

Practical Tips for Combating the Scourge of Global Piracy

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“Ripping” movies, “burning CD’s,” “warez” sites, peer to peer file “sharing,” darknets -- internet² piracy has become so prolific that it has developed its own shorthand for referring to such illegal activities as the unauthorized global reproduction and distribution of music, films, software and other copyrighted works on the so-called “Digital Information Highway.” While much of the discussion in the United States is on the problem of internet piracy, hard goods piracy remains a virtually insurmountable problem in most of the rest of the world. According to a recent report on global software piracy, 35% of all installed software in 2004 was pirated, resulting in over \$33 billion dollars in lost revenue for US industries alone.³ Estimates by the US Department of Commerce place global piracy losses by US industries at approximately \$250 billion in lost sales.⁴ Moreover, the economic impact of global piracy is not limited to IP owners in the developed world. To the contrary, in a 1995 report focusing on hard goods piracy, the United Nations Conference on Trade and Development (UNCTAD) reported that while the Jamaican music industry generated in excess of \$1 billion (US) globally in 1995, the total value of Jamaican music exports amounted to only \$1.4 million (US).⁵

Losses in developing countries are not limited to domestic music sales. Palace Amusement Company, a locally owned cinema operator in Kingston, Jamaica, recently reported losses last year of 25% of revenues due to the illegal trade in pirated DVDs.⁶ These are monies developing countries can ill afford to lose.

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² Although common usage continues to use initial capitals to describe “the Internet,” such usage no longer seems appropriate given the internet’s wide spread and long standing use. Just as “the Telephone” has become “the telephone,” so too, it is time to recognize that “the Internet” has become an accepted and longstanding communication form which no longer needs to be treated with the exclamatory reverence of initial capital letters. Capital letters subconsciously tell us all that the “Internet” is something new, so new that we cannot yet be expected to deal with the problems it poses. The time for such complacency, along with the initial capital letters, is long past.

³ BSA Global Piracy Study for 2004, <http://www.bsa.org/globalstudy>.

⁴ Bush creates new post to fight global piracy, http://news.com.com/2102-1028_3-5800092.html (July 22, 2005). This figure presumably does not include lost tax revenues, or lost business and employment opportunities.

⁵ Speaking Notes for HM at Official Launch of JIPO, http://www.mct.gov.jm/jipo_launch.pdf.

⁶ Movie Piracy Costing Cinemas by Box Office Losses, The Jamaica Observer (July 10, 2005)(<http://www.jamaica-observer.com/magazines/business/html>).

The truth is no one can precisely measure the scope of global piracy. Pirates are not exactly known for keeping accurate tallies of their sales. Yet there are numerous signposts that demonstrate how large the pirate problem on the ground has become. Importation of optical disc media far in excess of domestic demands, the presence of law enforcement officials patrolling well-known pirate markets, the virtual absence of legitimate sales by domestic music groups in the face of wide-spread popularity of the groups themselves, all help demonstrate the entrenched nature of global piracy in the hard goods world.

Whatever the actual figure of economic losses due to global piracy, there is no doubt that the problem is increasing, both in scope and frequency. As technology advances, so apparently does piracy. Where countries once only sold pirated tapes, increasing prosperity brings pirated CDs, and eventually pirated DVDs. Prosperity, however, does not necessarily also bring legitimate copyright industries. In fact, many developing countries are facing a “brain drain” as their creative and innovative talent leaves for the higher pay afforded in foreign countries whose laws protect the so-called “culture” industries of music, films, software and print publication.⁷

Countless factors have contributed to the growth of the global “scourge” of piracy. Perhaps one of the most significant contributing factors is the simple ease of reproduction offered by modern technologies. Not only can digital copies be created at ever-diminishing costs, these copies, unlike the analog copies of old, are virtually indistinguishable from the original in quality. Worse, the creation of such copies generally does not diminish the quality of the original.

Digital piracy is also relatively inexpensive and push-button easy. Transfer technology that allows people to copy (“burn”) music from one CD to another is so simple, a child can do it. And reproduction times continually drop as compression technology improves. These advances ensure that no copyrighted work is safe from the pirates.⁸

Further fueling global piracy is an increasing “disconnect” in end users’ minds between physical theft and the purchase of pirated works. People who would never engage in shoplifting have no apparent compunction in making and distributing illegal copies of copyrighted songs.⁹ In fact, as opposed to recognizing that such activities are unlawful, there appears to be a growing consensus that piracy is almost a *right* granted to consumers because the cost of a copyrighted work is so high. A common refrain, regardless of the region of the world I am in, is that consumers buy pirated works because the originals are too expensive. The unspoken corollary is that if the price of a work were

⁷ See, e.g., Richard Florida, *The World is Spiky*, THE ATLANTIC MONTHLY 48 (October 2005).

⁸ The exception may be unpopular works since pirates are noteworthy for selecting only the most popular works to sell.

⁹ See, e.g., Is it Wrong to Share Your Music?, THE NEW YORK TIMES (September 18, 2003); Studios Moving to Block Piracy of Films Online, THE NEW YORK TIMES (September 24, 2003); US is Only Tip of Pirated Music Iceberg, THE NEW YORK TIMES, (September 25, 2003).

lower, piracy would disappear. Unfortunately, no one can agree on what that price should be. And so long as borders remain a sieve, any global differential pricing system, which might at least recognize economic disparities in consumer incomes on a country-by-country basis, is more pipe dream than reality.

Although technology has created the “problem” of piracy,” it has not created its solution. There is currently no foolproof copy code or encryption technique developed to keep pirates from illegally copying songs from music CDs, or films from DVDs. To be honest, I seriously doubt that any such “foolproof” technology will ever be created. No matter how sophisticated the technique, somewhere in the world there is some computer hacker who will be able to circumvent the technology. But “foolproof” methods are not required. *Effective* methods capable of discouraging all but the hard-core pirate should be sufficient to substantially reduce global piracy (and would be a marked improvement over the current status quo). Such “effective” methods cannot be achieved overnight. But copyright owners can put in place a protection program that can begin to recover some of the lost income from pirate activities. More importantly, they can begin to build an atmosphere of respect for creative works that may make protection in the face of the next new technological breakthrough less of a catch-up game. An effective global program should include components that reflect eight fundamental realities of the current global piracy scourge.¹⁰ These realities are:

1. Enforcement Cannot Be Imposed Effectively from Without

Numerous international agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the IP treaty administered by the World Trade Organization (WTO), and many of the recently negotiated free trade agreements of the United States,¹¹ require signatories to provide processes and procedures for the enforcement of intellectual property rights.¹² Despite this internationally recognized protection requirement, the reality is that enforcement remains largely problematic, even in many developed countries.¹³ As Hisamitsu Arai demonstrated in his classic examination of Japan’s path from a technology pirate country of the mid-20th Century to a technology exporting country by the 1980’s, countries protect intellectual property

¹⁰ This list is not intended to be an exhaustive one. Instead, it is intended to provide helpful insights into some of the most critical realities impeding effective enforcement today.

¹¹ According to the USTR website, since 2000, the United States has either entered into or is in the process of negotiating free trade agreements with the following countries: Peru, Bolivia, Columbia, Venezuela, Ecuador; Australia, Bahrain, Chile, El Salvador, Costa Rica, Honduras, Nicaragua, Guatemala, Jordan, Singapore, Morocco, Panama, South Africa, Botswana, Lesotho, Namibia, Swaziland.

¹² Australia FTA (Chapter 17); Bahrain FTA (Chapter 14); Chile FTA (Chapter 17); CAFTA-DR FTA (Chapter 15); Jordan FTA (Article 4); Morocco FTA (Chapter 15); Singapore FTA (Chapter 16).

¹³ See Special 301 Report for 2005 (listing Canada and the European Union among those countries whose level of intellectual property protection fails to meet international norms)

(http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html?ht=special%20301%20special%20301).

rights when they recognize that it is in their self interest to do so.¹⁴ To marshal the necessary will power to combat global piracy, technical assistance must include as a critical component a thorough discussion of the value of intellectual property rights for the developing world. Before developing countries can be expected to provide the necessary manpower and expenses to enforce intellectual property rights effectively, they must realize that it is in their own interest to do so.

Efforts by developing countries to enforce IP rights must be supported by effective training programs that teach practical skills. Training of law enforcement personnel, including customs officers, police, prosecutors and judges remains a critical need in creating an effective enforcement infrastructure. IP owners can help alleviate this need by assisting diverse US and international agencies in providing training workshops in countries where their works are being pirated. Such training workshops should provide critical information investigative techniques as well as crucial evidentiary issues such as chain of custody. Theory must be replaced by hands-on training exercises that provide experience in dealing with “real world” problems.

Finally, training efforts should be proactive. It is easy to select countries for training where pirated activities are firmly entrenched. But some money should be set aside for training officials in countries that have not yet become significant pirate havens. It is easier to put out a small brush fire now than to wait for the conflagration later.

2. The “Benefits” of Piracy are Evanescent

In a recent trip to Jamaica to conduct a training workshop for police, prosecutors, and customs officials on piracy, I was surprised to discover that one of the largest stumbling blocks to effective enforcement of music copyright were the musicians themselves. Many of these musicians had proclaimed publicly that they did not object to piracy. To the contrary, they believed that piracy would help enhance their popularity because it made their music available to the masses.¹⁵ We hear the same argument from many musicians in connection with digital piracy in the United States.¹⁶ These same musicians, however, may find it difficult to land a recording contract because *they have no evidence of the amount of sales they could generate*.¹⁷ It is counterintuitive to believe that people who are used to getting music for free or at drastically reduced prices will

¹⁴ Hisamitsu Arai, *INTELLECTUAL PROPERTY POLICIES FOR THE TWENTY-FIRST CENTURY: THE JAPANESE EXPERIENCE IN WEALTH CREATION* (1999). *See also* Kamil Idris, *INTELLECTUAL PROPERTY: A POWER TOOL OF ECONOMIC GROWTH* (WIPO 2003); Shahid Alikahn, *SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES* (WIPO 2000).

¹⁵ *See, e.g.*, Red Flag, *JAMAICA GLEANER* (July 31, 2005) (<http://jamaica-gleaner.com/gleaner/20050731/ent/ent1.html>); Camille Royes, *Bootlegging and Piracy of Copyrighted Material*, *THE DAILY OBSERVER* 12 (August 20, 2005).

¹⁶ *See, e.g.*, Pew Internet and American Life Project, *ARTISTS, MUSICIANS AND THE INTERNET* (December 2004); *See also* Upstart Labels See File Sharing as Ally, Not Foe, *THE NEW YORK TIMES* (September 23, 2003).

¹⁷ Upstart Labels, *supra* note 16.

suddenly pay full price when there is little but anecdotal evidence to support such a view.

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Claims that musicians can make money from concert activities, as opposed to recording contracts, similarly ring hollow. Replacing music producers with concert promoters as the new power behind the music industry does little to address the concerns over fair treatment that lie at the heart of many current complaints over the economic treatment of musicians by “the industry.”¹⁹ Worse, debates over *musician’s* losses ignores another critical group of copyright owners who are plainly suffering from pirate sales – the songwriters. Their incomes depend more directly on album sales than on live performances of their music.²⁰

In reality, many of the perceived “benefits” of piracy are based on wishful thinking and a lack of information about the actual costs of pirate activities. Artists who understand the benefits of protection can be valuable allies in the fight against global piracy. But to obtain their help, time and money must be spent educating this potential class of overlooked warriors about their rights.

3. Too Much of a “Good Thing” Can Be Fatal to Future Growth

There is no question that certain nations are using the manufacture and distribution of pirated works as a tool for economic growth. Piracy has become big business with potentially large gains and few costs.²¹ Pirates do not have to invest in research and development for new product creation. They do not engage in advertising activities to create consumer demand for new products. Since enforcement is often negligible, even if the pirate is caught, penalties remain surprisingly low. Despite the obligation under TRIPS that criminal penalties be available to *deter* copyright piracy on a commercial scale,²² current global penalties are so slight they serve as a mere “cost of doing business.”²³ Yet, despite the facial appeal, the benefits of this new business model do *not* bode well for the host country.

It is well established that many of the technological powerhouses of today’s global economy, including the United States and Japan, built some of their early domestic

¹⁸ While the success of such legitimate music downloading sites as iTunes support the view that some former purchasers of pirated goods will eventually purchase lawful product, the number of such purchasers remains slight in comparison with the number who persist in illegal purchase and file trading activities. *See, e.g.*, Economists Spar Over Impact of File Sharing on Record Sales, 68 *Patents, Copyright and Trademark Journal* (BNA) (June 25, 2004)(Eric Garland comments).

¹⁹ *See* Royes, *supra* note 15.

²⁰ *See, e.g.*, Songwriters Say Piracy Eats Into Their Pay, *THE NEW YORK TIMES*, (January 5, 2004).

²¹ *See, e.g.*, Doris Estelle Long, “*Globalization*”: *A Future Trend or a Satisfying Mirage?*, *J. Copyrt Soc’y USA* 313 nn. 104 – 106 and accompanying text.

²² TRIPS, Article 61.

²³ *See* Special 301 Report, *supra* note 13.

industries on the backs of other countries' intellectual property.²⁴ What is equally clear, however, is that at some point, lack of consistent intellectual property protection can have devastating consequences, not the least of which is the "brain and talent drain." Gifted individuals flee to countries where their intellectual creations are protected, thus, guaranteeing them a steady source of income for their future creative efforts.²⁵

A pirate culture may actually impede a country's industrial growth as the revenue benefits of legitimate industries dissipate. Pirate industries are not generally known for their stellar accounting principles or their willingness to pay taxes on the revenue generated from their "entrepreneurial" activities. Since piracy is generally highest in those countries which are least developed industrially or commercially, any lost tax revenue is directly translatable into lost opportunities to improve education, health and domestic infrastructure. Even in countries where corruption and lax enforcement reduces the likelihood of significant tax revenues, there is at least a better chance of obtaining revenues from lawful industries than from pirate ones.

The presence of unchallenged pirate industries, and their unintended encouragement of a culture of "scofflaws" can erode other law enforcement efforts. The money earned from the "victimless" crime of copyright piracy is often used to finance other more directly dangerous criminal enterprises, including drug and arms dealing.²⁶ The destabilizing effects of these enterprises at both a domestic and international level have been well-documented.

4. Piracy is an Economic Crime Against the Public

The TRIPS Agreement plainly requires that signatories provide effective criminal enforcement against copyright piracy on a commercial scale.²⁷ Yet the reality is that piracy is often considered a private matter involving only the issue of lost compensation. This "no public harm" view of piracy, I believe, explains why many countries do not provide necessary ex officio power to police and other investigatory agencies. As a result, in the absence of an official complaint from the copyright owner, visible pirate activities remain uninvestigated and unchallenged.

²⁴ Thus, for example, the US publishing industry was built on the distribution of "pirated" works by foreign authors, such as Charles Dickens, at a time when domestic copyright law did not grant protection to foreign authors.

²⁵ Both India and Russia saw many of their talented computer programmers leave in the early 80's and 90's to work abroad in Europe and the United States. These countries provided strong protection for their works, resulting in more secure sources of compensation for their efforts

²⁶ See Remarks of Attorney General John Ashcroft on Release of Report of the Department of Justice's Task Force On Intellectual Property (October 12, 2004)(www.usdoj.gov/ag/speeches/2004/agremarksrip.htm); Idris, *supra* note 14.

²⁷ TRIPS Article 61 (requiring criminal penalties for "piracy on a commercial scale" and for "willful trademark counterfeiting).

This “private harm” view of piracy is supported by a dangerous corollary – that piracy is a local industry, conducted by local Mom and Pop “stores” surviving at a subsistence level. This corollary supports another, equally dangerous misperception – that piracy is actually a pro-development activity.

The reality is distinctly different.

As Kamil Idris, Director General of the World Intellectual Property organization recognized, intellectual property can serve as a “power tool” for economic development.²⁸ Pirates, however, do not create new works. They do not invent new cures; they do not innovate. Worse, rampant piracy may actually reduce foreign direct investment.²⁹

In addition to the economic harm to intellectual property owners and lawful domestic industries as a result of the sale of pirated goods, pirates generally do not guarantee the quality of the goods they produce, or exercise control to prevent the creation and marketing of defective or even harmful goods. Many pirates copy the label and packaging so that consumers may not realize they are buying counterfeit goods. This problem has increased with advances in graphics technologies that facilitate the ease with which packaging can be copied. There is nothing “private” about harmful products being marketed under otherwise respectable labels.

Finally, “Mom and Pop” are only the front men for cross-border, criminal enterprises who use money earned from the “harmless” crime of piracy to support more deadly activities.³⁰

5. Just Because It’s Illegal Doesn’t Make it Wrong

Education regarding the importance of valuing and protecting the creative act must form a significant portion of any attempt to deal with global piracy. Such efforts should be directed toward educating the public about the value of creativity as a social good and the harm caused to undiscovered musicians, writers, directors, etc, if illicit trading in pirated goods remains unchecked. Educational activities should be directed primarily to the early elementary and junior high grades where values are being formed and attitudes can be affected. Simply telling people that piracy is bad because it is illegal, without explaining the purposes behind such laws, does nothing to affect the ethical values being instilled by such teaching. Until respect for creators is taught as an ethical value, legal “solutions” to the problem of global piracy remain mere band-aids designed to cover a gaping wound.

6. Creativity Doesn’t Stop at the Studio

²⁸ Idris *supra* note 14.

²⁹ Long, *supra* note 21 and works cited therein.

³⁰ See note 21 *supra*.

Just as pirates do not create new works, they do not add value to existing ones. In the hard goods world, creative thinking at the product design stage could create opportunities for exploitation that pirates are unable to meet. Such “value added” goods may include product based enhancements, such as extended liner notes or instructional manuals. They may also include providing goods supported by warranty and technical support services not available from the pirate market, or the provision of update or replacement copies. To be successful, however, these value-added attributes must be publicized and must be perceived (or promoted) as commercially desirable for consumers.

Finally, new business models to respond to customer needs must be at the forefront of any plan to combat global piracy. The success of iTunes, and its role in launching a new method for lawful delivery of digital music to consumers underscores the potential economic pay off such new models can generate. They can also serve as a potent weapon against piracy by delivering desired products that meet customer demands.

7. It’s About Enforcement, Stupid

An asset without protection isn’t an asset, it’s a liability. Every company needs to conduct on-going audits to assure that critical intellectual property is registered in every country that serves as a present or potential key market. Such registration is helpful in protecting key copyrighted works, and a fundamental pre-requisite for trademarks and patents.

TRIP requires countries to provide “effective” criminal, civil and border protection (customs) enforcement.³¹ Criminal enforcement is the most obvious method for combating global piracy on the ground. Yet in some countries administrative procedures or even civil seizure actions may be more effective in real terms.

Just as piracy is a global affair, so too is the solution. For US companies, the US Government can prove a valuable ally. But it can only help if it has valid, factual information about the particular problems US companies face in a given country. Monitoring the USTR website (www.ustr.gov) for notices about upcoming trade negotiations and responding to periodic requests for information, such as during the annual Special 301 review process, should be a key element in every company’s protection program.

Proactivity also requires continual self-help efforts. Where works are delivered in digital format, technological protection measures must be used to slow the pirates down. Digital watermarks, copy codes, even digital rights management information should be routine product development concerns.

³¹ TRIPS, Articles 40 – 61.

Finally, once enforcement measures are begun on the ground, IP owners need to remain involved in the process. Dropping cases after prosecutors have spent time and money going after pirate organizations does not encourage local authorities to prosecute the next pirate. Neither does ignoring requests for technical assistance. With so many demands on law enforcement's budget, IP can rapidly drop to the bottom of the list if local efforts are not nurtured.

8. Tougher Laws Do Not Tougher Global Protection Make

Pirates take the path of least resistance. Strong enforcement in one country may cause pirate operations to move across the border. This means that solutions to the global piracy scourge require a *global* solution. Tougher penalties are needed in *all* countries, not just in those countries which are a problem today. These penalties must take the profit out of piracy. Slight monetary penalties which leave the pirate with the means to continue his activities are no penalties at all.

In addition to tougher global penalties for piracy, more consistent cross border cooperation between law enforcement agencies is a fundamental requirement to assure that such penalties actually have "teeth." The pirates appear to have little problems operating across borders. It is time for law enforcement, in coordination with IP owners, to achieve the same international cooperation.

Conclusion

Strong copyright protection can be a benefit for all parties in the global creation "mix" – artists, producers, distributors and even end users. Such protection, however, must presently grow in a rocky field filled with misconceptions, corruption and money earned from pirate activities. For the scourge of piracy to be reduced to a slow growing, controllable weed, concerted pre-planning and active involvement in the enforcement process is required by all interested parties.