$2 million in counterfeit software products.¹⁹⁷

Operation Summer Solstice also captured the leader of the Shanghai-based counterfeit ring, Ma Ke Pei. Previously, in 2003, Ma Ke Pei was indicted in New York for criminal copyright violations relating to the manufacture and distribution of counterfeit Microsoft products.¹⁹⁸ However, Ma fled the U.S. and returned to China where he allegedly continued his counterfeit operation by creating and directing an international organization to manufacture and distribute counterfeit Symantec software.¹⁹⁹ Many of the American-based distributors raided by the FBI's Los Angeles Field Office were allegedly being supplied by the Ma Ke Pei multinational criminal organization.²⁰⁰ According to estimates from Microsoft, the Ma Ke Pei criminal syndicate is responsible for manufacturing and distribut-

191. *Id.*

192. FBI International Investigation, *supra* note 189.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

ing more than \$2 billion worth of counterfeit Microsoft software over the lifetime of its criminal career.²⁰¹

b) Other Copyright Industry Actions in China

In addition to targeting illegal replicators of copyrighted works like those at the center of Operation Summer Solstice, industry associations signed an anti-piracy memorandum with the National Copyright Administration of China to protect movies, television programs, software, and literary works from piracy via the Internet in China.²⁰² Among the signatories were the Motion Picture Association (MPA, the worldwide analogue of the MPAA), the BSA, the Association of American Publishers, and the U.K.'s Publishers Association.²⁰³ According to an MPA study, movie studios lost \$6.1 billion to worldwide piracy in 2005, of which \$2.4 billion was lost to bootlegging, \$1.4 billion was lost to illegal copying, and \$2.3 billion to Internet piracy.²⁰⁴ Along with working with the Chinese government, the MPA's operations in Asia investigated more than 34,000 cases of piracy and assisted law enforcement officials in conducting over 10,500 raids in 2005.²⁰⁵ These raids and investigations resulted in the seizure of 34 million illegal optical discs, fifty-five factory production lines, thousands of optical disc burners, and the initiation of more than 8,000 legal actions across the Asia-Pacific region.²⁰⁶

5. *Prospects for Stemming Infringement in China*

While alliances between the private and governmental sectors have been successful at international copyright enforcement for criminal infringement, transnational organized crime groups are increasingly becoming involved in intellectual property crimes.²⁰⁷ The working partnership of industry and government must focus its attention on these large-scale commercial violations as a distinct problem within international copyright enforcement if it hopes to make a significant dent in copyright infringement.

201. Scott Bekker, *The Chinese Connection*, REDMOND CHANNEL PARTNER, Nov. 1, 2007, <http://rcpmag.com/features/article.aspx?editorialid=2362>.

202. Press Release, Motion Picture Association, National Copyright Administration of China Sign Anti-Piracy Memorandum with MPA (Dec. 16, 2006), http://www.mpa.org/press_releases/2006-12-16.pdf.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Maureen Walterbach, Comment, *International Illicit Convergence: The Growing Problem of Transnational Organized Crime Groups' Involvement in Intellectual Property Rights Violations*, 34 FLA. ST. U. L. REV. 591, 592-594 (2007).

Perhaps copyright holders wishing to stem infringement should also consider increasing their educational initiatives to raise awareness of intellectual property in local communities.²⁰⁸ In contrast with educational initiatives, civil lawsuits are less likely to be successful in China, due to the aforementioned ineffectiveness of the Chinese administrative judicial system when it comes to enforcing intellectual property rights.²⁰⁹ Yet copyright holders must acknowledge that the price differential between genuine and counterfeit goods in China is larger than neighboring countries, while its socioeconomic development lags behind.²¹⁰ Consumers care more about the price of their goods rather than their source, a fact that no educational initiative can change.²¹¹

Perhaps all that foreign businesses can really do is wait. Historically, nations become larger proponents of IP protections as their economies grow and their citizens create more intellectual property.²¹² As of now only 0.03% of Chinese companies own intellectual property for “key” technologies.²¹³ The Chinese government, in spite of political pressure, lacks the incentives to provide strong mechanisms for IP enforcement because its own domestic industries rely heavily on “imported IP assets to produce competitive goods for sale on the world market” and do not themselves “produce substantial IP assets requiring such protection.”²¹⁴

The key to international copyright enforcement may be to support Chinese copyright holders’ own domestic copyright enforcement, educate Chinese consumers and law enforcement officials about IP rights, and take on the organized crime syndicates in a major way. None of these three things alone will be able to change the influence of socioeconomic factors on copyright infringement levels. Nor will they necessarily provide strong

208. See Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT’L. & COMP. L. 143, 152 (2005) (arguing that education and not sanctions can improve IP enforcement in China).

209. For a further examination of how China’s administrative judicial system is flawed with respect to intellectual property rights enforcement) see Oliver Ting, Comment, *Pirates of the Orient: China, Film Piracy, and Hollywood*, 14 VILL. SPORTS & ENT. L.J. 399, 424-28 (2007).

210. Chun Hsien-Chen, *supra* note 172 at 244.

211. *Id.* at 245.

212. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 434-35 (2003) (comparing eighteenth-century America, twentieth-century China, and twenty-first century “cyberspace”).

213. YONGNIAN ZHENG & MINJIA CHEN, CHINA POLICY INST., CHINA PLANS TO BUILD AN INNOVATIVE STATE 12 (2006), http://www.nottingham.ac.uk/china-policy-institute/publications/documents/Briefing9_China_Innovative_State.pdf.

214. Chun Hsien-Chen, *supra* note 172 at 253.

incentives for the Chinese government to strength its IP regime. Without this strengthening, China will remain a problem for copyright enforcement for several years to come.

V. CONCLUSION

Copyright holders, largely through industry associations, are increasingly investigating and prosecuting direct infringers with the goal of changing social norms regarding copyright infringement. Additionally, these copyright holders and industry associations are expending large amounts of resources to build cases against criminal infringers in the U.S. and abroad, which they then turn over to law enforcement agencies. On the home front, stepping up criminal and civil enforcement actions sends a message to both those who profit from infringement and those who continue to perpetuate the notion that infringement is acceptable, whether malicious or not. It remains to be seen what effect these actions against direct infringers will have on the next generation's perception and actions regarding copyright infringement.

These private industry alliances with public agencies are changing the nature of copyright infringement in both positive and negative ways. These alliances are positive in that they bring the value of intellectual property rights to the forefront of government initiatives and awareness. Yet public-private enforcement alliances may be negative in that private industries with relatively narrow interests, rather than political bodies that represent citizens as a whole, are steering the agenda in such ways that have open them to serious criticism and a loss of good will with consumers.

Such issues play out both domestically and in China, the center of large efforts of copyright enforcement. China will remain a difficult area for intellectual property rights protection so long as it lacks sufficient incentives to strengthen its IP regime, its socioeconomic development is such that end-users prefer counterfeit goods, and knowledge of IP law remains low.

Nonetheless, the growing partnership between industry and government actors suggests that the number of copyright infringement actions—especially against direct infringers—will continue to grow in China, in the U.S., and throughout the world.