

**BOOTLEGS AND IMPORTS: SEEKING  
EFFECTIVE INTERNATIONAL  
ENFORCEMENT OF COPYRIGHT  
PROTECTION FOR UNAUTHORIZED MUSICAL  
RECORDINGS\***

I.	INTRODUCTION .....	170
A.	<i>Why Anti-Bootlegging Laws and Treaties Were Developed</i> .....	171
1.	<i>Technological Advancements in Recording</i> .....	172
2.	<i>Recognizable Effects of Sound Recording Advancements</i> .....	173
B.	<i>Comparing the Treaties and Agreements</i> .....	175
1.	<i>The Universal Copyright Convention</i> .....	175
2.	<i>The Berne Convention for the Protection of Literary and Artistic Property</i> .....	177
C.	<i>Neighboring Rights and Specific Phonorecording Protection Under the Rome and Geneva Conventions</i> .....	183
1.	<i>The Rome Convention</i> .....	183
2.	<i>The Geneva Convention</i> .....	185
D.	<i>The Uruguay Round of the General Agreement on Tariffs and Trade and the Resulting TRIPs Agreement</i> .....	186
II.	ANALYSIS .....	189
A.	<i>Has an International System of Enforcement Been Established?</i> .....	189
B.	<i>Problems With Enforcement</i> .....	192
1.	<i>The Enforcement Issues</i> .....	192
2.	<i>Locations and Instances of Enforcement Problems</i> .....	194
C.	<i>Enforcement Alternatives</i> .....	196
1.	<i>The Internet as a Safe Haven</i> .....	197
2.	<i>Web-Radio and MP3 Technology</i> .....	201
III.	CONCLUSION .....	207

---

\* Special thanks to the following people for their advice, support, criticism, and elbow grease as it relates to this paper: Emily Blunt, Jeff Colvin, Jeremy Roberts, Sarah Robins, Matt Waldrop, and William D. Walter.

## I. INTRODUCTION

In response to the swell of worldwide bootlegging and piracy of music, sound recordings, and motion pictures, several conventions have been held throughout the international community, resulting in anti-bootlegging treaties and laws.<sup>1</sup> These treaties and laws seek to establish a global system of copyright enforcement to curb the bootlegging problem.<sup>2</sup> This Comment will examine several of these international treaties and trade agreements, including the Berne Convention for the Protection of Literary and Artistic Works,<sup>3</sup> the Geneva<sup>4</sup> and Rome Conventions,<sup>5</sup> the Uruguay Round Agreements Act (Uruguay Round)<sup>6</sup>—trade negotiations under the General Agreement on Tariffs and Trade (GATT),<sup>7</sup> the Universal Copyright Convention,<sup>8</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).<sup>9</sup> Additionally, this Comment will address

---

1. See David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611, 633–637 (1995) (discussing the varying copyright protections sought by the enactment of the Universal Copyright Convention, the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the General Agreement on Tariffs and Trade).

2. See Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L J. L. 371, 373 (1997) (suggesting that these “new treaties and laws will show that artists and record companies have new tools with which to protect their rights—but only if they are able to effectively use those new tools”).

3. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised*, July 24, 1971, 828 U.N.T.S. 221 (as amended) [hereinafter Berne Convention].

4. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67 [hereinafter Geneva Convention].

5. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, October 26, 1961, 496 U.N.T.S. 44 [hereinafter Rome Convention].

6. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 2,108 Stat. 4809 (1994) (codified in scattered sections of 19 U.S.C.). “Historically, amendments to GATT have been called ‘negotiating rounds,’ the Uruguay Round takes its name from negotiations commenced in 1986 at Punta del Este, Uruguay.” Patterson, *supra* note 2, at 402 n.186 (citing David Nimmer, ESSAY, *The End of Copyright*, 48 VAND. L. REV. 1385, 1390–91 (1995)).

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 4 U.S.T. 639, 55 U.N.T.S. 194 [hereinafter GATT].

8. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, *revised*, July 24, 1971, 25 U.S.T. 1341 [hereinafter U.C. Convention].

9. Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—

whether these treaties actually establish an international system of copyright protection, and whether an international system of enforcement is the most effective approach to preventing bootlegging and piracy.

A. *Why Anti-Bootlegging Laws and Treaties Were Developed*

Many commentators refer to *Great White Wonder*, a two-record collection of previously unreleased Bob Dylan recordings from 1961, 1967, and 1969, as the first modern-era bootleg to have an impact on the artistic and financial concerns of musicians and their record companies.<sup>10</sup> It was, by industry standards, a poor quality recording—containing muffled, monaural, bass-heavy sounds—and was produced on a vinyl record carrying its own audible pops and crackles.<sup>11</sup> But rock and roll fans of that era, particularly those enamored with the legendary Bob Dylan, were so hungry for new music that sound quality remained a secondary consideration.<sup>12</sup> While the album became an underground craze, neither Dylan nor his exclusive record company, Columbia, played any part in its release or gained any of its considerable profits.<sup>13</sup>

1. *Technological Advancements in Recording*

Ironically, it was Bob Dylan who pointed out that “the times they are a-changin’.”<sup>14</sup> However, this was a reflection on the social changes of the sixties and seventies,<sup>15</sup> not a commentary on the technological advances in recording equipment that would make bootlegging much easier—and the resulting sound quality much better—as the end of twentieth century approached.<sup>16</sup> The advent of the portable tape recorder, the compact disc (CD), and most recently the digital audio tape (DAT) and recordable CD—which both offer

---

RESULTS OF THE URUGUAY ROUND VOL. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

10. See Schwartz, *supra* note 1, at 612–14; Patterson, *supra* note 2, at 371–72.

11. See Patterson, *supra* note 2, at 376–77.

12. See Schwartz, *supra* note 1, at 612 (observing that Bob Dylan fans paid for material he had recorded for his own use only).

13. See *id.*

14. See BOB DYLAN, *The Times They Are A-Changin'*, *BOB DYLAN'S GREATEST HITS* (Columbia Records 1964).

15. See generally *The Age of Rebellion 1964–1974*, LIFE, June 15, 1996, at 46.

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

high-fidelity digital recording and the promise of no loss of fidelity in subsequent copies<sup>17</sup>—now play a large part in driving the bootleg music industry.<sup>18</sup>

According to the Chief Counsel of the U.S. House Judiciary Subcommittee on Intellectual Property, the modern copyright industry has been most significantly affected by the development of digital recording technology.<sup>19</sup> To fully comprehend the danger of digital technology to copyright holders, it is important to distinguish it from traditional audio reproduction:<sup>20</sup>

An analog recording involves the physical tracing of the original sound directly and continuously into grooves on the storage medium by means of a “mechanical pickup”. Analog playback is accomplished by running a “stylus” [a/k/a “needle”] through the grooves and converting this movement into an electrical signal, which is then amplified. Because analog reproduction is a physical process, imperfections in the original work, such as cracks, pops and fuzz can diminish the sound quality of the copy.<sup>21</sup>

Digital reproduction on the other hand, uses a process called digitalization, which is not susceptible to the imperfections inherent in analog recordings:

Digitization is the process of electronically translating an original sound recording into a series of mathematical 1s and 0s, known as “bits,” and storing these bits on some form of digital medium, such as a computer hard-drive or a compact disc. Digital playback occurs when digital equipment reconverts the bits into sound, “with virtually no loss in quality from the original recording.”<sup>22</sup>

Analog media—records and cassette tapes—begin to lose audio quality through wear and tear, but digital recordings—

17. See CLINTON HEYLIN, *BOOTLEG: THE SECRET HISTORY OF THE OTHER RECORDING INDUSTRY* 242–43 (1994).

18. See *id.* at 242 (explaining that DAT was the “perfect bootlegging tool”).

19. See Teresa Riordan, *Digital Age to Trigger Copyright Adaptation*, COM. APPEAL, July 10, 1994, at 3C.

20. See Andrew S. Muroff, Comment, *Some Rights Reserved: Music Copyright in the Digital Era*, 1997 DET. C.L. REV. 1241, 1269.

21. *Id.* at 1269–70 (citations omitted).

22. *Id.* at 1270 (citations omitted).

CDs and DATs—yield consistent sound quality after repeated play.<sup>23</sup> Accordingly, the reliability of this digital medium, combined with the reproduction efficiency it brings to consumers, translates into profitability for bootleggers.<sup>24</sup>

## 2. *Recognizable Effects of Sound Recording Advancements*

In the entertainment industry, these technological advancements have led to copyright infringement issues; lost revenues in mainstream record sales; and hostility among artists, performers, and their production companies.<sup>25</sup> Often, the bootleggers are devoted fans who wish to capture a performance for their own private use.<sup>26</sup> However, they may also be underground sellers and distributors.<sup>27</sup> Because the latest technology enables bootleggers to achieve near-perfect quality recording and duplication, they are able to sell records that compete with professional studio recordings.<sup>28</sup>

On the international level, intellectual property—in the form of literary, musical, and visual media publication—is a chief export for many countries, generating billions for their

23. See Lawrence J. Glusman, *It's My Copy, Right? Music Industry Power to Control Growing Resale Markets in Used Digital Audio Recordings*, 1995 WIS. L. REV. 709, 713.

24. See Muroff, *supra* note 20, at 1270 (explaining how the digital medium has enhanced piracy).

25. See Patterson, *supra* note 2, at 374. The record industry argues that the sale and distribution of bootleg recordings prevents record companies from their due profits. Notably, the retail sales of studio albums are not necessarily thwarted by bootleggers of live concerts. Ultimately, record companies work to control an artist's output, and prefer to make the exclusive profits on any release of their contracted performer's work. See *id.* at 374 n.12 (citations omitted).

26. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (pointing out that a private, at-home videotaping of a nationally broadcast television program constituted fair use because it was a "non-commercial, non-profit activity").

27. See Linda W. Tai, *Music Piracy in the Pacific Rim: Applying a Regional Approach Towards the Enforcement of International Conventions*, 16 LOY L.A. ENT. L.J. 159, 161 (1995):

The pirating process usually originates in London or Los Angeles, where, for example, an employee of an international airline receives a copy of the latest album. Within twenty-four hours, that album is transported to a foreign production plant. Once there, legitimate importers must either ship in the records—taking up to two months—or air freight the records at great expense in order to gain, at most, a twenty-four hour edge over the pirates.

*Id.* (citations omitted).

28. See *id.* at 160–61.

respective economies.<sup>29</sup> Bootlegging deals a blow to these economies because it competes with, and often damages, mainstream music sales.<sup>30</sup> Additionally, bootlegger sales and distribution occur regularly over the Internet, so it is often difficult to trace and enforce bootlegging revenues through traditional marketing and accounting mechanisms, including, but not limited to, cash-flow methods, receipts, shipment invoices, order forms, and inventory tracking systems.<sup>31</sup>

Certain international treaties and conventions that are currently or were previously in place have failed to adequately protect copyrighted materials, resulting in additional enforcement issues.<sup>32</sup> Consequently, a few countries—namely China, Italy, Germany and Luxembourg—have become safe havens for bootleggers, because the amount of protection available for copyright holders in these countries is limited.<sup>33</sup> Furthermore, given the lack of a globally recognized and firmly enforced copyright law, it is arguable that “any country outside the United States could become a potential production site for bootlegs.”<sup>34</sup>

---

29. See generally Eric H. Smith, *Worldwide Copyright Protection Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 559 (1996) (emphasizing the effects of bootlegging and piracy on the economies of the United States and other nations around the globe).

30. See *id.* at 563.

31. See Fred Goodman, *Is MP3 the End of the Music Business?*, ROLLING STONE, Apr. 1, 1999, at 25, 25 (discussing the popularity of music duplication, trading and sales on the Internet, and the lack of a reliable delivery system that would enable record companies to track sales and receive royalties for downloaded tracks).

32. See Schwartz, *supra* note 1, at 642 (suggesting that the demand for bootlegged material far outweighs the effects of well-publicized raids and treaties enacted to close the bootlegging market).

33. See Patterson, *supra* note 2, at 389; Tai, *supra* note 27, at 163.

34. Patterson, *supra* note 2, at 389. “In 1985, for example, Live-Aid organizer Bob Geldof complained that 1.5 million copies of Live-Aid tapes had been illegally made in Indonesia while the Indonesian government remained indifferent to or even endorsed the practice.” *Id.* Moreover, the mere production, sale and distribution of bootlegs can escalate to issues more serious in nature than economic fairness. Geldof once stated that “purchasers of bootleg cassettes from Indonesia of the Live-Aid concerts were literally killing the Ethiopian refugees for whom proceeds from the concerts were intended.” Schwartz, *supra* note 1, at 638 (citing *Pirate Copies Trim Live Aid Income*, L.A. TIMES, Dec. 7, 1985, § 5, at 8).

B. *Comparing the Treaties and Agreements*

1. *The Universal Copyright Convention*

After World War II, the United States pushed the formation of the Universal Copyright Convention (U.C. Convention).<sup>35</sup> By means of its membership in the U.C. Convention, “the United States recognized the international copyright in sound recording.”<sup>36</sup> The U.C. Convention “was negotiated as a stop-gap measure to protect U.S. copyright interest temporarily . . . .”<sup>37</sup>

The current version of the U.C. Convention was ratified in Paris on July 24, 1971, and went into effect in the United States on July 10, 1974.<sup>38</sup> Article II, Section 1 of the convention maintains that “[p]ublished works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.”<sup>39</sup> Section 2 of Article II allows similar protection for unpublished works.<sup>40</sup> Despite the intended coverage of the treaty, the U.C. Convention has lacked effectiveness “in providing any sort of comprehensive copyright protection in the international arena.”<sup>41</sup> One commentator points out that the inadequate enforcement “stems from the international expansion of musical counterfeiting, piracy of sound recordings, and the bootlegging of live performances that have been the bane of the music industry” for decades.<sup>42</sup>

Because the U.C. Convention effectively limits member states to dealing with copyright infractions at the national level, the record industry must resort to traditional common law to address international bootlegging and piracy.<sup>43</sup> The wrinkles that have surfaced in the application and interpretation of the U.C. Convention have been smoothed out by other international copyright agreements, particularly

---

35. See Patterson, *supra* note 2, at 391.

36. Patterson, *supra* note 2, at 391. “In contrast, the Berne Convention failed to recognize the copyright in sound recording until the signatories revised the treaty in 1971. However, the United States did not ratify the Berne Convention until 1988.” *Id.* at 391 n.122.

37. CRAIG JOYCE ET AL., COPYRIGHT LAW §11.01, at 983 (3d ed. 1994).

38. See U.C. Convention, *supra* note 8, 25 U.S.T. at 1341.

39. *Id.* at 1345.

40. See *id.*

41. Patterson, *supra* note 2, at 391.

42. *Id.*

43. See *id.*

the Berne Convention.<sup>44</sup> For instance, the Berne Convention dispenses with formalities such as the copyright symbol (©), the name of the copyright proprietor, and the year of first publication, which the U.C. Convention requires.<sup>45</sup>

Although problems with the U.C. Convention may deter some countries from obtaining or continuing membership,<sup>46</sup> it is still a useful protection against bootleggers because nearly two dozen countries are members of the U.C. Convention, but not the Berne Convention.<sup>47</sup> However, as a consequence of the United States' withdrawal from the United Nations agency that administers the U.C. Convention,<sup>48</sup> American copyright holders have questioned the U.C. Convention's utility as a practical source of international copyright protection.<sup>49</sup> Accordingly, the recording industry now relies on the United States' adoption of the Berne Convention to provide the most comprehensive international copyright protection for sound recording, even though the U.C. Convention established sound recording protection for musical artists and record companies.<sup>50</sup>

## 2. *The Berne Convention for the Protection of Literary and Artistic Property*

Some commentators regard the Berne Convention as the most important treaty dealing with copyright issues.<sup>51</sup> The treaty was signed at Berne, Switzerland, on September 9, 1886,<sup>52</sup> and is the oldest multilateral copyright convention.<sup>53</sup> "This treaty resulted from a number of conferences culminating in the draft produced at the 1885 conference, which delayed the adoption of universally binding legislation

44. See *id.* at 391-92 (arguing that the Berne Convention provides more copyright protection).

45. See U.C. Convention, *supra* note 8, 25 U.S.T. at 1345; see generally Berne Convention, *supra* note 3; Patterson, *supra* note 2, at 391-92 (citing HEYLIN, *supra* note 17, at 51) (comparing the U.C. Convention with the Berne Convention).

46. See JOYCE ET AL., *supra* note 37, at 983 (noting that the United States has de-emphasized its U.C. Convention membership).

47. See *id.*; Patterson, *supra* note 2, at 392.

48. The United Nations Educational, Scientific and Cultural Organization (UNESCO) is the agency that presides over the U.C. Convention. See JOYCE ET AL., *supra* note 37, at 983.

49. See *id.*

50. See Patterson, *supra* note 2, at 392.

51. See Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate Its Development?*, 16 B.U. INT'L L.J. 165, 170 (1998).

52. See Berne Convention, *supra* note 3, at 223.

53. See JOYCE ET AL., *supra* note 37, at 981.

in favor of leaving decisions regarding the nature and scope of copyright protection for foreign authors up to the individual Member States.”<sup>54</sup> The underlying rationale was to ensure a flexible international body of law enabling more countries to join the Berne Convention,<sup>55</sup> and providing that “[a]uthors of literary and artistic works . . . shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”<sup>56</sup>

The Berne Convention effectively created a "Union" of member states “designed to protect the rights of authors in their literary and artistic works.”<sup>57</sup> The treaty establishes a system in which member states adopt, through their domestic laws, necessary measures that ensure the operation of the Berne Convention.<sup>58</sup> The levels of copyright protection offered by the treaty can differ, and may extend beyond the coverage suggested in its language.<sup>59</sup> Therefore, as one commentator suggests, “the division between protected and unprotected subject matter remains a question for national courts to decide.”<sup>60</sup>

---

54. Caviedes, *supra* note 51, at 170–71 (citations omitted).

55. See Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH 1, 14 (1988).

56. Berne Convention, *supra* note 3, at 239. Indeed,

It was not until the 1971 revision in Paris that the Berne Convention offered copyright protection to musical compositions and, only to a limited extent, sound recordings.

The only other Berne Convention provision relating to musical copyright is that “authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing . . . the public performance of their works.

Patterson, *supra* note 2, at 393 n.134.

57. Patterson, *supra* note 2, at 393 (citing Berne Convention, *supra* note 3, at 225).

58. See Berne Convention, *supra* note 3, at 277; VINCENT PORTER, COPYRIGHT AND INFORMATION LIMITS TO THE PROTECTION OF LITERARY AND PSEUDO-LITERARY WORKS IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES 6–7 (1992); Caviedes, *supra* note 51, at 171. “The Union’s aim to extend copyright protections available in one member country to all other member countries.” Anne Moebes, *Negotiating International Copyright Protection: The United States and the European Community Positions*, 14 LOY. L.A. INT’L & COMP. L.J. 301, 303 (1992).

59. See PORTER, *supra* note 58, at 7 (noting that Member States may grant copyright protection beyond that which is required by the Berne Convention).

60. Caviedes, *supra* note 51, at 171 (citing PORTER, *supra* note 58, at 7). Three ways in which member countries may limit the protection of literary or artistic work include:

a) to deny the work concerned the status of a literary or artistic work; b) to exempt from protection certain specified uses of the work; or c) to subject the use of a published work to a

The Berne Convention's provisions do not grant protection to a copyrighted work in the country of origin.<sup>61</sup> Instead, it provides for national treatment.<sup>62</sup> It is argued that any country may join the Berne Convention, but in order to be adequately protected by it, that country should be prepared to enact national legislation to meet the minimum standards set forth by the treaty.<sup>63</sup> One commentator suggests that there are several notable exceptions to the requirement of national treatment within the Berne Convention,<sup>64</sup> beginning with the nonexistence of a formality requirement.<sup>65</sup> The treaty also includes a provision for "material reciprocity with regard to protection periods in order to prevent works from being protected longer internationally than domestically."<sup>66</sup> However, because most member states honor the minimum fifty-year protection period established by the Convention,<sup>67</sup> this exception is rarely activated.<sup>68</sup> Finally, under the Convention "there are essentially ten principal intellectual property rights extended to authors . . . that are perceived as the minimum traditional rights to which authors should be entitled if the labor of their

---

compulsory licence [sic] under certain provisions laid down in the domestic law of the individual member country of the Union.

PORTER, *supra* note 58, at 10.

61. See Moebes, *supra* note 58, at 303.

62. See Caviedes, *supra* note 51, at 171 (arguing that copyright protection "falls under the ambit of domestic law"). In the case of a work published for the first time in a country that is a member of the Berne Convention, the country of origin is considered the country of first publication (or fixation). See Berne Convention, *supra* note 3, at 233. In the case of a work published simultaneously in several Member States in which each provide different levels of protection, the country of origin is the one granting the shortest term of protection. However, if the work is published simultaneously in a country outside the Member States and a country within the Union of Member States, the latter is considered to be the country of origin. See *id.*

63. See Patterson, *supra* note 2, at 393.

64. See Caviedes, *supra* note 51, at 172.

65. See Berne Convention, *supra* note 3, at 226 (referencing Article II, Section 2 of the Berne Convention). Individual contracting states can require formalities under their domestic copyright law, even though the Berne Convention itself does not require formalities. See *id.* "[W]hen the United States joined the Berne Convention in 1988, Congressional implementing legislation eliminated all formalities previously required to obtain a copyright." Patterson, *supra* note 2, at 394 (referring to the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988)).

66. Caviedes, *supra* note 51, at 172 (citing Berne Convention, *supra* note 3, at 237).

67. See Berne Convention, *supra* note 3, at 235.

68. See Caviedes, *supra* note 51, at 172.

authorship is to have any value at all.”<sup>69</sup> Unfortunately, even in light of these intellectual property provisions, “the Berne Convention fails to even address issues of piracy, counterfeiting, and bootlegging of musical works and recordings.”<sup>70</sup>

The Berne Convention is administered by the World Intellectual Property Organization (WIPO), headquartered in Geneva, Switzerland.<sup>71</sup> The WIPO is part of the United Nations system.<sup>72</sup> Its principal responsibility “is to conduct studies and provide services designed to facilitate protection of intellectual property.”<sup>73</sup> Additionally, the Director General and staff of the WIPO are charged with managing the International Union for the Protection of Literary and Artistic Works (Berne Union), established by the Berne Convention.<sup>74</sup>

It has been argued that “[c]urrently, the Berne Convention provides the broadest multilateral basis for international copyright protection.”<sup>75</sup> However, such a claim may be alluding to the century-long endurance of the treaty, rather than boasting of its ability to effectively “transpose copyright norms from international law into national legal systems.”<sup>76</sup> Berne’s attempt to implement an internationally construed copyright system into the domestic legislation of its Member States has resulted in a morass of conflicts within those states over the interpretation of the treaty’s provisions.<sup>77</sup> While the treaty is comprehensive in its endeavor toward copyright protection, on an international

---

69. *Id.*; PORTER, *supra* note 58, at 7. These rights are “moral rights, reproduction rights, translation rights, broadcasting and public communication rights, public recitation rights, adaptation rights, recording rights, cinematography rights, public performance rights, and the right of pursuit.” *Id.* However, these rights effectively are limited to the first eight, because the last two extend to dramatic and musical works, and to original works of art and original manuscripts of writers and composers, respectively. *See id.*

70. Patterson, *supra* note 2, at 395 (observing that both sound recordings and live performance in the provision on protected works of the Berne Convention are not mentioned); *see also* Berne Convention, *supra* note 3, at 227.

71. *See* JOYCE ET AL., *supra* note 37, at 985.

72. *See id.*

73. *Id.*

74. *See id.*

75. Patterson, *supra* note 2, at 394.

76. Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 373 (1998).

77. *See id.* at 374; Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPs Dispute Settlements?*, 29 INT’L LAW. 99, 106 (1995) (pointing out that national courts use their own constitutional law interpreting provisions of the Berne Convention).

level it fails to require the global community to enact provisions that truly enforce such protection.<sup>78</sup> Thus, Berne may be seen as “tolerant” of “disparate national approaches,” and lacking a firm hand over those Member States which deviate in significant ways from its requirements, “particularly where they fail to enforce copyright rules against private parties who infringe foreign copyrighted works.”<sup>79</sup>

Leniency and failures of enforcement under Berne throughout the eighties and early nineties led to an epidemic of commercial infringements of intellectual property rights in many developing nations.<sup>80</sup> One commentator suggests that this epidemic of infringement “went well beyond the outer margins of national discretion under Berne and constituted grave breaches of the treaty’s minimum standards.”<sup>81</sup> However, there have been few, if any, opportunities to challenge serious violations of the treaty internationally.<sup>82</sup> The Berne Convention allows for resolution of disputes between member states by the International Court of Justice (ICJ),<sup>83</sup> although no case has ever been brought before that court.<sup>84</sup> The general reluctance to litigate international copyright disputes in the ICJ may arise from a fear of burning bridges of trust and confidence between and among Berne member states.<sup>85</sup> Because of these recognized enforcement problems, “most of the Berne signatory nations currently support the protection and enforcement measures offered by GATT and the Uruguay Round Agreements Act.”<sup>86</sup>

Considering the United States’ presence as the world’s largest user and producer of copyrightable works, it has been argued that the Berne Convention is even more problematic when viewed from an American perspective.<sup>87</sup> The United States entered the Berne Convention in 1988 by enacting the

---

78. See Patterson, *supra* note 2, at 394.

79. Helfer, *supra* note 76, at 375.

80. See *id.*

81. *Id.*

82. See *id.*

83. See Berne Convention, *supra* note 3, at 275.

84. See Helfer, *supra* note 76, at 375–76 (examining the dispute settlement sections of Berne and concluding that such sections are “effectively worthless”).

85. See Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC’Y 121, 131 (1994) (explaining that challenges based on the Berne Convention are not brought to the ICJ “because the sued state would interpret the action as an unfriendly act”).

86. Patterson, *supra* note 2, at 394.

87. See *id.* at 395.

Berne Convention Implementation Act (BCIA).<sup>88</sup> The BCIA identifies differences between the legal traditions of European civil law countries and common law countries, particularly the United Kingdom and the United States.<sup>89</sup>

One shortcoming of the BCIA is its failure to recognize the “civil law’s moral rights element of copyright protection.”<sup>90</sup> This principle supports the author’s right “to object to any distortion, mutilation, or other modification of his work that would be prejudicial to his honor or reputation.”<sup>91</sup> Because the moral rights issue has traditionally received more representation in the laws of European countries,<sup>92</sup> “the EC Commission has recognized the variations in the laws of the EC Member States as well as among the members of the Berne Convention . . . .”<sup>93</sup>

### C. *Neighboring Rights and Specific Phonorecording Protection Under the Rome and Geneva Conventions*

#### 1. *The Rome Convention*

Prior to the Second World War, many Berne member states rallied to extend copyright protection to performing artists.<sup>94</sup> The Rome Convention, formally known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,<sup>95</sup> was the resulting multinational copyright agreement and was ratified by fewer than all the Berne members.<sup>96</sup>

---

88. See The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

89. See Patterson, *supra* note 2, at 395.

90. *Id.*

91. Anne Moebes, *Copyright Protection for Audiovisual Works in the European Community*, 15 HASTINGS COMM. & ENT. L.J. 399, 401 (1993).

92. See *id.* at 401 n.4 (listing Belgium, Denmark, France, Germany, Italy, Luxembourg, and the Netherlands as EC Member States with “moral rights” legislation in effect).

93. *Id.* at 401–02. “The EC Commission is the law-making institution created in 1957 by the Treaty Establishing the European Economic Community (EEC Treaty) to draft proposals for EC legislation. If a directive is adopted by the EC Council, all Member States must implement the directive into their own legislation, even if they do not approve of a given directive.” *Id.* at 401 n.5.

94. See Susan M. Deas, *Jazzing Up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law*, 20 HASTINGS COMM. & ENT. L.J. 567, 585 (1998).

95. See Rome Convention, *supra* note 5, at 44.

96. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 18.06[A][1][a], at 52 (1999) (indicating that the United States does not adhere to the Rome Convention).

Unlike the Berne Convention, the Rome Convention explicitly protects sound recordings and performers' rights, known as "neighboring rights,"<sup>97</sup> for a minimum of twenty years computed from the end of the year in which fixation, the performance, or the broadcast took place.<sup>98</sup> With respect to the specific issue of bootlegging, it is arguable that the grant of protection found in Article 7 of the Rome Convention is the most important provision in the treaty.<sup>99</sup> Article 7, Section 1, provides performers the possibility of protection against "fixation, without their consent, of their unfixed performance [or] the reproduction, without their consent, of a fixation of the performance."<sup>100</sup>

Like the Berne Convention, "the provisions of the Rome Convention are self-executing, with international disputes to be decided by the [ICJ] unless the parties involved in the dispute agree to another mode of settlement."<sup>101</sup> The EU Member States seek to protect neighboring rights through the Rome Convention but the United States has not adopted the treaty.<sup>102</sup> The "United States fails to recognize the distinction between *droits d'auteur* and *droits voisins*" unlike other countries that have adopted the Rome Convention.<sup>103</sup> One commentator argues that because the United States prefers the common law's economic incentive rationale as the justification for the copyright monopoly, it

avoided the rights protection requirements in the Rome Convention much like it refused to acknowledge the civil law's moral rights provisions embodied in the Berne Convention. Ironically, the United States eventually has come to recognize the sound recording protection requirements in the Rome Convention because they ultimately came to be

---

97. See Patterson, *supra* note 2, at 396 (pointing out that "[c]opyright commentators classify the treaty . . . as a 'neighboring rights' convention since it provides for the protection of those holders of musical copyright who are not the authors, but rather the authors' 'neighbors' "—i.e., the performers who made possible the films, records, and broadcasts which could be produced or fixed from an author's work).

98. See Rome Convention, *supra* note 5, at 52.

99. See Deas, *supra* note 94, at 586.

100. Rome Convention, *supra* note 5, at 48.

101. Deas, *supra* note 94, at 586 (citing Rome Convention, *supra* note 5, at 62).

102. See Patterson, *supra* note 2, at 396.

103. *Id.* at 396.

an integral part of the Uruguay Round Agreements Act.<sup>104</sup>

Another commentator points out that “except for some remedies under state law, such as unfair competition in the United States, numerous countries still do not provide legal protection against unauthorized fixations of live musical performances, including the United States—one of the world’s biggest entertainment creating and exporting countries.”<sup>105</sup>

## 2. *The Geneva Convention*

The Geneva Copyright Convention, signed in 1971,<sup>106</sup> provides international protection against the piracy of phonograms,<sup>107</sup> or “phonorecords.”<sup>108</sup> Member States under the Geneva Convention agree “to protect nationals of other member nations against the unauthorized manufacture, importation, and distribution of phonorecords.”<sup>109</sup> Member States base the Geneva Convention “on national protection . . . [having] minimum requirements for participation, such as a 20-year minimum term, measured from fixation, . . . or first publication.”<sup>110</sup> Furthermore, the Member States did not require formalities, such as notice, for protection to exist.<sup>111</sup> However, as one commentator observes,

the Berne Convention, and to some extent the U.C. Convention, provide much greater protection than the Geneva Convention, making it largely redundant. Ultimately, the United States has sacrificed a greater copyright regime in sound and music by favoring the Geneva Convention over the Rome Convention, which extends protection to performances, including those embodied in sound recordings.<sup>112</sup>

---

104. *Id.* at 396 n.154 (citation omitted).

105. Deas, *supra* note 94, at 587.

106. See Geneva Convention, *supra* note 4, 25 U.S.T. at 309, 866 U.N.T.S. at 67.

107. See *id.*; 25 U.S.T. at 324; 866 U.N.T.S. at 72. Phonograms is defined under the Geneva Convention as “any exclusive aural fixation of sounds of a performance or other sounds.” *Id.*

108. See JOYCE ET AL., *supra* note 37, at 993.

109. *Id.*

110. *Id.*

111. See Patterson, *supra* note 2, at 397.

112. *Id.* (citations omitted).

*D. The Uruguay Round of the General Agreement on Tariffs and Trade and the Resulting TRIPs Agreement*

A change in the United States' desire to avoid granting to performers any rights or remedies for unauthorized fixation of their unfixed performances became evident when the United States adhered to TRIPs.<sup>113</sup> TRIPs resulted from the negotiations under GATT,<sup>114</sup> as adopted by the Uruguay Round.<sup>115</sup> It is argued that the U.S. policy change occurred because "TRIPs incorporates most Berne provisions by reference and adopts Rome Convention standards for all signatories."<sup>116</sup> The United States then, having never ratified the Rome Convention, became obliged to meet Rome Convention standards as mandated by TRIPs.<sup>117</sup>

In Article I, Section 1, TRIPs empowers the members of the World Trade Organization (WTO)<sup>118</sup> to determine the appropriate method of implementing TRIPs provisions within their own legal system and practice.<sup>119</sup> Accordingly, Member

113. See Deas, *supra* note 94, at 587; see generally TRIPs Agreement, *supra* note 9, at 81.

114. Deas, *supra* 94, at 587. See TRIPs Agreement, *supra* note 9, at 81; Patterson, *supra* note 2, at 402. Patterson notes:

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT), completed on December 15, 1993, has advanced international intellectual property protection considerably. GATT is an international arrangement under which nearly eighty countries have negotiated common norms for international trade. The goal of GATT is to find ways to encourage free trade among nations. When it was first organized shortly after World War II, GATT focused primarily on promoting the reduction of tariff barriers to the international movement of goods. Since then, however, periodic multilateral negotiations convened to revise the Agreement have extended the scope of its norms to cover a variety of "non-tariff barriers." For example, many nations subscribe to a GATT agreement which limits the ability of governments to provide unfair economic advantages to local industries exporting goods in international commerce.

*Id.* (citations omitted).

115. See Deas, *supra* note 94, at 587; Uruguay Round Agreements Act, Pub. L. No. 103-465, § 2, 108 Stat. 4809 (1994) (codified as amended in scattered sections of 19 U.S.C.).

116. Deas, *supra* note 94, at 587-88.

117. See *id.*

118. The WTO is "a permanent forum for member governments to address issues affecting their multilateral trade relations as well as to supervise the implementation of the trade agreements negotiated in the Uruguay Round." Gloria C. Phares, *Retroactive Protection of Foreign Copyrights: What Has Congress Be-GATT?*, J. PROPRIETARY RTS., Apr. 1995, at 2 (quoting Statement of Administrative Action, U.S.C.C.A.N. 4040, 4042).

119. See TRIPs Agreement, *supra* note 9, at 84-85; Deas, *supra* note 94, at 588.

States may rely on their courts to construe private rights from the TRIPs language, as they would from the Berne or Rome Conventions language, or they may implement private rights through specific legislation.<sup>120</sup> Regardless of the path taken, all Member States must implement key provisions of TRIPs.<sup>121</sup>

With regard to the issue of bootlegging, one provision, Article XIV, Section 1, of TRIPs should be emphasized: "In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation."<sup>122</sup> Because TRIPs provides "the right to authorize or prohibit the direct or indirect reproduction of their phonograms,"<sup>123</sup> it has been argued that this right may have "implied an affirmative property right" that goes beyond the Rome Convention language.<sup>124</sup> "It remains to be seen whether the costs and benefits of this change are real or semantic."<sup>125</sup>

However, it appears Article XIV restricts the recording of live performances or the compilation of unreleased studio tapes so that artists can maintain control over any reproductions of their music.<sup>126</sup> Furthermore, Section 3 of Article XIV gives broadcasters the right to prohibit the fixation of broadcasts,<sup>127</sup> "a seeming prohibition against the practice of bootlegging broadcast concerts."<sup>128</sup> Finally, Section 5 of Article XIV protects the performance, production and broadcast rights for fifty years after the performance of the material.<sup>129</sup>

Arguably, the TRIPs Agreement may be the most effective international copyright enforcement mechanism for recording artists, record companies, and broadcasters concerned about bootleg recordings or any other form of record piracy.<sup>130</sup> "Unclear local statutes, antiquated statutory language,

---

120. See Deas, *supra* note 94, at 588.

121. See *id.*

122. TRIPs Agreement, *supra* note 9, at 88.

123. *Id.*

124. Deas, *supra* note 94, at 588.

125. *Id.*

126. See Schwartz, *supra* note 1, at 636.

127. See TRIPs Agreement, *supra* note 9, at 88.

128. Schwartz, *supra* note 1, at 636-37.

129. See TRIPs Agreement, *supra* note 9, at 88.

130. See Patterson, *supra* note 2, at 407-08 (commenting that the anti-bootlegging provisions are a "copyright victory to musical artists and record companies," at least in the United States).

inefficient court systems, and bribe-prone cultures are no longer acceptable excuses, as the WTO requires all members to effectively protect copyright interests.”<sup>131</sup> While sections of Article XIV seem to target bootleg recordings, the TRIPs Agreement never mentions or addresses “authorized recordings and whether any exclusive rights accrue.”<sup>132</sup> “This silence [regarding exclusive rights] represents a step backwards from the Rome Convention’s protection scheme.”<sup>133</sup>

## II. ANALYSIS

### A. *Has an International System of Enforcement Been Established?*

Upon examination of these conventions and the resulting international copyright enforcement treaties, we are inclined to question whether a global system of enforcement is coming to life, or whether any such system—which may currently be in place—is crumbling.

The U.C. Convention and the Berne Convention deal with enforcement in a similar manner—both treaties advocate national treatment as their main feature.<sup>134</sup> Moreover, the Berne Convention contains no dispute settlement provisions that have proven to be effective, an indication that its

131. *Id.* at 407.

132. Caviedes, *supra* note 51, at 207–08.

133. *Id.* at 207. Furthermore,

Phonogram producers have the right of prohibition in regard to phonogram reproduction, yet there is no exclusive public performance right nor the right to broadcast their recordings. The right to equitable compensation for secondary uses of commercial recordings under the Rome Convention is also absent from the TRIPs Agreement. According to Article 14(3) of the TRIPs Agreement, broadcasters’ rights to control fixation, reproduction, rebroadcast, and public communication of their broadcasts are basically the same, but where national law does not grant such rights to broadcast organizations, the right of control is reserved for copyright owners of the broadcast work, pursuant to the Berne Convention. Thus, a state in which the copyright holder of a film or a composition can prohibit its broadcast or the fixation of such broadcast need not provide any further related rights to the broadcasting organization. This is a derogation of the rights which were already conferred upon broadcasting organizations under article 13 of the Rome Convention, and [TRIPs Article 14(3)] has therefore been labeled as a “Rome-minus” provision.

*Id.* (footnotes omitted).

134. See Valerie L. Hummel, Note, *The Search for a Solution to the U.S.-Caribbean Copyright Enforcement Controversy*, 16 FORDHAM INT’L L.J. 721, 739 (1993).

drafters never intended it to be an enforcement vehicle for intellectual property rights.<sup>135</sup> Similarly, the U.C. Convention is regarded as weak in terms of its enforcement power because it allows countries with inadequate copyright laws to become member states.<sup>136</sup> This invites the argument that by requiring only the minimum adherence standards, these treaties are geared toward achieving mass membership, rather than establishing the maximum copyright protection among the member states.<sup>137</sup>

The Rome and Geneva Conventions emphasize and target the specific issues of piracy and bootlegging of unauthorized recordings,<sup>138</sup> but their enforcement provisions take litigants only as far as the “domestic law of the Contracting State in which protection is claimed”<sup>139</sup> or the ICJ.<sup>140</sup> It remains to be seen whether enforcing copyright protections via the ICJ will be a reliable or possible method of relief.<sup>141</sup>

Alternatively, nations are now looking to the enforcement mechanisms offered under the TRIPs Agreement, because it clearly seeks to identify and set a minimum world standard for the protection of intellectual property.<sup>142</sup> Rather than re-invent the enforcement wheel, TRIPs seeks to clarify existing GATT rules and institute new rules, as needed, to achieve adequate and effective protection for intellectual property rights.<sup>143</sup> Among the many enforcement provisions TRIPs proposes are “refined implementation of border ordinances designed to catch pirated goods before they reach the country’s markets, as well as increased international surveillance and notification,”<sup>144</sup> and dispute settlement

---

135. See Tai, *supra* note 27, at 171.

136. See *id.*

137. See *id.* (arguing that the goal of the U.C. Convention is to get more adherents rather than maximum copyright protection).

138. See JOYCE ET AL., *supra* note 37, at 993 (comparing and contrasting the copyright protection of the Rome and Geneva Conventions).

139. Rome Convention, *supra* note 5, at 44; Geneva Convention, *supra*, note 4, 25 U.S.T. at 328, 866 U.N.T.S. at 73.

140. See Cordray, *supra* note 85, at 131 (noting that both the Berne and Rome Conventions are required to go to the ICJ for intellectual property disputes).

141. See *id.* (discussing the ICJ).

142. See Tai, *supra* note 27, at 173 (explaining that “developed nations prefer the GATT option [TRIPs Agreement] to protect international” property rights).

143. See *id.*

144. *Id.*

procedures for the protection of intellectual property rights.<sup>145</sup>

The real beauty of TRIPs' enforcement power lies in the dispute resolution process offered by GATT,<sup>146</sup> a forum for negotiations that other treaties and conventions fail to provide.<sup>147</sup> Under this process, the aggrieved party files a complaint based on a disagreement that arose regarding a trade issue covered by GATT.<sup>148</sup> Then, permanent GATT committees and third party panels of experts review the claim and make a recommendation.<sup>149</sup> The recommendation is then reported to the contracting parties, who review and rule on the matter, and often follow the panel's recommendations.<sup>150</sup>

Under GATT's dispute resolution process for international copyright protection, the decision of the parties is a legally binding obligation.<sup>151</sup> A member country under GATT cannot disregard its legal obligations without facing sanctions, a heavy-handed enforcement tool not offered by the U.C. Convention or Berne Convention.<sup>152</sup>

The surveillance and notification improvements established by TRIPs, along with the formidable threat of sanctions,<sup>153</sup> may offer a more definite grievance process with the promise of punishment to a violating party, but this does not translate into a global system of enforcement for intellectual property rights. Instead, a trade-blocking system of punishment is emphasized, whereby those countries who cannot crack down on bootleggers, counterfeiters and pirates—because they do not have the resources, the know-how, or the aggressiveness to do so<sup>154</sup>—are squeezed out of

145. See Mark L. Damschroder, Note, *Intellectual Property Rights and the GATT: United States Goals in the Uruguay Round*, 21 VAND. J. TRANSNAT'L L. 367, 394 (1988).

146. See GATT, *supra* note 7, 4 U.S.T. at 670–71, 55 U.N.T.S. at 266–67.

147. See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 300 (1991).

148. See GATT, *supra* note 7, 4 U.S.T. 273, at 671, 55 U.N.T.S. at 226–68; Tai, *supra* note 27, at 173.

149. See Tai, *supra* note 27, at 173–74.

150. See *id.* at 173–74.

151. See *id.* at 174.

152. See *id.*

153. See *id.* at 173–74 (discussing the enforcement aspects of GATT through TRIPs). The underlying premise of the dispute and sanctions mechanism "is that a country's failure adequately to protect the intellectual property of foreign nationals effectively constitutes a nontariff barrier to trade." Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 308 (1998).

154. See Patterson, *supra* note 2, at 415–16 (discussing the affect of trade sanctions under the dispute settlement mechanism of TRIPs).

otherwise friendly trade alliances with their fellow GATT members.<sup>155</sup>

## B. Problems With Enforcement

### 1. The Enforcement Issues

TRIPs member countries may be successful in pushing their dispute through the requisite panels, but it is impossible to determine whether the penalized country will respond to the GATT penalties and punish bootleggers in its jurisdiction. Furthermore, there is concern as to whether GATT's dispute resolution mechanism is effective and efficient enough to be a reliable method of enforcement.<sup>156</sup> It is not uncommon for GATT cases to involve long, drawn-out hearings, "which average at least forty-five months for a complaint from a United States copyright owner, and severe politicization by member nations."<sup>157</sup> Moreover, it has been argued that the GATT dispute resolution personnel lack the knowledge and experience necessary to make informed decisions regarding international intellectual property issues.<sup>158</sup>

Under traditional methods of economic trade enforcement, countries are careful not to impose sanctions on other countries, unless absolutely necessary, because such sanctions tend to hurt the trade and political relations between those countries.<sup>159</sup> Thus, even though countries may have the right to impose these sanctions for copyright infringement and bootlegging under the TRIPs Agreement, they may be reluctant to do so, for fear of a political backlash or a resulting trade deficit.<sup>160</sup> As one commentator points out:

[I]t is unlikely that states would feel any more comfortable placing punitive sanctions on other states than they would suing them in The Hague. Indeed, foreign nations would likely regard the application of sanctions over a copyright violation as a much more serious "unfriendly act" than a lawsuit. Governments are aware that an economic strike

---

155. See *id.* at 416 (suggesting that sanctions would be considered an "unfriendly" act).

156. See Tai, *supra* note 27, at 174 (citing Leaffer, *supra* note 147, at 301).

157. *Id.*

158. See *id.*

159. See Patterson, *supra* note 2, at 416.

160. See *id.*

directed towards another state can foster dire political and economic consequences, depending on the international climate and the current relationship between the two nations.<sup>161</sup>

The conclusion can be made that nations recognize their potential for inducing unstable political and economic international relations, and therefore will most likely refrain from resorting to trade sanctions over copyright infringement issues.

An international system of enforcement could add billions to the economies of many bootleg-plagued nations.<sup>162</sup> Before this can happen, the nations participating in this system need to crack down forcefully on all violators.<sup>163</sup> Punishing bootleggers with stronger civil and criminal penalties is perhaps one method that countries can employ.<sup>164</sup> It is arguable whether this will send a strong enough message to deter bootleggers, but many countries have recognized the potential of taking this action, and are working to bring their domestic copyright laws into TRIPs compliance prior to the year 2000.<sup>165</sup>

However, the deterrence argument turns on first, the consistency of the prosecutions—the more often, with stiff criminal and civil penalties, the more likely the pirates will reconsider their acts,<sup>166</sup> and second, the ability to combat technology—while the traveler carrying a bag full of counterfeit CDs or tapes may be easy to bust at an airport, bootleggers now have the internet, which affords them a wide-open market for their pirated materials, and easily masks their identities.<sup>167</sup>

## 2. *Locations and Instances of Enforcement Problems*

As recording technology and computer communication channels continue to improve, the bootlegging market has experienced a parallel growth.<sup>168</sup> China is regarded as the

---

161. *Id.*

162. See Smith, *supra* note 29, at 572 (discussing a Price Waterhouse study that projected a job growth of 87,000 new positions and increased revenues of \$2.3 billion in Europe by the year 2000 if current piracy levels could be reduced by 10–15%).

163. See *id.* (noting the “five-step” plan to reduce piracy in Europe).

164. See *id.*

165. See *id.* at 575.

166. See *id.* at 576 (arguing the need for effective criminal enforcement).

167. See Muroff, *supra* note 20, at 1273–74.

168. See *id.* at 1273.

world's largest bootlegging country, having sold nearly forty-five million pirated compact discs in 1993.<sup>169</sup> Commentators single out China as a safe shelter for bootleggers and pirates because of its weak copyright protection and the fast growth of its CD production facilities.<sup>170</sup> As of 1995, China had twenty-nine factories producing CDs, compared to only three in 1992.<sup>171</sup> These Chinese factories have the capability of producing over seventy-five million CDs per year while the country's domestic demand is only five million.<sup>172</sup> "The remaining seventy-million CDs are believed to be pirated copies of popular albums that are exported and sold for a fraction of their legitimate price."<sup>173</sup>

While some reports claim that China is the heartbeat of the bootlegging industry, others claim that "the professional bootlegging center of the world lies in Western Europe."<sup>174</sup> For example, even though Germany signed the U.C. Convention, the Berne Convention, and the Rome Convention, a loophole in German copyright law allows some bootleg records to be sold on the open market.<sup>175</sup> This loophole opened up in 1985 when the West German Supreme Court ruled that recordings are not protected in Germany if the country where the recording took place did not sign the Rome Convention.<sup>176</sup> For nearly a decade thereafter, German bootleg manufacturers operated as if they were legitimate music retailers.<sup>177</sup>

In 1993, the Court of Justice of the European Communities held that German copyright law violated the non-discrimination provision of the Rome Convention,<sup>178</sup> effectively diminishing the manufacture of bootlegs made legal by the loophole.<sup>179</sup> This decision, known as the "*Phil Collins* case,"<sup>180</sup> suggests that "German record manufacturers can no longer legally produce bootlegs by bands whose

---

169. See Tai, *supra* note 27 at 162-63.

170. See *id.* at 163.

171. See *id.* at 164.

172. See *id.*

173. *Id.*

174. Schwartz, *supra* note 1, at 633.

175. See *id.* at 634.

176. See *id.*

177. See *id.* at 634-36 (observing the open bootleg-market from 1985 until 1993).

178. See Case 92/92, *Phil Collins v. Imtrat Handelsgesellschaft mbH*, 1993 E.C.R. I-5145 (1993).

179. See Schwartz, *supra* note 1, at 636.

180. See *Phil Collins*, 1993 E.C.R. I-5145; Schwartz, *supra* note 1, at 636.

members are from nations in the European Community.”<sup>181</sup> While this decision represents a major step forward for European rock stars it does not prevent German recording companies from producing bootlegs from artists who are citizens of non-European Community nations like the United States, Canada, the Caribbean, or Mexico.<sup>182</sup>

In line with China’s pirating practices, Mexico also has a poor enforcement policy against piracy and bootlegging, ranking as the second largest pirated-music market.<sup>183</sup> In 1991, Mexico amended its copyright laws to include music recordings.<sup>184</sup> Enforcement of these amendments began at the end of 1991, but it appears that only small-time solicitors have been targeted.<sup>185</sup> While Mexican officials claim that they lack the resources to put firm pressure on bootleggers, street vendors comment that no one is intimidated because the penalties for violating the copyright laws are insignificant.<sup>186</sup>

Additionally, some former Communist countries have recently become bootleg breeding grounds, inspiring one commentator to refer to Warsaw as “the pirate capital of Europe.”<sup>187</sup> When Sir John Morgan, President of the International Federation of the Phonographic Industry, and Czechoslovakian President Vaclav Havel went to see a Rolling Stones concert in Czechoslovakia, they stumbled upon street vendors pushing tapes of the previous night’s concert.<sup>188</sup> Other sources of pirated music material include Taiwan, Thailand, Italy, Korea, the Philippines and Turkey, to name a few.<sup>189</sup>

---

181. Schwartz, *supra* note 1, at 636.

182. *See id.*

183. *See* Muroff, *supra* note 20, at 1262; Elisabeth Malkin, *Declaring War on the Pirates*, BUS. WK., Oct. 24, 1994, at 56.

184. *See* Muroff, *supra* note 20, at 1262.

185. *See* Malkin, *supra* note 183, at 56 (commenting that enforcement efforts “have targeted street vendors and backroom pirates” rather than ringleaders).

186. *See id.* (reporting the testimony of a street vendor who said, “if they [enforcement officials] come in the morning, I’m back in business by afternoon”).

187. Schwartz, *supra* note 1, at 632–33.

188. *See id.* at 633; Nicholas Soames, *The Arts: Counterfeit Sounds of Music—Pavarotti or Pop, Warsaw Has it Illegally Taped*, DAILY TELEGRAPH, Jan. 25, 1992, at 127.

189. *See* Smith, *supra* note 29, at 562–68 (listing countries where a substantial portion of the world’s bootlegging and piracy markets exist).

### C. Enforcement Alternatives

“The reality is that record companies, for a variety of reasons, have hitherto largely turned a blind eye to most bootlegs.”<sup>190</sup> Usually, music fans who are devoted enough to collect bootlegs will buy all the legitimate releases by an artist anyway, leading one to conclude that the mainstream recording industry is not really damaged by bootleggers.<sup>191</sup> The argument: giving the fans what they want—no punishment for bootlegging—will help to generate more interest in the artists and the breadth of their recordings.<sup>192</sup>

This approach may benefit the record companies’ and artists’ sales and publicity, but does nothing to account for the millions of recordings produced and distributed across a country’s boundaries each year.<sup>193</sup> Thus, the increased mainstream record sales may help the economy, but this boost is overshadowed by the severe losses in sales taxes and import revenues that should be gleaned from the bootlegged products.<sup>194</sup>

#### 1. The Internet as a Safe Haven

Adding insult to injury is the pervasiveness of the Internet.<sup>195</sup> “The Internet is a digital environment, a global network of computers connected together through high-speed, long-distance digital data lines.”<sup>196</sup> The U.S. Defense Department began using the Internet in 1969 as a “computerized communications system that was capable of surviving a nuclear attack.”<sup>197</sup> By the middle of the 1980s, the Internet was being used and funded by universities, national laboratories, large corporations, and foreign

---

190. Tom Schultheiss, *Everything You Always Wanted to Know About Bootlegs, But Were Too Busy Collecting Them to Ask*, in *YOU CAN'T DO THAT* 405–06 (1981).

191. *See id.* at 406.

192. *See* Schwartz, *supra* note 1, at 637 (commenting that one rock band not only encourage their fans to record live performances but also set aside special areas for them to do so).

193. *See* Smith, *supra* note 29, at 562–63, 572 (emphasizing the damage the high losses and high levels of piracy inflict upon national economies).

194. *See id.* at 563, 572.

195. *See* Timothy Skelton, Note, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 *SAN DIEGO L. REV.* 219, 219 (1998) (commenting on the wide spread use of the Internet).

196. Muroff, *supra* note 20, at 1273.

197. James T. Madore, *Internet Connects Small Businesses with the World*, *BUFF. NEWS*, Oct. 24, 1994, available in LEXIS, News Library, CURNEWS File.

governments to exchange information.<sup>198</sup> In 1991, restrictions on commercial usage of the Internet were removed, and the age of digital information sharing began its boom.<sup>199</sup>

Notably, no central command or headquarters exists for controlling the Internet.<sup>200</sup> “It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers.”<sup>201</sup> As a result, music converted into a digital format can be sent across the world within seconds.<sup>202</sup> Bootleggers have taken full advantage of this medium.<sup>203</sup> Currently, “music downloading outposts” have sprung up on the Internet, enabling users to retrieve free musical samples or full recordings of performing artists.<sup>204</sup>

Recording and performing artists and their agencies understand the risk of posting their music on the Internet, but it is arguable that this risk may be outweighed by the potential for exposure and boosts in revenue.<sup>205</sup> Upstart bands see the Internet as an inexpensive advertising alternative for generating mass interest, without the need for agents and record deals.<sup>206</sup> Well-known bands reinforce their popularity and gain new fans by posting digitized audio and video clips on the Internet to catch the public’s attention.<sup>207</sup> Moreover, publishing houses, such as Broadcast Music Incorporated (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) use the Internet as a way to generate new income by marketing old titles at little cost.<sup>208</sup> In 1995, BMI became the first publishing house to license on-line transmissions of a library of musical titles.<sup>209</sup>

Because there are no sharply defined boundaries governing the Internet, it is difficult to detect and enforce bootlegging, and in general, any intellectual property

---

198. See Muroff, *supra* note 20, at 1273.

199. *See id.*

200. *See* ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996) (declaring “[n]o single entity—academic, corporate, governmental, or non-profit—administers the Internet”).

201. *Id.*

202. *See* Muroff, *supra* note 20, at 1273.

203. *See id.*

204. *See id.*

205. *See id.* at 1274.

206. *See id.*

207. *See id.*

208. *See id.*

209. *See id.*

violation, within a particular country's jurisdictional limits.<sup>210</sup> Moreover, "[t]he online consumer is generally unaware of copyright."<sup>211</sup> Those individuals who are aware of copyright laws and restrictions, but continue to use the Internet to traffic sound recordings, have no fear of getting caught because, as one commentator proclaims, "there are no means to catch them."<sup>212</sup>

To stymie this eruption of Internet bootlegging, it has been suggested that Internet access and on-line service providers be held responsible for Internet bootlegging based on the theory of vicarious or contributory infringement liability.<sup>213</sup> These on-line access and service providers have been compared with swap meet owners, "because they derive a direct financial benefit from the subscriber fees that they charge users."<sup>214</sup> Furthermore, these providers have a great deal of control over on-line users because "transmissions may be blocked and access can be terminated at anytime."<sup>215</sup> Most significantly, on-line service and access providers regularly "monitor user activities for marketing purposes, therefore they are in the best position to monitor for copyright infringement activities on the Internet."<sup>216</sup>

Exposing the basic on-line service and access providers to liability for contributory copyright infringement appears to be an effective enforcement idea at first glance, but preparing for this risk will ultimately hurt providers and users.<sup>217</sup>

First, the access provider will be required to thoroughly check Web pages for copyright infringement before including any hyperlinks to the larger World Wide Web community. Second, the access providers would have to continuously monitor the Web pages in case infringing material is later added. Third, the threat of liability for copyright

---

210. See Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 41 (1993) (describing the difficulty of monitoring global computer networks).

211. Muroff, *supra* note 20, at 1279 (quoting Stephanie C. Ardito, *Electronic Copyright Under Seige*, ONLINE, Sept.-Oct. 1996, at 88).

212. *Id.*

213. See Angela R. Dean, Note, *Expanding the Doctrines of Vicarious Liability and Contributory Copyright Infringement: Fonovisa, Inc. v. Cherry Auction, Inc. Targets the Primary Distribution Channels for Counterfeit Merchandise*, 4 VILL. SPORTS & ENT. L.J. 119, 144-46 (1997).

214. *Id.* at 145.

215. *Id.*

216. *Id.*

217. See *id.* (arguing that liability for Internet providers will increase cost and service to users).

infringement will deter Web sites from including hyperlinks to other Web pages. Finally, the inability to use hyperlinks without fear of exposure to copyright infringement liability will make it more difficult for users to navigate the Web and undermine the structure of the Web as a collection of interconnected documents.<sup>218</sup>

Inevitably, the increased costs of operation and changes in website structure may trickle down to inconvenience the average user, but it is the policing of Internet usage that troubles service providers and users alike.<sup>219</sup>

“In cases of colorable, but uncertainly permitted uses, Internet service providers (ISPs) would most probably prevent the transmission rather than take the risk of liability. Such a regime would thus effectively extend the reach of copyright owner prerogatives far beyond their statutory limits, posing an unacceptable chill on free expression.”<sup>220</sup> Theoretically, it may be argued that ISPs should be held liable for instances of infringement, but practically speaking, “[a]side from the legal arguments against this, imagine how fast the average ISP would be out of business.”<sup>221</sup>

As an alternative to the notion of enforcement, it is argued that artists should beat bootleggers to the punch by producing and selling their own bootleg-style recordings on the mainstream market.<sup>222</sup>

Paul McCartney rushed to release a live album after his appearance on the MTV television program *Unplugged*, even calling it *Unplugged: The Official Bootleg*, but he could not stop underground circulation of an unedited videotape of his performance, which included unreleased songs and mistakes. The late Frank Zappa . . . located ten bootlegs of his work and simply released them himself, complete with variable sound quality and original bootleg art with typos, in a series called *Beat the Boots!*<sup>223</sup>

---

218. *Id.* (citations omitted).

219. See Netanel, *supra* note 153, at 316–17.

220. *Id.* (citations omitted).

221. Muroff, *supra* note 20, at 1279.

222. See Schwartz, *supra* note 1, at 639 & n.183 (citing THE WHO, LIVE AT LEEDS (MCA Records 1970) and AEROSMITH, LIVE BOOTLEG (Columbia Records 1978) as two examples of “official mimicry”).

223. *Id.* (citations omitted).

This approach gives fans the missing performances they've been longing for, and is significantly effective in cutting the bootlegger out of the picture.<sup>224</sup> Furthermore, this alternative is arguably an effective non-legal method of achieving the result sought after in the treaties and conventions.<sup>225</sup> Unfortunately, not all bootlegged products are lost recordings or performances. Many are simply unauthorized duplications of a CD or home video, sold for much less than the original, but providing the same quality to the user.<sup>226</sup> The proliferation of—and weak enforcement against—these bootlegs seriously harms national economies.<sup>227</sup>

## 2. *Web-Radio and MP3 Technology*

Other non-legal alternatives have also begun to surface.<sup>228</sup> The *Wall Street Journal* recently reported on an Internet-based company that “found the sweet spot in the online-music scene”<sup>229</sup> by seizing upon an old familiar hook, radio broadcasting.<sup>230</sup> Radioactive Media Partners (RMP) designed “Play Music,” a program whose sole purpose is to enable Web users to download their favorite types of music by clicking on a ready-made Web-radio station, or by building Web-radio stations suited to their personal predilections.<sup>231</sup> The RMP

take[s] care of details like paying royalties to artists and record companies and making sure the music streams comply with digital copyright laws. For example, . . . digital broadcasts can't contain more

---

224. See *id.* at 640–41 (“[T]he best way the record industry can fight bootlegging is by giving the public what it seems to want.”).

225. See *id.* at 634 (discussing the copyright problems which were exacerbated by loopholes in the treaty language).

226. See Smith, *supra* note 29, at 563 (supporting the enhanced quality and decreased cost of bootleg copies due to new copying technology in the market).

227. See *id.*

228. See William M. Bulkeley, *Internet Start-Up Encourages Listeners to Log on and Tune in*, WALL ST. J., Sept. 9, 1999, at B8 (discussing radio on the Internet as one method for accessing free music and still providing benefits to artists and record companies).

229. *Id.* (quoting Larry Weber, Chairman of Weber Group Inc., who commented on the potential of the new product).

230. See *id.*; *A Glossary of MP3 Terms, Internet Radio*, ROLLING STONE, July 8–22, 1999, at 44 [hereinafter *MP3 Terms*] (describing Internet radio as “music streamed over the Internet, similar to the way music is broadcast over the airwaves by radio stations”).

231. See Bulkeley, *supra* note 228, at B8.

than four songs by the same artist or more than two consecutive songs from the same CD.<sup>232</sup>

While programs such as “Play Music” may not be intended to curb bootlegging and piracy,<sup>233</sup> they indirectly deter outright theft by providing Web users legally free access to music—without the necessity of entering credit card numbers, E-mail addresses, or passwords.<sup>234</sup> Moreover, record companies and artists can collect their deserved royalties in a manner similar to that employed in standard radio programming.<sup>235</sup>

The Web-radio program has its drawbacks as well.<sup>236</sup> Web users may freely choose the musical styles and artists they prefer, but they are not “owners” of the Web-radio stations they design.<sup>237</sup> Users may share their stations with friends, but the program does not allow them to choose what songs to play at any time, nor does it allow them to sell advertising.<sup>238</sup>

Driving the Internet-radio boom is the MP3<sup>239</sup> sound file, “an audio-coding technology that allows digital music files from CDs or other sources to be compressed into a size practical for Internet transmission and PC storage.”<sup>240</sup> MP3

232. *Id.*

233. The main purpose of Web-radio programming appears to be the advertising profit potential. See Jennifer L. Rewick, *Mixing Viacom, CBS Interests May Be Tricky*, WALL. ST. J., Sep. 8, 1999, at A8 (emphasizing cross-promotional and Internet advertising advantages gained when media corporations merge). Also,

While the audience for Internet radio is tiny, its fans tend to stay connected for 90 minutes or so at a time, an eon by Internet standards. While doing work on their computers, they usually minimize the radio window on their PC screen—meaning they don’t see the radio site’s banner ads—but when a song comes on that they like, they may blow the window up to learn the name of the artist or song and maybe order the disk. That makes radio listeners appealing to Internet sites, which typically make money by running ads.

Bulkeley, *supra* note 228, at B8.

234. Web users can get to free Internet-radio music simply by accessing the Web radio site. See, e.g., Jeff Salamon, *Radio’s Brave New World: The Coolest Stations on the Web*, ROLLING STONE, April 15, 1999, at 115.

235. See Bulkeley, *supra* note 228, at B8.

236. See *MP3 Terms*, *supra* note 230, at 44 (pointing out that “even with a fast cable-modem connection, [web radio] sound quality is not great”).

237. See Bulkeley, *supra* note 228, at B8.

238. See *id.*

239. MP3 stands for Motion Picture Experts Group (MPEG) Audio Layer 3. See John R. Quain, *Good-Bye MTV, Hello Net Radio*, PC BUYING GUIDE, Aug. 1999, at 70.

240. Fred Goodman, *Is MP3 the End of the Music Business?*, ROLLING STONE, Apr. 1, 1999, at 25.

files contain near-CD quality sound, can be quickly downloaded, and most attractive of all for bootleggers—they are mostly free:

Free for downloading off the Web, free for copying and trading, and even free to create from your own CDs. Of course, it's not all supposed to be free. But programs that convert music from CDs into MP3 files have tempted many Netizens to post their favorite songs on the Web, leading to illegal copying on a World Wide Web scale.<sup>241</sup>

Even without accessing a Web-radio site, Internet users can visit both legitimate and illegal MP3 distribution sites that offer free and marginally priced songs for downloading.<sup>242</sup> Moreover, high-tech companies have developed portable MP3 players that, similar to cassette or CD Walkmans enable Internet users to download songs onto memory-expansion cards for playback through headphones, home audio systems, and even car stereos.<sup>243</sup>

MP3 technology has been controversial within the recording industry, because many users violate copyright protections when they download posted tracks.<sup>244</sup> Record companies have yet to establish an industry-wide secure delivery system that “allows them to get paid for Internet downloads and that limits how those songs are used.”<sup>245</sup> Accordingly, they are apprehensive about allowing their artists' songs to be posted on the Internet.<sup>246</sup> For example, just weeks prior to releasing his latest album, Tom Petty posted the disk's first single “Free Girl Now” on *MP3.com*, “the Internet's largest clearinghouse of downloadable music files.”<sup>247</sup> Although it is not clear whether Warner Brothers

241. Quain, *supra* note 239, at 70.

242. *See id.* at 70–71 (observing by omission that one would not have to access a Web-radio site to access distribution sites).

243. *See* Steve Morgenstern, *Web Music Players: The Next Wave*, ROLLING STONE, May 27, 1999, at 75–77.

244. *See* Kara Swisher, *New Software Turns PCs Into Jukeboxes*, WALL ST. J., May 3, 1999, at B6; Jeff Goodell, *World War MP3*, ROLLING STONE, July 8–22, 1999, at 43; *Record. Indus. Assoc. of Amer. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (allowing manufacturer of portable MP3 player to continue selling product because the device did not record directly from “digital music recordings,” and holding device was not “digital audio recording device” because it did not reproduce digital music recordings from transmissions).

245. Goodman, *supra* note 232, at 25.

246. *See id.*

247. Eric Boehlert, *MP3.Mess: Petty Single Pulled from Net*, ROLLING STONE, Apr. 29, 1999, at 40.

Records or the artist made the decision, the song was pulled from the website after only two days, allegedly because it was downloaded over 150,000 times.<sup>248</sup> Similarly, Capitol Records convinced the *Beastie Boys* to take some of their tracks down to prevent lost revenues on the sale of its album *Hello Nasty*.<sup>249</sup> Sony Records also followed suit with some of its artists.<sup>250</sup> However, it is arguable that lost revenues have not proved to be a valid concern for record companies, because *Hello Nasty* is one of the *Beastie Boys*' best-selling albums.<sup>251</sup>

Despite the legal infractions that may abound, the MP3 medium is now considered to be a powerful, revolutionary method for obtaining and trading music, promoting lesser-known artists, and perhaps most popular of all undercutting the record companies.<sup>252</sup> The looming question for music industry executives continues to be, "Who wants to be in the business of selling intellectual property when everybody else is giving it away?"<sup>253</sup> Notably, record companies are working toward solutions to the copyright protection problems inherent in Internet sound-file swapping.<sup>254</sup> The Secure Digital Music Initiative (SDMI), a group of high-level recording industry moguls came together to work on an enforcement plan.<sup>255</sup>

With the ambitious goals of creating a technical standard for piracy-proof digital music files and enabling devices, like portable players, to translate the files into music, SDMI was seen by skeptics as a hopelessly belated response to the popular (and easily pirated) MP3, already entrenched as the Net's de facto audio standard.<sup>256</sup>

---

248. *See id.*

249. *See* Goodman, *supra* note 232, at 25.

250. *See id.* at 38.

251. *See id.* at 25.

252. *See MP3's Biggest Threat*, MAXIMUM PC, Sept. 1999, at 44, 46 (interviewing Hilary Rosen, President and CEO of the Recording Industry Association of America, who suggests that artists want to make money off their Web-posted songs, but they do not want the bulk of the revenues going to a record company. Rosen further states, "[w]hat caught us all by surprise was that this [MP3 downloading] became the symbol of the Internet as some revolutionary force providing power to the people in this really sexy way and not just stealing artists' music . . .").

253. Goodell, *supra* note 244, at 43.

254. *See* Julian Dibbell, *A Chat With Mr. MP3: Can This Man Save The Music Business?*, ROLLING STONE, May 13, 1999, at 97-98.

255. *See id.* at 97.

256. *Id.*

The SDMI working group announced that it would release technical specifications for secure portable devices by early 2000,<sup>257</sup> but by the summer of 1999, several of the SDMI group members had branched off on their own ventures to slow down the MP3 train.<sup>258</sup>

Such devices, if used for tracking the trade or purchase of sound files in addition to royalty tracing, are bound to raise consumer privacy concerns.<sup>259</sup> Moreover, it has also been noted that any device which continues to control what can be done with a song after it is purchased will be adamantly rejected by consumers, who are aware of their right to make copies of recordings for personal use.<sup>260</sup>

Ironically, it seems the creativity of the recording artists has trickled into the copyright enforcement camps, resulting in perhaps the most well thought out alternatives to encryption.<sup>261</sup> For example, British dance-pop band *Underworld*, seeking to boost mainstream record sales, made their new single available on the Internet for one day only, generating a Web-wide buzz with over 20,000 downloads.<sup>262</sup> Some bands have posted MP3 tracks which come with expiration dates once downloaded—“[u]nless users later purchased a CD, they would lose the track on their computer.”<sup>263</sup> Independent record label Rykodisc employs a novel idea based on innovative market pricing: it sells MP3 versions of songs for ninety-nine cents apiece, with the motto, “[W]e want to get people used to paying a fair price for music over the Internet.”<sup>264</sup>

These enforcement measures may not be a relentless crusade against Internet piracy, but they appear to be a step in the right direction, especially because they facilitate interaction among the music industry, artists, and consumers. As for the future of copyright enforcement for online music, one commentator aptly summed it up this way:

First, for people who want to buy music online, the next couple of years are going to be chaotic. Music will be available online in three or four different

---

257. See Goodell, *supra* note 244, at 46.

258. See *id.*

259. See Swisher, *supra* note 244 at B6.

260. See Goodman, *supra* note 232, at 39.

261. See *id.* at 38–39 (discussing enforcement alternatives employed by independent record labels and artists).

262. See *id.* at 38.

263. *Id.*

264. *Id.* at 39.

formats, including MP3, requiring us to keep several different players on our desktops. Some of this music will be transportable to desktop devices, and some of it will not; some, if not all, of the so-called secure delivery systems will have been hacked and yet another level of pirated music will spring up, inspiring yet another crackdown. Nevertheless, one of the immutable laws of the digital economy is that the Internet increases choices while cutting costs.<sup>265</sup>

In the meantime, it is believed by some that consumers will have the last word in setting the market agenda as they continue to use the Internet to appease their musical tastes.<sup>266</sup> Accordingly, because the current demand for free online music is so overwhelming,<sup>267</sup> signs of progress in preventing piracy may not be evident for some time:

Right now consumers are—more than ever and more than probably anyone could have imagined—really driving the music market. And companies—big and small—will no longer dictate the form consumers get their music in . . . . As the Internet has evolved, all international businesses have woken up to a series of changes.<sup>268</sup>

### III. CONCLUSION

As this Comment has demonstrated, the many treaties and conventions currently in place have sought to establish an international system of copyright enforcement, but the problems with membership, treaty overlap, and no immediately recognizable effects of enforcement cast doubt on whether such a system exists. Even if such a system is in place, the restorative economic benefits of its enforcement may not show up for many years. Additionally, unless all member nations approach copyright enforcement with equal firmness, bootleggers will find safe havens for continuing their acts.

Of course, artists, who initially are in control of their performances, may have the best opportunity to solve the

---

265. Goodell, *supra* note 244, at 46.

266. See Goodman, *supra* note 232, at 39; *MP3's Biggest Threat*, *supra* note 244, at 44.

267. See Goodman, *supra* note 232 at 25 (discussing “the explosive growth of music on the net,” and pointing out that “the only thing more popular than MP3 is sex”).

268. *MP3's Biggest Threat*, *supra* note 244, at 44.

pirating problem themselves. By publishing their own bootlegs and offering them at competitive prices, artists will be responding to the needs of their fans, while at the same time, making the bootleg market obsolete. However, to curb the proliferation of unauthorized duplication of those recordings already on the market, the international community may have to re-think its approach. Today's technology allows bootlegs to be excellent quality and the Internet allows seekers to get their knock-offs with little risk of exposure.

Clearly, artists and record companies have been dealt an ultimatum—they can satisfy the demand for their musical materials by authorizing, sponsoring, or joining in the proliferation of bootlegs, or they can fight for the enforcement of their intellectual property using legal methods. Considering the ease with which bootleggers can continue their practices under the current circumstances, an uphill battle awaits those who wish to establish a global system of copyright enforcement. Perhaps it is time to cut losses and follow a more sensible philosophy: "If you can't beat 'em, join 'em."

*Robert M. Blunt*\*\*

---

\*\* This paper received the James W. Skelton, Jr. Writing Award.