

THE INTERPLAY BETWEEN TRADE, IPR PROTECTION AND ENFORCEMENT, AND TECHNOLOGY TRANSFER: SOME OBSERVATIONS

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A simple observation to start: It is hard to grow flowers in a yard filled with weeds.

That is not the wise and insightful observation of Confucius, or Benjamin Franklin, or Luther Burbank, although one could easily imagine it to be. It is rather a truism expressed daily on the House and Garden Television Channel. But it is as applicable and relevant to the world of IPR and economic development as it is to amateur green-thumbed horticulturists and gardening enthusiasts worldwide.

A further observation: There is nothing modern about piracy or counterfeiting.

Indeed, both date to ancient times. Maritime pirates and marauders have been disrupting commerce, menacing shipping, and bedeviling trade between governments for millennia, from the Ancient World to the New World and throughout the Far East. And counterfeiters have been plying their illicit trade since at least 2,500 B.C. when the Code of Hammurabi imposed harsh penalties on those who would misrepresent their wares as those of another. Whenever and wherever commerce has expanded, pirates and counterfeiters have soon followed, drawn by the lure of illicit treasure, stolen wealth, gullible consumers, and quick profits.

Today, of course, piracy is not limited to the maritime world and the shipping lanes of the South China Sea or off the coast of Somalia. And counterfeiters have become tech savvy and expert at industrial production and marketing. In the global digital environment and on the Internet, modern incarnations of the cutthroat pirate Blackbeard or the legendary Lai Choi San, Queen of the Macao Pirates, not only exist; they thrive. They have even created their own political parties in more than 40 countries, funding protest rallies and demonstrations against governments, and having electoral success in getting their proudly anti-IP members elected to a variety of legislative bodies.

In place of the Barbary Coast being raided, Port Royal being plundered, and ships in the Gulf of Siam and the Malacca Straits being seized, today's intellectual property brigands are laying siege to local film and recording industries around the globe, stealing the knowledge-based products of Silicon Valley at will, and trading in faux luxury goods brands at an alarming rate and in alarming quantities. A rising tide of intellectual property piracy and counterfeiting is washing

over the economies and markets of nearly every country in the world, with an entire generation of students and citizens, educated and entertained with the stolen product of someone else's creativity, coming to believe that not only are the results of such piracy acceptable, but that such piracy itself is neither immoral nor illegal. And millions, if not billions, of consumers have convinced themselves that there is no real harm in downloading copyright protected works or buying fake goods, or that what they are doing is a "victimless" crime.

A recent U.S. Senate report, noting that the IP industries represent both the "largest single sector of the American economy" and the number one export sector, warned that the single greatest challenge faced by American creative and intellectual property reliant industries is the continuing battle against the piracy and counterfeiting of intellectual property both at home and abroad.

We are not talking about small numbers here. The estimate of the value of all U.S. based IPR is in excess of US\$5 trillion, which is about double the combined GDPs of all ASEAN countries with Hong Kong and Taiwan thrown in for good measure. And the estimated value of all IP in the entire world is likely two or three times that amount. The U.S. creative and innovative sectors, which account for more than 40% of the U.S. GDP, more than 40 million jobs in the U.S. economy alone, and almost 60% of all U.S. exports, produce everything from entertainment and educational content, like motion pictures, music, software, television, cable and satellite signal broadcasting, and books, to everyday consumer and personal care products, like toothpaste, mouthwash, cosmetics, and detergents, to food and beverages, agrochemicals and fertilizers, pesticides, herbicides, veterinary and human medicines and pharmaceuticals, automotive, motorcycle and aviation equipment and parts, industrial and automotive lubricants, communications, electronics, and computer chips. In other words, everything from heart valves, i-Pads and automobiles to the clothes you wear and the food you consume. The average consumer encounters daily more than a thousand products or goods that have some aspect of IPR protection, and intellectual property is at the root of modern economies and indispensable from one's daily life. It is increasingly, the basis of trade relations and economic growth. Adam Smith would be proud.

Yet, the scale of the threat is beyond alarming. Between 7-10% of all trade in hard goods globally is estimated to be counterfeit goods, meaning every consumer has a chance of encountering counterfeit goods, and if you live in a developing country, the likelihood increases dramatically and, in many cases, disastrously. Estimates of global economic losses due to counterfeiting and piracy run to as high as \$250 billion a year. Millions of jobs are lost, or never created, as a result of counterfeits and piracy, and struggling economies find it harder and harder to achieve sustained economic growth and local creativity and innovation in the face of a flood of counterfeits and pirated goods. The losses from piracy, for example, in such countries as Brazil, China, Colombia, Indonesia, Malaysia, Pakistan, Paraguay, Russia, and Thailand are all in excess of US\$100 million each annually, resulting in lost jobs, lost tax revenue, and consumer

fraud. And the situation in some developed countries is not much better. Copyright piracy in Argentina, Chile, Czech Republic, Hungary, Israel, Italy, Poland, South Korea, Taiwan, and Turkey taken together totaled almost US\$3.0 billion last year.

And though the economic, commercial and trade estimates of such losses are clear and compelling, and not to mention well documented, the loss in life and injury to human beings is both more elusive and more staggering. While the exact number cannot be determined, various experts and international organizations, including the World Health Organization and the U.S. Centers for Disease Control, estimate that millions annually die or suffer injuries or illness as a result of counterfeit products. Indeed, as the respected health law expert Professor Michele Forzley noted in her ground-breaking study in 2003 on *Counterfeit Goods and the Public's Health and Safety*, "this lack of data is a significant impediment to understanding the problem of counterfeit goods." But this is little consolation for those consumers who died in the last decade as a result of documented counterfeit and defective products, medicines, beverages, household appliances, or electrical goods in such places as Brazil, Cambodia, China, Egypt, Haiti, Nigeria, Oman, Pakistan, Panama, Russia, or Vietnam.

Further, as Dr. Moises Naim documented in his best-selling book, *Illicit: The Dark Trade*, and in the 2008 award-winning documentary film based on it, the profits to organized criminal groups, whether gangs, triads, syndicates or the Mafia, from IP theft and crime on a commercial scale, and the corrosive results it breeds through money-laundering, political corruption and official graft, is devastating to governments, society, law enforcement and the rule of law. Strong evidence suggests that such criminal IP operations have become part of an intricate web of organized crime with links to drug cartels and terrorist organizations, all involved in panoply of other crimes and nefarious activities, including money-laundering, arms dealing, pornography and human trafficking.

Globally, the failure to adequately confront IP crime as a serious crime, stemming from either a willful ignorance or an intentional disregard for its consequences, and the misperception that it is a victimless crime has had immense ramifications, economically and socially.

Piracy is indiscriminate and straightforward. Pirates do not base their business decisions on corporate determinations of a work's literary merit, critical acclaim, or historical value, but solely on whether it will sell. Pirates will steal and reproduce copies of anything these days. Nothing is exempt -- even the daughter of Deng Xiaoping had her biography of her father pirated by Chinese book publishers. And contrary to some popular beliefs, today's IP pirates are not of the endearing, swashbuckling Pirates of the Caribbean variety as portrayed by Johnny Depp or Keira Knightley.

In many places, some of the biggest pirates and counterfeiters are the government ministries and state-owned industries that regularly use pirated versions of copyright-protected software with impunity, or manufacture and distribute unfair knock-offs or imitations of well known brands. Unfortunately, the involvement of various government officials, police, military officers, and the courts in protecting such illegal activity is commonplace. Indeed, to many cynical minds, this may seem just the inevitable result of a weak or corrupt criminal justice system, and in much of the developing world that is true, but it is what it is: the state-sanctioned theft of intellectual property. Yet, such intellectual property theft is not limited to ripping off only the IP of rich foreigners. All too often, the lack of effective IP protection and enforcement harms struggling local software developers, artists, authors, musicians, performers, inventors, entrepreneurs and innovators, even more so, and prevents the growth of vibrant, local, indigenous IP industries.

While the current piracy situation is dire, without action, the future will be clearly worse. The risks of increased piracy mount on a daily basis. With approximately 30% of the world's population connected to the Internet and that number growing exponentially on a daily basis, the growth of e-commerce and the availability of peer-to-peer file exchange systems, digital piracy and online counterfeit marketing and sales will only get worse if not confronted.

This last development should come as no surprise. Pirates always follow the wealth. While small scale copying by underemployed workers and other “part-time” pirates has been a chronic annoyance that all IP owners experience and learn to deal with, more alarming is the surge in piracy by well-funded, well-organized, and, often, well-armed criminal groups. Such counterfeiting operations are controlled at the highest level by sophisticated criminals who rely on an organized, global network of manufacturers and distributors to produce and market massive volumes of counterfeit and pirated product.

Some of the most avid consumers and unwitting accomplices of piracy are young people. In Taiwan, police statistics document large numbers of arrests for adolescents caught running pirated CDs and DVDs to customers or distributors from manufacturers. In much of Asia, the vast majority of university chemistry students are likely to be using pirated copies of such basic academic journals as *Chemical Abstracts International* since less than 100 legal copies of this journal were sold in all of Asia last year. In Thailand, despite repeated representations of government policy, the Thai Government has been either unwilling or unable to eradicate the rampant, open and blatant trade in pirated and counterfeit goods taking place at numerous Government-designated “red zone” notorious markets and mega-malls. Even in Japan and South Korea, widespread Internet piracy is taking a huge toll on the sales of legitimate copyright-protected products, ranging from e-books and music, to movies and games. And despite the mounting evidence, many nations have yet to take seriously the prosecution of its citizens for copyright theft and trademark counterfeiting.

Take Indonesia as an example. As noted in the submission by the International Intellectual Property Alliance (IIPA) to the U.S. Trade Representative as part of the 2012 Special 301 cycle, Indonesia remains a market dominated by pirated material in physical form and supplied or distributed online, and remains a country swamped with counterfeit goods in the retail and online marketplace. Indonesia also retains some of the most restrictive market access barriers in the Asia-Pacific region, closing off opportunities to the creative industries to supply legitimate product into the country. The court system remains largely non-deterrent and non-transparent. And while Internet and mobile penetration continued to deepen in 2011, Indonesia did little to address the growing concerns of online and mobile piracy. There has never been an Internet piracy case investigated or brought by the Indonesian Government, despite a rapidly changing digital and online environment and one of the highest rates of mobile phone connectivity on the planet. One can always debate the merits of particularly survey statistics, but perceptions can be just as damaging to a country. A survey by Hong Kong-based Political and Economic Risk Consultancy (PERC) of 1,285 expatriate managers as reported in *Daily Indonesia* on August 29, 2010, found that Indonesia scored worst, behind China and Vietnam, among all Asian countries in terms of protecting IPR.

Government policies play a big role in this, and while there remains in place a ban on investment and distribution in audiovisual products which hits the motion picture, television, and music industries extremely hard and further narrows market access for the entire audiovisual sector, a new Decree issued in October 2011 has virtually destroyed a window of revenue for the music industry, by banning its sale of ring-back tones. The specter of a single Government-mandated collective licensing window continues to also give industry serious pause. As a result of deficiencies in its IPR regime and ongoing market access issues, copyright industries in the United States have submitted a request to the U.S. Government that the eligibility of Indonesia to receive benefits under the U.S. General System of Preferences (GSP) for duty-free treatment be reviewed, with an eye to specifically whether Indonesia is providing adequate and effective copyright protection for U.S. copyright owners, and equitable and reasonable access to the markets of Indonesia. A negative determination on this issue could cause Indonesia to lose as much as US\$1.85 billion in duty-free exports a year to the United States, which represents almost 11.4% of all of Indonesia's exports to the U.S. annually. Of course, Indonesian

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