

International Protection of Intellectual Property Rights in the 1990s: Will Trade Barriers and Pirating Practices in the Audiovisual Industry Continue?

INTRODUCTION

An intellectual property right is defined as “any right existing that is recognized under, inter alia, patent, trademark, copyright, trade secret or mask work regimes.”¹ An estimated \$40 billion is earned from foreign sales of United States copyrighted products each year.² The audiovisual industry, comprised of motion pictures, videocassettes, music and related products, represents the second greatest export for the United States.³ Advanced technological innovations and global distribution networks have enabled American culture to transcend international borders.⁴ In fact, most major motion picture studios reaped higher foreign box office growth than domestic

1. Clark W. Lackert, *International Efforts Against Trademark Counterfeiting*, 1988 COLUM. BUS. L. REV. 161, 162 n.1.

2. *Intellectual Property, Future Copyright Protection Concerns Likely To Focus on Technology Advances*, Daily Rep. for Exec. (BNA) Oct. 26, 1994, at A205 [hereinafter *Intellectual Property*].

The copyright industries in the United States, for example, “comprise an important and growing segment of the nation’s economy, employing over 5.5 million people and accounting for 5.6 percent of the gross domestic product. . . . Currently, 40 percent of the motion picture industry revenues come from abroad.” *Senate Finance/International Trade Generalized System of Preferences Before the Subcomm. on Trade of the Senate Comm. on Finance*, 103d Cong., 2d Sess. (1994) (statement of Lawrence E. Levinson, Senior Washington Counsel, Viacom, Inc.), available in LEXIS, Legis Library, Cngtst File [hereinafter Levinson].

The importance of international trade to the United States economy should not be underestimated. “Trade now represents over a quarter of our economy. . . . On average, every billion dollars of merchandise trade exports results in 16 - 17 thousand new jobs here at home; jobs that pay, on average, 17 percent higher than the U.S. average wage.” *General Agreement on Tariffs and Trade Before the Senate Comm. on Commerce*, 103d Cong., 2d Sess. (1994) (statement of Michael Kantor, Ambassador, United States Trade Representative), available in LEXIS, Legis Library, Cngtst file [hereinafter Kantor].

3. See *Intellectual Property*, supra note 2, at A205. “Copyrighted works—motion pictures, computer software, sound recording and books—generate about \$40 billion in foreign sales annually, making them the second or third largest U.S. export industry behind aviation and agriculture. . . .” *Id.*

This comment centers on the motion picture, video and television sectors of the audiovisual industry, which will be referred to as the “audiovisual industry.”

4. Advances in technology and communications systems have added to the proliferation of audiovisual products. As one scholar notes, “[t]he rapid and widespread demographic and technological changes in Europe in the 1970’s and 1980’s set the stage for a virtual invasion of American culture.” Laurence G.C. Kaplan, *The European Community’s ‘Television Without Frontiers’ Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT’L L. REV. 255, 257 (1994).

in 1993.⁵ Revenue potential for audiovisual works is jeopardized, however, by trade barriers imposed by foreign countries that desire protection against saturation by American products.

The rights to distribute and exhibit audiovisual works are usually transferred from the creator to producers or entertainment companies which exploit those rights in territories around the world.⁶ Copyrights⁷ and trademarks⁸ protect audiovisual works from infringement or unauthorized copying by others. The audiovisual industry relies heavily on protections against illegal practices to fully exploit the works themselves.⁹ Although the United States has established an effective domestic system of protection, other nations often refuse or fail to enforce similar laws.¹⁰ Negotiations with

5. Don Groves, *Jumbo B.O. Bucks Found O'seas in '93*, VARIETY, Jan. 17, 1994 - Jan. 23, 1994, at 13. This figure denotes motion picture studios based in the United States. Reasons for growth in foreign markets include "cinema building in many markets, less intense competition, retooled marketing campaigns and variations in audiences' tastes." *Id.*

Oftentimes, films that are perceived as "failures" in the domestic market break even or prove more successful in the international market, after revenues from foreign videocassette sales, worldwide pay television earnings and sales from television outlets are totalled. Leonard Klady & Don Groves, *'Hero': Slightly Less than Zero?*, VARIETY, Sept. 13, 1993, at 1.

6. See generally Jan D'Alessandro, Note, *A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry*, 76 GEO. L.J. 417, 418 (1993).

7. Copyright is defined as "[a]n intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a specific period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them." BLACKS LAW DICTIONARY 336 (6th ed. 1990).

The benefits of owning a copyright are numerous. Copyrights grant the exclusive rights to prevent copying and to make adaptations for other media, as well as derivative works (such as translations and other versions). Most copyrights provide protection for a term of years set by legislation, typically the author's life plus fifty years, but the term differs in different territories (A German copyright provides protection for the author's life plus seventy years). Where treaties and conventions are in place, copyright protection can extend to foreign countries. RICHARD WINCOR, COPYRIGHTS IN THE WORLD MARKETPLACE: SUCCESSFUL APPROACHES TO INTERNATIONAL MEDIA RIGHTS, 10, 10-11 (1990) [hereinafter WINCOR].

8. A trademark is defined as "any word, name, symbol or device, or any combination thereof [adopted and used by a manufacturer or merchant] to identify and distinguish his or her goods . . . from those manufactured or sold by others. . . ." 15 U.S.C.A. § 1127 (West 1994).

Because copyrights fall short of protecting titles and symbols, trademark law provides additional protection against unauthorized copying. "The idea is to shield consumers from the likelihood of confusion on encountering familiar brand names." WINCOR, *supra* note 7, at 16.

9. See Michael L. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. POL'Y 465, 465 (1994).

10. See generally D'Alessandro, *supra* note 6. Also, see generally Dennis Wharton and Adam Sandler, *MPÉAA [Motion Picture Export Association of America] Going Easier on EC*, VARIETY, Feb. 28, 1994, at 12. "More than \$18 million in pirated videocassettes were seized in 1993, resulting in 702 civil and criminal seizures, compared with 404 such seizures in 1992. As a result of these cases, 217 persons were charged with criminal violations, down from 222, indicating, according to the MPAA [Motion Picture Association of America], that video pirate operations are getting larger and more sophisticated." *Id.*

The Motion Picture Association of America is "[a] movie industry association organized to promote the international dissemination of American films and to upgrade imported films. The Motion Picture Export Association of America "is the international counterpart of the MPAA. It was formed in 1945 by MPAA companies to respond to the rising trade of protectionism resulting in barriers aimed at the importation of American films into other countries." Cones, *supra* note 42, at 311.

producers, studios, and distributors of audiovisual products in the international arena should reflect a knowledge of the differences in various countries' intellectual property laws in order to draft effective agreements and to capitalize on revenues.¹¹

Two major obstacles affect the ability of American audiovisual producers to maximize their profit potential in worldwide markets: piracy and trade barriers imposed because of threatened cultural identities. Piracy is "the unlawful reproduction or distribution of property protected by patent and trademark laws."¹² Piracy and counterfeiting are more serious than infringement of intellectual property rights, which does not require willful, intentional acts.¹³

The United State Trade Representative (USTR) office reported losses of almost \$7.5 billion from audiovisual products due to piracy in 1993 alone, the highest amounts in the six years of USTR reports.¹⁴ The United States

11. "[P]roducers [of motion pictures] should be aware of the degree of protection afforded by national laws so that they may formulate and structure their distribution agreements with the limitations of such protection in mind. . . . By familiarizing themselves with the laws and policies of the countries in which they are distributing, producers and distributors will be better positioned to protect their interests abroad." D'Alessandro, *supra* note 6, at 427.

See generally Don Groves, *Pay TV Biz Paying Off*, VARIETY, Oct. 18, 1993, at 46. Potential revenues are enormous, as seen by the growth of the international pay television business, which "has tripled its subscriber universe in the past three years." The foreign pay television subscriber universe could increase to 18-20 million within three to five years, predicts Drew Kaza, president of United Intl. Pictures pay TV group, which means profits of \$600-750 million a year from overseas pay television. *Id.*

12. BLACK'S LAW DICTIONARY 1148 (6th ed. 1990).

Article 51 of the Trade-Related Aspects of Intellectual Property Rights of GATT defines pirated copyright goods as "any goods which are copies made without the consent of the right holder or person duly authorized by him in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation." Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81, 103 n. 14 [hereinafter TRIPS] (See section II(D)(1) *infra*, for a discussion on TRIPS).

Counterfeiting is a similar illegal practice, defined as the "making of a copy without authority or right and with a view to deceive or defraud by passing [a] copy as original or genuine." BLACK'S LAW DICTIONARY 349 (6th ed. 1990).

Article 51 of the TRIPS Agreement defines counterfeit trademark goods as "any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation. . . ." TRIPS, *supra*, 33 I.L.M. at 103, art. 51, n.14.

For the purposes of this comment piracy and counterfeiting will be used interchangeably, both denoting the illegal copying of copyrighted and trademarked goods.

13. Proof of *deliberate* illegal copying typically subjects the offender to a higher degree of punishment. For instance, in the United States, violators of copyright law can face prison sentences and/or fines. 18 U.S.C. § 2319 (1994). The penalty for most willful copyright infringement is a fine of not more than \$25,000 and imprisonment for not more than one year. For the record and motion picture piracy, the penalty increases to a maximum fine of \$250,000 and five years imprisonment. *Id.*

14. The office of the United States Trade Representative reported \$1.3 billion of the \$7.5 billion lost by United States companies was due to film piracy alone. James Ulmer, *Trade Rep: Film Pirates Took \$1.3 Billion Last Year*, HOLLYWOOD REP., May 3, 1994, at 7.

government has strived to enact trade initiatives aimed at developing and enforcing more powerful protections for intellectual property rights. The North American Free Trade Agreement (NAFTA),¹⁵ seeks to strengthen the protection of intellectual property rights, but Canada has exempted its cultural industries from the treaty.¹⁶ The General Agreement on Tariffs and Trade (GATT)¹⁷ is a multilateral compact soon to enter into force that could potentially upgrade world protection of intellectual property rights. Whether the passage of these treaties will entirely eradicate trade barriers and pirating practices is uncertain, since years of effort to protect intellectual property rights has yielded little change. Illegal sales of audiovisual products continue, causing all sectors of the world economy to suffer.¹⁸ Companies in the United States attempting to take advantage of opportunities in the international marketplace must now balance possibilities for profiting from audiovisual sales against the exploitation they face by "pirates."

The purpose of this comment is to examine the effectiveness of current protections regarding international intellectual property rights. Section one presents reasons for foreign resistance of American audiovisual culture and the trade barriers commonly imposed on the distribution, exhibition and sale of audiovisual products. Section two analyzes current international protections for United States owners of copyrights and trademarks, focusing in particular on the strengths and weaknesses of NAFTA and GATT. Proposed legislation is analyzed in section three, with attention directed toward incentive programs aimed at upgrading protection. Measures United States producers may take to deal with trade barriers and cooperate with foreign producers are featured in section four.

I. REASONS FOR TRADE RESTRICTIONS

An understanding of the reasons for foreign resistance to American culture is necessary to adequately anticipate and recognize unfair trade practices.¹⁹ Although some countries have enacted intellectual property and anti-piracy laws, many governments lack the resources necessary for effective enforcement, tending to focus instead on violent and other "more serious"

15. North American Free Trade Agreement, Dec. 17, 1993, U.S.-Can.-Mex., 32 I.L.M. 296 and 32 I.L.M. 605 (1993) [hereinafter NAFTA].

16. See *infra* notes 152-63 and accompanying text for a discussion of Canada's cultural exemption.

17. General Agreement on Tariffs and Trade, Dec. 15, 1993, GATT Doc. MTN/FA, 33 I.L.M. 1 [hereinafter GATT].

18. Samantha Swiss, *Protectionism or Fair Play?* INT'L FIN. L. REV. 3, 3-4 (Special Supp. Sept. 1992). Joshua Bolten, former general counsel of the U.S. Trade Representative, notes, "pirates rob us not only of sales, but of a part of our future. Each act of piracy produces a chilling effect on innovation: fewer new medicines, fewer new machines, fewer new books, and fewer new symphonies makes us all poorer. In short, intellectual property pirates slow the pace of progress." *Id.*

19. D'Alessandro, *supra* note 6, at 427.

crimes.²⁰ Reasons for their apathy vary, but the United States economy remains threatened.²¹

This comment employs the presumption that audiovisual products do affect the values, political philosophies, and attitudes that ultimately constitute a country's culture.²² One scholar notes the power of television, in particular, is derived from its qualities which foster passivity by the consumer.²³ To take this analysis further, many believe that United States audiovisual products only reflect a small part of society, since urban, middle-class characters and similar plot sequences are most commonly featured in American films, videos, and television programs.²⁴ This theory supports the deterioration of cultural identities, which is the thrust of the European Union's²⁵ resistance to the "invasion" of American product.²⁶

France has been instrumental in shaping the audiovisual policy of the European Union, often condemning the influence of American entertainment products.²⁷ The European Union desires quotas mandating 60% of audiovisual works to be European.²⁸ This is apparently a defensive reaction to the large number of American films being exhibited in Europe. According to one

20. Ulmer, *supra* note 14, at 7. See also D'Alessandro *supra* note 6, at 426: "[p]iracy tends to flourish to the greatest degree in developing countries, where enforcement mechanisms and copyright laws are less developed and where piracy constitutes a major source of income."

21. See generally Jeff Bater, *Copyright Pirates Steal Billions from U.S. Economy*, WASH. NEWS, Sept. 29, 1992. Dangers to the economy include lower profits for legitimate rights owners and repercussions to countries' economies resulting from their allowance of trade restrictions. See generally D'Alessandro, *supra* note 6.

22. "The audiovisual sector is of great importance to the cultural identity of peoples, regions and nations." Richard Collins, *The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community*, 11 CARDOZO ARTS & ENT. L. J. 361, 361 (1993).

Television, in particular, impacts modern culture: "[t]elevision fabricates our way of thinking, defines our values, and chooses our political inclinations for us. . ." Kaplan, *supra* note 4, at 258.

23. Kaplan, *supra* note 4, at 258. Kaplan notes the four elements to this theory: (1) central location of power, (2) uniformity of message, (3) the viewer's passive reception of the message reception, and (4) the viewer's inability to reply to the message. *Id.*

24. *Id.* at 259.

25. As of November, 1993, the European Community is called the European Union.

26. See D'Alessandro, *supra* note 6, at 424.

27. Stephen R. Konigsberg, *Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws*, 12 CARDOZO ARTS & ENT. L.J. 281, 307 (1994).

France is a protectionist country, preferring to defend itself from the onslaught of American culture. See generally Adam Dawtrey, *'Park' Provokes Protectionists; GATT Gets France's Goat*, VARIETY, Sept. 27, 1993, 31, at 31. One particularly vehement statement by a Frenchman signifies a common French belief:

[w]e want to guarantee the diversity of cultures and their identity, to guarantee pluralism of expression, to protect copyright and to avoid an influx of cheap productions primarily from the USA . . . we have to act and provide adequate protection for Community works.

Konigsberg, *supra* note 27 (citing the statement of Representative Roelants Du Vivier, Rainbow Party member, (Eur. Parl. Deb. (No. 4) 113-14 (May 24, 1989))).

28. *Id.* at 304.

study, “[i]n 1991, U.S.-based productions accounted for 81% of all EC screenings (rising to a level of 90% in states such as the UK, Greece, the Netherlands and Ireland), 70% of all European box-office receipts, and 54% of all comedies and dramas broadcast on television.”²⁹ France has, as a result, issued taxes on all cinema tickets in France, which are used to subsidize its own film industry.³⁰

The European Union has struggled with the conflicting goals of providing their consumers free access to a wide range of audiovisual products and preserving its cultural identity.³¹ Governments often attempt to close their borders to the importation of American products to “defend against the infiltration of foreign cultures.”³² For instance, the European Union complains that American programming accounts for 70,000 hours of European television airtime, or 28% of the total, per year.³³ Additionally, 70% of box office revenues in the European Union are earned by American films.³⁴ The United States film, television and home video industries reportedly made \$18 billion in 1992, \$4 billion of which came from Western Europe.³⁵ “Europe imports about \$3.8 billion worth of audiovisual goods a year while it exports only about \$250 million.”³⁶ To minimize the impact of American programming on foreign culture, the European Union plans to strengthen its Television Without Frontiers directive,³⁷ calling for television broadcasters to commit the majority of broadcast time to European programming.³⁸ Because the European television market accounts for 75% of the international sales market for United States companies, the United States audiovisual industry is scrutinizing events in Europe closely.³⁹ Critics in the United States claim that France is attempting to justify its unfair trade practices using a “wave of Anti-Americanism thinly disguised behind pious expressions of

29. *Id.* (citing Frances Williams, *Europe Baulks at Hollywood's Onslaught-Solution of Audiovisual Row May be in Sight*, FIN. TIMES, Nov. 10, 1993).

30. *Id.*

31. See generally Kaplan, *supra* note 4, at 256. “Member States are extremely concerned about the erosion of both a common European identity and distinct national cultural identities by exogenous film and television programming.” Collins, *supra* note 22, at 369.

32. D'Alessandro, *supra* note 6, at 424.

33. Chris Fuller, *Audiovisual Gums Up GATT Talks*, VARIETY, Dec. 20, 1993, at 27.

34. *Id.*

35. *Id.*

36. Pia Farrell, *Finding Cure for Euro Woes Sets Tone at Beaune*, THE HOLLYWOOD REP., Oct. 28, 1994, at 8.

37. The European Union adopted a Television Without Frontiers Directive on October 3, 1989, which became effective October 3, 1991. Council Directive 89/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23.

38. See Andy Stern, *EU Plans to Put Teeth in TV Reg.*, VARIETY, June 20-26, 1994, at 30. Sanctions for broadcasters who violate the directive will be imposed promptly to ensure compliance. *Id.*

39. Elizabeth Guider, *Mavens See Bullish Future; Despite Euro Uncertainties, U.S. Marketgoers Confident*, VARIETY, April 11-April 17, 1994, at A1.

concern for European culture.”⁴⁰

European countries, in particular, claim a desire to develop their own image and culture without the influence of American audiovisual product.⁴¹ As a result, their governments impose strict trade barriers in the motion picture industry, including “import quotas, high duties, special and discriminatory taxes, foreign remittances,⁴² local ownership requirements, screen and air-time restrictions, subsidies to local industries, and currency controls.”⁴³

Other countries have used various means to prevent foreign access into their audiovisual markets. For example, South Korea has required that a certain percentage of films exhibited be produced locally.⁴⁴ The Philippines has “sequestered all revenues that are earned in the country.”⁴⁵ Australia has enacted taxes that discriminate against American distributors who do not market Australian films.⁴⁶ Canada has also imposed restrictions on American filmmakers who do not employ Canadian distributors.⁴⁷ In India, the government imposes taxes of up to 50% on cinema tickets, and censorship boards slow the exhibition of American films by three to nine months, allowing pirated copies of movies to satisfy (at least partially) the public’s demand for such products.⁴⁸ Despite efforts by the United States government to eliminate trade restrictions in recent years, such practices continue, resulting in reduced profits and fewer legitimate markets for American audiovisual products.⁴⁹ These practices deny outside access to markets and ultimately create a “black market” in which pirates flourish.⁵⁰

Exclusionary efforts by foreign governments have not eliminated the demand to access to American audiovisual products, possibly because of their

40. Roger Cohen, *Culture Dispute With Paris Now Snags World Accord*, N.Y. TIMES, Dec. 8, 1993, at A-1.

41. See generally Collins, *supra* note 22, at 361.

42. A remittance tax is “a sum of money paid to foreign governments as an assessment on the conduct of business in that country.” JOHN W. CONES, *FILM FINANCE & DISTRIBUTION: A DICTIONARY OF TERMS* 436 (1992).

43. D’Alessandro, *supra* note 6, at 424.

44. *Beefs With South Korea*, VARIETY, Oct. 16, 1985, at 336.

45. *Hard Dollar Means Tough Mifed Deals; Local Currency in New Light*, VARIETY, Oct. 24, 1984, at 295.

46. Blake Murdoch, *Ten Percent on Distributor Gross Proposed by NSW Inquiry: Trade Mum on Far-Ranging Report*, VARIETY, Feb. 29, 1994, at 5.

47. Will Tusher, *Boycott Looming if Law Enforced*, VARIETY, Sept. 18, 1985, at 3.

48. Don Groves and Uma Da Cunha, *‘Park’ Bow Taps Indian Distrib Doors*, VARIETY, April 11-April 17, 1994, at 13.

49. On the other hand, possible benefits consumers may see from pirating practices include breakdowns of monopolies and reduced prices. See Frank J. Garcia, *Article: Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U. J. INT’L L. & POL’Y 817, 819 (1993). Arguments for unregulated trade are not widely accepted, however, and will not be elaborated in this comment.

50. See D’Alessandro, *supra* note 6, at 425. The motion picture industry, for example, suffers as the demand for American products remains stable but trade barriers prevent open distribution and exhibition in certain foreign markets. “When American producers and distributors are rendered unable to make their films available in foreign countries, the market for pirated films expands.” *Id.* at 426.

quantity or quality.⁵¹ Because United States producers of audiovisual fare are deprived of foreign marketing opportunities, the demand is satisfied by pirates.⁵²

Several reasons explain the success of American audiovisual product in foreign markets. American entertainment products have an inherent advantage over foreign competitors because "English . . . is the world's preferred second language."⁵³ Therefore, producers of English-language products can sell their products in many more territories, reaping higher profits.⁵⁴ United States producers of film and television have also been able to create material that appeals to broad audiences⁵⁵ by using a large mass of creative talent, established distribution systems, and expensive production budgets.⁵⁶ In television, many foreign broadcasting companies emphasize their news over entertainment programming, and thus fall behind in competition with American programming.⁵⁷ Another reason foreign viewers turn to American product is the lack of competition due to the profusion of American product supplying the demand of newly developed technologies and expanded programming avenues.⁵⁸ As a result, the European Union, feeling threatened by the dominance of American product,⁵⁹ has created several programs affecting audiovisual policy there.⁶⁰

Some feel the present system of trade restrictions can be dealt with effectively. Jack Valenti, the president of the Motion Picture Association of

51. See generally Margaret Moore, *International Film Co-Production Tax and Subsidy Mechanisms*, HASTINGS COMM. & ENT. L. J. 287, 290 (Winter, 1994). "In 1990, United States films comprised over 77% of the European Community motion picture market, despite the fact that the European Community generated 474 films and the United States produced only 438 films that year." *Id.*

52. See D'Alessandro, *supra* note 6, at 425. Another danger of piracy is that "[d]evelopers of audiovisual works are reluctant to invest funds into creative projects, an attitude which results in fewer products, innovations, and jobs." Garcia, *supra* note 49, at 820.

53. Collins, *supra* note 22, at 364.

54. *Id.*

55. Kaplan, *supra* note 4, at 268.

56. See *id.* at 269.

57. *Id.* at 261.

58. See *id.* at 320.

59. *Id.* "A radical view of American dualism saw the U.S. cultural invasion of the audiovisual media as a spearhead for a total economic domination of EC economy. Once the Americans 'conquered' the music, television, and motion picture industries the United States could export the rest of its productions." *Id.*

60. Examples include the Directive on Satellite Television Transmission Standards, Council Directive 86/529 of 3 November 1986 on the Adoption of Common Technical Specifications of the MAC/Packet Family of Standards for Direct Satellite Television Broadcasting, 1986 O.J. (L 311) 28; the Directive on the single-market initiative for television broadcasting (Television Without Frontiers Directive), Council Directive 89/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down By Law, Regulation or Administration Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23; and the Action Programme to Promote the Development of the European Audiovisual Industry (MEDIA), Council Decision 90/865 of 21 December 1990 Concerning the Implementation of An Action Programme to Promote the Development of the European Audiovisual Industries (MEDIA) (1991 to 1995), 1990 O.J. (L 380) 37. Collins, *supra* note 22, at 365.

America,⁶¹ declared that Hollywood desires a relationship with the European entertainment industry “based on the principles of openness, artistic integrity and fairness.”⁶² In February, 1994, Valenti stressed that American producers are eager to enter into co-production deals and joint ventures with European entities.⁶³ However, Valenti remains wary of the European Union and perceives the need to maintain a close watch on those countries which continue to impose trade barriers.⁶⁴ “Should the barriers within the European Union become even more troublesome, it is important that the U.S. government be poised to act,” he stated in early 1994.⁶⁵ Other industry leaders feel the current quota system is not a major factor in foreign sales, believing that quality products will sell regardless of the regulations.⁶⁶

The Motion Picture Export Association of America (MPEAA)⁶⁷ estimates losses of \$2 billion worldwide each year due to “theft of film prints, unauthorized duplication of videocassettes, illegal cable-TV taps and hijacked satellite signals.”⁶⁸ The U.S. Anti-Piracy Office, a division of the Motion Picture Association of America (MPAA), made over 11,500 raids involving illegal duplication, distribution or sale of audiovisual works in 1993.⁶⁹ Piracy is difficult to prosecute because illegally copied items are typically transported and marketed in foreign locations. Judicial relief is difficult to obtain due to conflicts of laws and differences in countries’ available remedies.⁷⁰ United States owners of intellectual property rights can sue in domestic courts, but they often encounter service and jurisdictional problems because foreign producers typically have no presence in the United States.⁷¹

61. The Motion Picture Association of American was founded in 1922 as the trade association for the American film industry but has evolved into an advocate for major producers and distributors as opposed to the independent producers and distributors. Its members include Columbia Pictures (now Sony Pictures), the Walt Disney Company, MGM/Pathé (formerly MGM/UA), Orion, Paramount, 20th Century Fox, MCA/Universal, and Warner Brothers.” CONES, *supra* note 42, at 311.

62. Stephen West, *Valenti Takes Detente Tour to Berlin Fest*, VARIETY, Feb. 21, 1994, at 13.

63. *Id.*

64. Brooks Boliek, *H’wood Wary of Euro Union*, THE HOLLYWOOD REP., Feb. 22, 1994, at 4 [hereinafter *H’wood Wary*].

65. *Id.* A coalition of six entertainment industry groups urged Michael Kantor (U.S. Trade Representative) to keep the European Union on the “priority watch list” to scrutinize their future actions concerning trade barriers. *Id.*

66. Guider, *supra* note 39, at A1. Stan Golden, an entertainment industry leader, maintains, “For the most part it’s business as usual at MIP. GATT reaffirmed the status quo, which we’ve dealt with for years now. . . . We as a company have positioned ourselves to live with the quotas—we’re doing more co-productions anyway. And it’s not a given that the floodgates would be opened to us if there were no regulations.” *Id.*

67. For more information about the MPAA and the MPEAA, see Cones, *supra* note 42, at 311.

68. Rex Weiner, *Video Pirates Find Rough Seas Abroad*, VARIETY, May 9-16, 1994, at c86.

69. *Id.*

70. See Lackert, *supra* note 1, at 162-64.

71. Garcia, *supra* note 49, at 820.

Countries which fail to enforce laws protecting intellectual property rights deprive their own governments of taxes on goods that could be marketed legitimately within their borders.⁷² The reputation and credibility of a country notorious for permitting piracy suffers among trading nations, resulting in harm to its economy.⁷³ Today, countries such as Cyprus, Taiwan, Italy, Russia, and China suffer from the image of advocating illegal pirating practices within their borders.⁷⁴

The price of producing a "major" motion picture today is approximately \$30 million,⁷⁵ and the money for production often comes from intricate financing arrangements with lenders, studios, distributors and other investors.⁷⁶ Producers want to minimize their risks and protect their investments by ensuring that adequate channels of distribution are employed to meet audience demands, rather than losing their profits to pirates. To remain a dynamic force in today's global economy, the United States must abolish trade barriers and foster the growth of the audiovisual industry while simultaneously guaranteeing effective protection for owners of intellectual property rights.⁷⁷

II. CURRENT INTERNATIONAL PROTECTIONS

A. Bilateral Treaties, GSPs, and Trade Embargoes

Effective measures to protect intellectual property rights include bilateral treaties and unilateral actions such as trade embargoes and generalized systems of preferences (GSPs) with trading partners. The United States has ratified bilateral treaties with its trading partners prescribing strict levels of intellectual property rights.⁷⁸ Examples of bilateral treaties include the Memorandum of Understanding with China,⁷⁹ and Bilateral Copyright Agreements with Indonesia⁸⁰ and Singapore.⁸¹ These bilateral treaties have

72. D'Alessandro, *supra* note 6, at 425.

73. *See id.*

74. *See* Ulmer, *supra* note 14, at 7.

75. Bernard Weinraub, *Angst and Upheaval in Film Industry*, INT'L HERALD TRIB., Jan. 2, 1995, at Fin. Section.

76. *See* D'Alessandro *supra* note 6, at 418.

77. Levinson, *supra* note 2, notes that strong protection for intellectual property rights provides the necessary incentive for companies to develop creative projects by allowing them a reasonable rate of return on production and marketing costs.

78. CHARLES S. LEVY & STUART WEISER, INTELLECTUAL PROPERTY IN THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 269 (Judith H. Bello et al. eds., 1994).

79. Proclamation No. 6413, 57 Fed. Reg. 9647 (1992) (extending copyright protections to the works of the People's Republic of China).

80. Proclamation No. 6003, 54 Fed. Reg. 31931 (1989) (extending copyright protections to the works of the Republic of Indonesia).

81. Proclamation No. 5657, 52 Fed. Reg. 19122 (1987) (extending copyright protection to the works of the Republic of Singapore).

caused such nations to strengthen their intellectual property laws.

Trade embargoes are useful unilateral devices used by the United States Trade Representative's Office (USTR). Trade embargoes are government orders "prohibiting commercial trade with individuals or businesses of other specified nations."⁸² Trade embargoes against nations which refuse to develop or enforce anti-piracy laws have proved effective in some instances, but can actually provoke additional piracy and "covert trading activity," by aggravating the market and making it more receptive to illegal sales.⁸³ Thus, trade embargoes are employed only infrequently by the United States. Not only does the United States government enforce *trade sanctions* such as trade embargoes against countries which violate intellectual property laws, it sometimes grants favorable *trade incentives* to countries which provide adequate enforcement.

One trade incentive measure recently reinstated by the United States government to upgrade protection of intellectual property rights is the Generalized System of Preferences (GSP), which grants favorable trade incentives for countries that enforce protection of intellectual property rights.⁸⁴ GSPs often provide duty-free tariff treatment for eligible countries to improve trade relations.⁸⁵ "The goal is to aid economic development through preferential market access," noted an executive testifying recently during a Congressional hearing.⁸⁶ Efforts are now being made to streamline GSP petitions so more countries may become involved, since countries such as Turkey, Egypt, and Honduras, who do not benefit from GSPs currently, suffer piracy problems.⁸⁷ Due to the success the United States has experienced with the current GSPs,⁸⁸ other preferential programs have been developed, including the Caribbean Basin Initiative⁸⁹ and the Andean Trade Preferences.⁹⁰

82. BLACKS LAW DICTIONARY 522 (6th ed. 1990).

83. *Specialists Offer Views on Trademark Issues; From Asia to Brazil, Trademark Owners Face Protection Challenges*, NAT'L L. J., May 17, 1993, at S2.

84. Trade Act of 1974, 19 U.S.C. 2461 *et seq.* (1988).

For a more detailed description of the history of the GSP system, see Rachel McCulloch, UNITED STATES PREFERENCES: THE PROPOSED SYSTEM, 8 J. WORLD TRADE L. 216 (1974).

See also Levinson, *supra* note 2. "The GSP Program provides unilateral, nonreciprocal, dutyfree tariff treatment to some 4300 articles. The goal is to aid economic development through preferential market access. In order to qualify as a recipient of GSPs, countries must satisfy a number of eligibility criteria. Among these criteria, the President takes into account whether countries provide adequate and effective protection of intellectual property." *Id.*

85. Levinson, *supra* note 2.

86. *Id.*

87. *Id.*

88. The MPEAA filed a GSP petition against Guatemala in 1991 because Guatemalan cable operators were illegally retransmitting nearly 40 cable channels. The Guatemalan government then passed legislation requiring cable operators to purchase retransmission rights. As a result, fewer accounts of piracy have been reported, and cable programmers have realized greater profits for the first time since 1985. *Id.*

89. 19 U.S.C.S. § 2701 *et seq.* (Law. Co-op. 1994).

90. 19 U.S.C.S. § 3202 (Law. Co-op. 1994).

The United States government has recently sought to protect owners of intellectual property rights on a more comprehensive, international level.⁹¹ Numerous bills were introduced in Congress in 1994 to provide long-overdue protection and enforcement measures.⁹² NAFTA and GATT are two revolutionary accords aimed at placing intellectual property rights at the forefront of trade policy objectives. Free trade agreements have, in the past, proved successful in dictating terms of protection between participating countries.

B. Multilateral Trade Agreements

Free trade agreements concern two or more customs territories that eliminate all or most of the restrictive regulations between the territories.⁹³ The United States and its trading partners have enacted free trade agreements for years.⁹⁴ The critical feature giving impetus to United States free trade agreements is Special 301 (or Section 301) of the Omnibus Trade and Competitiveness Act of 1988⁹⁵ which sanctions countries that violate trade agreements.⁹⁶ Under Special 301, the USTR can designate a country which allegedly denies effective protection of intellectual property rights a priority country.⁹⁷ Its inadequacies may then be investigated.⁹⁸ If the country refuses to enter into good faith negotiations with the USTR, and fails to correct its inadequacies promptly, the USTR may enact trade sanctions against that country.⁹⁹ Because trade sanctions (usually in the form of tariffs on the country's products) can be devastating to a foreign nation's economy, the threat of Special 301 sanctions is a powerful tool that has prompted many

91. Current international treaties have set forth only minimal terms of intellectual property protection. The fundamental international treaties dealing with intellectual property rights include the Paris Convention for the Protection of Industrial Property (providing treatment for patents, designs and trademarks), Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379, as revised by Act of Brussels, Dec. 14, 1900, 32 Stat. 1936, T.S. No. 411, Act of Washington, June 2, 1911, 37 Stat. 1645, T.S. No. 579, Act of the Hague, Nov. 6, 1925, 47 Stat. 1789, T.S. No. 834, Act of London, June 2, 1934, 53 Stat. 1748, T.S. No. 941, Act of Lisbon, Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931, Act of Stockholm, July 14, 1967, 21 U.S.T. 1629, T.I.A.S. No. 1583; the Berne Convention for the Protection of Literary and Artistic Works (covering copyright), June 26, 1948, 331 U.N.T.S. 217, Paris revision, July 24, 1971; and the United Nations' World Intellectual Property Organization's Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, T.I.A.S. No. 8733. Swiss, *supra* note 18, at 5.

92. See discussion *infra* in part III regarding current and pending legislation in the United States.

93. Swiss, *supra* note 18, at 5.

94. Richard H. Steinberg, *Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreement*, 29 STAN. J. INT'L L. 315, 320 (1993).

95. The Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2242 (1988).

96. *Id.*

97. 19 U.S.C. § 2412 (1994).

98. *Id.*

99. 19 U.S.C. § 2411 (1988). Tariff increases or denial of tariff preferences are the typical economic sanctions imposed.

nations to enact more favorable intellectual property laws.¹⁰⁰

On April 30, 1994, the office of the United States Trade Representative identified 37 trading partners that “deny adequate and effective protection of intellectual property or deny fair and equitable market access to United States citizens who rely on intellectual property protection.”¹⁰¹ The USTR reports found Italy to be the worst offender, with \$357 million losses to American companies, then Japan, (\$95 million), Saudi Arabia (\$79 million), Greece (\$55 million), Spain and Germany (\$53 million each) and China (\$50 million).¹⁰² Also mentioned on the “watch list” of offenders are Japan, Korea, Turkey, and Thailand.¹⁰³ The USTR may use Special 301 to sanction those countries refusing to enforce piracy laws. Although many of these countries have such laws in place, enforcement has been an increasing problem.¹⁰⁴

China is an example of a country which possesses fairly strict intellectual property laws yet fails to provide adequate enforcement.¹⁰⁵ In 1991, the office of the United States Trade Representative named China a “priority” country under the Special 301 provision of the Omnibus Trade and Competitiveness Act of 1988.¹⁰⁶ China then attempted to improve its intellectual property laws by signing a “Memorandum of Understanding” with the United

100. Mexico, for instance, completely overhauled its intellectual property laws after being placed on the United States’ priority designation in 1991. Garcia, *supra* note 49, at 821.

101. *Media Availability with USTR Mickey Kantor on Special 301 Provisions of the Trade Act of 1974 and Title VII of the 1988 Omnibus and Trade Competitiveness Act*, (statement of United States Trade Representative Michael Kantor), Fed. News Serv., June 30, 1994 (available in LEXIS, News library, Curmws file) [hereinafter *Media Availability*].

102. Ulmer, *supra* note 14, at 7.

103. *Id.*

104. *See generally id.*

105. *See generally International Trade, China Condemns U.S. Decision to Cite its Shortcomings on Intellectual Property*, DAILY REP. FOR EXEC., July 5, 1994, at A126 [hereinafter *Shortcomings*].

China also maintains a system of quotas that prevents many foreign products from being imported into their country, causing the audiovisual industry to suffer extreme losses. Kevin Murphy, *China Sets Up Barriers to Protect Its Film Industry*, INT’L HERALD TRIB., July 6, 1994. Efforts to co-produce audiovisual works with Chinese producers (to avoid its quota system) faltered in the past because the Chinese government tried to limit the number of co-productions between local and foreign filmmakers to 30 each year. *Id.* Beijing conditions release of films on the completion of final editing and production within China. *Id.* Under the Communist regime, the Chinese media is already restricted as to programming exhibited within China’s borders, sometimes banning or censoring products it deems “ideologically too sensitive.” *Id.*

On the other hand, some strides have been made: the Chinese government has recently expressed interest in buying American and other foreign films on a revenue-sharing basis, rather than the typical flat-rate fee China has been paying in the past. In 1992, the China Film Export & Import Corporation imported only twelve films for fees of \$30,000 - \$50,000 each. China will keep 60% of revenues, and give 40% to the foreign distributor or producer. Don Groves, *China Deals for Yank Pix*, VARIETY, March 21, 1994, at 1.

106. *See International Trade, U.S. Initiates Trade Action Against China Over Problems with Copyright Protections*, DAILY REP. FOR EXEC., July 1, 1994, at A126. [hereinafter *Trade Action*].

States to draft plans for reform.¹⁰⁷ China failed, however, to provide adequate enforcement measures, and piracy persisted.¹⁰⁸ If the United States' concerns are not soon resolved, however, China may be subject to trade sanctions equivalent to the estimated losses U.S. companies suffer.¹⁰⁹

Threats of Special 301 sanctions have prompted the Chinese government to make efforts to battle piracy of audiovisual products. Although the Chinese government has raided several retail outlets marketing pirated goods, deputy U.S. trade representative Charlene Barshefsky maintains that raids must strike at the manufacturing base, rather than the retail locations, to be effective.¹¹⁰ In addition, the United States government is instructing China to allow greater numbers of legitimate intellectual property imports to freely cross its borders, in order to diminish the demand for piracy.¹¹¹ Responding to threats of sanctions, China has begun establishing administrative councils to improve enforcement, including the formation of local courts to try cases involving piracy.¹¹²

Like China, India has proved to be a country dominated by pirates, due to its lack of effective copyright laws in the past.¹¹³ The United States Trade Representative cited India as a priority country under Special 301 from 1991-1993 and then again in a tentative list in April, 1994.¹¹⁴ India has since amended its copyright and trademark legislation to reform its system of enforcing protections.¹¹⁵ The United States government is now consulting India's parliament on aspects of its newly introduced trademark law and other aspects of intellectual property protection.¹¹⁶

107. Proclamation No. 6413, 57 Fed. Reg. 9647 (1992) (extending copyright protections to the works of the People's Republic of China). See *Mainland China Named Special 301 Priority Country*, Cent. News Agency, July 1, 1994 (available in LEXIS, News Library, Curnws file).

108. "Among the most egregious examples are allegedly 26 compact disc and laser disc factories in central and southern China that are capable of manufacturing 75 million [counterfeit] discs annually. . . ." *Trade Action*, *supra* note 106, at A125.

109. *Id.*

110. *China Accuses U.S. of 'Trampling' on Textile Agreement*, Agence France Presse, July 22, 1994, available in LEXIS, News Library, Curnws File [hereinafter *China Accuses*].

It is likely, however, that China will respond *slowly* to U.S. demands to close down factories, "since all of the 26 factories were partly owned by provincial governments in joint ventures with Hong Kong and Taiwanese outfits." *China Boosts Copyright Protection*, UPI, July 22, 1994, available in LEXIS, News Library, Wires File [hereinafter *China Boosts*].

111. *No Special Breaks for China on GATT: U.S. Trade Official*, Agence France Presse, July 23, 1994 (available in LEXIS, News Library, Curnws File).

112. *China Boosts*, *supra* note 110.

113. See *Media Availability*, *supra* note 101.

114. *Id.* U.S. Trade Representative Mickey Kantor has noted, "The more we protect intellectual property, you protect the property interests of U.S. exporters, but you also encourage investment in a country like India because then intellectual property producers will feel freer to invest in India and to engage in activity there because their products will be protected." *Id.*

115. *Id.*

116. *Id.* India has recently explored options to expand by allowing foreign investments and foreign products to enter its borders. *Piracy One of Many Software Issues*, CORP. LEGAL TIMES, June 1994, at 96 [hereinafter *Piracy*].

Cyprus is a notorious transshipping center for pirated videocassettes.¹¹⁷ The MPEAA filed a GSP petition in 1992, but later withdrew it when Cyprus promised to pass new copyright laws by January 1992.¹¹⁸ When it failed to do so, the MPEAA filed another petition in June 1993.¹¹⁹ The American motion picture industry loses about \$10 million per year to piracy in the Caribbean Basin, according to the MPAA.¹²⁰ During a time where such countries could contemplate joining a NAFTA-like agreement with the United States, these statistics pose a critical obstacle to future trade with Caribbean countries. Multilateral treaties such as NAFTA and GATT could provide an innovative system of worldwide intellectual property protection that could eradicate piracy and trade restrictions currently imposed.

One free trade agreement recently passed by the United States Congress, the North American Free Trade Agreement (NAFTA), will affect six trillion dollars of trade among 360 million people.¹²¹

C. *The North American Free Trade Agreement (NAFTA)*

The North American Free Trade Agreement¹²² (NAFTA) entered into force on January 1, 1994.¹²³ NAFTA attempts to abolish tariff and non-tariff barriers among the United States, Canada, and Mexico and will create unlimited trade potential, replacing the European Union as the largest free trade area in the world.¹²⁴ Consequently, other countries such as Chile, Venezuela, and Argentina have followed the NAFTA debates closely, possibly contemplating accession to the agreement.¹²⁵

The drafters of NAFTA have included a strong system of protection for

117. Levinson, *supra* note 2.

118. *Id.*

119. *Id.*

120. Brooks Boliek, *Caribbean Haul Put at \$10 mil*, THE HOLLYWOOD REP., June 1, 1994, at 8.

121. Konigsberg, *supra* note 27, at 281.

122. NAFTA, *supra* note 15.

123. *Id.* art. 2203, 32 I.L.M. at 702. NAFTA was negotiated by the governments of former President George Bush, former Canadian Prime Minister Brian Mulroney, and former Mexican President Carlos Salinas de Gortari. Konigsberg, *supra* note 27, at 281.

124. *Senate Comm. on Agriculture, Nutrition and Forestry*, Senate Foreign Relations Committee, 103d Cong., 1st Sess. (1993) (statement of Michael Kantor, Ambassador, United States Trade Representative), available in LEXIS, Legis Library, Cngtst File [hereinafter *Senate Commerce*]. Kantor states, "[i]n this intensely competitive global economy, NAFTA presents an opportunity to compete freely in a vast new market: 90 million people in Mexico, in a fast growing area, hungry for U.S. goods. It is also a step to an even larger market—400 million people throughout Central and South America and the Caribbean."

125. Senate Foreign Relations Committee, 103d Cong., 1st Sess. (1993) (statement of Rufus Yerxa, Deputy United States Trade Representative), available in LEXIS, Legis Library, Cngtst file.

owners of intellectual property rights.¹²⁶ Article 102 cites one of the goals of NAFTA as “provid[ing] adequate and effective protection and enforcement of intellectual property rights in each Party’s territory. . . .”¹²⁷ In fact, Article 1702 of NAFTA states the provisions for intellectual property protection are simply minimum terms and allows for the passage of more comprehensive agreements.¹²⁸

Article 1701(2) requires each Party to honor the provisions of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)¹²⁹ to upgrade protection for audiovisual works.¹³⁰ Because the United States ratified the Berne Convention in 1988,¹³¹ it was not required to revamp its current laws concerning intellectual property.¹³²

Article 1705 of NAFTA grants authors the right to authorize or prohibit public distribution of their works.¹³³ Trademarks are also granted a high level of protection in NAFTA. Article 1708 allows the owner of a registered

126. The preamble of the NAFTA resolves to “. . . FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights; . . .” NAFTA, *supra* note 15, pmbl., 32 I.L.M. at 247.

The objective of stimulating creativity requires a strong system of intellectual property rights. Risk-taking and innovation are most profitable if the rights owner can be assured the ability to exploit those rights to the greatest extent possible. Garcia, *supra* note 49, at 819.

127. NAFTA, *supra* note 15, art. 102, 32 I.L.M. at 297.

128. *Id.*, art. 1702, at 671.

129. Sept. 9, 1886, *revised* Paris, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221. The text of the Berne Convention is reprinted in 4 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT, app. 27 (1989).

130. Article 1701(2) of NAFTA states that each Party “shall, at a minimum, give effect to this Chapter and to the substantive provisions of: (a) the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971; (b) the Berne Convention for the Protection of Literary and Artistic Works, 1971; (c) the Paris Convention for the Protection of Industrial Property, 1967; and (d) the International Convention for the Protection of New Varieties of Plants, 1978.” NAFTA, *supra* note 15, art. 1701(2), 32 I.L.M. at 671.

This article focuses on copyright and trademark protection of audiovisual products, but other intellectual property rights are included in NAFTA: sound recordings are protected in Article 1706; patents are protected in Article 1709; layout designs of semiconductor integrated circuits are protected in Article 1710; trade secrets are protected in Article 1711; geographical indications are protected in Article 1712; and industrial designs are protected in Article 1713. *Id.* at 672-76.

131. The United States became a signatory to the Berne Convention in October, 1988, by enacting the Berne Convention Implementation Act of 1988, 17 U.S.C. § 101. See Valerie L. Hummel, *The Search For A Solution to the U.S.-Caribbean Copyright Enforcement Controversy*, 16 FORDHAM INT’L L.J. 721, at 738 (1993).

132. The United States is required, however, to implement changes in its copyright laws to protect “motion pictures produced in Canada and Mexico that fell into the public domain between 1978 and 1989 through failure to display a copyright notice as required by U.S. law as it existed prior to U.S. accession to the Berne Convention.” LEVY & WEISER, *supra* note 78, at 272 (citing NAFTA, Annex 1705.7, 32 I.L.M. at 680).

133. Article 1705 of NAFTA also allows authors to freely transfer their rights by contract. NAFTA, *supra* note 15, art. 1705, 32 I.L.M. at 671-72.

Copyright holders typically are granted broad rights over their works, including reproduction, distribution by sale or rental, and importation of copies. LEVY & WEISER, *supra* note 78, at 272.

trademark to prevent others from using it in commerce without permission.¹³⁴ Yet NAFTA fails to address problems where a trademark is used in another signatory country.¹³⁵ When different persons register a trademark in different countries, problems may result when goods are transported across borders.¹³⁶

The practical benefits of NAFTA's passage are significant. With increased protection against piracy, greater potential for opening exhibition outlets in Mexico and Canada should ensue, and easier access to the market should equate to better opportunities to supply the demand for legitimate products.¹³⁷ Many predict Mexico will make more serious efforts to battle piracy and illegal trade in the film, video and television sectors.¹³⁸

Ingenious provisions such as border protections and criminal sanctions have caused NAFTA to be cited as establishing a strong foundation for solid intellectual property rights.¹³⁹ The United States, Canada, and Mexico are required to enforce strict laws against piracy, especially at the borders.¹⁴⁰ Owners of intellectual property may request customs authorities to impound alleged illegal goods, provided they post a bond or other security.¹⁴¹ These border provisions should increase trade revenues for all three countries while minimizing losses due to piracy and illegal trade practices.¹⁴² Criminal sanctions are also employed in NAFTA's intellectual property protection.¹⁴³ The purposes of employing such sanctions are to deter violators as well as to seize and destroy infringing goods.¹⁴⁴

In order to level the playing field of intellectual property laws, it was necessary for Mexico to strengthen its criminal and civil remedies and to pass legislation lengthening the term of copyright protection.¹⁴⁵ Obtaining pre-trial relief in Mexico has been difficult in the past, however, because Mexico

134. NAFTA, *supra* note 15, art. 1708(2), 32 I.L.M. at 672-73.

135. LEVY & WEISER, *supra* note 78, at 283.

136. *Id.*

137. James Ulmer, *Trade Winds Change Direction*, THE HOLLYWOOD REP., Dec. 28, 1993, at 4. "Exhibitors, for example, who formerly found it tricky to enter the Mexican market, should now find it 'much easier for an American cinema chain to go in,' noted Lawrence Garrett, vice president, international TV at Republic Pictures and vice chairman of the American Film Marketing Assn." *Id.*

138. *Id.*

139. See LEVY & WEISER, *supra* note 78, at 286-89.

140. NAFTA, *supra* note 15, arts. 1714-18, 32 I.L.M. at 676-79.

141. Mexico, according to Annex 1718.14, is required to implement these border measures within three years of ratification. *id.*, Annex 1718.14, at 681.

142. See generally *Senate Commerce*, *supra* note 124.

143. Article 1717(1) of NAFTA provides for criminal procedures and penalties to violators who willfully counterfeit or pirate goods commercially. Penalties include imprisonment or monetary fines. NAFTA, *supra* note 15, art. 1717(1), 32 I.L.M. at 678.

144. *Id.*

145. Cf. Garcia, *supra* note 49, at 825. "Prior to 1991, Mexico has been identified as one of the seven countries with the largest pirate industries and the least effective intellectual property protection." *Id.*

has historically not recognized injunctive relief in its courts.¹⁴⁶ Article 1706 of NAFTA attempts to cure this deficiency by allowing preliminary injunctive relief to prohibit alleged illegal goods from crossing the countries' borders.¹⁴⁷ Article 1714 of NAFTA states "each party must ensure that its procedures for enforcement of intellectual property rights are fair and equitable, are not unnecessarily complicated or costly, and do not entail unreasonable time-limits or unwarranted delays."¹⁴⁸ Mexico may be required to upgrade its domestic legal system to fulfill this obligation, because many complain about its lengthy litigation procedures and small damage awards.¹⁴⁹

One point that may be subject to future negotiations is NAFTA's failure to protect against the interception and distribution of satellite-encrypted programming, an important concern for the audiovisual industry.¹⁵⁰ This has been a serious problem in the past with Mexico and Latin American countries, which often refuse to pay the royalties due the copyright owners.¹⁵¹

Canada has an intellectual property scheme similar to that of the United States,¹⁵² with one major exception. Canada has traditionally exempted its cultural industries, including "newspapers, magazines, publication industries, film creation industries and so forth" from free trade agreements with the United States.¹⁵³ NAFTA, too, includes an exemption for Canada's cultural

146. Garcia, *supra* note 49, at 828.

147. NAFTA, *supra* note 15, art. 1706, 32 I.L.M. at 672.

148. *Id.*, art. 1714, at 676.

149. See Garcia, *supra* note 49, at 828. "[T]he effectiveness of Mexico's enforcement system suffers because of a cumbersome combination of civil, administrative, and criminal procedures." *Id.*

One commentator notes "[t]here are three hallmarks of intellectual property protection in NAFTA: 1) recognition on paper that a broad variety of very fair, well thought out property rights are going to be protected; 2) that the contracting parties will put into place rules, laws, and administrative procedures to institute enforcement proceedings with court-oriented, damage-oriented, injunction-oriented, and administrative-oriented methods of stopping and remedying intellectual property abuses; and 3) muscle at the border." Thomas W. Ferrell, *Panel Discussion: Intellectual Property*, 2 SAN DIEGO JUST. J. 70, 70-71 (1994).

150. Garcia, *supra* note 49, at 828. The sale of international television rights remains a profitable commodity for producers of audiovisual works. *Id.* The United States law prohibiting the interception and disclosure of electronic communication within the United States is 19 U.S.C. § 2511 (1993). *Id.*

151. Royalties are "payments to the holder for the right to use property such as copyrighted material. . . or a share of the product or of the proceeds therefrom reserved by an owner for permitting another to exploit and use his, her, or its property." CONES, *supra* note 42, at 454.

152. Garcia, *supra* note 49, at 829.

153. Konigsberg, *supra* note 27, at 284. "The Canadian fear of American political and economic domination has become a major issue in the negotiations of previous and current free trade agreements. Particularly, the Canadian fear of both American culture and the domination of its entertainment industry interests prompted Canada to exclude or exempt its own cultural industries from the [Free Trade Agreements]." *Id.*

See e.g., the United States Free Trade Agreement with Canada. Canada-United States: Free Trade Agreement, Jan. 2, 1988, U.S.-Can., H.R. Doc. 216, 100th Cong., 2d Sess. 297 (1988), reprinted in 27 I.L.M. 281 (1988).

industries.¹⁵⁴

Canada claims to be protecting itself from an infusion of American culture.¹⁵⁵ Canadian citizens seem to fear a collapse of their social and cultural order if unchecked trade with the United States is allowed.¹⁵⁶ Despite cries of protest from the American audiovisual industry, NAFTA's exemption clause removes audiovisual rights from the purview of protection, which the United States feels is an essential component of NAFTA.¹⁵⁷

The United States has requested renegotiation of NAFTA numerous times to eliminate the "cultural exemption."¹⁵⁸ Jack Valenti, President of the Motion Picture Association of America, complains that the exclusions endanger the \$3.5 billion trade surplus of the film, television and video industries.¹⁵⁹ Further negotiations may ensue to discuss the cultural exemption, but NAFTA has entered into force with the exception in place. Canada has not yet actively sought to enforce its exemption, possibly for fear of endangering relations with the United States, which has the ability to use trade sanctions against Canada under Special 301.¹⁶⁰ Thus, it seems improbable that Canada will enforce its cultural exemption, since retaliation measures by the United States would be likely.¹⁶¹

Despite political and economic turmoil in Mexico in 1994, NAFTA

154. Article 2106 and Annex 2106 allow Canada to exempt its cultural industries, which include audiovisual rights. NAFTA, *supra* note 15, art. 2106, Annex 2106, 32 I.L.M. at 703. Canada was afforded the same level of protection that exists in the United States-Canada Free-Trade Agreement, art. 2005, in President's Communication Transmitting the Final Legal Text of the U.S.-Canada Free Trade Agreement, the Proposed U.S.-Canada Free-Trade Agreement Implementation Act of 1988, and a Statement of Administrative Action, H.R. Doc. 216, 100th Cong., 2d Sess. 167 (1988).

155. See generally Konigsberg, *supra* note 27.

156. *Id.* at 284.

157. *Id.* at 299 (citing a letter by Jack Valenti, President and Chief Executive Officer of the Motion Picture Association of America, to the House Ways and Means Committee's Subcommittee on Trade: "films, television programs, home video, books and sound recordings have no protection in Canada and are removed from those binding commitments of NAFTA's chapter on intellectual property.").

158. *Id.* at 306.

159. Valenti, had previously (in November, 1993) issued a statement of support for NAFTA:

the MPAA believes that NAFTA will succeed in opening new markets for motion pictures worldwide. The agreement requires Mexico, a country with a long history of intellectual property violations, to begin to strictly protect intellectual property, which has the industry anticipating an increase in the sale of U.S. videos in Mexico. NAFTA also requires greater protection against the signal theft of U.S. satellite programming into Latin America. Security for such programming is expected to result in increased development of cable programmers in Latin America.

Reactions to Approval of NAFTA, 6 J. PROPRIETY RTS. No. 1, at 35 (Jan. 1994).

160. See LEVY & WEISER, *supra* note 78, at 288. Special 301 could be employed to commence an investigation of Canada's trade practices concerning intellectual property rights, and sanctions could follow. *Id.*

161. "[T]he United States government has indicated clearly that it is ready, willing, and able to use this defensive weapon by including in the NAFTA implementing legislation amendments to the Special 301 provision of U.S. trade law." LEVY & WEISER, *supra* note 78, at 288.

appears to remain promising.¹⁶² Whether the United States, Canada, and Mexico can maintain their own distinct cultures while providing open trading markets for audiovisual goods remains to be seen. Governments with varying levels of protection of rights have faced different obstacles in achieving operable multilateral treaties with effective protection of intellectual property rights. The General Agreement on Tariff and Trade (GATT) is an example of a multilateral accord signed by member countries with varying degrees of intellectual property rights protection.¹⁶³

D. General Agreement on Tariff and Trade (GATT)¹⁶⁴

On April 15, 1994, one hundred fifteen nations met in Marrakesh, Morocco, to formally sign the Uruguay Round of multilateral trade negotiations after seven years of negotiations.¹⁶⁵ The members of GATT now

162. In 1994, Mexico faced problems of drug feuds, a weak currency system, several political assassinations, armed uprisings, kidnapping, and an Indian rebellion. Yet many say current conditions should improve and the positive benefits of NAFTA will emerge gradually. Susana Hayward, *First Year of NAFTA Marred by Upheaval, Peso's Crash*, SAN DIEGO UNION-TRIB., Jan. 1, 1995, at I-4.

163. "[F]ewer than half the signatory nations to the Berne Convention actually maintain adequate copyright protection although their domestic regulations are in agreement with the [Berne] Convention's terms." Garcia, *supra* note 49, at 823 (citing Ulrich Joos & Rainer Moufang, *Report on the Second Ringberg Symposium, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY* 903 (Friedrich-Karl Beier & Gerhard Schricker eds., 1989)).

164. GATT, *supra* note 17.

165. Kantor, *supra* note 2.

As of late December, 1994, 76 of the 124 countries had approved the GATT.

As of December 30, countries which have accepted the [World Trade Organization] included: Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Brazil, Brunei, Canada, Chile, Colombia, Costa Rica, Côte d'Ivoire, Czech Republic, Denmark, Dominica, the European Union, Finland, France, Gabon, Germany, Ghana, Greece, Guyana, Honduras, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Kenya, South Korea, Kuwait, Lesotho, Luxemburg, Macao, Malaysia, Malta, Mauritania, Mauritius, Mexico, Morocco, Myanmar, Namibia, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Portugal, Romania, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, St. Vincent, Surinam, Swaziland, Sweden, Tanzania, Thailand, Uganda, United Kingdom, United States, and Zambia.

Governments which have ratified the WTO, but still have to post their market access schedules, included are Central African Republic, Chad, Guinea Bissau, Maldives, Mali, Mozambique, Grenada and Qatar.

Those with domestic process concluded no notification yet were Botswana, Haiti, Poland, Venezuela and Zimbabwe.

Countries still in the process of ratifying included Algeria, Angola, Benin, Bolivia, Burkina Faso, Burundi, Cameroon, Congo, Cuba, Cyprus, Djibouti, Dominican Republic, Egypt, El Salvador, Fiji, Guatemala, Guinea, Israel, Jamaica, Liechtenstein, Nicaragua, Papua New Guinea, Slovenia, Solomon Islands, St. Lucia, St. Kitts and Nevis, Switzerland, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, Gambia, Madagascar, Malawi, Niger, Rwanda, Sierra Leone, Togo and Zaire.

Uruguay Round: Quad Countries Deliver Ratification of Uruguay Round World Trade

represent 124 countries and 97% of world trade.¹⁶⁶ The most comprehensive trade agreement in history to date,¹⁶⁷ the Uruguay Round attempts to heavily reduce or eliminate trade barriers¹⁶⁸ to aid world economic growth.¹⁶⁹ When the agreement enters into force on July 1, 1995,¹⁷⁰ the World Trade Organization (WTO) will oversee the GATT.¹⁷¹ The WTO will have the ability to enforce sanctions against member states that violate provisions of GATT.¹⁷² GATT will provide increased protection against

Agreement, Int'l Trade Daily (BNA), Jan. 3, 1995.

166. Amy Kaslow, *US Congress Dims Future of GATT*, THE CHRISTIAN SCI. MON., Oct. 5, 1994, at 1.

167. Amelia Porges, *Introductory Note to General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (the Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, December 15, 1993, 33 I.L.M. 1, 5 (1994) [hereinafter *Introductory Note*].

The text of the GATT agreement is over 22,000 pages and weighs 385 pounds. 140 CONG. REC. S6979 (daily ed. June 7, 1994) (statement of Sen. Thurmond).

168. The preamble of GATT states, “[b]eing desirous of contributing to these objectives of entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations. . . .” General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round) - Agreement Establishing the Multilateral Trade Organization [World Trade Organization], December 15, 1993, 33 I.L.M. 13, 15 (1994).

169. “The Organization for Economic Cooperation and Development (OECD) estimates that the Uruguay Round will increase world gross domestic product by approximately \$274 billion per year, in current prices, by the year 2002.” OECD, *Trade Policy Issues: Assessing the Effects of the Uruguay Round*, 9 November 1993, TD(93)413. The Clinton Administration estimates the Uruguay Round will increase U.S. gross domestic product by an average of \$110 billion per year over the next ten years. *Id.* at 1.

If GATT is passed, Treasury Secretary Lloyd Bentsen estimates that “[o]ver the next decade, (GATT) will increase exports about \$150 billion, create about 500,000 new American jobs and increase America’s income by about \$1,700 per family per year.” *U.S. Postpones Decision in Japan Trade Action*, INVESTOR’S BUS. DAILY, July 1, 1994, at B1.

170. Part One of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations states “[p]articipants agree on the desirability of acceptance of the Agreement Establishing the Multilateral Trade Organization by all participants with a view to its entry into force as early as possible, and not later than [1 July 1995].” Article XIV(1) states it “shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise.” GATT, *supra* note 17, art. XIV(1), 33 I.L.M. at 22.

The United States calls for “fast track procedures” for implementing legislation for the Uruguay Round under Section 1103 of the 1988 Omnibus Trade and Competiveness Act, 19 U.S.C. § 2903 (1988). “Before entering into a trade agreement the President must consult with the House Ways and Means and Senate Finance Committees and any other Congressional committee having jurisdiction over any subject-matters which would be affected by this agreement.” “Fast-track” treatment requires each house of Congress to vote “yes or no” pursuant to established timeliness under section 151 of the Trade Act of 1974, 19 U.S.C. § 2191 (1989). *Introductory Note*, *supra* note 167, 33 I.L.M. at 8.

The United States House of Representatives approved the GATT implementation legislation with a vote of 288-146 on November 29, 1994, and the Senate approved it 76-24 on December 1, 1994. Uruguay Round Agreement Act, 103d Cong., 2d Sess., H 11535-11536, S 15379 (1994).

171. *Introductory Note*, *supra* note 167, 33 I.L.M. at 2. The WTO will be supervised by a Ministerial Conference that is scheduled to meet at least once every second year, and a General Council, consisting of representatives from all member countries, that will oversee regular business of the WTO on a daily basis. The WTO will act as an arbitrator of trade disputes between signatory countries. *Id.*

172. Dick Gephardt, *After the Uruguay Round*, ROLL CALL, May 2, 1994.

piracy, using incentive programs and the passage of consistent laws to harmonize worldwide protection.¹⁷³ Nevertheless, the United States government has faced serious opposition from environmental and labor groups, "who see the consensus reached among 123 nations as greatly compromising the United States interests."¹⁷⁴

One powerful aspect of the GATT is its ability to bind member states who currently offer little or no intellectual property protection.¹⁷⁵ One of the primary goals of the United States in the Uruguay Round negotiations was assurance of intellectual property rights internationally.¹⁷⁶ Thus, countries such as India and France will be compelled to enforce anti-piracy laws and will suffer serious trade sanctions if they fail.¹⁷⁷ Producers of audiovisual products should realize increased profits in international markets as a result. Yet critics contend President Clinton sacrificed important concerns of the audiovisual industry in his eagerness to accede to the GATT.¹⁷⁸ Initially, representatives of the United States government stood strong on their commitment to eliminate the unfair trade practices of the European Union.¹⁷⁹ Michael Kantor, representative of the United States Trade Representative, insisted that "[n]o Uruguay Round of trade talks will be finalized unless this issue is resolved."¹⁸⁰ Negotiators for European interests prevailed in the end, and the current system of quotas and taxes imposed on United States audiovisual products continues today.

The United States audiovisual industry had twin objectives in the negotiation of GATT: increased access to European markets and the termination of film subsidies in European countries.¹⁸¹ Neither goal was realized. President Clinton ultimately sacrificed these goals in order to draft

173. *Introductory Note, supra* note 167, at 4. Two important goals for GATT are to help resolve trade disputes between countries and to reduce trade barriers in all markets. Thurmond, *supra* note 167, at S6979.

174. Kaslow, *supra* note 166, at 1.

Senator Ernest Hollings of South Carolina, criticized GATT, posing the question, "[i]f GATT is so good, why is the U.S. working for a better bilateral trade accord with Japan?" Hollings' main concern is that an influx of cheap foreign goods will enter the American market, and cause damage to the United States economy upon facing fierce competition. Senator Hollings demanded the ability to consider the treaty for 45 days before it passes on the fast-track legislation route. Karen Hosler, *Clinton Presses Senate to Vote on Trade Pact*, THE BALTIMORE SUN, Sept. 29, 1994, at A1. The House of Representatives and the Senate approved the GATT despite Senator Hollings' concerns. See *supra* note 170.

175. Bruce A. Lehman, *Intellectual Property Rights Under the Clinton Administration*, 27 G.W. J. INT'L L. & ECON. 395, 396 (1993-94).

176. See Thurmond, *supra* note 167.

177. *Id.*

178. Ulmer, *supra* note 137, at 6.

179. Dennis Wharton, *Clinton Pledges GATT Support to Hollywood*, VARIETY, Oct. 25, 1993, at 69. In the fall of 1993, President Clinton stated, "[t]he U.S. is ready to sign a GATT accord that is fair and just for all. But let me make it clear that fairness and justice must apply to audiovisual works as well as other elements in a final GATT deal." *Id.*

180. Cohen, *supra* note 40, at A1.

181. Fuller, *supra* note 33, at 27.

the Uruguay Round.¹⁸²

The European Union entered the GATT negotiations with three opposing goals: to preserve the existing quota system, to continue subsidizing their own domestic producers, and to keep the freedom to change quota and subsidy systems as new technologies are developed.¹⁸³ French negotiators wanted audiovisual works to be entirely excluded from GATT in order to preserve their local production scene.¹⁸⁴ French productions benefit from a tax imposed by its government on all blank videotapes sold, which is funnelled back to subsidize its national film and music productions.¹⁸⁵

During negotiations of the Uruguay Round, the European Union resisted petitions to lift its Broadcast Directive,¹⁸⁶ which would have liberalized its communications sector.¹⁸⁷ In addition, the American film industry was deprived of full access to the European Union's system of levying fines for piracy of video recordings.¹⁸⁸

Australia, which imposes 50% local-content quotas, also opposed the United States' objective of ending trade barriers when the United States pushed for total free trade of audiovisual product during GATT negotiations.¹⁸⁹ When pressed by American negotiators to eliminate quotas and taxes imposed on audiovisual products, the European negotiators refused to concede, which resulted in an "agreement to disagree."¹⁹⁰ In the end, President Clinton removed audiovisual interests from GATT talks, stating the status quo was preferable to sacrificing the passage of the treaty.¹⁹¹

Reaction to the United States concession has ranged from indifference to outrage. The American Motion Picture Association stated that

the quotas will be a serious threat to the future of American movies and TV programs unless they are halted or phased out over a number of years.

182. Mark Sandalow, *Historic Global Trade Pact; GATT Issues Resolved By 116 Nations*, THE S. F. CHRON., Dec. 15, 1993, at A1.

183. *Id.*

184. *Id.*

185. *Id.*

186. See *supra* note 37.

187. Richard H. Steinberg, *The Uruguay Round: A Preliminary Analysis of the Final Act (1994)* [unpublished manuscript on file with the *California Western International Law Journal*], at vi.

188. *Id.*

189. Don Groves, *Aussies Brace for Battle with U.S. over TV Quotas*, VARIETY, Dec. 27, 1993, at 49.

190. Sandalow, *supra* note 182, at A1.

One major problem during negotiations of the Uruguay Round was the classification of audiovisual products. The negotiators representing the European Union wanted to classify audiovisual products as cultural products, warranting protection. The United States negotiators, on the other hand, took the stance that audiovisual products are commercial, just as agricultural and other items, and should be treated in the same manner (no special protection). See Lisa L. Garrett, *Commerce Versus Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies*, 19 N.C. J. INT'L & COM. REG. 553 (1994).

191. Ulmer, *supra* note 14, at 6.

Moreover, the new technology—all the magic of new ways to hurl programs all over Europe at the speed of light—this new technology cannot be restricted by artificial barriers planted by parliaments.¹⁹²

One possible repercussion of the firm U.S. stance was that it made more Europeans aware of the domination of American films.¹⁹³ Pitting the United States against France has called attention to current market conditions. As a result, more European countries, which seemed indifferent to the dominance of United States audiovisual products in the past, now support France's position.¹⁹⁴ Despite criticism that GATT sacrificed American audiovisual concerns, several features of GATT have revolutionized international intellectual property laws. One such feature is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁹⁵

1. TRIPS

TRIPS is designed to enhance international protection against piracy and restrictive trade practices. TRIPS recognizes increased protection for copyrights,¹⁹⁶ trademarks¹⁹⁷ and patents,¹⁹⁸ trade secrets,¹⁹⁹ and rights for performers, phonogram producers and broadcasting organizations.²⁰⁰ Each signatory to GATT agrees to adhere to the Berne Convention of Copyrights, and protection of works must last at least fifty years.²⁰¹ The TRIPS Agreement, like NAFTA, requires member countries to provide appropriate remedies for violations of its provisions.²⁰²

Two general rules are presented in the TRIPS Agreement: each member party will treat nationals of other parties no less favorably than it treats its own,²⁰³ and each party will grant nationals of all countries the same

192. Cohen, *supra* note 40, at A1.

193. Michael Williamsadam Dawtrey, et al., *GATT Spat Wake-Up on Yank Market Muscle*, VARIETY, Dec. 27, 1993, at 45.

194. *Id.*

195. TRIPS, *supra* note 12, 33 I.L.M. at 81.

196. *Id.*, art. 9.

197. *Id.*, arts. 15-21.

198. *Id.*, arts. 27-34.

199. *Id.*, art. 39.

200. *Id.*, art. 14.

201. *Id.*, art. 12.

The TRIPS provisions may ensure greater protection than the Berne Convention's requirements because signatories can be sanctioned if they fail to abide by the provisions. Hummel, *supra* note 131, at 752.

202. *Id.*, art. 41, para. 1. Article 41(1) provides: "Members shall ensure that enforcement procedures as specified in this Part are available under their national laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements . . ." *Id.*

203. TRIPS, *supra* note 12, art. 3, 33 I.L.M. at 85.

privileges and immunities that it grants to any one party ("most-favored nations" treatment).²⁰⁴ Article 3 of TRIPS provides for national treatment as follows: "Each Member shall accord to the nationals of other Members treatment no less favorably than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided, respectively, the Paris Convention" ²⁰⁵

Article 4 of TRIPS, calling for most-favored nation treatment, reads: "[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of another country shall be accorded immediately and unconditionally to the nationals of all other Members" ²⁰⁶

This provides that every signatory will receive the same treatment as given to the most-favored trading partner. If trade restrictions are lowered for one nation, those constraints are lowered for all contracting parties.²⁰⁷ The provisions requiring national and most-favored nations treatment should benefit all signatories to TRIPS as each signatory country upgrades its intellectual property laws.

Article 11 of TRIPS also grants producers of works the right to authorize or prohibit the commercial rental of their works to the public,²⁰⁸ and article 14 protects performers from unauthorized recordings and broadcasts of their works (bootlegging).²⁰⁹ These provisions represent significant progress in providing intellectual property protection. The difficulty, however, lies in enforcement procedures.

The TRIPS agreement will allow customs authorities to search and confiscate suspected pirated goods.²¹⁰ Border measures will be accompanied by fair judicial or administrative policies to determine infringement questions.²¹¹ Like NAFTA, TRIPS's border provisions and criminal sanctions for willful violations should strengthen enforcement.²¹² Rights' holders with evidence of another's infringement will have the ability to lodge complaints. Customs authorities can then suspend suspected infringing goods from free circulation until an investigation results in action.²¹³

When a dispute arises under the TRIPS Agreements of the GATT, the

204. *Id.*, art. 4, 33 I.L.M. at 86. See also Steinberg, *supra* note 187, at 40. For instance, if the United States offers England a special rate on a particular product, it must offer all other contracting parties the same rate.

205. *Id.*, art. 3.

206. *Id.*

207. Hummel, *supra* note 131, at 744.

208. TRIPS, *supra* note 12, art. 11, 33 I.L.M. at 87-88.

209. *Id.*, art. 14, 33 I.L.M. at 88-89.

210. *Id.*, arts. 44, para. 1; arts. 51-60, 33 I.L.M. 103-05.

211. LEVY & WEISER, *supra* note 78, at 286.

212. TRIPS, *supra* note 12, art. 61, 33 I.L.M. at 105.

213. *Id.*, arts. 50-60, 33 I.L.M. at 102-105. Article 53 allows customs authorities to require a security by the rights' holder as long as it does not "unreasonably deter recourse to these proceedings." *Id.*, art. 53, 33 I.L.M. at 103.

Uruguay Round provides a means for dispute resolution procedures.²¹⁴ First, disputes may be referred to a Council for Trade-Related Aspects of Intellectual Property Rights, which will operate by consensus.²¹⁵ Before a panel is formed to hear such a dispute, a Dispute Settlement Understanding (DSU) requires consultations between member states to attempt a resolution.²¹⁶ At this point, the parties may voluntarily agree to a different form of settlement such as mediation or arbitration.²¹⁷ For situations where the DSU panel is used, an appellate review system is in place, consisting of any three of the seven members.²¹⁸ When a recommendation is rendered, a deadline for compliance is set, with a body called the Dispute Settlement Board overseeing implementation until the issue is resolved.²¹⁹ Fortunately, the DSU will continue permitting the United States to sanction other members using section 301 of the Trade Act of 1974.²²⁰

2. Points of Controversy in GATT

The United States audiovisual industry would like to take advantage of the TRIPS provisions of GATT as soon as possible to capitalize on potential profits. TRIPS, however, permits a "transitional period" for developing nations to comply with TRIPS conditions.²²¹ Developing nations and the former Soviet bloc countries, are granted five years to comply,²²² while lesser-developed countries have up to eleven years to implement legislation and enforcement of these protections.²²³ Developed nations (including the United States) are granted approximately one year (after the treaty comes into

214. *Id.*, art. 64, 33 I.L.M. at 107.

215. *Id.*, art. 68, 33 I.L.M. at 108. The council will operate by consensus, which means one vote can block an action. There is some concern, however, that operating by consensus may be ineffective in resolving disputes efficiently, however, since many countries will take sides with their allies. Steinberg, *supra* note 187, at 46.

216. Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112, 115, sections 4.1-4.11 (1994) [hereinafter Dispute Settlement].

217. *Id.* at 117. Section 5.1 of the Dispute Settlement states that "[g]ood offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree." Section 5.3 states that these measures can be requested at any time by any party involved in the dispute. *Id.*

218. Section 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes governs the appellate review process. "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. . ." *Id.*, section 17, 33 I.L.M. at 123.

219. Section 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes dictates the means of compliance with the panel's recommendations and rulings. *Id.*, 33 I.L.M. at 125-26.

220. See explanation of Special 301 provisions in part II(B) *supra*.

221. TRIPS, *supra* note 12, art. 65, 33 I.L.M. at 107-108.

222. *Id.*, art. 65, para. 2, 33 I.L.M. at 107.

223. *Id.*, art. 65, para. 4, 33 I.L.M. at 107.

force in 1995) to align their national laws and practices with those in GATT.²²⁴ Critics feel the transitional arrangements are too weak and will result in additional losses from piracy before action is taken.²²⁵ While governments often move slowly in passing implementing legislation, Americans argue that complete alignment is necessary within five years to ensure uniform protection by all members.²²⁶

Several problems have prevented a more expeditious passage of GATT. Some critics expressed concern that the GATT would infringe upon United States sovereignty²²⁷ because member countries must ensure that their laws comport with those passed by the World Trade Organization (WTO).²²⁸ Some feel that if the United States is forced to change its laws to comply with WTO rulings, Congress's constitutional power may be restricted.²²⁹ Always fearful of losing its power, the United States believes its sovereignty will be weakened if domestic laws must be consistent with worldwide protection.²³⁰

The GATT does, however, allow the United States government to continue passing and enforcing its existing laws without interference.²³¹ Special 301 provisions²³² will still be available to address practices not covered by GATT or WTO that are committed by non-WTO members.²³³ Further, GATT operates by consensus, so that United States' domestic laws

224. *Id.*, art. 65, para. 1, 33 I.L.M. at 107. "No member need apply the TRIPS provisions before one year after the entry into force of the Agreement Establishing the MTO." *Id.*

225. "Estimated losses to the U.S. economy in piracy of intellectual property are up to \$20 billion annually." *Intellectual Property, Witnesses Urge Foreign Aid As Lever For Intellectual Property Protection*, Daily Rep. for Exec. (BNA) May 4, 1994, at d31 [hereinafter *Witnesses*].

Also see Doane, *supra* note 9, at 482. "Due to the fast pace of technological development, this extended transition period is extremely burdensome to high technology industries and other creative or research-oriented industries. . . . Excessive transition periods merely allow nations with thriving pirate industries to continue operating to the detriment of foreign and domestic innovators."

226. See House Ways and Means/Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations, 103d Cong., 2d Sess. (Feb. 1, 1994), available in LEXIS, Legis Library, Cgts File (statement of Eric H. Smith, Executive Director and General Counsel, International Intellectual Property Alliance).

Yet a danger may exist in mandating shorter transitional terms; lesser developed nations slow to pass the necessary legislation may forego greater access to world markets and monopolization of technology that more developed nations will enjoy. Garcia, *supra* note 49, at 823-24.

227. Sovereignty is defined as the "supreme, absolute and uncontrollable power by which any independent state is governed . . . the power to make laws, to execute and to apply them. . . ." BLACKS LAW DICTIONARY 1396 (6th ed. 1990).

228. Article 1 of TRIPS states, "Members shall give effect to the provisions of this Agreement. . . ." TRIPS, *supra* note 12, art. 1, 33 I.L.M. at 84-85.

229. See Thurmond, *supra* note 167, at S6979.

230. See *id.*

231. Article 1(I) of GATT reads, "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." TRIPS, *supra* note 12, art. 1, para. 1, 33 I.L.M. at 84-85.

232. See Special 301 discussion *supra* part II(B).

233. Kantor, *supra* note 2.

will not change unless it agrees to make changes.²³⁴ The United States could, of course, nullify GATT if it believed its sovereignty was being surrendered.²³⁵

Concerns about sovereignty may be placated by continued active participation by the United States with the World Intellectual Property Organization (WIPO)²³⁶ and the World Trade Organization (WTO).²³⁷ The United States has a strong interest to ensure these two units work together to monitor coordination of worldwide development of intellectual property laws. United States citizens own more intellectual property rights than citizens of any other country.²³⁸

Others warned against the approval of GATT for budgetary reasons. Some predict losses to the United States of \$40 billion due to tariff reductions over the next decade.²³⁹ Although part of this sum may be recovered from the increase in trade resulting from tariff reductions, the United States budget is in danger of incurring an even greater deficit²⁴⁰ (the national debt is more than \$5 trillion now²⁴¹). Other commentators disagree, contending that the ultimate increase in trade will benefit the government with earnings of about \$3 in revenue for every \$1 lost in tariffs.²⁴²

China wanted to be considered a "developing nation" under GATT,

234. *Id.*

235. Article XV of the Final Act states "[a]ny member may withdraw from this Agreement." GATT, *supra* note 12, art. XV, 33 I.L.M. at 23.

Mr. Thurmond offers four courses of action if the WTO rules against the United States: "first, we can leave the WTO; second, pay tariff penalties to other countries; third, not enforce our domestic laws; or fourth, change our laws to comply with the WTO ruling." Thurmond, *supra* note 167, at S6979.

236. Piracy, *supra* note 116, at 96. "WIPO helps administer existing treaties and adjust existing treaties, such as the Berne Convention. . . . They also help educate around the world." *Id.*

237. The introduction to the Final Act explains the WTO's responsibilities: "The WTO has the tasks of implementing the WTO Agreement and the Multilateral Trade Agreements; providing the framework for implementation of the Plurilateral Trade Agreements; providing the forum for negotiations among its Members concerning matters dealt with in the attached agreements; providing a forum for other negotiations; and cooperating as appropriate with the Bretton Woods institutions. . ." *Introductory Note, supra* note 167, at 2.

238. Lehman, *supra* note 175, at 401.

239. Thurmond, *supra* note 167, at S6979.

240. *Id.* Mr. Thurmond, in addressing these concerns, compared GATT to the Tokyo round talks in the late 1970's, in which the goal was also to make the United States more competitive in global trade. Thurmond noted, "[a]fter implementation of the Tokyo round, the United States trade deficit grew from \$14 billion in 1979 to over \$115 billion for 1993." *Id.*

241. "U.S. government-related debt has exploded from \$1 trillion outstanding in 1980 to \$5.3 trillion now, the result of years of record federal budget deficits." Tom Petrino, *The Bond Market Monster; Some Demonize It, But It's A Creature of Our Own Making*, L.A. TIMES, Nov. 20, 1994, at D1.

242. Thurmond, *supra* note 167, at S 6979. Thurmond submitted an article from the International Herald Tribune by Reginald Dale, which stated, "in the next five years the government is likely to collect about \$3 in revenue for every \$1 lost in tariffs, because of vastly increased trade."

which would give it more time to align its laws, but the United States is staunchly opposed, stating that such "status is only extended to countries that are disadvantaged in export markets."²⁴³

The United States government has also indicated it will refrain from supporting China's accession to GATT until it fully enforces its protections, which may entail closing down most or all of the illegal duplication facilities present there.²⁴⁴ China's foreign trade ministry condemned the recent decision by the United States government to investigate China's alleged piracy practices, calling it "irrational."²⁴⁵ China vows it will seek world support to reenter GATT.²⁴⁶

The United States audiovisual industry, while originally outraged by the terms of GATT, has grown more receptive to the agreement.²⁴⁷ Yet, for the GATT to function efficiently, a great deal of collaboration will be necessary. The United States plans to continue offering educational and incentive programs to strive for an effective system of international intellectual property protection.

III. PROPOSED UNITED STATES LEGISLATION

The implementation of the TRIPS agreement of GATT may still fall short of satisfactory protection of intellectual property rights. Several bills resolve to continue pursuing such goals in the future. One proposed bill entitled the Rights of Intellectual Property Owners Fairness Facilitation Act of 1994,²⁴⁸ aims to encourage developing countries to commence or improve protection procedures.²⁴⁹ This legislation prohibits the United States government from designating a country as eligible for GSP benefits if

243. China Accuses, *supra* note 110 (citing United States Trade Representative Charlene Barshefsky).

244. See *Media Availability*, *supra* note 101. In an interview with United States Trade Representative Michael Kantor, Kantor states, "[w]e will staunchly support China's accession when they meet the standards. This is no different position, frankly, than many in the world community are taking, including many of our allies, Japan and the European Union." *Id.*

245. *Shortcomings*, *supra* note 105, at A126. A spokesman for the ministry stated, "The U.S. move will harm bilateral economic and trade relations and the U.S. government will be held responsible for all the consequences arising therefrom." *Id.*

246. *China Issues Warning on GATT Re-entry* UPI, Oct. 30, 1994, available in LEXIS, News Library, Curnws File.

247. James Bates, *The GATT Vote: Impact on Business; Hollywood's New Reading of Pact Supports Passage*, L.A. TIMES, Dec. 2, 1994, at I-4. In fact, "there is the feeling in the industry that lowering trade barriers worldwide is good for business overall because it will stimulate the economies of developing nations, which in turn will eventually boost demand for Hollywood's products. . . . Indeed, some executives say there has been a clear surge in the movie business in Mexico, which they attribute in part to the enactment of the North American Free Trade Agreement." *Id.*

248. S. 2041, 103d Cong., 2d Sess. (1994).

249. *Id.* The bill states, "[i]t is in the interest of the United States to leverage its foreign policy to achieve certain trade policy objectives to achieve adequate, effective, and timely protection of intellectual property rights." *Id.*

the country fails to implement TRIPS within a specified time period.²⁵⁰

Efforts to establish foreign assistance programs to help other countries implement measures of protection also include House of Representatives' pending bills 4239²⁵¹ and 240.²⁵² H.R. bill 4329 aims to "help foreign nations develop and strengthen their copyright protection laws and . . . to enforce those laws,"²⁵³ while H.R. bill 240 calls for "strengthened levels of protection in the post-TRIPS environment through bilateral, regional and multilateral negotiations. . . ."²⁵⁴ Determination of a country's ability to participate in free trade agreements will be based on their level of intellectual property protection.²⁵⁵ Efforts to educate governments, establish patent and trademark offices, and improve judicial systems have enjoyed success in some countries, such as Mexico.²⁵⁶ The U.S. Trade Representative lists four additional goals: "(1) implementation of TRIPs; (2) foreign enforcement of the new intellectual property standards; (3) expanded protection for emerging technologies; and (4) opening of new markets for U.S. intellectual property."²⁵⁷ A comprehensive scheme of education and appropriate trade incentives is essential to the successful implementation of a global trading system intended by international treaties.

Further, the Model Intellectual Property Agreement, of the GATT Fair Trade Enforcement Act,²⁵⁸ is an incentive program designed to encourage

250. *Id.* See discussion *supra* part II(A) on GSP systems.

251. H.R. 4239 103d Cong., 2d Sess. (1994) reads as follows: "[T]he President, acting through the Administrator of the Agency for International Development, to establish a program of training and technical assistance to assist foreign countries in: (1) developing and strengthening laws and regulations to protect intellectual property; and (2) developing the infrastructure necessary to implement and enforce such laws and regulations."

252. H.R. 240, 103d Cong., 2d Sess. (1994). This bill acknowledges the importance of strong protection of intellectual property rights and acknowledges that gaps in adequate protection will remain even after NAFTA and TRIPS are implemented. House bill 240 resolves to focus on intellectual property abroad as a main trade policy objective and proposes to strengthen levels of intellectual property protection.

253. H.R. 4329, *supra* note 251, "[t]he President, acting through the Administrator of the United States Agency for International Development, shall establish a program of training and other technical assistance to assist foreign countries in: (1) developing and strengthening laws and regulations to protect intellectual property; and (2) developing the infrastructure necessary to impalement and enforce such laws and regulations. . . ."

254. H.R. 240, *supra* note 252.

255. *Witnesses, supra* note 225, at A84. Upon introduction of his bill, Rep. Gejdenson explained how these bills will interact: "Hconres 240 calls on the Administration to use every possible lever, including withholding of preferential trade benefits, to end the theft of intellectual property. . . . And for those countries that are earnestly trying to stop the thievery but do not have the wherewithal to do so, HR 4329 helps them to get the training and technology needed to put into place a real system of intellectual property protection." *Id.*

256. *Id.* For example, such a program has proven successful in upgrading patents: the United States Patent and Trademark Office has instructed Mexico's examiners recently, and as a result, Mexico has "almost eliminated a multi-year backlog of patent applications." *Id.*

257. *Id.*

258. H.R. 4206, 103d Cong., 2d Sess. § 206 (1994). One particularly strong feature of this act is the provision requiring it be periodically reviewed to reflect new and emerging technologies.

trading partners who are chronic offenders to implement more effective border control measures to reduce illegal trade when sufficient evidence of such practices is discovered.²⁵⁹ Section 206 of the GATT Fair Trade Enforcement Act of 1994, in implementing the Uruguay Round of the GATT, dictates that the act will strengthen obligations of the parties to GATT and NAFTA.²⁶⁰ Incentives for aiding other countries' efforts to improve their systems of protecting intellectual property include establishing private insurance for intellectual property assets;²⁶¹ assisting in the passage of national laws in foreign countries to protect intellectual property rights;²⁶² organizing committees in regional organizations to promote co-operation;²⁶³ and providing technical assistance through the United States Agency for International Development.²⁶⁴

IV. MEASURES FOR THE UNITED STATES AUDIOVISUAL INDUSTRY TO COMBAT TRADE RESTRICTIONS

Improved communication technology and improved financing arrangements have led to more international co-productions²⁶⁵ and joint ventures²⁶⁶ in the audiovisual industry.²⁶⁷ Co-productions enable producers to share risks, to gain tax breaks, participate in subsidies, avoid quotas, and establish long-term relationships with foreign partners.²⁶⁸ Co-productions may also furnish alternatives to standard American major film and television fare, stimulate independent film production, and expand cultural frontiers.²⁶⁹ Further advantages to co-productions are lower customs duties on

259. *See id.* § 210(b).

260. *See id.* § 206(a).

261. *Id.* § 209 (a)(1).

262. *Id.* § 209(a)(2).

263. *Id.* § 209(a)(3).

264. *Id.* § 209(a)(4).

265. "Co-productions generally involve two, three or four partners who together supply financing, a negative pickup agreement from an international sales agent, a government subsidy or investment, and a legally binding partnership contract." Penny Britell, *U.S. - Euro Prod'n Pacts Soar*, VARIETY, March 21, 1994, at 51. *See generally* Moore, *supra* note 51, for features of such co-production deals.

266. A joint venture is "[a] business undertaking by two or more parties in which profits, losses, and control are shared. A joint venture is a combination of two or more persons who jointly seek a profit from some specific business venture without designating themselves as an actual partnership or corporation." Cones, *supra* note 42, at 263.

267. *See generally* Daniel S. Moore, *Hungry For More Chocolate; Spanish-Lingo Filmmers Aim Challenge For U.S. Market*, VARIETY, May 9-16, 1994, at c6 [hereinafter Daniel Moore].

268. *See* Moore, *supra* note 51, at 290. While the United States film community depends primarily on private investments for financing, many foreign governments provide subsidies, tax shelters, and interest-free loans to their audiovisual industries to promote local or regional production, which they feel will nourish their country's cultural identity and economic welfare. *See generally id.*

269. *Id.* at 287-88.

imports, and reduced or eliminated airtime and screen quotas.²⁷⁰ Foreign audiovisual companies involved in co-productions with United States producers have better chances of being released in the United States market,²⁷¹ which results in greater revenues. This, in turn, may eventually lead to abandonment of unfair trade practices if foreign entities capture a greater market share and increased profits.²⁷²

Audiences in the United States seem more receptive to foreign audiovisual fare in recent years, as evidenced by the success of such films as Mexico's *Like Water For Chocolate*,²⁷³ China's *Farewell My Concubine*,²⁷⁴ Vietnam's *The Scent of Green Papaya*,²⁷⁵ and the Taiwanese/American *The Wedding Banquet*²⁷⁶ in the American box office.²⁷⁷ If foreign films continue to gain better market shares in the United States, such collaborative attitudes may cause foreign nations to lower trade restrictions for United States filmmakers.²⁷⁸

Reasons for increased co-production efforts stem from the need for more products to fill new media channels such as cable and pay-per-view.²⁷⁹ Many countries have negotiated film treaties with other nations to allow foreigners access to federal funding if specified requirements are met.²⁸⁰ Other films are made through joint efforts without treaties.²⁸¹

Despite trade barriers and piracy problems, many United States audiovisual companies are currently making efforts to expand in the international marketplace. In the fall of 1994, Walt Disney Company created a subsidiary of its Miramax division to promote French films in the United States market.²⁸² The new subsidiary plans to release at least three French films each year in the United States, and will be investing about \$20-30

270. Co-productions may allow a United States producer to avoid the European Broadcast Directive or other countries' quota systems if a designated number of participants in the production are nationals of that country. *Id.* at 294.

271. *Id.* at 290.

272. Cohen, *supra* note 40, at A1.

273. LIKE WATER FOR CHOCOLATE (Miramax Films 1993).

274. FAREWELL MY CONCUBINE (Tomson Films Co. Ltd., Hong Kong/Miramax Films 1993).

275. THE SCENT OF GREEN PAPAYA (Les Productions Lazennec, Paris/Gai Phong Film Studio, Ho Chi Minh City/First Look Pictures, Vietnam, 1993).

276. THE WEDDING BANQUET (Central Motion Pictures Corp., Samuel Goldwyn Co., 1993).

277. Daniel Moore, *supra* note 267, at c6.

278. *See generally id.* Although foreign films only constitute approximately two percent of the total United States domestic box office (about half of which goes to French films), the numbers do appear to be rising. *See id.*

279. Britell, *supra* note 265, at 51.

280. *Id.* Examples of requirements are certain percentages of native talent or local production shooting. For a thorough treatment of co-productions and their tax consequences, see Moore, *supra* note 51.

281. *Id.*

282. Pia Farrell, *Disney, Miramax Cook Up New Unit For French Fare; Goal: 'Greater Exposure on American Screens'*, THE HOLLYWOOD REP., Oct. 10, 1994, 1, at 1.

million in co-productions with European entities.²⁸³ The French film community views this arrangement as an effort to improve relations between the United States and France and as relations improve, more co-productions may be employed.²⁸⁴ Other countries are also realizing the benefits of collaborative relationships with the United States. The British Film Commission is creating a database of American and British producers to foster production relationships since it is often difficult to know what sources are available.²⁸⁵ Collaborative efforts in the motion picture, television, and video industries between the United States and other countries should improve existing relationships and result in better audiovisual products for consumers.

CONCLUSION

Given the high costs of producing and distributing audiovisual products, the likelihood of recovering a healthy return on investments is slight. The problems of piracy and trade restrictions imposed by foreign countries frustrates the American distribution, sale and exhibition of audiovisual products. Because United States citizens own more intellectual property rights than the people of any other country,²⁸⁶ their risks are extreme. Yet foreign revenues of audiovisual products can be substantial if the rights owner adequately anticipates problems in the international marketplace. While losses due to current trade barriers and unauthorized duplication may be inevitable, efforts to minimize losses by opening world markets should be continued.

If foreign audiences prefer American audiovisual products,²⁸⁷ their governments should not deprive them of access by setting quotas, imposing taxes, and using other restrictive trade barriers. Ideally, a free market system should allow consumers the freedom to choose their purchases, so access to American films, television programming, and videocassettes should be unhampered. Arguments for continued protectionism, that “[a] society which abandons the means of depicting itself would soon be an enslaved society”²⁸⁸ falters in today’s global village, where an “international culture” is developing.

NAFTA has been a successful venture in balancing the systems of intellectual property laws in Canada, Mexico, and the United States. Unprecedented provisions concerning intellectual property rights may serve

283. *Id.*

284. See generally Moore, *supra* note 51.

285. See Britell, *supra* note 265, at 51.

286. Lehman, *supra* note 175, at 401.

287. Statistics in 1990 indicate greater success of United States film productions even when it produced fewer films. Moore, *supra* note 51, at 290.

288. This statement was made by the President of France, Francois Mitterrand. Karl E. Meyer, *High Noon at Uruguay Gulch*, N.Y. TIMES, Dec. 13, 1993, at A16.

as a model for other bilateral and multilateral treaties.²⁸⁹

The GATT is another powerful tool attempting to harmonize the intellectual property laws of more than 100 countries. TRIPS will call for the sanctioning of countries which fail to enforce important intellectual property rights. GATT has established minimum standards for protections in nearly all the major world forces, although quotas and tax barriers still exist in many. Negotiators of GATT failed, however, to guarantee fair market access for audiovisual products and uniform treatment for domestic and foreign rights holders.²⁹⁰ And it is questionable whether trading partners which have allowed piracy in the past will ratify the GATT or other international agreements, and more importantly, whether they will enforce the laws necessary for an effective protection system.

Nevertheless, the United States government must continue making serious efforts to enter treaties—bilateral and multilateral—with nations notorious for allowing piracy. Nations must be educated about the harms resulting from piracy crimes, which are, in effect, a form of larceny. The punishment should fit the crime. Additional GSP-like incentives, trade embargoes, and negotiations to encourage other countries to enforce protections should be employed.²⁹¹ Special 301 sanctions may also be effective to ensure foreign countries uphold their promises.²⁹²

Ideally, foreign countries should become self-supportive so their governments will reduce or terminate trade barriers against United States audiovisual products.²⁹³ Other countries should stimulate local production and improve the quality of their audiovisual works in order to build revenues. In the meantime, as long as protectionist attitudes persist, the American audiovisual industry should respond to foreign territories' protectionist attitudes with more co-productions. Alliances with other countries can be formed, using agreements to distribute their products within United States' borders as long as foreign countries allow United States

289. LEVY & WEISER, *supra* note 78, at 289.

290. Bill Holland, *GATT Bill Would Up Protection for Copyright Holders*, BILLBOARD, Aug. 27, 1994, at 10.

291. One recent success was the Peruvian government's agreement to join the Paris Convention for the Protection of Industrial Property, which may improve Peru's reputation for allowing a 60% market penetration of counterfeit audio and video recordings and software programs. *Peru's Officials Vow to Combat Piracy; Nation Agrees to Join Paris Convention*, Int'l Trade Rep. (BNA) 1614 (Oct. 19, 1994). Enhanced enforcement procedures should "increase commerce, production and investment." *Id.*

Thailand also agreed to enact a copyright bill aimed at imposing strict enforcement procedures to combat rampant piracy in Thailand. *Thai Senate Adopts New Copyright Law*, Int'l Bus. & Fin. Daily (BNA), Oct. 18, 1994.

292. As Jonas Rosenfield (president of the American Film Marketing Association) states, "[a]s we enter the post-Uruguay Round and NAFTA world, the availability of 301 leverage[] looms large to smooth away trade barriers in the form of discriminatory legislation." *H'wood Wary*, *supra* note 64, at 4.

293. See generally Kaplan, *supra* note 4, at 322. "Preservation achieved by protectionist measures, however, impairs the efficient allocation of global resources, which is the goal of market liberalization." *Id.* at 317.

products to be distributed. Co-productions can be arranged, where two or more territories share the financing obligations and rewards of audiovisual projects. Provisions should be drafted in agreements with other nations to provide the highest degree of protection available, by limiting the number of master tapes and creating internal checks to prevent unauthorized copying.

Practicing attorneys should be familiar with current domestic legislation and international treaties that the United States is considering (such as GATT) or has actually ratified (such as NAFTA). Practitioners must analyze all types of available protection and advise clients to obtain adequate protection in foreign as well as in domestic markets.²⁹⁴ An awareness of which countries allow illegal trade practices is essential in the negotiation and drafting of agreements.

In addition to GSPs, bilateral, and international treaties, new technology may enable more effective policing in the future: "coded anti-piracy systems [may] identify and track film prints; [m]acrovision encoding and hologram stamps separate legal videocassette product from bootleg; [and] [t]he G12 satellite transmission encoding successfully deters signal theft."²⁹⁵ Sophisticated technology, combined with strict copyright laws, strong enforcement procedures and educational programs, should deter piracy.²⁹⁶

Bilateral and multilateral trade agreements benefit individual countries as well as the global economy.²⁹⁷ As President Clinton stated in 1993:

American jobs and prosperity are reasons enough for us to be working at mastering the essentials of the global economy, but far more is at stake. For this new fabric of commerce will also shape global prosperity or the lack of it, and with it, the prospects of people around the world for democracy, freedom, and peace. . . . [i]t is time for us to make trade a priority element of American security. . . . we will continue to welcome foreign products and services into our own markets, but insist that our products and services be able to enter theirs own equal terms.²⁹⁸

Cultural and informational products created by United States citizens provide the cornerstone for our economy and must be adequately protected by international intellectual property standards. The United States audiovisual industry must unite to lobby for an end to trade barriers and pirating

294. See generally Levinson, *supra* note 2.

295. *Id.*

296. *Id.*

297. *Trade Law 301 Designations Before the Senate Comm. on Finance/International Trade*, 103d Cong., 2d Sess. (1994) (statement of Jason S. Berman, Chairman and Chief Executive Officer of the Recording Industry Association), available in LEXIS, Legis Library, Cngtst File. Berman noted, "Our creative industries, already important in an industrial age, will become increasingly more critical to our economy in the coming information age. The US must protect its leadership and competitive edge in this critical sector of the world economy. . . [not by] preserving the status quo—rather it suggests the need to continue to find creative ways of opening foreign markets and promoting more effective copyright protection."

298. President Clinton, *Prosperity Aids Freedom*, Speech at American University, reprinted in *President's Speech: Prosperity Aids Freedom*, N.Y. TIMES, Feb. 27, 1993, at 6.

practices.²⁹⁹ Global audiovisual commerce should benefit economically and culturally as trade barriers continue to fall.

*Meredith A. Harper**

299. "GATT . . . provides a valuable lesson to U.S. artists and business interests about the need to organize and unite. . . to bring U.S. intellectual property law into the 21st century and, simultaneously, obtain all the rights due them as they seek to compete in the global entertainment marketplace." Jeffrey L. Graubart, *Industry Fails to Rally for Rights*, BILLBOARD, May 7, 1994, at 8.

* B.A., 1991, University of Georgia; J.D., 1995, California Western School of Law. The author expresses gratitude to Rachel A. Smith and the law review staff of California Western School of Law for their insightful comments and assistance. Special thanks to my family and friends for their support and encouragement.