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Toward Negotiating a Remedy to Copyright Piracy in Singapore

I. INTRODUCTION

The cove is sheltered from the straits and the thick jungle brush hides small boats from view. The water which rushes past the island carries merchant ships from the west to the riches of the spice islands. Long ago, the Malays had built a settlement at the base of the river which runs to this cove; no trace remains. And by 1819, Sir Stamford Raffles, British colonialist, cleared the jungle and erected the walls of a future world port. But years before the British reached the island, Singapore—where the Malacca Straits run to the China and Java Seas—harbored the scourge of the Arab traders: pirates.¹

No less menacing, and no less successful, the pirates of modern Singapore threaten to undermine the international trade of copyrighted works.² Advancements in technology have facilitated the inexpensive reproduction of books, audio and video cassettes, and computer programs.³

¹ ABDULLAH (A. KADIR), *HIKAYAT ABDULLAH*, reprinted in 28 J. MALAYAN BRANCH ROYAL ASIATIC SOC'Y 125-31 (A.H. Hill trans. 1955). This is the biography of Abdul Kadir, a Malayan who, as a boy, served as scribe for Sir Stamford Raffles—founder of Singapore.

² For the most part, unauthorized reproduction outside the United States involves piracy—the duplication of recordings or manuscripts without copying the original packaging. The reproduction of trademarks and packaging on unauthorized books, audio and video cassettes, and computer programs constitutes counterfeiting. *Proposed Renewal of the Generalized System of Preferences—1984: Hearing Before the Senate Subcomm. on International Trade of the Comm. on Finance*, 98th Cong., 2d Sess. 202 (1984) (statement of the Recording Industry Association of American ("RIAA"))[hereinafter *Proposed Renewal*].

To combat piracy, there is no international copyright law but rather an international system in which countries provide protection through their own laws for works originating in other countries. The principle of "national treatment" is where the foreign rightsholder is treated as a domestic rightsholder under the laws of the country where protection is sought. *Civil and Criminal Enforcement of the Copyright Laws: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 59 (1985)(statement of Michael Kirk, Assistant Commissioner for External Affairs, U.S. Patent and Trademark Office)[hereinafter *Civil and Criminal Enforcement*].

³ Garzon, *Piracy: Contribution to an Analysis of the Phenomenon*, COPYRIGHT BULL., vol. xvii, No. 2, at 13 (1983). The effect of technology on copyright piracy was recently addressed by Michael Kirk, before a Senate Committee:

This tremendous increase in the level of unauthorized duplication is directly traceable to advances in technology and to increasing standards of living and income levels in many countries throughout the world. Only a few years ago, because of the high equipment costs, duplica-

Printing, video, and audio pirates have found Singapore well suited to the unauthorized copying of protected works. Literature and music reproduced in Singapore has found its way to markets throughout the world. To persuade Singapore to protect intellectual property, United States and British business organizations, the United States government, and the governing bodies of international intellectual property conventions have proposed measures ranging from educational programs to economic reprisals. Still, introducing copyright protection into Singapore is more than a question of legal cooperation. Ending piracy in Singapore raises the larger question of whether the western legal principle of protecting intellectual property can be imposed on a developing country which has a great economic interest in nonobservance.

This Comment proposes to criticize and evaluate the legal underpinnings and expected success of various remedies to the problem of piracy. To begin, this Comment will examine the nature and scope of copyright pirating.⁴ Next, this Comment will analyze three approaches to combat piracy. First, the government of Singapore itself has demonstrated, in the last few years, a desire to crack down on the pirates,⁵ including recent judicial action in the High Court of Singapore.⁶ Second, the United States Government has amended trade and tariff laws to condition eligibility for trade preferences on the quality of protection afforded copyright holders in countries applying for preferred status.⁷ Third, the governing bodies of the two conventions on copyrights—the Berne Convention and the Universal Copyright Convention—have explored the possibility of gaining wider acceptance of these conventions.⁸ Finally, this Comment proposes both extending the use of compulsory licenses to encourage protection and employing harsher terms of retribution for failure to provide protection to remedy piracy.⁹

II. THE PROBLEM: ITS NATURE AND SCOPE

The problem of piracy in Singapore is the scale, both economic and geographic, on which it flourishes in the island state.

tion of copyrighted works was a phenomenon largely confined to the developed world. But the increased availability of high-quality, low-priced equipment capable of cheaply and rapidly duplicating copyrighted works has caused uncontrolled duplication to spread throughout the world.

Civil and Criminal Enforcement, *supra* note 2, at 58.

⁴ See *infra* notes 10-46 and accompanying text.

⁵ See *infra* notes 47-91 and accompanying text.

⁶ See *infra* notes 56-91 and accompanying text.

⁷ See *infra* notes 92-153 and accompanying text.

⁸ See *infra* notes 154-87 and accompanying text.

⁹ See *infra* notes 188-202 and accompanying text.

Singapore piracy is estimated to cost United States businesses from \$60 million for the recording industry alone¹⁰ to \$1 billion in sales of pirated books and cassettes.¹¹ Up to ninety percent of all recordings made in Singapore are counterfeit or pirated; there are approximately fifteen million unauthorized recordings in the Singapore domestic market alone.¹² For the most part it is not possible to estimate losses more precisely because pirates operate covertly and are not monitored by any government agency.¹³ But even without the statistics, the vast size of the pirating business is uncontroverted: according to Senator Patrick J. Leahy, member of the Subcommittee on Patents, Copyrights and Trademarks, "Singapore is now considered to be the piracy capital of the world."¹⁴

The extent of Singapore piracy is equally impressive on a geographic scale. According to a report prepared by the United States Copyright Office and presented to the Subcommittee on Patents, Copyrights and

¹⁰ *U.S. Copyright Delegation Gets No Action on Piracy*, EAST ASIAN EXECUTIVE REPORTS, June 15, 1984, at 21 [hereinafter *U.S. Copyright Delegation*]; see also Watts, *U.S. Out to Sink \$100m Pirates*, The Times(London), Mar. 30, 1984, at 6, col. 5 (where David Watts writes: "The pirates of Singapore cost the British and American recording industries about \$100m (£70m) a year in lost sales.") [hereinafter *U.S. Out to Sink*]; H.R. REP. NO. 1090, 98th Cong., 2d Sess. 13, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5113 (quoting the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce: "the direct loss in sales to American companies for counterfeit merchandise runs into the tens of billions of dollars.")

¹¹ *Busting the Software Pirates*, BUSINESS WEEK, June 17, 1985, at 56 (brief description of the government of Singapore's attempt to revamp the 1911 Copyright Act) [hereinafter *Busting*]. Compare the figures for losses with the one billion dollar total value of United States export of copyrighted works; the most dramatic estimates place piracy as equal to the legitimate business. *Proposed Renewal*, *supra* note 2, at 166, 168 (statement of Townsend Hoopes, President of the Association of American Publishers ("AAP")). The International Federation of Phonogram and Videogram Producers ("IFPI") has estimated worldwide piracy and counterfeiting at \$515 million, one-half of which is probably of United States works. *Id.* at 190 (statement of Stanley Gortikov, President of RIAA). The IFPI reports that it possesses over 650,000 counterfeit cassettes, seized during raids. *Id.* at 205 (statement of RIAA). In testifying before the Senate Subcommittee on International Trade, Mr. Gortikov presented the fruit of several raids:

I have the problem actually in front of me here. These are a dozen or so illicit tapes from Singapore. They are part of over 200 that I have in my office. They comprise the product of 20 American companies, over 500 American recording artists, and they represent 213 titles—Johnny Cash, George Benson, Willie Nelson, and on and on.

Id. at 186. For a list of book publishers who have reported piracy of their works in Singapore, see *id.* at 183-84 (statement of Townsend Hoopes).

¹² *Proposed Renewal*, *supra* note 2, at 191 (statement of Stanley Gortikov).

¹³ *U.S. Copyright Delegation*, *supra* note 10, at 21.

¹⁴ *Oversight on International Copyrights: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 1 (1984) [hereinafter *Oversight*]. See also H.R. REP. NO. 1090, *supra* note 10, at 13, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5113 (where the report states that: "The Committee is extremely concerned about the growing problem of counterfeiting which is costing American jobs, threatening the health and safety of consumers and undermining the ability of American businesses to compete in world markets.")

Trademarks, the pirate industry of Singapore exported seventy million unauthorized recordings, from Europe to Latin America,¹⁵ in 1982 alone: "nearly five times the number sold in Singapore itself."¹⁶ *The Economist* reports that: "Singapore is the world's biggest exporter of illicit music tapes, supplying half the US\$300 million international market"¹⁷ The bulk of these exports ends up in lesser developed countries, particularly in the Middle East where ready cash and the thirst for western goods creates a market for the pirates.¹⁸

This dissemination of cheap reproductions from Singapore has spawned criticism from lesser developed countries. The government of Kenya, for example, views piracy as a threat to local composers and musicians.¹⁹ Again the Copyright Office report states that "[t]he indigenous recording industries of the Ivory Coast, Malawi, and Nigeria are reported to have suffered serious setbacks due to piracy. The source of pirated copies of local and foreign works is often cited by experts in these African nations as one site in particular: Singapore."²⁰ Thus, Singapore's well-established pirate industry appears to threaten not only the profits of copyright-exporting countries (such as the United States) but also the development of indigenous music and film production in countries which, at present, are net copyright importers.

The advancement in reproduction equipment is mirrored by the increasing sophistication of the pirates. The audio pirate may gain a competitive edge over legitimate importers and dealers not only by underpricing goods but also by providing better quality recordings at an earlier date. David Watts, writing for *The Times (London)*, describes how the pirates are able to beat legitimate business to the market:

The pirates' story begins in London or Los Angeles when an employee of one of the international airlines picks up a copy of a new album. Within 24 hours, that LP is back in Singapore, and one of the top three pirates will

¹⁵ *Oversight*, *supra* note 14, at 98 ("Their piratical products can be found as far away as Africa, Western Europe, and Latin America.")

¹⁶ *Id.* at 101.

¹⁷ *Singapore Lays Down the Law*, *ECONOMIST*, Mar. 2, 1985, at 66; *see also U.S. Out to Sink*, *supra* note 10, at 6 (stating that: "Big business is not in the home market, however. In 1982, Singapore exported nearly 36 million pre-recorded cassettes, not to mention pirate blanks of both audio and video cassettes.")

¹⁸ *U.S. Out to Sink*, *supra* note 10, at 6, where *The Times* reports that:

They have zeroed in on a market which the legitimate companies have neglected: the Middle East.

In 1982 Saudi Arabia took nearly 29 million of the pirate cassettes. The hundreds of thousands of guest workers from all over the world have musical tastes which are as varied—and the Singapore pirates are there with their cassettes by the container-load.

¹⁹ *Oversight*, *supra* note 14, at 102.

²⁰ *Id.* at 103.

be running off cassette copies at the rate of 1,500 an hour.²¹

Apparently, the only impediment to an even earlier release "is the need to print inserts of the cover and the album contents."²² The legitimate importers, on the other hand, 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.²³

The quality of the pirated cassettes is at least preserved if not improved because pirates make a master tape of the imported original. From the master, the pirates make copies so good that, according to a record company executive, "very often . . . you can't tell it from the original."²⁴

The result is a profitable business in reproductions which are cheaper, better, and more timely—a business which, until the last few years, has attracted little press attention. However, with the unauthorized copying of the charity record, "Do They Know It's Christmas?,"²⁵ an outraged press lashed out against the Singapore pirates who reaped the revenues from the artists' work.²⁶ The incident, embarrassing to the Singapore government, has helped to publicize the plight of the artists, authors, and rightsholders who seek redress in the island republic. The advent of a United States Copyright Delegation²⁷ and debates in Congress over amendments in the trade law²⁸ have likewise brought the problem of piracy to public attention.

The most frustrating problem for United States rightsholders is not the government of Singapore's unwillingness to enforce copyright laws so

²¹ *U.S. Out to Sink*, *supra* note 10, at 6.

²² *Id.*

²³ *Id.* If the record is shipped in for simultaneous release with either London or the United States, the importer will have 24 hours before the pirate could have copies out on the market.

²⁴ *Id.* The resulting disparity in competition is even more dramatic in the case of computer programs. Cheryl Debes, writing for *Business Week*, describes the scene:

Grouped together in the People's Park Centre at the edge of Singapore's Chinatown, tiny computer shops blithely churn out hundreds of counterfeit copies of top-selling software. Lining up at the counters, goggle-eyed American tourists eagerly dole out \$15 for Lotus Development Corporation's S 1-2-3 program, which lists for \$495 back home. Software piracy is so commonplace in Singapore that local computer buffs can't fathom spending more than \$4 for a single-disk program.

Busting, *supra* note 11, at 56.

²⁵ The charity pop record, "Do They Know It's Christmas?" was recorded to raise money for Ethiopian famine relief. Taylor, *Singapore Judge Curbs the Pirates*, *The Times*(London), Feb. 27, 1985, at 7, col. 6.

²⁶ Taylor, *Charity Hit May Help End Rule of Singapore 'Pirates'*, *The Times*(London), Jan. 11, 1985, at 8, col. 7 ("An international outcry over what amounts to the hijacking of aid to Ethiopian famine victims may ironically rebound to the benefit of others who have suffered at the hands of Singapore's notorious entertainment pirates.") [hereinafter *Charity Hit*].

²⁷ See *infra* notes 48-51 and accompanying text.

²⁸ See *infra* notes 92-94, 113-53 and accompanying text.

much as it is the lack of protective copyright legislation to enforce.²⁹ Before Singapore's independence, the colony came under the protective umbrella of Great Britain's Imperial Copyright Act of 1911.³⁰ Traditionally, this Act had been applied only to domestic authors and rights-holders. In the past year, however, the Singapore High Court extended protection to British rightsholders in *Butterworth Co. v. Ng Sui Nam*.³¹ The 1911 Act is nonetheless inadequate because it is limited in scope and because copyright legislation at the time of the Act did not contemplate today's technology for recording or copying works.³² Otherwise, copyrighted material is protected by Singapore's 1968 Copyright (Gramophone, Record, and Government Broadcasting) Act.³³ While the 1968 Act makes infringement a criminal offense,³⁴ the punishments are minimal, thereby providing little protection for foreign rightsholders.³⁵

The change in the law sought by foreign rightsholders is slow in

²⁹ In his statement before the Senate Subcommittee, Mr. Townsend Hoopes, President of the AAP, maintained that "[i]n many cases, 'piracy' represents a wholesale disregard for the legal idea of copyright . . . [E]ntire industries are built on the theft of intellectual property, aided by the complicity of governments who refuse either to enforce existing laws or to enact more stringent ones." *Proposed Renewal*, *supra* note 2, at 169.

³⁰ Copyright Act, 1911, 1 & 2 Geo. 5, ch. 46. The criminal penalties were established by amendment to the 1911 Copyright Act, 1914, ch. 187 (6 Singapore Statutes 489-91, rev'd ed. 1970).

³¹ [1985] 1 M.L.J. 196; *see infra* notes 56-91 and accompanying text.

³² *See Charity Hit*, *supra* note 26, at 8 ("The Imperial Copyright Act, 1911 which was designed for the published word, is still the only law covering an array of technologies subject to highly sophisticated piracy in Singapore, including film, video, and computer software.")

³³ Copyright (Gramophone Records and Government Broadcasting) Act, 1968, ch. 188 (6 Singapore Statutes 493-96, rev'd ed. 1970).

³⁴ *Id.* § 3(1)(6 Singapore Statutes 494), providing in pertinent part:

Every person who makes, reproduces, imports for sale, sells, exposes or offers for sale, or has in his possession for sale, any pirated copies of any gramophone record, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand dollars, and in the case of a second or subsequent conviction to imprisonment for a term not exceeding one year or a fine not exceeding two thousand dollars or to both such imprisonment and fine.

³⁵ *U.S. Copyright Delegation*, *supra* note 10, at 21 ("A fine of \$1,000 (US\$50) is slapped on first offenders, and few have had to pay the \$2,000 fine for a second offense. No one has yet been put in jail for counterfeiting." The delegation had asked for an interim increase in penalties and enforcement until revision of the "outdated" 1911 Act.)

The limited effect and poor drafting of Singapore's antipiracy law is dramatically illustrated by an example given by the Recording Industry Association of America:

In a case in July, 1982, a defendant successfully appealed his conviction on the grounds that the prosecution had failed to prove lack of consent. The Chief Justice ruled that the prosecution must prove that no consent had been given by the copyright owner for the manufacture of the alleged infringing copies to anybody anywhere in the world. He also ruled that the evidence had to be given directly by the copyright owner or from the witness' personal knowledge. In most cases in Singapore, the evidence of a local licensee [that the copyright holder had specifically contracted and allowed that licensee to reproduce his work] would not be acceptable. Therefore, the decision has restricted the ability of the prosecution to bring cases involving foreign repertoire such as U.S.-owned sound recordings, in that it is now necessary to call each copyright owner to give direct evidence as to lack of consent.

Proposed Renewal, *supra* note 2, at 206.

coming. While the government is anxious to polish its tarnished image, piracy is too vital an economic force to part with so easily.³⁶ Responding to considerable outside pressure, the government is said to be considering various changes in Singapore law. Already there are proposals to amend the laws to protect computer software.³⁷ By and large, however, foreign rightsholders have been extremely disappointed with the slow progress made in changing domestic laws.³⁸ Likewise, there is no indication that Singapore is moving closer to accession to an international convention governing copyright.

The mobility of the pirates poses an additional problem in suppressing the practice. The United States could seek to establish a direct, bilateral agreement with Singapore regarding copyright. Yet, the problem of piracy is diffused over the entire Pacific Rim region. The extermination of piracy in Singapore would only encourage the pirates to shift their operations elsewhere.³⁹ Constructing agreements with each of the countries concerned may only create inconsistent standards of protection across the region.⁴⁰ The problem of varying standards would suggest the better success of a regional approach. This tactic was very successful in the Caribbean Basin Initiative where, for the first time, trade benefits and economic assistance were conditioned on copyright protection.⁴¹

³⁶ The Times(London) suggests an even stronger deterrent to change:

The priates [sic] seem to have some powerful friends . . . They also appear to be determined. When an official of the British Company, EMI, tried to look into their [the pirates'] activities, he was warned off with death threats.

U.S. Out to Sink, *supra* note 10, at 6.

Stanley Gortikov also referred to the "considerable political clout" of the pirates as one of the obstacles to ardent enforcement of copyright laws in some third world countries. *Proposed Renewal*, *supra* note 2, at 193. Singapore pirates and counterfeiters are now reported to have retained special counsel for the sole purpose of defending every counterfeiting and piracy prosecution brought by the government. *Id.* at 205 (statement of RIAA).

³⁷ *Busting*, *supra* note 11, at 56 ("In Singapore, the government is revamping its 1911 copyright code to include software. After several delays, the draft version is expected to be ready by summer."); see also *Asian Report: Singapore, Seoul Pressed by Firms on Patents*, Wall St. J., Aug. 9, 1984, at 32, col. 3 ("Singapore government officials are privately considering measures to curb rampant computer-software piracy. The findings of a government-appointed task force are expected to be released this fall, and legislation is likely to be introduced before the end of the year.") For a thorough discussion of pending legislation, see *infra* notes 52-54 and accompanying text.

³⁸ The Times(London) quotes Mr. Stephen Club, a member of the Motion Picture Export Association of America, as saying: "We have had promises that the law will be revised for the past four years. We have waited long enough and now are going to test the existing legislation." *Charity Hit*, *supra* note 26, at 8.

³⁹ *Oversight*, *supra* note 14, at 108. In fact, a recent Singapore police crackdown on copyright pirates has already caused a shift in pirate operations; according to William Maxwell, of the International Intellectual Property Alliance, "it's a moving red light district." Trautman, *U.S. Firms Step Up Action, Against Foreign Counterfeiters*, Reuters, June 12, 1986.

⁴⁰ *Oversight*, *supra* note 14, at 35.

⁴¹ *Id.* at 127; see also *Proposed Renewal*, *supra* note 2, at 165 (statement of Townsend Hoopes).

In Singapore's defense, the sluggishness of the government in acting to combat copyright piracy does not stem from bureaucratic inefficiency or laziness. The government bases its reluctance to protect foreign rights holders on the grounds that "the genuine products are priced beyond the reach of the average consumer."⁴² Because lesser developed countries, like Singapore, have no indigenous recording, film, or publishing industry, they have little to gain in providing copyright protection. According to the Minister of Culture, Mr. S. Dhanabalan: "[t]here is no local talent in Singapore worth protecting."⁴³ The problem is only exacerbated by the lucrative rewards of the pirating industry; the intangible benefits of international goodwill are hard to measure against mounting revenues.⁴⁴ Moreover, these countries import intellectual property without the money or goods to offer in exchange. The problem is particularly vexing for educational, cultural, and scientific materials without which Singapore cannot advance.⁴⁵ The alternative may be to opt out of the system and to take what is needed on the grounds that industrial countries operated in the same fashion not long ago.⁴⁶ The task of the United States government is to bring Singapore into the international copyright system.

The Caribbean Basin Economic Recovery Act (commonly referred to as an Initiative) conditions designation as a beneficiary state first on the mandatory criterion that the state does not rebroadcast United States copyrighted works through government-owned channels without the consent of the rightsholder. Designation is also based on the discretionary criteria that the state acts to prevent unauthorized appropriation and use of United States copyrighted works and enacts domestic laws governing such intellectual property. *Oversight, supra* note 14, at 127-28. As an example of the Initiative's success, the Dominican Republic has since adhered to the principles of the UCC in order to assure the United States of its intention and efforts to combat book piracy. *Id.* at 129-30.

⁴² *Oversight, supra* note 14, at 100 (quoting WIPO Worldwide Forum on the Piracy of Sound and Audiovisual Recording 2, Mar. 25-27, 1984, No. PF/I/15/8 (statement of Mohamed Gouma).

⁴³ *U.S. Out to Sink, supra* note 10, at 6. This is borne out by Singapore's response to a UNESCO questionnaire in which Singapore indicated that there was an insufficient number of national authors to provide the materials required by the country. *Developing Country Needs for Copyrighted Works*, COPYRIGHT BULL., vol. xv, No. 2, at 13 (1981).

⁴⁴ *Oversight, supra* note 14, at 1 (where Senator Leahy writes: "I asked one of the government officials about [the government's refusal to take an official stand on piracy], having seen so many obviously pirated items on the street, and his answer was very blunt and to the point. 'It makes money,' and they have no intention of doing anything about it." David Ladd, Register for Copyrights for the United States, writes: "These states are long on printers and short on publishers, long on audio hardware and short on record producers, long on VCRs and short on filmmakers." *Id.* at 98.)

⁴⁵ See *infra* note 200 and accompanying text.

⁴⁶ S. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 279 (1983)(referring to the wealth allegedly drained from developing countries by the colonizing powers).

III CURRENT APPROACHES TO COMBATING PIRACY

A. Reform from within Singapore

Without either the natural resources or the boundless supply of labor of its Southeast Asian neighbors, Singapore is dependent on its position as a major port and center of international trade for economic success. It is not surprising, then, that the government of Singapore is extremely concerned with its image in the international business world.⁴⁷ In the past year this concern has been evidenced by the government's attempts to end piracy. If successful, such action would undoubtedly be a significant step toward reconciliation with United States businesses and the United States government. On the other hand, if the recent activity is merely window dressing for the benefit of the United States, such deception will only add to the frustrations of foreign rightsholders.

Singapore is undoubtedly under considerable pressure from outside to reform its laws and enforcement. The United States government sent a delegation of officials, accompanied by representatives of copyright industries (audio, video, publishing, and computer software) to meet with Singapore officials on May 2 and 3, 1984.⁴⁸ The delegation sought a pledge from Singapore "to end the export and domestic manufacture as well as sale of pirated and counterfeited American products."⁴⁹ Although Singapore officials agreed to look into the problem, the absence of any timetable prompted the delegation to consider the trip a failure.⁵⁰ According to the subcommittee report: "[e]ven a requested general commitment by the Singaporean government to condemn piracy as 'unacceptable' commercial behavior was not forthcoming."⁵¹

Still, there are indications of copyright reform in the legislative and the judicial branches of the government. First, the Singapore Parliament is expected to revise the domestic copyright laws by the end of the 1986 calendar year. Under the draft bill, pirates would face stiffer maximum fines (of up to S\$10,000 for each infringement) for a wider range of

⁴⁷ See *Charity Hit*, *supra* note 26, at 8 (where *The Times(London)* reports that: "A number of legal sources believe the Bandid incident [pirating the charity album] which has embarrassed and angered a highly-image conscious Administration, has added urgency to the issue.")

⁴⁸ *U.S. Copyright Delegation*, *supra* note 10, at 21; see also *Oversight*, *supra* note 14, at 104 n.137 (statement of David Ladd), noting that the delegation was under the direction of the Office of the Pacific Basin, International Trade Administration, Department of Commerce. Among the participants, the hearing lists "officials of the Office of the United States Trade Representative, the Department of State and the Copyright Office. . . . For both negotiations, representatives of concerned United States Industries were present and, contributed to the analysis of particular intellectual [property] problems." *Id.*

⁴⁹ *U.S. Copyright Delegation*, *supra* note 10, at 21.

⁵⁰ *Id.*

⁵¹ *Oversight*, *supra* note 14, at 104 (statement of David Ladd).

works, including videotapes and computer software.⁵² This latest surge is attributable to Singapore's desire to attract computer software business and, at the same time, avoid losing beneficiary status under the United States' Generalized System of Preferences.⁵³ Although such legislation would appear to provide rights holders with greater protection against piracy, according to IFPI lawyer Nicolas Garnett, the bill has three serious faults: 1) it gives the State the burden of proving *knowing* infringement by the defendant; 2) it does not require Singapore to adhere to the international copyright conventions; 3) while it raises the maximum penalty, it still provides for no minimum penalty with the result that "judges will be able to impose small fines of 200 to 300 dollars as they do now."⁵⁴

While statutory revision is caught in the mire of legislative politics, the Singapore courts have recently had the opportunity to experiment with copyright reform in *Butterworth & Co. v. Ng Sui Nam*.⁵⁵ While the decision holds little promise of relief for United States rightsholders, it is certainly indicative that change is in the works.

1. *Butterworth & Co. v. Ng Sui Nam*

In the face of the government's refusal to change copyright laws, a consortium of British book publishers and rightsholders sought copyright protection by arguing that the Imperial Copyright Act of 1911⁵⁶ still protected British rightsholders in the former colony.⁵⁷ The plaintiffs brought this action against the proprietor of several Singapore book

⁵² Beale, *Singapore: Action Against Offenders Stepped Up*, *The Financial Times*, Nov. 3, 1986, at 23 (available on NEXUS, Nov. 4, 1986). *The Financial Times* also reported that "the government plans to set up a copyright tribunal to decide on the remuneration payable under statutory licenses."

⁵³ Beale, *supra* note 52. Beale writes:

First, it became apparent that Singapore's aspirations to become a regional focus for research and development in high technology sectors—a "brain services centre"—were increasingly under threat because of its reputation as a hotbed of piracy. US computer software makers, keen to set up business in Singapore, were worried about protection for the copyright on their products, in some cases representing investment of millions of dollars. Commercial staff at the US embassy went so far as to advise companies to stay away until the law was reinforced.

...

The second incentive to beef up the copyright law is the danger that continued pirate activity could jeopardise Singapore's status as a favoured trading partner under the US Generalized System of Preferences (GSP), which is currently being reviewed. Beale also referred to *Butterworth*, [1985] 1 M.L.J. 196, as "[t]he beginning of the end for the island's copyright pirates." For a discussion of *Butterworth*, see *infra* notes 56-91 and accompanying text. For a discussion of the threat to Singapore's beneficiary status under the GSP, see *infra* notes 92-153 and accompanying text.

⁵⁴ Telford, *Music Industry Says Copyright Bill Lacks Teeth*, *Reuters*, May 2, 1986 (available on NEXUS).

⁵⁵ [1985] 1 M.L.J. 196.

⁵⁶ Copyright Act, 1911, 1 & 2 Geo. 5, ch. 46.

⁵⁷ *Butterworth*, [1985] 1 M.L.J. at 203.

stores who had imported and sold copies of works without the license or consent of the plaintiffs who owned the rights.⁵⁸ The sole question of law before Judge Thean and the High Court was “whether such works are entitled to copyright protection within the Republic of Singapore.”⁵⁹

In order to prove an infringement under the Imperial Copyright Act of 1911, the plaintiffs had to prove first, that the 1911 Act was still in force, and second, that the Act provided protection for works first published in the United Kingdom as well as those first published in Singapore.⁶⁰

2. *The Force of the 1911 Act in Singapore*

The application of the 1911 Act reflects the legal complexities of evolving statehood. To prove that the 1911 Act was still in effect, the plaintiffs had to trace its application through the laws of the Straits Settlements, the Federation of Malaysia, and, finally, the Republic of Singapore. The 1911 Act was originally enacted by the British Parliament on December 16, 1911. The Act provides copyright protection throughout “His Majesty’s dominions” for work first published within those dominions.⁶¹ At the time, Singapore was a dominion of the British Empire (as the Straits Settlements). By a proclamation of July 1, 1912, the 1911 Act came into force in the colony.⁶²

The 1911 Act was superseded in Great Britain on June 1, 1957 by

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The court readily disposed of the first argument in plaintiff’s favor and focused on the second question, saying:

The issue . . . is not whether the 1911 Act applies as part of the law of Singapore, as will be seen from a historical review of the copyright legislation, it undoubtedly forms part of the law of Singapore. The issue really is how is the 1911 Act to be construed; whether it is to be construed so as to confer copyright protection on the said works, all of which were first published in the United Kingdom, or only on works first published in Singapore. The question for determination turns on the construction of the 1911 Act in the context of Singapore as a sovereign independent state.

Id. at 198. Nevertheless, the issue of the continued applicability of the 1911 Act is of utmost importance to the case as demonstrated by the court’s later decision not to protect works copyrighted between 1957 and 1959 where there was a gap in the applicability of the Act. *Id.* at 199.

⁶¹ Copyright Act, 1911, 1 & 2 Geo. 5, ch. 46. The Act provides in pertinent part:

1.(1) . . . copyright shall subsist throughout the parts of His Majesty’s dominions to which this Act extends. . . in every original literary dramatic musical and artistic work, if—

(a) . . . the work was first published within such parts of His Majesty’s dominions . . . except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries . . .

25.(1) . . . shall extend throughout His Majesty’s dominions: Provided that it shall not extend to self-governing dominions, unless declared by the Legislature of that dominion to be in force.

⁶² *Butterworth*, [1985] 1 M.L.J. at 198.

the Copyright Act of 1956.⁶³ The 1956 Act made no provision for the extension of the 1911 Act articles concerning reciprocal protection between Great Britain and the dominions. Thus, Judge Thean concluded that, after June 1, 1957, although the 1911 Act was still in force in Singapore, "one was driven inescapably to the conclusion that the United Kingdom was no longer an area to which the 1911 Act extended and consequently as from that date all works first published in the United Kingdom were no longer afforded any copyright protection."⁶⁴ The Court attributes this omission to a lapse on the part of the Parliament. By June 26, 1959, however, Parliament rectified the situation by passing the Extension Order of 1959⁶⁵—this extended the 1956 Act to the colonies providing protection once again for British rightsholders.⁶⁶ However, the Court determined that this provision did not provide retroactive protection for the three years between 1957 and 1959 with the result that British rightsholders were left unprotected for work first published between June 1, 1957 and June 26, 1959.⁶⁷

The 1911 Act survived several later changes in the government of Singapore. First, Britain granted the island a limited statehood in 1958 which allowed for internal self-government while preserving external affairs as a dominion of Great Britain.⁶⁸ The Constitution governing internal affairs did not affect the 1911 Act.⁶⁹ On September 16, 1963, Singapore was granted independence from the British Empire as a constituent state of the Federation of Malaysia.⁷⁰ The Constitution of the State of Singapore provided that "all existing laws shall . . . continue to have effect."⁷¹

⁶³ Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74.

⁶⁴ *Butterworth*, [1985] 1 M.L.J. at 198-99.

⁶⁵ *Id.* at 199.

⁶⁶ The order states:

In so far as the Act of 1911 or any order in Council made thereunder forms part of the law of any country other than the United Kingdom, at a time after that Act has been wholly or partly repealed in the law of the United Kingdom . . . it shall, so long as it forms part of the law of the country first mentioned, be construed and have effect as if that Act had not been so repealed.

Id.

⁶⁷ *Id.*

⁶⁸ THE SINGAPORE (CONSTITUTION) ORDER IN COUNCIL, [1958] 2 U.K. S.I. 2156 (No. 1956).

⁶⁹ The Constitution continued in force all existing laws. THE SINGAPORE (CONSTITUTION) ORDER IN COUNCIL, § 121.-(1), [1958] 2 U.K. S.I. at 2205. See also *Butterworth*, [1985] 1 M.L.J. at 199; S. JAYAKUMAR, CONSTITUTIONAL LAW 2 (Singapore Law Series, Koh Kheng Lian ed. 1976).

⁷⁰ Under the Malaysia Agreement, Singapore became one of the states of Malaysia. THE MALAYSIA AGREEMENT, 1963 U.K. Cmnd 2094. Singapore was officially governed by THE SABAH, SARAWAK AND SINGAPORE (STATE CONSTITUTIONS) ORDER IN COUNCIL, [1963] 2 U.K. S.I. 2656 (No. 1493); see also S. JAYAKUMAR, *supra* note 69, at 3.

⁷¹ THE SABAH, SARAWAK AND SINGAPORE (STATE CONSTITUTIONS) ORDER IN COUNCIL § 48(1), [1963] 2 U.K. S.I. at 2677.

To answer the question whether imperial legislation, such as the 1911 Act, continued in force after the independence of a former colony, the Court looked to some judicial precedents. In *Performing Right Society v. Bray Urban District Council*,⁷² the Privy Council determined that the 1911 Act continued in force after Ireland's independence because the 1911 Act was not inconsistent with the Irish Constitution.⁷³ The problem was also addressed by the Madras High Court in *Blackwood & Sons Ltd. v. A.N. Parasuraman*.⁷⁴ Here the court determined that the 1911 Act remained in force after India's independence because the Constitution continued existing law.⁷⁵ Following these precedents, Judge Thean determined that "the 1911 Act . . . [was] part of the then existing law of Singapore and by virtue of Article 105 [of the Constitution]⁷⁶ continued in force on and after the Constitution came into effect."⁷⁷

Likewise, the Court had little trouble finding that the Act was still in force when Singapore later became independent from Malaysia in 1965. The Singapore Independence Act⁷⁸ had incorporated all existing laws including the 1911 Act.⁷⁹ The result was that the original 1911 Act remained in force in Singapore long after the United Kingdom and other countries had amended or repealed the Act. The historical accident which left Singapore copyright laws badly outdated ironically preserved, intact, protection for rightsholders "throughout His Majesty's dominions."

3. *Protection for Works First Published in the United Kingdom*

The defendants challenged the application of the 1911 Act to Singapore as the island republic was no longer a dominion of the British Empire.⁸⁰ The outcome of the case rested on the judge's construction of the phrase, "His Majesty's dominions," to be a geographical and not a political description. Had Judge Thean interpreted the phrase to turn on the political relationship between Great Britain and Singapore, the law

⁷² [1930] A.C. 377 (Ireland).

⁷³ *Id.* at 395-96.

⁷⁴ 1959 A.I.R. 410 (Madras H.C.).

⁷⁵ *Id.* at 417-18.

⁷⁶ THE SABAH, SARAWAK AND SINGAPORE (STATE CONSTITUTIONS) ORDER IN COUNCIL, [1963] 2 U.K. S.I. 2656 (No. 1495).

⁷⁷ *Butterworth*, [1985] 1 M.L.J. at 201.

⁷⁸ REPUBLIC OF SINGAPORE INDEPENDENCE ACT 1965 § 13. The Act states that: "all existing laws shall continue in force on and after Singapore Day, but all such laws shall be construed as from Singapore Day with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act and with the independent status of Singapore . . ."

⁷⁹ *Butterworth*, [1985] 1 M.L.J. at 203.

⁸⁰ *Id.* at 198.

would be said to have expired when Britain granted Singapore independence.

Judge Thean drew on earlier precedent to hold that "dominions" referred to a geographical description.⁸¹ In *Public Prosecutor v. Anthony Wee Boon Chye*,⁸² the defendants were accused of forgery in Hong Kong. Having fled to Singapore, they challenged a Singapore order for repatriation made under the Fugitive Offenders Act because the Act applied only to a "British possession."⁸³ The court preferred to construe "British possession" to be a geographical expression stating that the phrase was "drained of any content implying any political relationship between the United Kingdom and Singapore"⁸⁴ Judge Thean focused attention on the language of the earlier case stating: "I find that I am bound to follow the principles adopted by the majority of the Federal Court in construing the [Fugitives] Act In other words, the term the 'parts of His Majesty's dominions' to which the 1911 Act extends is to be construed as an area embracing all countries geographically falling within those parts of the British dominions."⁸⁵ The Court further determined that the law was not repugnant to the present constitution so that works first published in Great Britain are still protected by the 1911 Act.

4. Butterworth and United States Rightsholders

While the decision may be of comfort to British book publishers, the real issue for United States rightsholders is the significance of *Butterworth* as either a vehicle for or an indication of change in Singapore laws. The narrow holding of the case provides that British rightsholders⁸⁶ are protected for literary, dramatic, musical, and artistic work,⁸⁷ except those created between 1957 and 1959. The case would seem to suggest little direct relief for United States rightsholders.⁸⁸ How-

⁸¹ *Id.* at 202.

⁸² [1965] 1 M.L.J. 189.

⁸³ *Id.* at 190.

⁸⁴ *Id.* at 193.

⁸⁵ [1985] 1 M.L.J. at 202.

⁸⁶ While the phrase is open to all the British dominions, the Court speculates that most of the countries which would qualify as dominions have probably repealed or amended the 1911 Act to read out the phrase "throughout . . . His Majesty's Dominions." *Id.* at 203.

⁸⁷ At the time the 1911 Act was written, no protection was contemplated for recordings, reproductions, and software. The court, under stipulated facts for the determination of the sole question of the applicability of the 1911 Act, did not define the extent to which the rights of reproduction were protected.

⁸⁸ Not all United States rightsholders are necessarily unprotected. By a quirk of history, United States book publishers may garner some relief from the protection of works first published in Great Britain. While the United States did not accede to the Berne Convention on International Copyright Protection, United States rightsholders were able to secure protection for their works by making

ever, there is room for optimism in the Court's willingness to extend protection to British rightsholders. First, the Court entertained the argument that the 1911 Act was still applicable, relying on thirty- and fifty-year-old precedents. Second, the Court, relying on a thirty-year-old case, interpreted the phrase "British dominions" to be only a geographic expression although it was surely intended at its writing to refer to territories in a certain political relationship with Great Britain.⁸⁹ Had there been no pressure on the government to reform copyright protection, the court might well have interpreted the word "dominion" according to its political, not geographical significance.⁹⁰ Thus, the case suggests that the Singapore Court may be more open to arguments extending existing protection to areas once thought beyond the scope of the laws.⁹¹

B. Economic Reprisals: the United States Trade and Tariff Act of 1984

The alternative to relying on Singapore's judicial system to vindicate intellectual property rights is to impose economic pressure on the Singapore government. This approach has found support in the United States Congress. In late 1984, Congress amended the Generalized System of Preferences ("GSP")⁹² to condition status as a beneficiary country on effective protection of United States intellectual property.⁹³ The measure is most appropriate as eleven of the top fifteen beneficiaries of the GSP "clearly failed to provide protection to U.S. publishers against unauthorized reproduction and sale of copyrighted materials."⁹⁴ Although effec-

simultaneous first publications in the United States and a Berne Union country such as Great Britain. Because this backdoor approach relieved rightsholders of eligibility requirements, the practice was widespread. *Oversight*, *supra* note 14, at 42-43 (statement of David Ladd). *See also* S. STEWART, *supra* note 46, at 128. Those United States publishers who had works simultaneously first published in the United States and in Great Britain may now find that those works are eligible for protection by Singapore's 1911 Act.

⁸⁹ This is the reason for the Act's distinction between dominions and self-governing dominions; *see supra* note 61 (containing the provisions of the Act which except protection to self-governing dominions).

⁹⁰ This suggests only that judge-made law is susceptible and properly responsive to the progress of public and official sentiment, not that judges are coerced or coaxed into strained definitions.

⁹¹ For example, an argument suggesting a more expansive reading of "literary, dramatic, musical, and artistic work" so as to include reproductions, recordings, and perhaps software.

This optimism would no doubt be welcomed by the Motion Picture Export Association of America (representing ten of the major United States film producers) which is presently seeking an injunction against local video distributors who are marketing pirated goods. *Charity Hit*, *supra* note 26, at 8.

⁹² *See infra* notes 127-33 and accompanying text.

⁹³ The renewal itself was quite controversial as the GSP was meant to be only temporary relief. H.R. REP. NO. 1090, *supra* note 10, at 2, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5101.

⁹⁴ *Proposed Renewal*, *supra* note 2, at 168 (Hoopes; Singapore was number six. *Id.* at 174.)

tive January 4, 1985, this amendment has yet to be tested.

1. The Trade Act of 1974

The GSP provides special tariff treatment for certain products from developing countries. The preference is intended to promote economic development and diversification by providing market access to certain beneficiary countries.⁹⁵ Presently, the program provides 140 countries with unilateral, nonreciprocal duty-free tariffs for approximately 3,000 articles.⁹⁶ The idea was first introduced at the 1964 United Nations Conference on Trade and Development.⁹⁷ The GSP is structured so as to enable developing countries to compete on a more equal basis with developed nations. By increasing exports, and consequently foreign exchange earnings, these countries may grow to be less dependent on outright aid.⁹⁸

The United States enacted a System of Preferences in 1974 under Title V of the Trade Act of 1974 ("1974 Act").⁹⁹ The GSP allows the developed countries to designate products and countries which are to be considered for preferential treatment. The 1974 Act allows the United States to restrict preferential treatment for certain products so as "to protect domestic industries sensitive to import competition."¹⁰⁰

The President is authorized to designate countries as beneficiary states.¹⁰¹ The 1974 Act lists countries which are ineligible for preferential treatment. These include industrialized countries,¹⁰² communist countries,¹⁰³ OPEC countries,¹⁰⁴ and individual countries which have nationalized property of a United States citizen,¹⁰⁵ nullified or repudiated a contract with a United States citizen or corporation,¹⁰⁶ or enforced penalty taxes which, in effect, nationalized property of a United States citizen or corporation.¹⁰⁷ The Act also sets out other factors which the President would take into account, including the desire to be designated

⁹⁵ H.R. REP. NO. 1090, *supra* note 10, at 2, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5101.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 19 U.S.C. §§ 2101-2487 (1982 & Supp. 1985).

¹⁰⁰ H.R. REP. NO. 1090, *supra* note 10, at 2, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5101-02.

¹⁰¹ 19 U.S.C. § 2462.

¹⁰² 19 U.S.C. § 2462(b)(enumerated; presumably because they do not require special treatment.)

¹⁰³ 19 U.S.C. § 2462(b)(1)(presumably since non-market countries would distort trade on the international market.)

¹⁰⁴ 19 U.S.C. § 2462(b)(2).

¹⁰⁵ 19 U.S.C. § 2462(b)(4)(A).

¹⁰⁶ 19 U.S.C. § 2462(b)(4)(B).

¹⁰⁷ 19 U.S.C. § 2462(b)(4)(C).

a beneficiary state, the degree of the country's economic development, and assurances by the developing country that the United States would have equitable and reasonable access to that country's markets and resources.¹⁰⁸

The President also has the power to withdraw the beneficiary status.¹⁰⁹ The Act provides that the President may withdraw treatment as a beneficiary country to any state which exports to the United States a quantity of some item over a prescribed amount¹¹⁰ or a prescribed percentage of the total imports of that article.¹¹¹ The President has the discretion to allow a country to exceed these limits if a historical trading preference or supplementary trade agreement exists between the United States and that state and the state does not discriminate against the United States.¹¹²

2. Behind the 1984 Amendments

Prompted by the fear that piracy and counterfeiting are "costing American jobs, threatening the health and safety of consumers, and undermining the ability of American businesses to compete in world markets," Congress considered proposals to make intellectual property protection a requirement for beneficiary status.¹¹³

Piracy affects the United States in the extra cost of antipiracy programs, loss of potential income, and a reduced benefit to the balance of trade.¹¹⁴ However, the problem is not how to combat counterfeits on the domestic market, but how to control sales from Singapore to other foreign nations. Unlike customs problems, this is an area in which the United States cannot police activity.¹¹⁵ The problem of copyright violation is of even greater concern to the United States Congress for as the

¹⁰⁸ 19 U.S.C. § 2462(c).

¹⁰⁹ 19 U.S.C. § 2464.

¹¹⁰ 19 U.S.C. § 2464(c)(1)(A).

¹¹¹ 19 U.S.C. § 2464(c)(1)(B).

¹¹² 19 U.S.C. § 2464(c)(4)(A-C).

¹¹³ H.R. REP. NO. 1090, *supra* note 10, at 13, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5113.

¹¹⁴ *Proposed Renewal*, *supra* note 2, at 213 (statement of RIAA). *See also id.* at 214, where the RIAA reports that companies donate several million dollars a year to RIAA and IFPI antipiracy activities.

¹¹⁵ In the words of the Subcommittee on Oversight and Investigations:

It is very difficult for a U.S. company to stop this practice. Such laws as exist to protect intellectual property rights in developing nations, where most of the activity takes place, are usually inadequate. Moreover, enforcement is typically unaggressive or nonexistent, especially against a local company accused by a foreign firm.

Unfair Foreign Trade Practices, Criminal Components of America's Trade Problem: Report by the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. 8 (1985).

United States loses its edge in the manufacturing of goods, its export of intellectual property becomes a vital component of United States trade.¹¹⁶

As copyrights may be assigned or transferred by the original author, the publishing and recording industries in the United States are the rights holders most adversely affected by piracy. Accordingly, these industries were particularly outspoken in support of conditioning beneficiary status in the GSP on protection of United States copyrighted works. That the countries receiving the greatest benefits under the program were, at the same time, the countries harboring the most virulent pirate industry, sparked the industries' interest in amending the act.¹¹⁷

The recommendations of the publishing and recording industries for the revision of the Trade Act of 1974 were threefold. First, the industries were concerned that recognition of intellectual property protection as a requirement for beneficiary status should not be understood to be simply part of the President's consideration, but that it should be explicitly expressed in the new act.¹¹⁸ House of Representatives Bill 3398 proposed such explicit criteria.¹¹⁹

Second, the industries argued that protection of intellectual property should be a mandatory criterion for designation as a beneficiary state.¹²⁰ The GSP includes both mandatory criteria, which must be satisfied if the country in question is to be eligible for benefits, and discretionary criteria, which the President will take into account in making status deci-

¹¹⁶ According to David Ladd:

Much of the industrial base which has historically supported American growth, prosperity, and power has migrated to foreign countries But the United States has an enviable position in the information (i.e., copyright) technologies and industries and the United States can maintain it. But to do so, there must be not only in the United States, but throughout the world, adequate and effective protection against theft.

Oversight, *supra* note 14, at 15. See also *Proposed Renewal*, *supra* note 2, at 196 (statement of Stanley Gortikov) ("there can be no doubt that intellectual property of every kind is of increasing importance to the U.S. economy and the competitive posture of the United States in international trade.")

¹¹⁷ *Proposed Renewal*, *supra* note 2, at 168 (statement of Townsend Hoopes). In a statement presented to a Senate Subcommittee, Townsend Hoopes, President of the AAP, argued that:

it is not too much to require such countries to protect U.S. intellectual property interests in exchange for the very substantial trade benefits accorded them under the GSP.

. . . .

Flagrant disregard for intellectual property is inexcusable in countries which benefit from substantial trade and aid concessions provided to them.

Id. at 168-69 (statement of Townsend Hoopes). See also *id.* at 604, where Theodore Weber of McGraw-Hill submitted that: "[i]t should not be too much to expect that these nations which benefit from the GSP do their utmost to protect the right of American companies."

¹¹⁸ *Id.* at 188-89 (statement of Stanley Gortikov).

¹¹⁹ An Act to Change the Tariff Treatment with Respect to Certain Articles and for other Purposes, H.R. 3398, 98th Cong., 1st Sess., 129 CONG. REC. 4516 (1983)[hereinafter H.R. 3398].

¹²⁰ *Proposed Renewal*, *supra* note 2, at 172 (Hoopes).

sions.¹²¹ If a country expropriates United States property, that country will be ineligible for beneficiary status under the Trade Act of 1974. An industry representative testified that “[a] country which offers virtually no protection to U.S. citizens when their intangible. . . property is ‘taken’ without permission or compensation is ‘expropriating’ property just as much as if it were seizing physical assets.”¹²² House of Representatives bill 3398 provided that expropriation of intellectual property would be a mandatory criterion but that the adequacy of foreign laws would remain subject to the President’s discretion.¹²³

Third, the industries proposed that the President submit periodic reports to Congress on the progress of anti-piracy measures in beneficiary states.¹²⁴ House of Representatives bill 3398 provided for a general review by the President to be presented to Congress.¹²⁵

3. *The Trade and Tariff Act of 1984*

In response to pressure by the recording and publishing industries, Congress passed House of Representatives Bill 3398 as the Trade and Tariff Act of 1984 (“1984 Act”).¹²⁶ Where the 1974 Act gave the President the authority to declare a country ineligible if it had nationalized, repudiated a contract, or enforced taxes with the effect of nationalization, the 1984 Act added that the President shall not designate a state as a beneficiary country if: 1) it has nationalized property “including patents, trademarks, or copyrights” belonging to United States citizens or corporations;¹²⁷ 2) it has repudiated contracts which in effect nationalize property “including patents, trademarks or copyrights;”¹²⁸ or 3) it has enforced taxes which in effect nationalize property “including patents,

¹²¹ *Id.*

¹²² *Id.*

¹²³ H.R. 3398, *supra* note 119. Donald Peterson, of the Monsanto Company, made the further suggestion that the President be given the discretion to waive mandatory criteria provided the President report to Congress on antipiracy action being taken by that country. *Proposed Renewal, supra* note 2, at 274. This too is included in the proposed amendment. H.R. 3398, *supra* note 119.

¹²⁴ *Proposed Renewal, supra* note 2, at 178 (Hoopes) and 189 (Gortikov).

¹²⁵ H.R. 3398, *supra* note 119.

¹²⁶ H.R. 3398 was approved on Oct. 20, 1984. There were several other amendments proposed to use the GSP to encourage copyright protection. Senate Bill 1718 would have required the Chief Executive to consider as a basis for GSP status, “the extent to which a country is providing under its law, adequate and effective means for foreign nationals . . . effectively to exercise and to enforce exclusive rights in intellectual property.” (The language is similar to the amended version of 19 U.S.C. § 2462(c)(5), *see infra* text accompanying note 141.) Senate Bill 2539 would have provided for a reporting and review process by which the President could determine whether or not to suspend trade preferences with a particular country. *Oversight, supra* note 14, at 140-44, 149-52.

¹²⁷ 19 U.S.C. § 2462(b)(4)(A)(1982 & Supp. 1984).

¹²⁸ 19 U.S.C. § 2462(b)(4)(B).

trademarks, or copyrights.”¹²⁹ The amendment provides an additional factor which the President would take into account in designating beneficiary countries: “the extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.”¹³⁰ The President’s power to withdraw beneficiary status was likewise conditioned on intellectual property rights protection. In determining whether to waive ineligibility if a country has exceeded import limitations, the President should again take into account the adequacy and effectiveness of that country’s laws in protecting the intellectual property rights of foreign nationals.¹³¹ Finally, the Act allows the United States Trade Representative (“U.S.T.R.”) to initiate investigations into foreign protection.¹³²

The amendments strive to protect the interests of the high technology information industries. By setting the objective of creating open markets for investment in high technology products and services, the amendments add the goal of providing “effective minimum safeguards for the acquisition and enforcement of intellectual property rights and the property value of proprietary data.”¹³³

On November 1, 1985, the U.S.T.R. gave notice of an investigation on the adequacy of the Republic of Korea’s intellectual property laws.¹³⁴ The investigation is the first action taken under the Trade and Tariff Act of 1984 involving the provisions on intellectual property. According to the U.S.T.R., the action was prompted by the failure of Korea’s laws to protect United States intellectual property. “Copyright protection is virtually non-existent for works of U.S. authors. U.S. industry has expressed concern that these practices have inhibited U.S. sales and investment in Korea.”¹³⁵ The investigation will be available to aid the President in the exercise of his power under the Trade and Tariff Act of 1984.¹³⁶

4. *Criticisms of the 1984 Act*

There are three major criticisms of the 1984 amendments to the

¹²⁹ 19 U.S.C. § 2462(b)(4)(C).

¹³⁰ 19 U.S.C. § 2462(c)(5).

¹³¹ 19 U.S.C. § 2462(c)(3)(B)(ii).

¹³² *Civil and Criminal Enforcement*, *supra* note 2, at 65.

¹³³ *Oversight*, *supra* note 14, at 145.

¹³⁴ Notice, 50 Fed. Reg. 45,883 (1985).

¹³⁵ *Id.*

¹³⁶ *Id.*

GSP.¹³⁷ First, the standards of “adequate and effective” protection and “unreasonable trade practices” are insufficiently defined. Second, the Act may not have gone far enough by not explicitly conditioning beneficiary status on protection of intellectual property. Third, forcing a country to choose between trade benefits and the pirate industry on a purely economic ground may lead that country to elect piracy.

While flexibility in standards like “adequate and effective protection” and “unreasonable trade practices” undoubtedly work to the benefit of the officials who may exercise a broad discretion in designating beneficiary countries, the same ambiguity opens the United States to criticism of violating those Universal Copyright Convention¹³⁸ provisions designed to encourage developing countries to adopt copyright laws.

In support of the flexible standards, the House Committee studying the amendments stated:

The Committee recognizes that the new paragraph (5) does not provide a single, objective test for determining whether the law of a foreign country provides adequate and effective protection for intellectual property. This is not a standard susceptible to such a simplistic test, however, since there are a wide range of acceptable standards which vary country to country.¹³⁹

The report also suggested several factors which the President would take into account: 1) the extent (scope and duration) of existing statutory protection; 2) the remedies given injured parties; 3) the vigor with which a government enforces the laws; 4) the opportunity for foreigners to enforce their own rights; and 5) whether the laws discriminate against foreign nationals as opposed to domestic citizens.¹⁴⁰

The problem arises where developing countries enact legislation which falls within the special provisions of the Universal Copyright Convention (“UCC”) but nonetheless appears to provide inadequate and ineffective protection according to the criteria set out above. For example, the UCC provides liberal reprint and translation rights as well as compulsory licenses. These licenses provide that, unless a publisher provides certain materials at a “reasonable” cost, the publisher will have waived the right to translate or reproduce the work and instead will be entitled to some fixed remuneration.¹⁴¹ Rightsholders view these allowances “as inherently unfair and coercive.”¹⁴² Because these practices adversely af-

¹³⁷ *Oversight*, *supra* note 14, at 146-49; see *infra* notes 142-53 and accompanying text.

¹³⁸ For a further discussion of the Universal Copyright Convention, see *infra* notes 161-65 and accompanying text.

¹³⁹ H.R. REP. NO. 1090, *supra* note 10, at 13, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5113.

¹⁴⁰ *Id.* at 12-13, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5112-13.

¹⁴¹ For a more thorough discussion of compulsory licenses, see *infra* text accompanying note 167.

¹⁴² *Oversight*, *supra* note 13, at 149.

fect the remedies and enforcement available to rightsholders, the President could disqualify any country which uses such practices. But the UCC has endorsed liberal reprint and translation rights and compulsory licenses not only to UCC members, but to other states as an enticement to join the copyright system and thus address the needs of disadvantaged states. By denying trade preferences for the exercise of UCC programs, the United States may, in the words of the subcommittee report, "violate the spirit of the UCC and damage comity in the international copyright community."¹⁴³

On the other hand, the amendments have been criticized as not going far enough.¹⁴⁴ By making intellectual property rights a factor which the President may take into account (by designating or withdrawing beneficiary status), the effectiveness of this economic pressure depends on how vigorously the President will exercise the authority. Had copyright protection been a mandatory requirement for designation as a beneficiary, the Act would have sent a clearer and stronger message to countries harboring pirates.¹⁴⁵ Moreover, the burden of showing intellectual property reform would fall squarely on the shoulders of the country desiring preference. Rather than relying on the President to report to Congress on whether its programs merit a waiver, the applicant government would have to prove to Congress the adequacy of its laws. To create a policy with teeth, Congress may have to revoke trade preferences and erect trade barriers.

Finally, forcing Singapore to choose between its tolerance of piracy and its trade with the United States could easily backfire. From an economic standpoint, coercion would force Singapore to evaluate protection in terms of economic costs and benefits. If the value of the proceeds from export piracy plus the money saved in not paying fully for imported works is greater than the value of domestic intellectual property not protected plus the loss in United States trade preferences, then Singapore would not choose to protect intellectual property.¹⁴⁶ As stated earlier,

¹⁴³ *Id.* at 148.

¹⁴⁴ *Oversight*, *supra* note 13, at 149.

¹⁴⁵ *Id.* at 143-44.

¹⁴⁶ For a similar formula, see S. STEWART, *supra* note 46, at 279-80. Stewart reasons that a government will accept international copyright laws if *Ex* (the total of the country's exports of copyrights) plus *NPg* (the national prestige of national authors) is greater than *In* (the total of imported copyrighted materials). Since most developing countries must import copyrighted materials, the developing countries are less likely to find protection to be to their benefit. The National Prestige is said to be the variable at which copyright reform should aim; by convincing governments of the value of copyright law, their interest in national protection would outweigh the costs of importing copyrighted material from the industrial world. *Id.* at 280. This could also be accomplished by lessening the cost of importing copyrights. See *infra* note 188 and accompanying text. Instead,

the value of the proceeds of exported pirated works in the recording industry alone is roughly \$150 million.¹⁴⁷ The money saved in not compensating United States companies (for books and recordings) is said to be roughly \$1 billion.¹⁴⁸ The present value of Singapore's domestic copyright industry is reportedly negligible.¹⁴⁹ Although Singapore is one of the leading seven beneficiary states under the GSP,¹⁵⁰ Singapore's 1983 GSP eligible exports to the United States totaled only \$1,394 million of which only \$512 million is duty free.¹⁵¹ The savings in duties on \$500 million in exports to the United States cannot compare to an industry generating over \$1 billion in business. Thus, from an economic standpoint, Singapore would be likely to continue to tolerate piracy. The figures are of course rough, but the difference is dramatic. Moreover, Singapore may be approaching graduation from beneficiary status¹⁵² because its Gross National Product per capita is \$5,910—highest among the beneficiary countries.¹⁵³ Consequently, the United States must appeal to more than just Singapore's financial concerns in order to get the government to provide protection for intellectual property.

C. Accession to Conventions: International Solutions

The United States is not alone in the desire to extend protection for intellectual property. The governing bodies of the international intellectual property conventions, the Berne Union,¹⁵⁴ and the Universal Copyright Convention,¹⁵⁵ are working towards universal recognition of intellectual property rights through the promotion of and education about international property rights. Singapore has not acceded to either agreement.

The key to extending this body of international law to Singapore is to persuade the government that accession is not only in Singapore's best interest, but that copyright protection is a fundamental tenet of international law. Both conventions are dedicated to the promotion of copy-

economic coercion—as suggested by the equation in the text—adds to the cost side of the equation with the effect of discouraging protection.

¹⁴⁷ See *supra* text accompanying note 17.

¹⁴⁸ See *supra* text accompanying note 11.

¹⁴⁹ See *supra* note 43, and accompanying text.

¹⁵⁰ H.R. REP. NO. 1090, *supra* note 10, at 3, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5104.

¹⁵¹ *Id.* at 4, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5104.

¹⁵² *Oversight, supra* note 14, at 142.

¹⁵³ H.R. REP. NO. 1090, *supra* note 10, at 4, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5104.

¹⁵⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Parry's T.S. 185.

¹⁵⁵ Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132.

right protection through educational programs.¹⁵⁶

The Berne Convention for the Protection of Literary and Artistic Works, established in 1880, is under the auspices of the World Intellectual Property Organization ("WIPO").¹⁵⁷ After one hundred years and several revisions and amendments (the latest in 1979), the Berne Convention is presently recognized by seventy-six states.¹⁵⁸ The convention aspires "to promote the protection of intellectual property throughout the world and to ensure administrative co-operation and co-ordination among the intellectual property unions."¹⁵⁹ As part of a program to increase worldwide acceptance of intellectual property law through promotional efforts, WIPO sponsored a seminar in Manila in 1984 focused on the Pacific Basin region.¹⁶⁰ Nonetheless, the convention has yet to garner the support of key Asian countries such as Korea and Taiwan in addition to Singapore.

Under the auspices of the United Nations Educational, Scientific, and Cultural Organization, the UCC bridged the gap between United States copyright laws and the European conventions. The UCC is designed not only to protect the author's interest but also to encourage the dissemination of ideas.¹⁶¹ The convention is founded on the notion of national treatment (i.e., foreign authors are given the same protection as national authors) and on the requirement that an author's work be given, at a minimum, "adequate and effective" protection.¹⁶² The UCC came into effect in 1955 and, at present, seventy-eight states are signatories; Singapore is not among them.¹⁶³

¹⁵⁶ The idea of educational seminars is also strongly supported by Michael Kirk, Assistant Commissioner for External Affairs, U.S. Patent and Trademark Office, who wrote: "[w]e must continue to encourage these efforts and cooperate in them." *Civil and Criminal Enforcement*, *supra* note 2, at 62.

¹⁵⁷ The World Intellectual Property Organization was created by a special convention in Stockholm in 1974 to govern the Berne Convention. See E.W. PLOMAN & L.C. HAMILTON, COPYRIGHT 84-89 (1980).

¹⁵⁸ *Membership*, 1986 COPYRIGHT 6-8 (*Copyright* is a publication of the World Intellectual Property Organization.)

¹⁵⁹ E.W. PLOMAN & L.C. HAMILTON, *supra* note 157, at 85.

¹⁶⁰ *World Intellectual Property Organization*, 1985 COPYRIGHT 88.

¹⁶¹ For an exhaustive comparison of these two treaties, see generally S. STEWART, *supra* note 46, at 86-173.

¹⁶² *Id.* at 135.

¹⁶³ *Membership*, *supra* note 169, at 12. While the United States still belongs to the governing body of the Universal Copyright Convention, the United States withdrawal from UNESCO at the end of 1984 may have affected the ability of the United States to add significantly to promotion of or changes in the convention. According to Michael Kirk of the Patent and Trademark Office:

There will be an adverse effect because we will not be able to participate in the general assembly of Unesco which determines the program and budget for the copyright activities of Unesco. We will not have a voice at that time of year when the programs established by Unesco are put

The UCC is instrumental in extending copyright protection by its sensitivity to the interests and needs of developing countries. In drafting the UCC, the convention members were responsive to arguments "that without easy access to the literary and scientific works of the developed countries they [developing countries] could not achieve the economic and social progress they were trying to achieve, an aim to which particularly UNESCO was devoted."¹⁶⁴ Accordingly, the Convention embodied an exchange of the recognition of reproduction, broadcasting, and public performance rights in exchange for a system of compulsory licenses.¹⁶⁵

A country with a system of compulsory licenses may require a rightsholder to provide a work within a reasonable period of time for a reasonable price or waive these rights and accept compensation from the licensee for works published. The United Nations General Assembly decides which countries are to be considered developing countries for the purpose of these provisions. Compulsory licenses granted by the state are nonexclusive (i.e., any number of nationals may apply for licenses for one work), nontransferable, applicable only to domestic markets (i.e., no exports are permitted), and granted "for the purpose of teaching, scholarship or research."¹⁶⁶ The original author or rightsholder is given a period of time to market works, notice of the license, and, if the license is used, equitable remuneration.¹⁶⁷ Developed countries may not act reciprocally.

A compulsory license may be granted for a translation right. If a rightsholder "does not exercise his right and does not cause a translation to be made within the stated period after first publication his exclusive translation [right] is temporarily lost and a compulsory license can be imposed."¹⁶⁸ Thus, a country is not disadvantaged in access to works by a language barrier.

Similarly, a compulsory license may be issued for a reproduction

forward and amounts of money are associated with them. So we will lose our voice in that forum.

Civil and Criminal Enforcement, *supra* note 2, at 69. The United States is also considering accession to the Berne Union at this time. *Id.* at 54.

¹⁶⁴ S. STEWART, *supra* note 46, at 136; Stewart also remarks that the same violations (refusal to recognize authors' rights) were committed by countries such as the United States at a period in their development when they were net importers of copyrighted works. Or, in the words of the Senate Report: "since the United States, for so long, had taken the view that international copyright was dangerous to domestic interests, it should be no surprise to hear our own words in the mouths of others." *Oversight*, *supra* note 14, at 84.

¹⁶⁵ *Id.* at 137. See also *supra* note 133 and accompanying text.

¹⁶⁶ *Id.* at 161-62.

¹⁶⁷ *Id.* at 162. Remuneration is adequate and just if it is: 1) consistent with freely negotiated royalties; and 2) paid to the correct owner. *Id.* at 166.

¹⁶⁸ *Id.* at 164.

right "if after a stated period from the first publication of that edition in the developing country concerned copies of that edition have not been distributed either to the general public or in connection with systematic educational activities by the owner of the reproduction right."¹⁶⁹ The compulsory license program is not yet widely used.¹⁷⁰

The greatest drawback of the international copyright system is its failure to include such important states as Singapore. The promotion of United Nations conventions, including the UCC, was the subject of a United Nations Institute for Training and Research study, *Toward Acceptance of UN Treaties*.¹⁷¹ The study suggests that United Nations organizations may gain wider acceptance through a promotional approach (e.g., appeals by the General Assembly or programs by regional or non-governmental organizations), a reporting approach (e.g., to United Nations bodies such as UNESCO), a servicing approach (e.g., disseminating ideas), or a revision of the treaties.¹⁷²

To promote copyright law in Singapore, the United States sent a delegation of government officials and business representatives to Singapore. The delegation had little if any success.¹⁷³ Still, the implementation of international copyright law to Singapore may hinge on the creative revision of the UCC to address the convention's present shortcomings. To an extent, the UCC would benefit from a more realistic approach to the needs of the developing world.¹⁷⁴ There is, however, no guarantee that a more attractive convention would inspire faithful implementation as well as accession.

Criticism of the international conventions and the special provisions for developing countries emanate from both western businesses and commentators from developing nations. First, the United States recording and publishing industries prefer hard-line bargaining and economic coercion instead of a battery of educational programs. Second, developing countries are critical of the complexity of the compulsory licensing program. Finally, the special provisions for developing countries focus on educational materials only—sidestepping the larger problems of piracy.

¹⁶⁹ *Id.* at 169; Singapore expressed a need for some secondary and adult education materials as attested to in the questionnaire conducted by UNESCO. *Developing Countries Needs*, *supra* note 43, at 12.

¹⁷⁰ Ladd, *Copyright and the international technological environment*, COPYRIGHT BULL., vol. xviii, No. 3, at 20 (1983).

¹⁷¹ O. SCHACHTER, M. NAWAZ, & J. FRIED, *TOWARD WIDER ACCEPTANCE OF UN TREATIES*, *passim* (1971).

¹⁷² *Id.* at 15-17, 41-79.

¹⁷³ See *supra* text accompanying notes 48-51.

¹⁷⁴ See *infra* notes 180-84 and accompanying text.

Understandably, promotional and educational programs are generally preferred by the beneficiary nation. These programs are painless and often provide the country with a forum for drawing attention to its economic needs. United States businesses, on the other hand, are increasingly critical of this approach to copyright protection. According to the Copyright Office Report, "industries, particularly those concerned with piracy, desire prompt action taken against piracy in terms of new and vigorously enforced criminal laws and view training programs with some skepticism."¹⁷⁵ Stanley Gortikov, President of the Recording Industry Association of America, at the conclusion of the United States copyright delegation's visit to Singapore, criticized the sluggishness with which the United States government was acting to protect copyrights and urged economic pressure.¹⁷⁶ The Copyright Office report similarly concludes that "the intractability of copyright piracy in many places has raised further questions of the practical effectiveness of copyright treaties."¹⁷⁷

The skepticism of promotional programs evinced by United States copyright industries is not without theoretical backing. Several legal theorists have challenged the effectiveness of imposing western legal concepts on non-western cultures. While concepts of property law are not universally accepted, the concept of intellectual property is even further removed from non-western systems.¹⁷⁸ Writers from developing countries have been quick to criticize the imposition of European law on Asian and African peoples. R. P. Anand, a well-known commentator, argued that "international law can win the respect of the new states only if it reflects the attitudes toward law and justice that correspond with the attitudes held by these countries in their own cultural backgrounds."¹⁷⁹ In light of such criticism, the attempts to persuade Singapore of the importance of copyright protection may be money thrown to the wind.

The most common criticism of developing countries towards the special provisions of the UCC is that the compulsory licensing program is so complex and its requirements so rigid, that the program discourages

¹⁷⁵ *Oversight*, *supra* note 14, at 151.

¹⁷⁶ *U.S. Copyright Delegation*, *supra* note 10, at 21.

¹⁷⁷ *Oversight*, *supra* note 14, at 83.

¹⁷⁸ See E.W. PLOMAN & L.C. HAMILTON, *supra* note 157, at 4 ("[I]t is a vain enterprise to look for signs of copyright in ancient cultures, where intellectual works did not belong to the creator but to the community and to society.")

¹⁷⁹ R.P. ANAND, *NEW STATES AND INTERNATIONAL LAW* 49 (1972). Upendra Baxi has pointed to the Eurocentrism of international law: "settled habits of thought which have led to the acceptance, mostly uncritical, of European (and Western) intellectual and socio-cultural traditions as the invariable, if not superior, frameworks for inquiry." R.P. ANAND, *ASIAN STATES AND THE DEVELOPMENT OF UNIVERSAL INTERNATIONAL LAW* 3 (1972).

its use.¹⁸⁰ The complexity of the arrangement undoubtedly reflects the fact that the system was the product of a difficult compromise between developing and industrial nations.¹⁸¹ David Ladd, Register for Copyrights for the United States, responding to allegations that the compulsory licensing program was too slow or too complex stated that:

these regimes were not intended to be a complete substitute for voluntary negotiations between rightsholders and users. . . . Indeed, it may be fair to observe that the compulsory licensing systems, as now elaborated, optimally would never be required; that their ultimate availability would provide very strong incentives for mutually advantageous voluntary licenses.¹⁸²

Although Ladd suggests that the existence of a compulsory license system should be a sufficient threat to get rightsholders to the bargaining table, the threat is toothless if both parties know that such licensing is too complicated for use by the developing world.

The compulsory license system of the UCC will prove to be inadequate to stem piracy because the provisions are severely limited by their application solely to educational materials. Compulsory licenses for both translation and reproduction rights require that the materials be requested for teaching, scholarship, or research. This limitation is based on the assumption that literary and musical works do not similarly advance development.¹⁸³ Such works require a seven-year wait until the author is said to have waived reproduction rights.¹⁸⁴ Yet the latest works of literature or music are precisely what the public demands and what the pirates are copying. So while compulsory licensing programs would placate the ostensible concerns of developing countries for educational materials, neither of these concerns nor their remedies are honest or realistic.

The alternative to multilateral conventions is bilateral agreements between the United States and the offending nation. Michael Kirk of the Patent and Trademark Office reported on current efforts to forge bilateral treaties on intellectual property protection before a Senate Subcommittee.¹⁸⁵ Included in this effort is a Department of Commerce program, established in conjunction with private industry, in which Foreign Commercial Service Officers report the progress of protection in selected countries—Singapore among them.¹⁸⁶ These reports will serve as the ba-

¹⁸⁰ Ladd, *supra* note 170, at 20.

¹⁸¹ S. STEWART, *supra* note 46, at 162.

¹⁸² Ladd, *supra* note 170, at 20.

¹⁸³ S. STEWART, *supra* note 46, at 161.

¹⁸⁴ *Id.* at 169.

¹⁸⁵ *Civil and Criminal Enforcement*, *supra* note 2, at 55.

¹⁸⁶ *Id.* at 61-64.

sis for bilateral talks. The program also includes training sessions and educational seminars, the first of which involved Singapore's neighbors: Thailand, Malaysia, and Indonesia.¹⁸⁷

IV. NEGOTIATING A REMEDY TO PIRACY

The remedy to copyright piracy lies in a compromise of the needs of developing countries and the interests of the industrial world. In the absence of such compromise, piracy will continue to undermine both. Still, there is room for an agreement which will be mutually beneficial to all parties without sacrificing the fundamental principles of international intellectual property law. A proposed compromise should not only be firmly based on generally accepted principles of intellectual property law but should also answer the threat to copyright posed by rampant piracy.

A. The Basic Concerns of Copyright

The international law of intellectual property is rooted in the balance of two competing interests. On one hand, protection serves to encourage the creation of artistic, literary, or scientific works by ensuring remuneration to the author.¹⁸⁸ On the other hand, copyright protection should not impede the dissemination of information and the sharing of cultural achievements.¹⁸⁹ These interests are not irreconcilable.

B. The Threat to Intellectual Property Posed by Copyright Pirates

Piracy threatens to discourage both the creation and the dissemination of literary, musical, and artistic works. First, piracy impedes the efficient dissemination of information—and thus the right to participate or enjoy the fruit of such information—by placing the flow of works in the hands of mercenaries. While their production mirrors demand to some extent, such production also reflects the ease of producing some works or their appeal to the agent procuring the original. Furthermore, pirated works are not necessarily cheaper than the originals. Alvaro

¹⁸⁷ *Id.* at 55.

¹⁸⁸ S. STEWART, *supra* note 46, at 3; *see also* Hasan, *Copyright and Development*, COPYRIGHT BULL., vol. xvi, No. 1/2, at 11 (1982)(where the author writes: "Without adequate protection, creators would be unwilling to engage in the exacting work of the mind. If, on the other hand, the work is duly rewarded, the author will be encouraged to create more works and enrich the nation's storehouse of knowledge and culture.")

¹⁸⁹ The Declaration of Human Rights presents the rationale of these two competing interests:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits.

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.

S. STEWART, *supra* note 46, at 5.

Garzon of the Mexican Copyright Office, reports that pirates sell school-books at near normal prices and pocket the difference. This surely does not provide a developing country with increased access to educational materials.¹⁹⁰ It is also argued that the existence of rampant piracy discourages investment by and trade with United States companies (such as computer companies) which would otherwise promote the inflow of educational and cultural materials.¹⁹¹ Finally, as the pirates do not pay royalties, the burden of providing access falls on the individual rightsholders. Thus, while the state has the power to cover costs of information dissemination (i.e., developing nations through financial assistance and developed countries by forwarding that assistance), piracy would promote access only at the expense of individual authors or rightsholders.¹⁹²

Second, piracy discourages the creation of intellectual property by appropriating the royalties of the authors. Less obvious, but equally invidious, is the effect of piracy in standardizing public taste. By flooding world markets with cheap works from the United States and Europe, "[e]roding the original characteristics and national temperaments, smoothing away the differences, reducing tastes to the same level, pirates destroy the culture of people."¹⁹³ Market flooding not only molds public buying behavior, but also forces or encourages local authors to imitate the imported works.¹⁹⁴

Perhaps most important, piracy discourages a domestic industry in intellectual property in several ways. Piracy satiates the demand for such works with foreign products at low prices. It also undercuts domestic prices to the point where there would be no economic incentive for domestic authors. Piracy hinders the establishment and growth of domestic publishing and distribution businesses which rely on the more highly-priced copyrighted works.¹⁹⁵ Finally, as mentioned above, piracy encourages only the imitation of pirated works.¹⁹⁶

¹⁹⁰ Garzon, *supra* note 3, at 12.

¹⁹¹ *Proposed Renewal*, *supra* note 2, at 170-71.

¹⁹² Koumantos, *Copyright and the financing of educational policy*, COPYRIGHT BULL., vol. xvi, No. 4, at 16-19 (1982)(This is a perspective piece on balancing education needs against a desire to promote copyright protection by Georges Koumantos, President of the International Literary and Artistic Association.)

¹⁹³ UNESCO, *Piracy and Creativity*, COPYRIGHT BULL., vol. xv, No. 2, at 4 (1981)(the article discusses the problems of standardization of public taste and discouragement of national creation which result from piracy.)

¹⁹⁴ *Id.*

¹⁹⁵ *Proposed Renewal*, *supra* note 2, at 170.

¹⁹⁶ *Piracy and Creativity*, *supra* note 193, at 5.

C. Why Piracy is Rampant

The opportunity for the pirate's success is the result of two factors: 1) the economic incentives provided to pirates, and 2) the ineffective legislation which allows for their operation. The rewards of piracy are certainly lucrative, garnering up to \$1 billion.¹⁹⁷ Moreover, the existence of excess printing or reproduction capacity also facilitates piracy.¹⁹⁸ Despite these rewards, piracy would fail to prosper in the face of effective legislation and enforcement. Such legislation will not be forthcoming, however, until there is some incentive for the Singapore government to act to protect copyrights.

D. Failure of Existing Policies

The three approaches discussed earlier have failed to balance the interests of encouraging artistic and intellectual works with the concern for facilitating the dissemination of scientific and cultural advancements. The hesitation with which Singapore enforces its existing laws and the limited scope of statutory changes and recent case law deny remuneration to authors without substantially furthering access to information. The savings from unpaid royalties might have been applied toward reducing the cost, thereby increasing the accessibility of copyright works to the Singapore citizenry. Instead, local pirate businesses determine the substance and cost of works and also pocket the savings.

Economic retaliation, on the other hand, favors remuneration for authors' works without regard to the substantial needs of the developing world. Thus, Singapore is likely to reject the idea of intellectual property rights in favor of the returns from, and prosperity of, the reproductions industry.

Finally, existing international conventions are not attractive to either party. The provisions for developing countries are so limited and complicated as to inhibit their use. At the same time, the conventions have not managed, despite the financial assistance of the industrial world, to gain adherence from the countries where pirates operate.

E. A Solution

A compromise which will balance the interests of the developing and the industrial states requires both the carrot and the stick. As an inducement to enter the copyright system—the carrot—the UCC might offer an enlarged system of compulsory licensing. At present, compul-

¹⁹⁷ See *supra* text accompanying note 2.

¹⁹⁸ Garzon, *supra* note 3, at 16.

sory licenses are granted for only scientific or educational materials. If, however, the licenses were granted for nonscientific, noneducational materials, the program would better reflect the demand of developing countries. It is unrealistic to expect these countries to develop technologically while they are relegated to a cultural stone age. Technological advancement is perilous without concurrent social and cultural progress.

The point is particularly evident when the impact on local industry is taken into account. At present, the local industry consists of pirate houses and small outlets of legitimate works;¹⁹⁹ neither has the stability necessary to promote long-term economic growth for Singapore. In contrast, a system in which government appointed licensees remunerate rightsholders with fixed royalties and reproduce artistic and literary works would promote the development of an indigenous production and distribution network. Eventually, the industry would service both foreign and domestic artists. Thus, instead of competing with pirate's cost-cutting, local artists would compete with foreign artists for readers or listeners. This is the type of competition that encourages cultural development instead of impeding it.

Such a compulsory license program would require certain basic features. First, the rightsholders must be compensated in some form. By recognizing compulsory licensing as a type of nationalization of property, the licensing offices of each country may apply the tenets of fair valuation to arrive at a value to pay the author. This would reflect what consumers in developing countries would expect to pay for works, not what western artists expect to be paid. This differential, plus the savings from local production (e.g., cheaper labor), would bring the price of books, computer programs, and cassettes down to an affordable level. Second, the compulsory license should be a temporary program—available until the country has become sufficiently developed. This time period, whether gauged by growth in per capita income or industrial output, should be liberal enough to recognize that industrial development is a long process and requires the patience of the industrial world. Third, the program must give the author some opportunity to negotiate with local publishers or recording businesses before the licenses are dispensed. As with licenses for educational and scientific materials, it is hoped that such a program would create such a successful domestic industry that artists will readily negotiate with the businesses thereby rendering the licensing program obsolete.²⁰⁰

¹⁹⁹ Napier-Bell, *Treasure on tape in pirate island*, *The Times*(London), Aug. 22, 1985, at 8, col. 7 (where *The Times* reports that there are six major pirate syndicates.)

²⁰⁰ Ladd, *supra* note 170, at 20-21.

The notion of treating piracy and compulsory licenses as issues of nationalization is not novel. The arguments are reminiscent of arguments for and against nationalization: developing countries desire access to technology and the ability to protect the return on their investments.²⁰¹

A successful remedy to piracy requires an inducement to accept copyright law and some compulsion to enforce it. This compulsion—the stick—might take the form of economic and penal sanctions. While the most ardent commentators in developing countries would argue that the United States has an obligation to finance development, the reality is that development assistance exists at the benevolence of the United States and its government. The government would lose its credibility if perceived as the benefactor of countries whose citizens rob United States industries of legitimate royalties. The GSP amendments would be more effective if protection of intellectual property were mandatory for trade benefits. A foreign government seeking preferences, not the President of the United States, should have to prove to Congress the adequacy of its intellectual property protection. In addition, the adequacy of that country's laws should include strict minimum penal sanctions for the failure to obtain a license. Such strict measures are necessary in order to send a clear message to developing countries of the importance of copyright.

V. CONCLUSION

Coupling a broadened program of compulsory licenses with economic and penal sanctions is a balancing approach rather than a compromise of the interests of copyright dissemination and protection. Some remuneration is provided to encourage the creation of works and some further access is afforded developing nations by keeping prices low. The result should be the development of a local industry to manufacture and distribute works as well as the cultivation of a market hungry for the work of both foreign and domestic artists.²⁰² Government control of the process takes the business away from the pirates and provides economic incentives only in so far as licensed producers can cut costs rather than

²⁰¹ Intellectual property is often spoken of in terms of "the cultural heritage of mankind"—a term usually associated with resources such as the earth and the sea. León, *Copyright as the basis of cultural development*, COPYRIGHT BULL., vol. xvi, No. 4, at 26 (1982)(This is a discussion of the concerns of the developing countries by J. Ramón Obón León, Director of Legal and International Affairs for the General Association of Mexican Writers.)

²⁰² *Oversight*, *supra* note 14, at 65 ("American copyright owners, as well as those from other countries, can advance their own interests, as well as authorship and publishing generally, by energetically moving to bring their works to the less developed countries timely and at prices realistic for the particular market")

royalties. To some extent, the rightsholders and not the state subsidize the program. However, the rightsholder has an interest in the legitimate, as opposed to pirated, diffusion of the rightsholder's works and some responsibility to the common good by sharing these accomplishments. As an incentive to create works, the rightsholder is more likely to be responsive to smaller official remuneration than to the complete loss of royalties to pirates.

Most importantly, the broadened program of compulsory licenses allows countries such as Singapore to enter the international copyright system without risking political and economic ruin. Both the development of legitimate publishing and recording industries and the retention of trade benefits would provide enough incentive for countries like Singapore to enter the international copyright system. At the same time, this proposal offers sufficient concessions from the United States to prevent developing nations from losing credibility. The international copyright system can only benefit from the wider acceptance of the principles of intellectual property rights. New life for international copyright protection lies in such a balance.

James W. Peters