

THE GLOBAL RESPONSE TO DIGITAL MUSIC PIRACY

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*And through the wire You are secure
And through the wire We can talk
And through the wire We can walk
And through the wire We're clinging like leeches
And through the wire We push out tailor-made speeches
And through the wire We get so strange across the border
We get so strange across the border¹*

I. INTRODUCTION

And through the wire We can get music. The technology facilitating the recent explosion of music on the Internet has grown exponentially during the past few years. Such technology exposes music and musicians to Internet users all over the world. Unfortunately for the recording industry, it also creates tremendous opportunities for music pirates to copy and distribute copyrighted music.² This circumstance is so recent that many countries lack knowledge and resources to combat the problem.

Digital music attracts music pirates. Digital copying creates high quality sound, unlike analog tape recordings, which degrade rapidly from the first generation. Music pirates can transfer huge music files

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¹ PETER GABRIEL, *And Through the Wire*, on PETER GABRIEL III (Geffen 1980).

² Piracy is the unauthorized copying of sound recordings, typically for financial gain. In the music industry, piracy represents a massive US\$4.5 billion illicit enterprise. See *What Is Copyright?* (visited Mar. 29, 2000) <<http://www.ifpi.org>>.

easily and quickly over the Internet with newly developed file compression techniques. The most popular technique is MPEG-1 Audio Layer 3 (commonly known as MP3).³ Music pirates allegedly maintain web sites with thousands of MP3s converted from commercial compact discs (CDs).⁴ Internet users access this music for free or for a small fee.

Portable MP3 players are now available for sale through the Internet or at electronics retailers for less than \$500.⁵ The Ninth Circuit recently dealt a heavy blow to the recording industry in refusing to grant an injunction on the sale of these devices.⁶ These devices can receive, store, and re-play digital audio files, such as MP3s, stored on a personal computer's hard drive. Individuals can download high-clarity music from the Internet or copy a purchased CD, whether copyright protected or not, onto their hard drive, store it in a portable device, and presumably, sell that device. It is easy to imagine these digital devices adapted to boomboxes and car and home audio systems.

Internet users can also record their MP3 files onto blank CDs using a CD ReWriteable (CD-RW) drive.⁷ With CD-RW, it is possible to record and rerecord an unlimited number of song compilations or entire CDs. Thus, individuals can copy music easier and more efficiently. Factory production is no longer necessary for piracy of commercial-quality music.

These new products simplify the production of multiple high-quality copies with a very low investment. When large numbers of high-quality copies can be made privately, piracy, and any copying for personal use is devastating to the copyright system.⁸ Now, music

³ See Stephen M. Kamarsky, *Managing Copyright in Digital Marketplace System May Be Redefined By Music Distribution War*, 222 No. 76 N.Y.L.J (1999) at 54.

⁴ See *id.*

⁵ For example, the "eGo" player for cars costs \$499. See <<http://www.i2go.com/asp/pgobject.asp>> (visited Apr. 12, 2000).

⁶ See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072 (9th Cir. 1999).

⁷ See *Infostation* (visited Nov. 19, 1999) <<http://www.yamaha.com>>.

⁸ Private copying is the non-commercial copying of sound recording for personal use. See GILLIAN DAVIES AND MICHÈLE E. HUNG, *MUSIC AND VIDEO PRIVATE COPYING* (1993), for an argument against reproduction for private use in the digital

piracy can occur anywhere, by anyone with access to a computer. It is estimated that more than 100 million computers worldwide are connected to the Internet and most of them can download and store pirated copies of recorded music.⁹

The advent of digital music on the Internet is arguably the single greatest threat to copyright standards in the history of recorded music.¹⁰ U.S. copyright laws cannot win against global piracy. The response must be global and immediate. Part II of this essay reviews the major multilateral treaties that have addressed piracy. Part III outlines the United States' use of economic leverage in the encouragement of international compliance with these treaties, and Part IV proposes some solutions.

II. MULTILATERAL TREATIES

No universal statutory language requirement or international means for copyright enforcement exists in any multilateral treaty.

A. *The Berne Convention*

Standard copyright customs originated in the Berne Convention, signed in 1886.¹¹ The Berne Convention set minimum standards for copyright protection and required the parties to adopt measures to ensure application of the treaties and availability of enforcement procedures. Every subsequent copyright treaty incorporated the Berne convention standards. Unfortunately, these standards do not sufficiently combat music piracy on the Internet.

age.

⁹ See *Piracy, RIAA Online* (visited Apr. 12, 2000) <<http://www.riaa.com/piracy/piracy.htm>>.

¹⁰ Steven Devick, chief executive officer of Platinum Music believes the Internet will change the way music is promoted. In the future, most music will be available free over the Internet, and advertisers will pay the music companies and musicians. Platinum Music will make its entire catalog available at www.heardon.com by mid-December, 1999. See Press Release *AP-Free Music*, AP-NY-12-01-99 1820EST (Associated Press 1999).

¹¹ The United States joined over 100 years later, in 1988. See Berne Convention Implementation Act, Pub. L.No. 100-568, 102 Stat. 2853 (1988).

The Berne Convention and its later revisions at Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971) provide minimum standards of protection, although national law may afford greater protections.¹² Each signatory agrees to incorporate these standards into its national law, although a number of the provisions are optional.¹³ The treaties allow either National Treatment, which means that foreign copyright holders receive the same protection as domestic authors, or Reciprocal Treatment, in which a foreign copyright holder receives the level of protection he would in his own country.¹⁴

B. *The United Nations*

Two separate agencies of the United Nations (UN) have addressed copyright protection. The World Intellectual Property Organization (WIPO) oversees protection of intellectual property generally,¹⁵ and the World Trade Organization¹⁶ (WTO) works for the protection of copyright in its relation to international trade.

1. World Intellectual Property Organization (WIPO)

Founded in 1967, WIPO has 171 nations among its members.¹⁷ WIPO administers various multilateral treaties dealing with the legal aspects of intellectual property, and facilitates cooperation with developing countries.¹⁸ WIPO adopted the so-called Internet treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and

¹² See Dave Laing, *Copyright and the International Music Industry*, in *MUSIC AND COPYRIGHT* 22, 24-25 (Simon Frith, ed., 1993).

¹³ See *id.* at 25.

¹⁴ See *id.*

¹⁵ Intellectual property includes musical works, as well as literary works, choreographic works, artistic works, maps and technical drawings, photographic works, audiovisual works, and sometimes derivative works, collections and mere data. See *Intellectual Property, About Copyright and Neighboring Rights* (visited Apr. 12, 2000) <<http://www.wipo.org/eng/main.htm>>.

¹⁶ The WTO is the successor organization to the General Agreement on Tariffs and Trade (GATT).

¹⁷ See *About WIPO, General Information, Member States* (visited Apr. 12, 2000) <<http://www.wipo.org/eng/main.htm>>.

¹⁸ See *What is WIPO* (visited Nov. 8, 1999) <<http://www.wipo.org/eng/dgtex.htm>>.

Phonograms Treaty (WPPT) on December 20, 1996.¹⁹ These treaties incorporate copyright protections established in the Berne Convention and extend these rights to works in the realm of digital technology.²⁰ The U.S. Congress ratified both treaties in 1999.²¹ Thirty ratifications or accessions are required before the treaties become binding. At present, only nine countries have ratified the WCT and seven the WPPT.²²

2. World Trade Organization (WTO)

The World Trade Organization negotiates international treaties designed to promote and police free trade on a worldwide basis. The 1971 Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Phonograms (Phonograms Convention) was the first international treaty designed to deal with piracy.²³ The Phonograms Convention protected against duplication of recordings without the consent of the producer for the purpose of distribution and resulted from the arrival of the compact tape cassette in 1963.²⁴ This treaty granted new rights that allowed record producers to stop illegal imports and take action against wholesalers, retailers and manufacturers of illegal copies. However, the Phonograms Convention requires implementing legislation in each contracting state. The Phonograms Convention has achieved success in combating piracy in markets in the record producing countries, but has been less effective in the largely piratical countries, situated mainly in the developing world.²⁵ Developing states have little incentive, other than the economic leverage asserted by the music exporting countries, to spend their limited resources enforcing anti-piracy laws.

¹⁹ See WIPO Copyright Treaty, *opened for signature* Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997).

²⁰ *See id.*

²¹ See Press Release PR/99/185 (Rev.) WIPO Outlines "Digital Agenda" (visited Nov. 8, 1999) <<http://www.wipo.org/eng/pressrel/1999/p185r.htm>>.

²² *See id.*

²³ See Laing, *supra* note 12, at 30-31.

²⁴ *See id.*

²⁵ *See id.* at 31 (quoting Stephen Stewart, Director General, International Federation of the Phonographic Industry).

The Trade Related Aspects of Intellectual Property Rights (TRIPS) emerged from the GATT Uruguay Round negotiations, which started in 1986. It incorporated trade in intellectual property for the first time. During the Uruguay Round, the U.S. maintained that inadequate protection of intellectual property rights is a serious non-tariff barrier to trade.²⁶ On the other hand, developing countries criticized intellectual property rights, saying that developed countries could use them to maintain a competitive edge relative to countries lacking sophisticated technology.²⁷

The TRIPS agreement incorporates by reference most of the substantive provisions of the Berne Convention, thus extending the Berne minimums to WTO countries.²⁸ Developing countries' obligations will go into effect in 2000, with the least developed countries to follow in 2006.²⁹

TRIPS requires member countries to establish enforcement procedures, including provisions for seizure of pirated goods at borders.³⁰ It also requires the establishment of effective judicial procedures, including injunctive relief, measures to preserve evidence,

²⁶ See GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 81 (1992).

²⁷ See *id.*

²⁸ See DAVID LANGE, *INTELLECTUAL PROPERTY CASES AND MATERIALS* 1074 (1998). The TRIPS agreement excludes Article 6*bis* of Berne, which grants moral rights (the spirit and personality of the work).

²⁹ See *id.* There are no WTO definitions of "developed" or "developing" countries. Developing countries in the WTO are designated by self-selection. The WTO recognizes as least-developed countries those countries that have been designated as such by the United Nations. There are currently 48 least-developed countries on the UN list, 29 of which to date have become WTO Members. These are: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, and Zambia. Six least-developed countries in the process of accession to the WTO are: Cambodia, Laos, Nepal, Samoa, Sudan and Vanuatu. Bhutan, Cape Verde, Ethiopia and Yemen are WTO Observers. See *About the WTO* (visited Mar. 29, 2000) <<http://www.wto.org/wto/about/devgroups.htm>>.

³⁰ TRIPS Agreement, Part III § 3 (1994).

and civil damages.³¹ Disputes arising under TRIPS must be settled under the terms of the WTO Dispute Settlement Understanding (DSU), an arbitration mechanism for states that are members of the WTO.³²

III. THE U.S. RESPONSE

Notwithstanding the multilateral treaties outlined above, local legislation governs copyright infringement. For example, a U.S. rightsholder, with a complaint against a pirate located in Brazil, is subject to Brazilian copyright law. Laws in almost every country set forth the specific rights of authors, producers and performers of copyrighted works. Copyright law varies considerably around the globe, as does the commitment to enforcement.

The U.S. encourages other countries to comply with U.S. copyright standards by imposing trade sanctions against countries that violate copyright standards. Section 301 of the Trade Act of 1974 allows U.S. citizens to petition the Office of the U.S. Trade Representative (USTR) against foreign unfair trade practices that adversely affect U.S. commerce.³³ Section 301 directs the President to "take all appropriate and feasible action" to enforce U.S. rights under any trade agreement.³⁴ Thus, Section 301 can be a fairly broad and powerful tool for U.S. commerce, allowing private parties to take a first step in the enforcement of both the substantive and procedural provisions of the various codes.³⁵ However, the actual decision to enforce trade rights rests exclusively with the President, with no opportunity for judicial review if no action is taken.³⁶ The decision may rest entirely on domestic publicity, congressional relations and foreign policy rather

³¹ See *id.* § 2.

³² *Id.*

³³ See Bart S. Fisher and Ralph G. Steinhardt, *The Enforcement by Private Citizens of United States Rights Under International Trade*, in CURRENT LEGAL ASPECTS OF INTERNATIONAL TRADE LAW, 189 (Patrick F. J. Macrory and Peter O. Suchman, Eds., 1982).

³⁴ See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2411 (1996).

³⁵ See Fisher and Steinhardt, *supra* note 33.

³⁶ See *id.*

than the actual merits.³⁷

The USTR identifies those countries with the greatest adverse impact on U.S. trade as "priority foreign countries," unless they begin good faith negotiations or significantly improve their protection of intellectual property rights.³⁸ On April 30, 1999, the USTR identified 53 trading partners as failing to provide adequate and effective intellectual property protection and fair and equitable market access to persons who rely on such protection.³⁹ The USTR placed sixteen trading partners on the administratively created "Priority Watch List," and thirty-seven countries were placed on the special 301 "Watch List."⁴⁰

The USTR initiates an investigation and consultation with any country placed on the Priority Watch List. If the USTR determines that the offending country violates trade standards, the U.S. may retaliate by withdrawing trade agreement concessions, imposing import restrictions, or any other action within the power of the President.⁴¹ When the investigation reveals a violation of TRIPS, the USTR initiates consultations in the Dispute Settlement Understanding (DSU) of the WTO.⁴²

IV. GLOBAL SOLUTIONS

The Internet facilitates immediate worldwide communication of copyrighted material. The Berne Convention and the older copyright treaties assume that for piracy to exist an illegal copy must be manufactured in a factory then physically transported across international borders. Although traditional pirates still exist, cyberspace border controls are now necessary. The problem of digital music piracy and the Internet requires an entirely new generation of treaties.

³⁷ *See id.*

³⁸ *See* Notice, 64 Fed. Reg. 87, 24438 (1999).

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ 19 U.S.C. § 2411(a)(1)(B)(ii) and (c)(1)(A-B) (1999).

⁴² *See* Nicole Telecki, Note, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round*, 14 B.U. INT'L L.J. 187, 197 (1996).

Because copyright law varies from nation to nation, treaties dealing with copyright should be written *in haec verba*, mandating specific provisions. The treaties should be self-executing, granting explicit rights to copyright owners, rather than mere suggestions and minimum standards.

Provisions should include mandated standards for digital security controls, such as watermarking and encryption,⁴³ and a larger scale version of the Secure Digital Music Initiative (SDMI), an agreement among the major record producers to use a standard distribution format. Any treaty should also impose standard royalties on the sale of each piece of blank digital recording media and hardware, such as CD-RWs and MP3 players. The proceeds could be proportionately distributed to copyrighted artists around the world.⁴⁴ Finally, royalties should apply to all copies, including private copies for noncommercial use.⁴⁵

Universal jurisdiction should be mandated. Each state will have jurisdiction whenever the violation occurs in its territory; when the victim or alleged offender is a national of that state; or when substantial ill effects of the violation are felt in its territory.

The current treaties lack enforcement rights for artists and producers, since private parties do not have standing in the DSU or in any of the international tribunals, such as the International Court of Justice. Standard civil remedies, such as injunctions or punitive damages should be created where they do not currently exist.⁴⁶ There

⁴³ See, for example, PETER WAYNER, *DIGITAL COPYRIGHT PROTECTION* (1997), for a description of computer programming techniques for defending copyrighted data. These techniques are not foolproof, but may make it easier for someone to simply buy a copy instead of trying to steal it. *Id.* at 1.

⁴⁴ See DAVIES AND HUNG, *supra* note 8, for a discussion on national laws for private copying royalties in the member states of the EEC.

⁴⁵ The Audio Home Recording Act, 17 U.S.C.A. §§ 1001, 1002 (1992) allows U.S. consumers to record music for private, noncommercial use without violating copyright laws.

⁴⁶ See generally Keshia B. Haskins, Note, *Special 301 in China and Mexico: A Policy Which Fails to Consider how Politics, Economics and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1155 (1999).

must be clear and effective legal processes.

There should also be standards for enforcement of criminal anti-piracy laws. Developing countries are either unable or unwilling to adequately fund law enforcement agencies. However, the inducement for enforcement should not be tied to international trade. Punitive measures tied to international trade, such as Section 301, are extremely politicized and may encourage resistance to anti-piracy efforts.⁴⁷ WIPO sponsored training seminars promote awareness of law enforcement techniques, yet real funding is essential. A fund should be established to finance cyber-police efforts in developing countries. This fund may be established through royalties or surcharges on recording media as discussed *supra*.

This proposed paradigm of global cooperation is unprecedented. However, because of the global penetration of the Internet and the potential for digital music piracy, this type of global response is essential.

V. CONCLUSION

Music piracy takes on a much larger international dimension with the advent of MP3 technology. The biggest problems remain inefficient enforcement of anti-piracy laws and the lack of common rights for producers. Treaties designed to address copyright and intellectual property issues address traditional methods of piracy by focusing on CD manufacturers and border controls. These treaty provisions will not be adequate in the digital age. Because it is increasingly in the best interest of all nations to protect their national artists, all nations need a standard set of laws and enforcement mechanisms.

Peter Gabriel sings, "And through the wire We get so strange across the border."⁴⁸ Once the appropriate agreements are in force, maybe copyright law will not be so strange across the border after all.

⁴⁷ *See id.* at 1162.

⁴⁸ PETER GABRIEL, *supra* note 1.