

THEFT OF FOREIGN-OWNED INTELLECTUAL PROPERTY IN LATIN AMERICA: A NEW STRATEGY

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INTRODUCTION

As the strong Colombian sun begins to dry up the morning dew in the capital city of Bogotá, and the mild Colombian coffee sinks in, hundreds of microenterprise vendors are checking their stock and preparing for another busy sales day. These vendors sell, among other wares, “official” soccer jerseys, each prominently bearing a fake logo of the Colombian national team.¹ Like other participants in the informal market economy, these vendors are likely paying no royalties to the owners of the rights behind their products.² Because of this, they can sell their goods at marked discounts from formal vendors, capturing demand by buyers with fewer resources to spend on these products.³ Sales will be brisk.

Before sales begin, authorities from Colombia’s national police gather outside this *San Andresito*, an informal marketplace where largely unregulated vendors sell mostly unlicensed products, and prepare to conduct a raid on pirated merchandise. Lookouts working for the association of vendors spot them and warn the vendors inside. Vendors shut their stalls and await the passing of the officials. Officials may seize specifically targeted items, but generally ignore the shuttered stalls filled with pirated merchandise. The

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1. See, e.g., Oliver Sheldon, *3,000 Fake Colombia Soccer Jerseys Seized in Bogota*, COLOM. REP. (Jun. 15, 2014), <http://colombiareports.com/3000-fake-colombia-soccer-jerseys-seized-bogota/> [<https://perma.cc/S7TL-E83W>] (describing the seizure of fake soccer jerseys being sold by street vendors in Colombia).

2. See, e.g., Justin Webb et al., *You Say Illegal, I Say Legitimate: Entrepreneurship in the Informal Economy*, 34 ACAD. MGMT. REV. 492, 498 (July 2009) (citing Napster as an informal market participant whose business model relied upon non-payment of royalties to copyright owners).

3. See, e.g., Annapurna Shaw, *The Informal Sector in a Third World Urban Economy: A Case Study of Calcutta, India*, 17 BULL. CONCERNED ASIAN SCHOLARS 1, 42 (1985) (describing the low production costs for informal merchants based on data from India).

raid ends as quickly as it began, and the stalls promptly reopen. The cycle continues.

This scenario is only one of many that the author witnessed while researching for this Article in Colombia, a destination market for U.S. intellectual property (IP) exports.⁴ IP is an extremely valuable part of economic development and advancement in the United States, creating 27.7 percent of all jobs nationwide.⁵ In turn, Americans value and understand the nature of laws that incentivize software engineers, movie studios, artists, and musicians to create.⁶ And, more importantly, they understand the role that this type of property plays in our economy.⁷

Intangible assets—trade secrets, copyrights, patents, and so forth—comprise a substantial portion, if not the majority, of value for firms (i.e., IP producers) in the United States today.⁸ Machinery, retail outlets, and other physical assets are of lessening importance in today's business model.⁹ The top ten fastest growing companies in the United States today are found in the pharmaceutical and service sectors.¹⁰ All of these areas focus on knowledge,

4. *Colombia Included Among Gartner's Research of Top 30 Country Destinations for Offshore Services*, PROCOLOMBIA (Oct. 25, 2012), <http://www.investincolombia.com.co/newsletter/607-colombia-included-among-gartner-s-research-of-top-30-country-destinations-for-offshore-services.html> [<https://perma.cc/N64K-LPQT>].

5. See, e.g., Joe Colangelo, *Protecting American Intellectual Property Vital to Economic Growth*, THE HILL (Feb. 12, 2015), <http://thehill.com/blogs/congress-blog/technology/232553-protecting-american-intellectual-property-vital-to-economic> [<https://perma.cc/SKZ3-GXH5>] (noting IP industry's impact and significance to U.S. economy).

6. See William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, § II.B (1999), <https://cyber.law.harvard.edu/property99/history.html> [<https://perma.cc/S2QP-TMBA>].

7. See, e.g., *id.*

8. See, e.g., Kevin R. Rivette & David Kline, *Discovering New Value in Intellectual Property*, 78 HARV. BUS. REV. 54, 54, 58 (Jan./Feb. 2000) (stating “[c]ompanies biggest assets today are intangible ones like patents[,]” and giving examples of major companies, such as Xerox, that are focusing on adding value through strategic management of intellectual property).

9. See, e.g., MATTHEW J. SLAUGHTER, THE CONTRIBUTIONS OF INTANGIBLE PROPERTY TO THE U.S. ECONOMY 1–3, (June 2013), <http://www.tiecoalition.com/wp-content/uploads/2013/06/IP-White-Paper-Final-Draft-June-2013.pdf> [<https://perma.cc/6BFV-3HXH>] (noting “IP’s essential role in the health of the U.S. economy continues to rise”); KEVIN A. HASSETT & ROBERT J. SHAPIRO, WHAT IDEAS ARE WORTH: THE VALUE OF INTELLECTUAL CAPITAL AND INTANGIBLE ASSETS IN THE AMERICAN ECONOMY, SONECON (Oct. 2011), http://www.sonecon.com/docs/studies/Value_of_Intellectual_Capital_in_American_Economy.pdf [<https://perma.cc/L5K9-5BS9>] (noting a shift from tangible assets to intangible assets for U.S. companies).

10. *Fastest Growing Companies*, FORTUNE (2015), <http://fortune.com/100-fastest-growing-companies/2015/> [<https://perma.cc/8MRC-FDBX>].

innovation, and licenses, rather than physical infrastructure, for their economic success.¹¹

More than twenty-seven million U.S. jobs depend on IP-intensive industries, accounting for 18.8 percent of all employment.¹² These industries contributed to more than 34.8 percent of the U.S. Gross Domestic Product (GDP) in 2010.¹³ Consumers of the goods and services produced by IP-intensive industries have principally come from within developed economies; however, more recently, export markets have proven highly lucrative for these goods.¹⁴ In 2010, more than US\$750 billion in exports—60.7 percent of total U.S. exports—were from IP-intensive industries.¹⁵

Trading IP-intensive goods in a developed economy (such as the United States) is lucrative largely because those countries provide strong protection for the rights underlying those goods, protecting their intangible value.¹⁶ Federal agencies, such as the U.S. Patent and Trademark Office¹⁷ and the U.S. Copyright Office, streamline the registration process for innovations. Law enforcement agencies, such as the Federal Bureau of Investigation and U.S. Immigration and Customs Enforcement,¹⁸ enforce those protections through investigations, inspections, and enforcement operations targeting counterfeiters. Finally, federal courts deliver efficient

11. *See id.*

12. ECON. & STATISTICS ADMIN. AND U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS 39 (Mar. 2012), http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf [<https://perma.cc/YJJ5-JSEJ>].

13. *Id.* at 45.

14. *See* Pawel Folfas & Andzelika Kuznar, *International Trade in Intellectual Property-intensive Goods* 7–8 (Aug. 2013), <http://www.etsg.org/ETSG2013/Papers/137.pdf> (describing and illustrating with charts the significant growth in imports of IP-intensive industry products into less-developed countries) [<https://perma.cc/WF8K-BJY8>].

15. ECON. & STATISTICS ADMIN. AND U.S. PATENT & TRADEMARK OFF., *supra* note 12, at 53.

16. WORLD INTEL. PROP. ORG., IPO INTELLECTUAL PROPERTY HANDBOOK 209 (2004), <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch4.pdf> [<https://perma.cc/A3CD-Q9RF>] (“Without a proper system for both enforcing rights and also enabling the grant of rights to others to be resisted, an intellectual property system will have no value.”).

17. *See About Us*, U.S. PATENT AND TRADEMARK OFF., <http://www.uspto.gov/about-us> [<https://perma.cc/5G3G-UVEX>] (last visited Nov. 30, 2016); *see also About Us*, U.K. INTEL. PROP. OFF., <https://www.gov.uk/government/organisations/intellectual-property-office/about> [<https://perma.cc/8ZBQ-7R7L>] (last visited Nov. 11, 2016) (similar offices also exist in other countries, such as the UK).

18. *See About Us*, NAT’L INTEL. PROP. RTS. COORDINATION CTR., <https://www.iprcenter.gov/about-us> [<https://perma.cc/J6XP-42AJ>] (last visited Nov. 30, 2016).

judgments against violators, levying monetary penalties and incarceration in some cases.¹⁹

All of these mechanisms guarantee a high degree of protection for rightholders when their rights are violated in the United States. However, once the innovation leaves the country, these rights diminish rapidly, and enforcement of existing rights may cease altogether.²⁰ But with great risk comes great reward. Developing country markets are ripe for exports of protected goods, especially those at the back end of their product life cycle.²¹ Accordingly, exporting protected goods to developing countries, while potentially lucrative for the rightholder, may substantially increase the risk of piracy and theft.

From the perspective of the developing country, increasing imports of foreign IP, such as software, movies, music, and computer equipment, can mean tax revenue for the government, consumer access to goods in high demand, and spin-off domestic enterprises that service the new imports or sell related accessories.²² At the same time, importation can open the door to illegitimate sales of these goods, production of counterfeit goods, and theft of the technology underlying the creation of these goods.²³ As access to protected products such as software and movies increases, opportunities for unlicensed and unregulated sales of these goods likewise increase.²⁴

19. See BRIAN T. YEH, CONG. RESEARCH SERV., RL34109, INTELLECTUAL PROPERTY RIGHTS VIOLATIONS: FEDERAL CIVIL REMEDIES AND CRIMINAL PENALTIES RELATED TO COPYRIGHTS, TRADEMARKS, AND PATENTS 15 (2012).

20. See CLARISA LONG, *Intellectual Property Rights in the Developing World*, INTELL. PROP. PRACTICE GRP. NEWSLETTER (July 1, 1997), <http://www.fed-soc.org/publications/detail/intellectual-property-rights-in-the-developing-world> [<https://perma.cc/9TPR-RSXM>] (asserting that lack of enforcement laws abroad for U.S.-owned IP costs U.S. firms US\$80 billion per year).

21. See generally Alicia Mullor-Sebastian, *The Product Life Cycle Theory: Empirical Evidence*, 14 J. INT'L BUS. STUD. 95, 103 (1983) (providing evidence to support the theory that innovative products tend to begin their life cycles in wealthier countries and proceed down the economic scale toward developing countries as demand diminishes in wealthy markets).

22. See, e.g., Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1 (2011); CARSTEN FINK & KEITH E. MASKUS, INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH (2005).

23. See Kevin Lewis, *The Fake and the Fatal: The Consequences of Counterfeits*, 17 PARK PLACE ECONOMIST 47, 47-48 (2009), <https://www.iwu.edu/economics/PPE17/lewis.pdf> [<https://perma.cc/3RU8-RTZB>] (describing the different, and potentially dangerous, improper uses of IP rights, especially in developing nations).

24. See KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 2-3 (2000) (noting that as the focus of competition moves toward innovation, copying such creative activities becomes easier).

Unregulated firms exist around the world, but are most prominent in developing countries.²⁵ They often survive not by innovating, but by skirting the high costs associated with registering and operating their firms, thus giving them an economic competitive advantage over formal firms.²⁶ These firms operate under the radar of the state by remaining small or underground, and they maintain their existence by avoiding the high costs of operating a legitimate firm.²⁷

These informal firms already benefit from their avoidance of regulatory costs associated with operating a firm.²⁸ But those informal firms that focus on the production or sale of IP-protected goods reap an additional benefit by avoiding the costs associated with proper licensing. By illegally copying original goods, selling original goods without a license, or selling counterfeit goods, an informal entrepreneur in this sector enjoys an enhanced competitive advantage over traditional or formal firms.²⁹

Piracy and counterfeiting are illegal in most developed and developing countries.³⁰ And yet a widespread acceptance of this practice is evident in the culture of many developing countries.³¹ The high cost of IP-protected imports, combined with the ease of infringement, make foreign IP-intensive goods obvious targets for theft.³² In developing countries, where demand for these goods is high (making it a desirable export market for manufacturers) but

25. See Klarita Gerxhani, *The Informal Sector in Developed and Less Developed Countries*, TINBERGEN INST. viii (1999), <http://papers.tinbergen.nl/99083.pdf> [<https://perma.cc/E729-9ZM7>] (representing the size of the informal economy, on average, as twelve percent of gross national income in developed countries and between thirty-five and forty-four percent of gross national income in developing countries).

26. See Kevin J. Fandl & Juana Paola Bustamante, *Incentivizing Gray Market Entrepreneurs in Emerging Markets*, NW. J. INT'L L. & BUS. (forthcoming 2017).

27. See, e.g., Kevin J. Fandl, *Making Trade Liberalization Work for the Poor: Trade Law and the Informal Economy in Colombia*, 43 TEX. INT'L L. J. 161, 167–69 (2008).

28. See, e.g., Rafael La Porta & Andrei Shleifer, *Informality and Development*, 28 J. ECON. PERSPECTIVES 109, 110 (2014).

29. See Lewis, *supra* note 23, at 52.

30. See *Colombia 2015 Report*, INT'L INTELL. PROP. ALLIANCE (Feb. 6, 2015), <http://www.iipawebsite.com/rbc/2015/2015SPEC301COLOMBIA.pdf> [<https://perma.cc/3MAN-D7RM>] (describing the numerous laws and statutory proposals protecting copyright in Colombia).

31. See, e.g., Cory Doctorow, *Why Poor Countries Lead the World in Piracy*, GUARDIAN (May 3, 2011) (describing a lack of “copyright culture” in developing countries as one of the primary reasons for lack of respect of intellectual property rights (IPRs)); Darrell Panethiere, *The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development*, UNESCO E-COPYRIGHT BULLETIN (July–Sept. 2005) (“[P]iracy, properly understood, derives entirely from a willful determination not to respect those rights.”).

32. See Lewis, *supra* note 23, at 49–50.

income is limited, a substantial gray market arises to connect limited income buyers with pirated versions of these goods.³³ This informal IP economy is an important engine of economic growth in developing countries, and it is also the target of foreign enforcement efforts.³⁴

In the following pages, this Article discusses the rationale for maintaining an informal IP economy, the effects of this sector on foreign rightholders, and the strategies in place to combat theft of intellectual property in developing countries. Using Colombia and Chile as case studies, the Article will then offer alternative strategies for protecting rightholders in developed countries while facilitating economic growth in developing markets.

I. INTANGIBLE VALUE

A. *The IP Landscape*

Business value in the United States today is far less physical than it was thirty years ago.³⁵ Today, more than half of the value of major businesses in the United States is found in intangible assets—intellectual property rights (IPRs).³⁶ The new model of corporate success is not based upon production, but rather protection of patents, copyrights, trademarks, and trade secrets. This is most evident in the success of business models based upon protected technology, used by such companies as Uber, Facebook, and WhatsApp.³⁷

33. See *id.* at 50 (explaining that an increase in globalization and economic interconnectivity has allowed counterfeit markets to arise).

34. See Doctorow, *supra* note 31, at 2–3 (outlining recent enforcement efforts related to violations of IPRs in Colombia).

35. See Leonard Nakamura, *Intangibles: What Put the New in the New Economy?*, BUS. REV. 3, 5 (July/August 1999) (noting that research and development expenditures have more than doubled, while tangible investment has remained steady); see also INT'L CHAMBER OF COMMERCE, INTELLECTUAL PROPERTY: SOURCE OF INNOVATION, CREATIVITY, GROWTH AND PROGRESS 10 (2005) (explaining that in 2000, seventy percent of corporate assets in the United States were intangible assets, and up to half of U.S. economic growth was due to technological progress).

36. Lev Baruch & Juergen H. Daum, *The Dominance of Intangible Assets: Consequences for Enterprise Management and Corporate Reporting*, NEW ECON. ANALYST REP. (Nov. 14, 2004), http://www.juergendaum.com/news/11_14_2004.htm [<https://perma.cc/KK6T-EWYY>].

37. Though not the focus of this Article, patents similarly create value for their owners in this way. Consider the cholesterol-lowering drug Lipitor. This drug was produced and patented by the U.S. company Pfizer in 1991 (the patent was granted in 1993). Gauntam Bakshi, *Lipitor Pfizer Reigns*, IP FRONTLINE (Jan. 9, 2007), <http://blog.ip.com/2007/01/lipitor-pfizer-reigns/> [<https://perma.cc/W99V-KXNU>]. During its lifetime, revenues from the sales of this drug surpassed US\$131 billion. YCharts, *Projected \$3B Drug: Name Will Shock You*, FORBES (July 9, 2013), <http://www.forbes.com/sites/ycharts/2013/07/09/pfizers-projected-3b-drug-name-will-shock-you/#3c1a0f46232a> [<https://perma.cc/>]

The system of intellectual property—which originated in Italy, where the first patent law was enacted in 1474—has facilitated significant economic growth without reliance upon physical production.³⁸ The ideas that go into a creation have proven to be more valuable than the creation itself. In fact, an entire economic theory has been built around this notion.³⁹ Economist Paul Romer explained in his “new growth theory” that the one aspect of an economy that does not suffer from diminishing returns and that can foster sustained economic growth is knowledge.⁴⁰ He believes that ideas drive the economic growth engine more than land, labor, or capital, all of which are scarce.⁴¹

But if ideas are the engine of economic growth, and those ideas are embodied in physical goods such as DVDs or sneakers, creators need a mechanism to protect those ideas against theft.⁴² Protection of IP is one of the critical components needed to achieve the

A4S9-HT2Z]. The vast majority of value in Lipitor resulted from its patent. See, e.g., Jonha Revesencio, *How Much Could Your Idea Be Worth? The Patent Marketing Process*, HUFFINGTON POST (Apr. 10, 2015) http://www.huffingtonpost.com/jonha-revesencio/how-much-is-your-idea-cou_b_7041368.html [https://perma.cc/WEB5-3R6W] (indicating the value created for products like Lipitor through intellectual property protection). Consider also the more recent case of Daraprim, the first standard treatment for a condition called toxoplasmosis. Andrew Pollack, *Drug Goes From \$13.50 a Tablet to \$750, Overnight*, N.Y. TIMES (Sept. 20, 2015), <http://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html> [https://perma.cc/B2LS-6QJS]. The pills originally sold for US\$13.50 each. *Id.* But after the patent rights were purchased by a former hedge fund manager in 2015, the price rose to US\$750 per pill. *Id.* The new owner claimed that the price was justified based upon market conditions and economics. *Id.*

38. Ted Sichelman, *Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic*, 49 SAN DIEGO L. REV. 1267, 1268 (2012) (noting that the first regularized patent system originated in the Venetian Republic); see also Kamil Idris, *Intellectual Property: A Powerful Tool for Economic Growth (Overview)*, 888.1 WORLD INTELL. PROP. ORG. 3 (2d ed. 2003) (proposing that innovation and intellectual property combine to be a powerful driver for economic development).

39. See Paul Romer, *When Should We Use Intellectual Property Rights?*, 92 AM. ECON. REV. 213 (2002).

40. Paul Romer, *Human Capital and Growth: Theory and Evidence*, 32 CARNEGIE-ROCHESTER CONFERENCE SERIES ON PUB. POL'Y 251 (1990) (describing the role of technological change in measuring economic growth).

41. Bernard Wysocki Jr., *For Economist Paul Romer, Prosperity Depends on Ideas*, WALL STREET J. (Jan. 21, 1997), <http://online.wsj.com/news/articles/SB853799061723758500?mg=Reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB853799061723758500.html> [https://perma.cc/9FHH-UGAT].

42. See Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth*, World Intellectual Property Organization, No. 888 (2003); see also Yee Kyoung Kim, Keun Lee & Walter G. Park, *Appropriate Intellectual Property Protection and Economic Growth in Countries at Different Levels of Development*, 41 RESEARCH POL'Y 358 (2012) (arguing that stronger IP protections may prevent imitation but do not necessarily limit innovation).

economic growth that results from those ideas,⁴³ and this intangible property is only as good as the system that protects it.

Perhaps unsurprisingly, countries where most patents and trademarks are registered have invested most heavily in their research and development markets.⁴⁴ In fact, China was the top investor in domestic research and development in 2015, attracting eighty-eight Greenfield investments, a form of foreign direct investment that involves the establishment of an overseas operational facility controlled by a domestic parent company.⁴⁵ China is also on track to achieve its goal of registering two million patents per year starting in 2015.⁴⁶

Heavy investment in research and development in these countries has been accompanied by the implementation of extensive enforcement mechanisms to ensure that rewards are fully reaped by inventors (and the government).⁴⁷ There is little point in investing in IP if the government will not support the creator in protecting that property. Accordingly, enforcement programs in these countries are extensive and well-funded.⁴⁸ This is also the case in countries just recently considered “developing,” such as China.⁴⁹

43. See Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. WORLD TRADE 75 (1990) (arguing that there is incentive to devote resources to innovation when developers are allowed to retain the rights to their inventions); see also INT'L CHAMBER OF COMMERCE, *INTELLECTUAL PROPERTY: SOURCE OF INNOVATION, CREATIVITY, GROWTH AND PROGRESS* 8 (2005) (arguing that providing incentives to innovate is a purpose of the IPR system).

44. See, e.g., Hulya Ulka, *R&D, Innovation, and Economic Growth: An Empirical Analysis* (IMF, Working Paper No. 04/185, 2004), <https://www.imf.org/external/pubs/ft/wp/2004/wp04185.pdf> [<https://perma.cc/GHL8-5E42>].

45. Courtney Fingar, *China Passes U.S. in Race for FDI in Research and Development*, FIN. TIMES (July 22, 2015), https://www.ft.com/content/241d9366-3058-11e5-91ac-a5e17d9b4c9f?sectionid=topics/authors/Courtney_Fingar [<https://perma.cc/Z6MK-HYQQ>].

46. Chris Neumeyer, *China's Great Leap Forward in Patents*, IP WATCHDOG (Apr. 4, 2013), <http://www.ipwatchdog.com/2013/04/04/chinas-great-leap-forward-in-patents/id=38625/> [<https://perma.cc/43JJ-E3UX>].

47. See, e.g., Brad Chin, *Effective IP Enforcement is Taking Shape in China*, LAW360 (Oct. 16, 2015), <http://www.law360.com/articles/713143/effective-ip-enforcement-is-taking-shape-in-china> [<https://perma.cc/K8JH-XJXK>].

48. Consider, for instance, efforts in the United States to combat IP theft by focusing on substantial increases in the number of investigations and operations domestically and abroad to protect rightholders. See DEP'T OF HOMELAND SECURITY, U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATION JOINT STRATEGIC PLAN (2011), https://www.whitehouse.gov/sites/default/files/ipec_anniversary_report.pdf [<https://perma.cc/F9RV-N8ZR>].

49. See, e.g., Lily Fang & Josh Lerner, *Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China* (INSEAD, Working Paper No. 2015/54/FIN, 2015) (explaining that private entities in China are investing more heavily in innovation due to strengthening protection for domestic rightholders).

An extensive study of 159 countries by Rapp and Rozek at the Rand Corporation attempted to link economic development to the degree of patent protection afforded by different countries.⁵⁰ They found that the innovation necessary to facilitate economic opportunity depends on the ability of the innovator “to recoup the costs of his effort[.]”⁵¹ Without this compensation structure in place, these authors argue that developing country residents will engage in parallel importing—selling unlicensed protected goods from abroad to avoid the costs of innovating domestically.⁵²

This appears to be what is happening in Latin America. Though some ideas are certainly registered domestically, many Latin American innovators are taking their ideas abroad.⁵³ This reflects their mistrust in their domestic legal systems’ abilities to protect their inventions at home and give the inventor foreign enforcement opportunities he may not have access to at home, such as an efficient and transparent judiciary.⁵⁴

It is important to note the distinction between unlicensed (“parallel imports”) and counterfeit goods. Though neither types of products carry protection—such as guarantees or technical support—from the manufacturer, an unlicensed product is preferable, because an unlicensed good is a legitimate product that possesses the quality associated with an original good.⁵⁵ These goods are sold by both informal and formal firms and have similar prices to those of an original product.⁵⁶ If they are intended to be used as or along with original components, they are more likely to be compatible than would a counterfeit product.⁵⁷ Counterfeit products, on the other hand, resemble the original in many ways and may

50. Rapp & Rozek, *supra* note 43, at 79.

51. *See id.* at 81.

52. *See id.* at 81, 84. *But see* A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L. J. 831 (1987) (arguing that the costs to a developing country to implement a strong patent regime are substantial and may not be worth the effort at early stages of economic development).

53. *See, e.g.*, James Pethokoukis, *America, The World’s Top Destination for Immigrant Inventors*, AEI IDEAS (July 17, 2013), <http://www.aei.org/publication/america-the-worlds-top-destination-for-immigrant-inventors/> [<https://perma.cc/AQA7-W4K4>].

54. *See, e.g.*, OECD, *Colombia: Policy Priorities for Inclusive Development*, at 47 (2015).

55. *See* Christopher Heath, *Parallel Imports and International Trade*, 28 INT’L REV. INDUS. PROP. 623 (1997).

56. *See* Reza Ahmadi & B. Rachel Yang, *Parallel Imports: Challenges from Unauthorized Distribution Channels*, 19 J. MARKETING SCI. 279, 291 (2000) (“Unlike counterfeits that are fabricated by imitators, all parallel imports are genuine and sourced from the manufacturer in the lower-priced country through authorized dealers.”).

57. *Id.*

pass as an original to the untrained eye.⁵⁸ Yet these goods may have an inferior degree of quality, reducing their lifespan and usability. In some cases, they may even be dangerous.⁵⁹ The price point for counterfeit goods is usually the most telling sign—it is significantly lower than an original good.⁶⁰

Though the reasons may be increasingly obvious, the next Section explores why the informal IP market is flourishing.

B. *Pirates in the Gray Sea*

Ideas are expensive to produce but cheap to copy. The fixed costs of producing knowledge are high. Hollywood blockbusters can cost[] hundreds of millions of dollars to make and [research and development] for drugs can cost billions of pounds. At the same time, the marginal costs of production, both for drugs and for digital files, are very low. Without protection, others will free ride on the creator's initial investment and sell the invention or creation at a much lower cost. If the innovator knows that someone else can do this easily, there will be no financial incentive to innovate in the first instance.⁶¹

Most developing countries engage minimally in innovation and show little interest in pushing for domestic protections of copyrighted goods.⁶² “Least-developed countries devote virtually no resources to innovation and have little intellectual property to protect.”⁶³ This sets up the vicious cycle of innovation piracy—with no incentive to innovate but rising demand for innovations, an opportunity arises for entrepreneurial gray market firms.

But the effects of this innovation piracy run even deeper. Access to affordable IP-protected goods, from software to movies to soccer jerseys, sold by unregulated firms has fostered a cultural accept-

58. See Lewis, *supra* note 23, at 47–48.

59. Yanzhong Huang, *The 2008 Milk Scandal Revisited*, FORBES (July 16, 2014) (discussing the 2002 scandal involving toxic infant formula that made over 300,000 babies in China sick).

60. See, e.g., *Fake and Counterfeit Goods Are No Bargain*, LAWYERS.COM, <http://consumer-law.lawyers.com/consumer-fraud/fake-and-counterfeit-goods-are-no-bargain.html> [<https://perma.cc/VH78-JL2K>] (last visited Nov. 30, 2016).

61. U.K. Treasury, Andrew Gowers, *Gowers Review of Intellectual Property* ¶ 1.4 (Dec. 2006).

62. See, e.g., Christopher Beam, *Bootleg Nation*, SLATE.COM (Oct. 22, 2009), http://www.slate.com/articles/news_and_politics/explainer/2009/10/bootleg_nation.html [<https://perma.cc/374L-LHGJ>] (explaining that despite a strengthening patent regime, China continues to ignore rampant violations of copyright law).

63. Keith Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 478 (2000).

ance of piracy as legitimate.⁶⁴ The high price and limited supply of original goods sold by licensed suppliers appear to have facilitated much of this mentality.⁶⁵ Consumers rely on unregulated vendors to access the goods they demand. Unregulated vendors rely upon the unlicensed sale of these goods for income to survive. And no one is stopping them.

In principle, these are unlawful actions that the state is responsible for preventing. Yet throughout much of Latin America, the state has implicitly sanctioned these sales by failing to enforce the law.⁶⁶ Their rationale for weak enforcement can be attributed to three key factors: (1) these states have limited law enforcement resources to devote to what might be considered minor crimes;⁶⁷ (2) the vendors selling the goods without authorization have a need to earn income to survive, and selling, for instance, unlicensed soccer jerseys is preferable to selling goods such as illegal drugs;⁶⁸ and (3) because the lost profits from these unlawful sales would accrue to foreign firms in most cases, there is little economic incentive for the state to take enforcement actions that offer only limited domestic benefits.⁶⁹

Rightholders in the United States have taken an aggressive position against piracy no matter where it occurs.⁷⁰ As U.S. innovators

64. See, e.g., Robert Schoon, *Online Piracy in Latin America: Half of South American Internet Users Steal Media*, LATINPOST (Jan. 27, 2016), <http://www.latinpost.com/articles/111879/20160127/online-piracy-in-latin-america-half-of-south-american-internet-users-steal-media-report.htm> [<https://perma.cc/NCAZ-JYLA>] (describing the cultural acceptance of piracy in file sharing and other IP violations in Latin America).

65. See, e.g., Theodore A. Khoury & Mike W. Peng, *Does Institutional Reform of Intellectual Property Rights Lead to More Inbound FDI? Evidence from Latin America and the Caribbean*, 46 J. WORLD BUS. 337 (2011).

66. See Ronald J. T. Corbett, *Protecting and Enforcing Intellectual Property Rights in Developing Countries*, 35 INT'L L. 1083, 1086 (2001) (explaining that many developing countries, like Mexico, have lax enforcement of IP laws because they are unable or unwilling to enforce these laws).

67. See MASKUS, *supra* note 24, at 4 (finding resources for enforcement of IPRs often inadequate to protect rights).

68. See, e.g., Fandl, *Incentivizing Gray Market Entrepreneurs*, *supra* note 26, at 16 (explaining that a culture of illegality harms economic growth in the long-term).

69. See Corbett, *supra* note 66, at 1085 (noting that most IP to be protected was created in foreign, developed countries); see also Carlos M. Correa, *The TRIPS Agreement and Developing Countries*, in 2 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 419, 420–21 (Arthur E. Appleton & Michael G. Plummer eds., 2005) (explaining that developing countries have a very low share of research and development expenditures; the majority belongs to foreign, developed countries).

70. See, e.g., Warner Bros. *Anti-Piracy Operations*, WARNER BROS. <http://www.warnerbros.com/studio/divisions/home-entertainment/warner-bros-anti-piracy-operations> [<https://perma.cc/2FT7-VZ9D>] (last visited Nov. 30, 2016); Microsoft *Announces Global Anti-Piracy Day to Highlight Collaborative Efforts to Protect Customers and Partners Around the World From*

expand their distribution network to more developing countries, they want to expand aggressive protections globally.⁷¹ Whether this strategy to expand distribution is intentional or not remains to be seen;⁷² however, it appears clear that increases in piracy have led many firms to seek the help of the United States and foreign governments in protecting their rights abroad.⁷³

The significant level of piracy of protected goods in developing countries has not deterred owners of these goods from selling in these markets.⁷⁴ But it has led them to seek assistance in enforcing their rights. Firms and representative organizations, such as the Business Software Alliance (BSA) based in Washington, D.C., have pushed for stronger legislation in developing countries to reduce theft, participated in capacity-building efforts to strengthen investigations and enforcement, and coordinated public awareness campaigns to attack the culture of disrespect for intellectual property rights.⁷⁵

Software Piracy and Counterfeiting, MICROSOFT (Mar. 2008), <https://news.microsoft.com/2008/10/20/microsoft-announces-global-anti-piracy-day-to-highlight-collaborative-efforts-to-protect-customers-and-partners-around-the-world-from-software-piracy-and-counterfeiting/> [<https://perma.cc/U5TT-VR6T>]; *FAQ*, RECORDING INDUSTRY ASS'N AM., <http://www.riaa.com/faq.php> [<https://perma.cc/QV98-5UZT>] (last visited Nov. 30, 2016). The Recording Industry Association of America represents the music industry and lobbies the government to protect against unlawful sales and downloads of music abroad. *What We Do*, RECORDING INDUSTRY ASS'N AM., <http://www.riaa.com/what-we-do/> [<https://perma.cc/9HUV-7NJ6>] (last visited Nov. 30, 2016).

71. See, e.g., *Protect Intellectual Property*, U.S. CHAMBER OF COMMERCE (May 19, 2015), <https://www.uschamber.com/issue-brief/protect-intellectual-property> [<https://perma.cc/H3G7-YKPQ>] (explaining the actions their members would like to see taken to protect their IPR investments abroad).

72. See, e.g., EUROPEAN UNION JRC TECHNICAL REPORTS, *DIGITAL MUSIC CONSUMPTION ON THE INTERNET* (2013) (suggesting that illegal music downloads have a small, but positive, impact on the purchase of legitimate music downloads); *Music Sales Are Not Affected by Web Piracy, Study Finds*, BBC NEWS (Mar. 20, 2013), <http://www.bbc.com/news/technology-21856720> [<https://perma.cc/MXY7-2P59>].

73. See, e.g., *Piracy of Intellectual Property: Hearing Before the Subcomm. on Intellectual Prop., S. Comm. on the Judiciary*, 109th Cong. 87–101 (2005) (statement of Stephen Pinkos, Deputy Director, United States Trade and Patent Office) (explaining role that USPTO plays in protecting U.S. businesses dealing from IP theft in international markets); Christopher Johnson & Daniel J. Walworth, *Protecting U.S. Intellectual Property Rights and the Challenges of Digital Piracy*, (Off. of Industries, U.S. Int'l Trade Comm'n, Working Paper No. ID-05, Mar. 2003) (explaining role U.S. can play in protecting U.S. businesses through IP laws abroad).

74. See Magdalena Kondej, *Latin America: Sportswear Sales Jump*, LATINVEX (Nov. 24, 2014) <http://www.latinvex.com/app/article.aspx?id=1749> [<https://perma.cc/487A-KAWS>] (explaining that sales of sportswear in Latin America increased by seventy-seven percent between 2008 and 2014, faster than sales in Western Europe).

75. See Thomas Boué, *The Role of Government in Protecting and Promoting Intellectual Property*, BUS. SOFTWARE ALLIANCE (Apr. 5, 2012) http://www.bsa.org/~media/Files/Policy/IntellectualProperty/EU/BSAResponse_AllPartyParliamentaryIPGroup_Roleinquiry.pdf [<https://perma.cc/W86N-5GJZ>].

Campaigns by U.S. companies to discourage piracy and counterfeiting in developing countries blame high rates of theft on a lack of strict laws or enforcement of those laws. Government agencies in the United States attempt to persuade other countries to take more aggressive enforcement actions and, in some cases, engage in joint operations with them to do so.⁷⁶ Sometimes trade sanctions are threatened against those countries that fail to take adequate actions against offenders.⁷⁷ Yet these approaches fail to address the fact that developing countries benefit both economically and politically by turning a blind eye to their informal IP economy. Thus, perhaps a new understanding of and strategy towards the issue is needed.

II. GLOBAL IP ENFORCEMENT

The impact on rightholders of counterfeiting, parallel importing, reverse engineering, and other forms of IP theft may be substantial. According to the U.S. Federal Bureau of Investigation (FBI),

IPR violations which include theft of trade secrets, digital piracy, and the trafficking of counterfeit goods, result in billions of dollars in lost profits annually. Failure to protect IPR undermines confidence in the economy, removes opportunities for growth, erodes the [United States's] technological advantage, and disrupts fairness and competitiveness in the marketplace. In short, a robust system for protecting IPR is critical to economic prosperity.⁷⁸

76. See Edgardo Buscaglia & Clarisa Long, *U.S. Foreign Policy and Intellectual Property Rights in Latin America*, HOOVER INSTITUTION (Apr. 1, 1997) (discussing the U.S. government's efforts to strengthen intellectual property rights worldwide, including bilateral actions with foreign governments); see also Correa, *supra* note 69, at 420–21 (explaining that the United States puts pressure on countries with weak IPRs).

77. See Y. Kurt Chang, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 *Nw. J. INT'L L. & BUS.* 206, 216–17 (Fall 1994) (discussing the threats made against Taiwan by the United States when Taiwan became a Priority Foreign Country on the Special 301 Watch List).

78. The U.S. Federal Bureau of Investigation (FBI) investigates IPR violations in the United States and abroad through their collaboration with the National Intellectual Property Rights Coordination Center, part of the U.S. Department of Homeland Security (DHS). *Oversight of Intellectual Property Law Enforcement Efforts: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 67–74 (2011) (statement of Gordon M. Snow, Assistant Director, Cyber Division, Federal Bureau of Investigation).

The principal concern of agencies such as the FBI⁷⁹ and the U.S. Department of Homeland Security⁸⁰ appears to be the risks that consumers face as a result of counterfeit medicines, auto parts, and other potentially dangerous goods, as well as linkages to organized crime and national security. Firms in the United States have capitalized on these linkages to argue that any violation of IP rights abroad is a potential risk to consumer safety or national security.⁸¹ Accordingly, federal agencies in the United States have taken an aggressive stance toward the growing incidence of IP violations in developing countries.⁸²

However, enforcement of IPRs extraterritorially requires persuasion and coordination, as most domestic enforcement powers terminate at the border.⁸³ Given this fact, countries where a significant amount of IP is registered follow several routes to protect rightholders. This Article categorizes them as follows: international collaboration, unilateral sanctions, and trade access. The following Sections address these mechanisms in turn.

A. *International Collaboration*

The territorial principle in IP instructs that IP laws are only enforceable to the water's edge of the country in which the laws

79. The FBI's IPR enforcement mission focuses on "the theft of trade secrets and infringements on products that can impact consumers' health and safety, such as counterfeit aircraft, car, and electronic parts." *Intellectual Property Theft/Piracy*, FBI, <https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft> [<https://perma.cc/N6DC-4DNQ>] (last visited Nov. 30, 2016).

80. DHS's National Intellectual Property Rights Center asserts its mission as "to ensure national security by protecting the public's health and safety, the U.S. economy, and our war fighters, and to stop predatory and unfair trade practices that threaten the global economy." *About the IPR Center*, NAT'L INTELL. PROP. RTS. CTR., <https://www.iprcenter.gov/about-us> [<https://perma.cc/MMV5-8XUL>] (last visited Nov. 30, 2016).

81. *See id.*; *see also* *Counterfeiting, Piracy and Smuggling: Growing Threat to National Security*, ERNST & YOUNG 7 (2013), [http://www.ey.com/Publication/vwLUAssets/EY-Government-and-Public-Sector-Growing-threat-to-national-security-an-analysis/\\$FILE/EY-Counterfeiting-piracy-and-smuggling-Growing-threat-to-national-security.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Government-and-Public-Sector-Growing-threat-to-national-security-an-analysis/$FILE/EY-Counterfeiting-piracy-and-smuggling-Growing-threat-to-national-security.pdf) [<https://perma.cc/7KB4-CS6Z>] (asserting that though no solid proof exists, a strong linkage exists between counterfeiting and risk to national security).

82. *See generally* NAT'L INTELL. PROP. RTS. CTR., *supra* note 80 (explaining the mission of combating global IPR theft and the numerous government agencies involved in the effort).

83. *See generally* Alexander Peukert, *Territoriality and Extraterritoriality in Intellectual Property Law*, in 2 BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 189 (Günther Handl, Joachim Zekoll & Peer Zumbansen eds., 2010) (broadly discussing challenges unique to coordinated IPR enforcement among nations).

are registered.⁸⁴ Though the Paris,⁸⁵ Berne,⁸⁶ and related conventions⁸⁷ provide national treatment for registrations in member states—meaning that countries agree to recognize rightholders regardless of where they registered their innovation—enforcement mechanisms have no effect outside the rightholder’s primary country of registration. “The exclusive right can only cover activities occurring within the respective territory. No intangible subject matter is protected by one uniform right covering the whole world.”⁸⁸

Enforcing intellectual property law outside the rightholder’s territory requires recognition in the foreign country that such a right exists, and a legal structure within that country that is capable of enforcing recognized rights.⁸⁹ Since the late nineteenth century, the principal means for addressing the first point has been through the establishment of multilateral treaties that recognize certain IPRs.⁹⁰ The enforcement requirement traditionally resides with the country where the violation has occurred.⁹¹ However, when infringement can be linked to broader international commerce, international law enforcement bodies may step in to protect rightholders. According to the World Intellectual Property Organization (WIPO):

84. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 510–13 (1997) (discussing presumption against extraterritoriality). But see Paulius Jurcys, *The Role of the Territoriality Principle in Modern Intellectual Property Regimes: Institutional Lessons from Japan*, SOC. SCI. RES. NETWORK (Feb. 22, 2010), <http://dx.doi.org/10.2139/ssrn.1663219> [<https://perma.cc/88ZU-KC6G>] (considering the drawbacks of the territoriality principle, where infringement occurs beyond the home nation’s borders).

85. Paris Convention for the Protection of Industrial Property art. 2, ¶ 1, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

86. Berne Convention for the Protection of Literary and Artistic Works of 1883 art. 5, ¶ 1–3, Sept. 9, 1886, as last revised July 24, 1971, amended Oct. 2, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

87. See, e.g., Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter U.C.C.]; Digital Millennium Copyright Act, 17 U.S.C. § 104(b) (covering foreign produced works as U.S. produced works if are “a national, domicile, or sovereign authority of a treaty party”).

88. Peukert, *supra* note 83, at 189.

89. *Id.*; see also Bradley, *supra* note 84, at 506 (emphasizing increased extraterritorial intellectual property protection for patents, copyrights, and trademarks).

90. *International Treaties and Conventions on Intellectual Property*, in WORLD INTELLECTUAL PROPERTY ORGANISATION INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE (2004) [hereinafter WIPO], <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf> [<https://perma.cc/8YRT-A8SY>].

91. Jacob A. Schroeder, *So Long as you Live Under My Roof, You’ll Live by. . . Whose Rules? Ending the Extraterritorial Application of Patent Law*, 18 TEX. INTELL. PROP. L.J. 55, 72–74 (2009).

There is no point in establishing a detailed and comprehensive system for protecting intellectual property rights and disseminating information concerning them[] if it is not possible for the right-owners to enforce their rights effectively in a world where expanding technologies have facilitated infringement of protected rights to a hitherto unprecedented extent. [Rightholders] must be able to take action against infringers in order to prevent further infringement and recover the losses incurred from any actual infringement. They must also be able to call on the state authorities to deal with counterfeits.⁹²

One of the mechanisms that owners of intellectual property may turn to is treaty law. Treaties are often effective mechanisms to influence the domestic laws of other countries.⁹³ Once a treaty is signed and ratified, and subsequently implemented by domestic legislation, citizens are bound by their treaty obligations just as they would be by any other domestic legislation.⁹⁴ Accordingly, pushing for accession to a treaty that protects IP rightholders can be a valuable mechanism for establishing a legal enforcement regime extraterritorially.

Treaties protecting IPRs have existed as long as IP has been recognized as economically valuable. The first major treaty protecting rightholders was the 1883 Paris Convention for the Protection of Industrial Property (Paris Convention), which provides national treatment to patent and trademark holders who register their works in a member country.⁹⁵ As of this writing, 175 countries are members of this treaty.⁹⁶ That convention also included language suggesting the need for an international secretariat to enforce the rights created by the convention.⁹⁷ This secretariat was finally

92. *Id.* ¶ 4.1.

93. Consider, for instance, the 2015 climate pact signed by 196 countries in an effort to require signatories to change their approach toward the environment. Joby Warrick & Chris Mooney, *196 Countries Approve Historic Climate Agreement*, WASH. POST (Dec. 12, 2015), <https://www.washingtonpost.com/news/energy-environment/wp/2015/12/12/proposed-historic-climate-pact-nears-final-vote/> [<https://perma.cc/982P-ZDSE>]; see also *Intellectual Property: United States Making Progress in Convincing Other Nations to Improve Rights Protection Laws*, 4 INT'L TRADE REP. (BNA) 556, 557 (Apr. 22, 1987) (emphasizing the United States' success in convincing countries to protect intellectual property rights through bilateral consultations).

94. See, e.g., Michael John Garcia, *International Law and Agreements: Their Effect Upon U.S. Law*, CRS REPORT (Feb. 18, 2015); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 101 (AM. LAW. INST. 1987).

95. See U.C.C., *supra* note 87.

96. The United States ratified the Paris Convention in 1887; Colombia ratified the convention in 1996. WIPO, *WIPO Administered Treaties, Contracting Parties, Paris Convention (Total Contracting Parties: 176)*, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2 [<https://perma.cc/6ZJ6-3PCK>] (last visited Nov. 30, 2016).

97. Paris Convention art. 15(1)(b).

established in 1970 as WIPO, which became part of the United Nations in 1974.⁹⁸

Shortly after the passage of the Paris Convention, the complementary Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) came into force in 1886.⁹⁹ The Berne Convention provides international protection for copyrighted works by guaranteeing that such works will be protected as if they originated in the country where protection is sought, regardless of actual origin.¹⁰⁰ As of this writing, 167 countries have ratified the Berne Convention.¹⁰¹

Simultaneously with the development of computers and associated software and databases, changes in the nature of intellectual property led to the long-planned creation of WIPO.¹⁰² WIPO is responsible for promoting the protection of intellectual property around the world.¹⁰³ It carries out this function largely in part by drafting treaties with strong enforcement language.

The WIPO Copyright Treaty (WCT) came into force in 2002 and provides a high degree of protection for software and computer databases, and allows for the rental of IPRs.¹⁰⁴ Importantly, the treaty also requires signatories to provide legal remedies for circumvention of encryption and other technology measures intended to protect the copyrighted material against unlawful use.¹⁰⁵ The treaty further requires that signatories provide enforcement mechanisms that offer expeditious resolution of infringement cases and effective deterrents against future infringement.¹⁰⁶ There are currently ninety-four signatories to the WCT.¹⁰⁷

98. See, e.g., WIPO, *WIPO—A Brief History*, <http://www.wipo.int/about-wipo/en/history.html> [<https://perma.cc/P2G3-3A4L>] (last visited Dec. 1, 2016).

99. See Peukert, *supra* note 83.

100. Berne Convention art. 5.

101. The United States ratified the convention in 1987; Colombia ratified the convention in 1987. WIPO, *WIPO Administered Treaties, Contracting Parties, Berne Convention (Total Contracting Parties: 172)*, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 [<https://perma.cc/DT89-A48R>] (last visited Dec. 1, 2016)

102. See Convention Establishing the World Intellectual Property Organization, A3(iii), *opened for signature* July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3.

103. See *International Protection*, WIPO, http://www.wipo.int/sme/en/ip_business/ip_protection/protection.htm [<https://perma.cc/VD8E-QUE7>] (last visited Dec. 1, 2016) (explaining their single-registration point for global IPR protection).

104. WIPO Copyright Treaty art. 7, Dec. 20, 1996, S. TREATY DOC. No. 105-17 [hereinafter WIPO Copyright Treaty].

105. *Id.* art. 11.

106. *Id.* art. 14.

107. WIPO, *WIPO Administered Treaties, Contracting Parties, WIPO Copyright Treaty (Total Contracting Parties: 94)*, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16

The second principal WIPO treaty used to enhance extraterritorial enforcement is the Performances and Phonograms Treaty (WPPT), which also entered into force in 2002.¹⁰⁸ Like the WCT, the WPPT prevents circumvention of technological measures meant to protect artistic works.¹⁰⁹ The treaty also requires signatories to provide legal remedies for infringement and enforcement mechanisms to expeditiously resolve infringement cases.¹¹⁰ There are currently ninety-two signatories to the WPPT.¹¹¹

The only multilateral trade agreement currently in place that addresses intellectual property is the General Agreement on Tariffs and Trade (GATT).¹¹² In 1995, an updated version of that agreement (GATT 1995) took effect and included an annex specifically focusing on IPRs—the Agreement on Trade Related Aspects of Intellectual Property, commonly known as the TRIPS Agreement.¹¹³ Part III of that Agreement sets out minimum requirements for IPR enforcement among members,¹¹⁴ although countries are free to impose more extensive enforcement provisions.¹¹⁵ TRIPS covers patents, copyrights, trademarks, geographical indications, and related IP rights.¹¹⁶ All signatories to the GATT are bound to the TRIPS Agreement, which as of this writing includes 159 countries.¹¹⁷

[<https://perma.cc/5ESG-NKE9>] (last visited Dec. 1, 2016). The United States became a member in 1999; Colombia became a member in 2000. *Id.*

108. See WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997) [hereinafter WPP Treaty].

109. *Id.* art. 18.

110. *Id.* art. 23.

111. WIPO, *WIPO-Administered Treaties, Contracting Parties, Performances and Phonograms Treaty (Total Contracting Parties: 94)*, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=EN&treaty_id=20 [<https://perma.cc/H745-4V3J>] (last visited Dec. 1, 2016). The United States became a member in 1999; Colombia became a member in 2000. *Id.*

112. See General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

113. See Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights), Apr. 15, 1994, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement].

114. *Id.* art. 41.

115. *Id.* arts. 1, 41(5).

116. See *id.* arts. 27, 9, and 15, respectively.

117. The United States and Colombia joined the World Trade Organization (WTO) at its inception on January 1, 1995. *Members and Observers of the WTO*, WORLD TRADE ORG. (WTO), https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm [<https://perma.cc/G8AR-5VVN>] (last visited Dec. 1, 2016).

While the TRIPS Agreement itself imposes similar requirements for protection as other IP agreements,¹¹⁸ Part III of the Agreement is particularly relevant to this Article's analysis. Part III focuses on enforcement and requires signatories to ensure that rightholders can protect their IP rights under domestic laws in member states, and that those states will provide adequate penalties to deter future violations.¹¹⁹ However, the Agreement imposes no obligation to develop a new judicial procedure or to expend resources for the enforcement of IP violations.¹²⁰

As the TRIPS Agreement shows, although advocated as a mechanism to facilitate economic growth in developing countries, stronger intellectual property protections are more likely to be oriented toward the protection of rightholders, rather than the creation of a market for new innovations. Professor Carlos Correa notes:

Empirical evidence on the role of intellectual property protection in promoting innovation and growth remains inconclusive. Diverging views also persist on the impacts of intellectual property rights on development prospects. Some point out that, in a modern economy, the minimum standards laid down in [the] TRIPS [Agreement] will bring benefits to developing countries by creating the incentive structure necessary for knowledge generation and diffusion, technology transfer and private investment flows. Others stress that IP, especially some of its elements, such as the patenting regime, will adversely affect the pursuit of sustainable development strategies by: raising the prices of essential drugs to levels that are too high for the poor to afford; limiting the availability of educational materials for developing country school and university students; legitimizing the piracy of traditional knowledge; and undermining the self-reliance of resource-poor farmers.¹²¹

Finally, the Anti-Counterfeiting Trade Agreement is an agreement providing for international IPR enforcement.¹²² The agree-

118. For example, the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement) requires member states to enforce the existing provisions of the World Intellectual Property Organization treaties, the Berne Convention, and the Paris Convention. See *Overview: the TRIPS Agreement*, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm [<https://perma.cc/GKT6-BBNB>] (last visited Dec. 1, 2016).

119. See TRIPS Agreement, *supra* note 113, Part III.

120. *Id.* art. 41.5.

121. Ricardo Meléndez-Ortiz, *Forward In, Intellectual Property and Competition Law: Exploring Some Issues of Relevance to Developing Countries*, INT'L CTR. TRADE & SUSTAINABLE DEV. vii (Oct. 2007), https://www.iprsonline.org/resources/docs/corea_Oct07.pdf [<https://perma.cc/N3RD-G8CB>].

122. See Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, 50 I.L.M. 243 (2011) [hereinafter ACTA].

ment is far-reaching and includes civil and criminal penalties for violations of IPRs as well as a governing institutional body.¹²³ The impetus for the agreement appears to be concern by the countries of major rightholders that counterfeiting and infringement abroad have increased substantially and that a more substantial response was needed.¹²⁴ Major rightholders, such as the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA), lobbied Congress on the content of the agreement.¹²⁵ As of this writing, the treaty has been signed only by developed countries and developing countries with significant IPR interests to protect.¹²⁶ Amid controversy over the scope of the treaty, the European Union, which originally signed the treaty, withdrew after the agreement was rejected by the European Parliament.¹²⁷

B. *Unilateral Actions*

The Trade Act of 1974 significantly modernized rules surrounding U.S. international trade.¹²⁸ One of the provisions of that act, Section 301, gave the president the authority to investigate, negotiate with, and impose unilateral sanctions against trade agreement partners when they violate the trade agreement or impose unfair or unreasonable burdens on U.S. trade.¹²⁹ This section was challenged by the European Union in a 1999 World Trade Organization (WTO) case, but the WTO upheld the statute as consistent with WTO rules, since Section 301 did not mandate unilateral

123. See *id.* art. 7 (Availability of Civil Procedures); *id.* art. 23 (Criminal Offences); *id.* ch. V (Institutional Arrangements).

124. See, e.g., Margot E. Kaminski, *An Overview and The Evolution Of The Anti-Counterfeiting Trade Agreement*, 21 ALB. L. J. SCI. & TECH. 385, 388 (2011).

125. See Letter from the Motion Picture Association of America and the Recording Industry Association of America et al., to Chairmen and Ranking Members of Congress (Nov. 19, 2009), <https://www.publicknowledge.org/pdf/content-acta-letter-20091119.pdf> [<https://perma.cc/E7DX-DEJZ>].

126. The United States is a signatory to ACTA. Office of the U.S. Trade Representative, *Anti-Counterfeiting Trade Agreement (ACTA)*, <https://ustr.gov/acta> [<https://perma.cc/R5RH-336W>] (last visited Dec. 1, 2016). However, many original signatories, including the European Union, have withdrawn their participation. See, e.g., *ACTA: Controversial Anti-piracy Agreement Rejected by EU*, BBC.COM (July 4, 2012), <http://www.bbc.com/news/technology-18704192> [<https://perma.cc/2KR5-N4ZV>].

127. European Parliament Press Release 20120703IPR48247, European Parliament Rejects ACTA (July 4, 2012).

128. Trade Act of 1974, 19 U.S.C. §§ 2411–18 (2012) [hereinafter Trade Act].

129. *Id.* § 2411.

action, but only permitted it as an option.¹³⁰ The WTO panel implied that the United States would have to deny WTO-negotiated benefits in its application of Section 301 to establish a justiciable case.¹³¹

In 1988, over President Reagan's objection,¹³² Congress passed the Omnibus Trade and Competitiveness Act which, among other things, included a section requiring the president to take action against countries that infringed upon U.S. rightholders' IP or that failed to effectively enforce protections for those rights.¹³³ The act's "Special 301" provision explained that "[m]arket access barriers include acts, policies, laws and regulations of a government that affect the distribution of goods relying upon intellectual property protection."¹³⁴ Though it did not create any new legal authority, Special 301 *required* the president to take aggressive action to investigate and, if necessary, levy sanctions on violating countries.¹³⁵

Some authors have objected to the linkage of trade sanctions with a willingness to negotiate legal changes. As one scholar explained, "The U.S. experience with Special 301 suggests that a strategy developed around coercing negotiations under threats of retaliatory trade sanctions is more effective for obtaining multilateral negotiations and agreements than for producing concrete enforcement results."¹³⁶

Special 301 investigatory authority fell to the U.S. Trade Representative (USTR), a position created in 1962 to manage U.S. trade policy.¹³⁷ As part of its monitoring process, USTR issues an annual "name and shame" list formally known as the Special 301 Annual

130. See Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* ¶¶ 4.35(a), 8.1, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000) [hereinafter Section 301 Panel Report] (rejecting claims that Section 301-310 improperly mandated unilateral action).

131. See *id.* at 22–24.

132. President Reagan claimed that Section 301 provided enough authority to negotiate IP violations. See Norman D. Sandler, *President Reagan, decrying "the Piracy of our Intellectual Property,"* . . . , UNITED PRESS INT'L, INC. (July 22, 1988), <http://www.upi.com/Archives/1988/07/22/President-Reagan-decrying-the-piracy-of-our-intellectual-property/4118585547200/> [<https://perma.cc/3XPC-3Q6K>].

133. See, e.g., Brian Mark Berliner, *Making Intellectual Property Pirates Walk the Plank: Using Special 301 to Protect the United States' Rights*, 12 LOY. L.A. INT'L & COMP. L. REV. 725, 734 (1990).

134. Nicole Telecki, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round*, 14 B.U. INT'L L. J. 187, 196 (1996).

135. See Trade Act, 19 U.S.C. §1365.

136. C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 235 (1997).

137. See *History of the United States Trade Representative*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/history> [<https://perma.cc/TH34-D9P3>] (last visited Dec. 1, 2016).

Review. That report categorizes countries into Priority Foreign Country, Priority Watch, and Watch Lists.¹³⁸ Countries that fall on the Priority Foreign Country List are the most serious violators of U.S. IPRs.¹³⁹ Once a country is placed on this list, USTR can initiate an investigation and potentially take unilateral (suspension of concessions) or multilateral (WTO) retaliatory action.¹⁴⁰ Countries on the Priority Watch List are monitored closely and usually engage in negotiations with USTR over how to improve their protection of U.S. IPRs to avoid losing benefits under a trade agreement.¹⁴¹ Finally, countries on the Watch List are those that are in violation of their trade agreement with the United States, but that are taking steps to change their laws to come into compliance.¹⁴²

Following the conclusion of the GATT 1995 agreement, the United States had to shift its strategy in applying unilateral sanctions under Special 301, which became unlawful under the GATT 1995.¹⁴³ Now, rather than taking direct action against the violating country, the United States can pursue multilateral resolution at the WTO Dispute Settlement Body (DSB), which can authorize retaliatory sanctions against any WTO member, regardless of the member's participation in a bilateral trade agreement with the United States.¹⁴⁴ This does not mean that the United States will forego any unilateral retaliation, only that they have a broader mechanism for pursuing resolution.

The USTR is required to investigate the laws and practices of countries that appear on the Priority Watch List under Special

138. Alisa Wrase, *U.S. Bilateral Agreements and the Protection of Intellectual Property Rights In Foreign Countries: Effective for U.S. Intellectual Property Interests or a Way Out of Addressing the Issue?*, 19 DICK. J. INT'L L. 245, 252–54 (2000) (providing background on the development and application of the Special 301 Annual Review).

139. See, e.g., OFF. OF THE U.S. TRADE REPRESENTATIVE, 2016 SPECIAL 301 REPORT, at 1 (Apr. 2016) [hereinafter U.S.T.R. Special 301 Report], <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf> [<https://perma.cc/R6HA-8PLK>].

140. See *id.* at 2–3, 45.

141. See *id.*

142. See *id.*

143. Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPs" over Special 301*, 7 MINN. J. GLOBAL TRADE 179, 201–05 (explaining that Special 301 has been highly criticized by the General Agreement on Tariffs and Trade and may violate the terms of the "national treatment" principle found in that agreement). See generally Telecki, *supra* note 134, at 198 (discussing the development of Special 301 alongside the TRIPS Agreement).

144. See, e.g., *Understanding the WTO: Settling Disputes*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [<https://perma.cc/H4VB-L3MB>] (last visited Dec. 1, 2016) (describing the process for pursuing and settling a dispute through the WTO).

301.¹⁴⁵ They are also required to initiate bilateral consultations with the infringing country unless it would be economically disadvantageous to do so.¹⁴⁶ If the alleged violation relates to agreements under the WTO, principally the TRIPS Agreement, the USTR is required to initiate proceedings at the WTO's DSB if the matter is not resolved within 150 days.¹⁴⁷

If the matter is not referred to the DSB, Special 301 allows the United States to retaliate if the listed country is violating the terms or expectations outlined under a trade agreement, or is otherwise unreasonable or discriminatory and is burdening or restricting U.S. commerce.¹⁴⁸ However, it is worth noting that in practice this retaliation is discretionary as the statute permits the president foreign policy exceptions to the retaliation requirement.¹⁴⁹

Each year, the United States identifies the countries that it contends are the most serious offenders of U.S. IP laws and publishes that list for the world to see.¹⁵⁰ The information that leads countries to be placed on this Special 301 list is often provided by U.S. industries.¹⁵¹ Once on the list, the United States is able to unilaterally remove trade preferences granted outside the WTO, or to initiate dispute settlement proceedings through that organization to punish the offending country.¹⁵² In either case, the goal is to convince the country to make more concerted efforts to enforce the protection of U.S. intellectual property.

Some of the countries on the Special 301 list, such as Switzerland and Canada,¹⁵³ have the resources to invest in new laws and better enforcement efforts. However, the majority of list members are developing countries that lack both the resources and the will to protect foreign IP rights.¹⁵⁴ In these countries, violation of IP rights through the sale of pirated videos, generic medicines, and copied software, is not only far outside the enforcement priorities of the government, it is also a significant part of the economic growth engine that moves these economies forward. Without this informal IP sector, discussed in greater detail in Part VI, legitimate

145. See 19 U.S.C. § 2412(b)(2)(A).

146. See 19 U.S.C. § 2413(a)(1).

147. See 19 U.S.C. § 2413(a)(2).

148. See 19 U.S.C. § 2411(b)(1); see also Telecki, *supra* note 134, at 197–98.

149. See, e.g., Telecki, *supra* note 134, § II.

150. See U.S.T.R. Special 301 Report, *supra* note 139, at 1.

151. See *id.* at 2.

152. See C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 217–18 (1997).

153. See U.S.T.R. Special 301 Report, *supra* note 139, at 3.

154. See *id.*

and high-priced foreign imports would significantly limit the ability of consumers to acquire necessary software, medicines, and other IP-intensive products.

C. *Trade Access or Sanctions*

Seeing its options at the WTO limited to explicit violations of GATT rules, and its options under Special 301 curtailed under WTO rules, the United States sought a third option to pursue protection of its rightholders overseas. This option presented itself in the form of free trade agreements—exceptions to WTO rules that, if negotiated to include reductions in tariffs, could also include measures not directly related to trade, such as protection of IPRs.¹⁵⁵

The United States included intellectual property provisions in its bilateral trade agreements following its first agreement with Israel (which lacked such a provision) in 1985.¹⁵⁶ However, it was not until 2001, when the United States concluded a free trade agreement with Singapore, that the IP provisions were substantially enhanced and strengthened to ensure strong enforcement mechanisms and increased protection of U.S. rightholders.¹⁵⁷ Since then, each subsequent agreement has included more specific and aggressive protections for U.S. rightholders.¹⁵⁸

In the most recent iterations of IP protections within trade agreements, the United States has included strong language relating to the enforcement of U.S. rightholders' protections.¹⁵⁹ In the overview of the United States-Colombia Trade Promotion Agreement, which entered into force in 2011, for instance, the USTR states:

The Agreement calls on Colombia to provide strong, deterrent criminal penalties against copyright piracy and trademark coun-

155. See GATT, *supra* note 112, art. 10.1(d).

156. United States-Israel Free Trade Area Agreement, U.S.-Isr., art. 14, Apr. 22, 1985, Hein's No. KAV 7204, 24 I.L.M. 653 (reaffirming prior treaty intellectual property rights without adding any new obligations); see *International Copyright Relations of the United States*, U.S. COPYRIGHT OFFICE (Aug. 2016), <https://www.copyright.gov/circs/circ38a.pdf> [<https://perma.cc/2VLA-YVHX>].

157. United States-Singapore Free Trade Agreement, U.S.-Sing., art. 16, May 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter Singapore FTA].

158. See generally United States-Israel Free Trade Area Agreement, *supra* note 156; U.S.-Colombia Trade Promotion Agreement, Nov. 22, 2006, 125 Stat. 462 [hereinafter Colombia FTA].

159. C. O'Neal Taylor, *Regional Trade Agreements: Current Issues and Controversies: The U.S. Approach to Regionalism: Recent Past and Future*, 15 ILSA J. INT'L & COMP. L. 411, 432 (2009) (discussing the development of a model free trade agreement that includes strong IP protection provisions).

terfeiting, including, for example, end-user piracy of software. To strengthen enforcement procedures, the Agreement authorizes the seizure, forfeiture, and destruction of counterfeit and pirated goods and the equipment used to produce them. It also permits customs officials and prosecutors to bring an IPR enforcement action without having to wait for a formal complaint from the right[holders].¹⁶⁰

Terms similar to those mentioned above have been included in the Central American Free Trade Agreement and the United States-Chile Free Trade Agreement, among others.¹⁶¹ The emphasis on enforcement and penalties is indicative of the United States' awareness that, while laws already exist preventing piracy and counterfeiting, they are not being enforced strongly enough. Accordingly, the trade agreement route sets in place a commitment by the target country to increase enforcement efforts or face sanctions under the trade agreement.

Despite strong IP protections in the United States, the presumption against the extraterritorial application of the law substantially weakens efforts to protect rightholders when they sell abroad.¹⁶² The initiatives described above have had some success in convincing countries to change their laws, but minimal success in improving the protection environment on the ground.¹⁶³ The existence of strong laws is no guarantee of respect for and enforcement of those laws. This issue is the subject of the next Part.

III. ENFORCEMENT INCENTIVES

There is a dramatic difference between passing a law and enforcing that law.¹⁶⁴ Passage alone, in some cases, is enough to satisfy external parties that effective action is being taken. However, in

160. *Intellectual Property Rights in the U.S. – Colombia Trade Promotion Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/uscolombiatpa/ipr> [<https://perma.cc/Y3K6-2F39>] (last visited Dec. 1, 2016).

161. United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, Hein's No. KAV 6375 [hereinafter Chile FTA]; see also United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (Sept. 3, 2003) (requiring strong criminal penalties for copyright and trademark infringement).

162. See Peukert, *supra* note 83, at 200-02 (describing the extraterritoriality principle).

163. See, e.g., Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29 (1995) (describing the limited successes of Special 301, such as facilitating raids on copyright violators in Indonesia, while suggesting that overall the agreement has done little to change the culture of rights protection); 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 (1994).

164. See, e.g., Xuan Li & Carlos M. Correa, *Towards a Development Approach on IP Enforcement: Conclusions and Strategic Recommendations*, in *INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES* 207, 207 (Xuan Li & Carlos M. Correa eds., 2009).

most developing countries, rule of law is weak and resources to dedicate to enforcement of laws are highly limited.¹⁶⁵ In countries like Colombia and Chile, enforcement of basic traffic laws is largely non-existent.¹⁶⁶ Expecting stronger action on foreign IPR protections may be even less likely.

There is no shortage of efforts on the part of the government to change this approach.¹⁶⁷ Yet mere passage of a law indicates very little about the effectiveness of that law in practice. Lack of law enforcement resources, as well as conflicting enforcement priorities, can leave countries with little incentive to protect foreign IPRs. In some cases, this means that parties sometimes look to the private sector for enforcement, rather than the government.¹⁶⁸

But it is not just weak rule of law and limited resources that prevent the enforcement of IP laws affecting mostly foreign-owned intellectual property. “Developing countries often find piracy to be profitable and therefore fail to enforce laws enacted to protect copyrights.”¹⁶⁹ With little risk of being caught, and low punishments in any event, piracy involving foreign IP is both an easy and attractive business alternative to unemployment. But it is not just the “pirate” that benefits—his or her country may as well.

Piracy can be beneficial to a developing economy in a number of ways. The pirates who copy movies, music, and other copyrighted materials survive on their sales, generating employment, albeit in an unlawful industry.¹⁷⁰ The protected goods that are sold at significantly lower cost to domestic consumers also reduce the cost of those products to consumers at the expense of foreign (and some domestic) competitors, creating an artificial domestic competitor

165. See generally Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895 (2008) (discussing the link between rule of law and economic growth).

166. See, e.g., Kevin J. Fandl, Elin Cohen, Amanda Perry-Kessaris & Veronica Taylor, *Success in Law and Development: Evaluating the Conventional Wisdom Using Evidence from the Field*, 3 HAGUE R. L.J. 1 (2011).

167. See *infra* notes 193–195.

168. See, e.g., Keshia B. Haskins, *Special 301 in China and Mexico: A Policy Which Fails to Consider how Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1125, 1126 (1999) (finding that despite many Mexican laws prohibiting piracy, lack of enforcement leads some to use private parties to assist in enforcement).

169. *Id.* at 1128.

170. See, e.g., Steve Shlackman, *Copyright Infringement is a High-Benefit, Low-Risk Business Model*, ART L. J. (Mar. 23, 2014).

of like products.¹⁷¹ And finally, because there is little popular demand to stop this type of piracy, the government has little need to devote precious enforcement resources to investigate or prevent IP theft.¹⁷² Unless and until public outcry from voting citizens becomes significant, there is a disincentive for state action.

There are numerous downsides to maintaining an informal IP economy as well. Among these, the government collects no tax revenue from these illegitimate sales of goods, which it would be able to do if the sale came from either a legitimate domestic or foreign firm. Also, lack of enforcement of IPRs applies equally to foreign and domestic rightholders. For domestic firms with the potential to innovate, this may mean less desire to innovate or register their ideas domestically, knowing that they will not be protected.¹⁷³ And, of course, on the international scale, failure to offer adequate protection for foreign rightholders may lead to sanctions or other penalties through the WTO or other trade agreements.¹⁷⁴

Countries that lack significant intellectual property to protect, moreover, tend to have less interest in pursuing enforcement of any IPRs.¹⁷⁵ Even now IP-rich nations,

including the [United States], Germany and Japan[,] tend to be indifferent to the protection of intellectual property rights when the nation is in an early stage of developing innovation and technology, because at that point its citizens benefit from pirating from others; but as the nation develops, it tends to become more protective of IPR[s], because its citizens have property to protect.¹⁷⁶

This same experience is shared by many developing countries today.

171. See, e.g., Vincent Wenxiong Yao, *An Economic Analysis of Counterfeit Goods: The Case of China*, 1 J. WASH. INST. CHINA STUD. 16 (2006) (explaining the considerable difference in market price between legitimate and pirated goods).

172. Carlos A. Primo Braga & Carsten Fink, *The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict*, 72 CHI.-KENT L. REV. 439, 446 (1996).

173. See, e.g., Patrick Kilbride, *Weak Intellectual Property Protection is a Barrier for Innovators*, U.S. CHAMBER OF COM. (Aug. 27, 2014, 12:30 PM), <https://www.uschamber.com/above-the-fold/weak-intellectual-property-protection-barrier-innovators> [<https://perma.cc/Q32Z-GDSZ>].

174. For a list of WTO cases addressing IP issues, see *Disputes by Agreement*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26# [<https://perma.cc/TJ2H-PFXG>] (last visited Dec. 1, 2016).

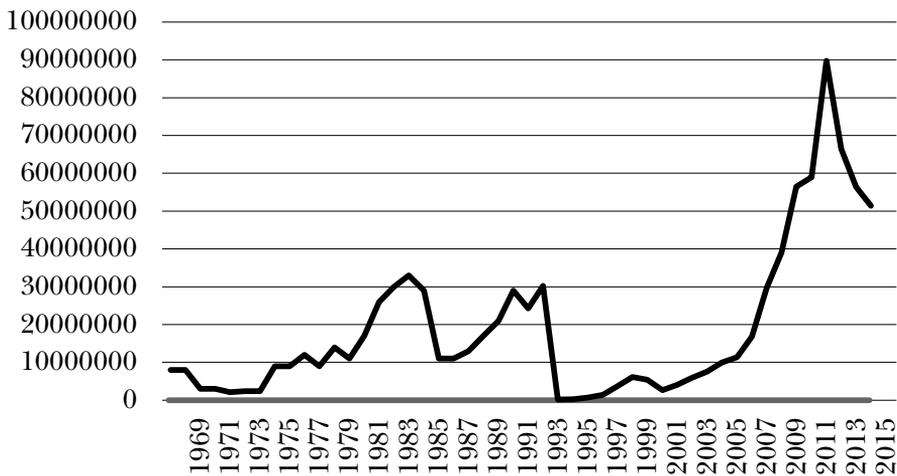
175. See generally Sana El Harbi, Giles Grolleau & Insaf Bekir, *Is There a Piracy Kuznets Curve?*, 8 REV. L. & ECON. 433 (2012) (comparing the relationship between software piracy and GDP per capita for a hundred countries).

176. See Neumeyer, *supra* note 46.

IV. CASE STUDY: COLOMBIA

Colombia represents a strong and growing economy in Latin America.¹⁷⁷ An expanding middle class¹⁷⁸ and growing GDP per capita¹⁷⁹ means more consumer demand for high-end products, including imported goods. Growth in per capita GDP in Colombia has been steady as tensions from a long-running civil war reduce and investment grows (see Figure 2). Consequently, appetite for foreign imports, which in high-end industries such as technology may be more costly than locally produced goods, has also grown, as measured fees paid to license foreign imports (see Figure 1). Yet with a per capita GDP of less than US\$14,000 in 2015, not all Colombians are able to partake in this sector of import growth legitimately.

FIGURE 1. IPR TRADE IN COLOMBIA (1968–2015).



Source: World Bank, International Monetary Fund.¹⁸⁰

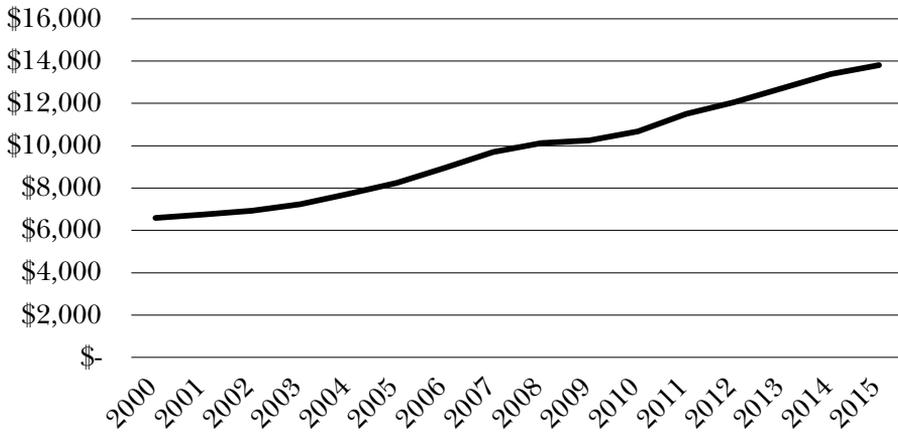
177. See, e.g., *Passing the Baton: Colombia Overtakes Peru to Become the Region's Fastest-growing Economy*, *ECONOMIST* (Aug. 2, 2014), <http://www.economist.com/node/21610305/print> [<https://perma.cc/3DMJ-E4DN>].

178. See *Colombian Middle Class Grows Over Past Decade*, *WORLD BANK* (Nov. 13, 2012), <http://www.worldbank.org/en/news/feature/2012/11/13/colombia-middle-class-grows-over-past-decade> [<https://perma.cc/NYD8-DE3V>].

179. See Oscar Medina & Andrea Jaramillo, *Colombia GDP Grew 3% in Second Quarter, Exceeding Forecasts*, *BLOOMBERG BUS.* (Sept. 10, 2015), <http://www.bloomberg.com/news/articles/2015-09-10/colombian-economy-grew-faster-than-expected-3-in-second-quarter> [<https://perma.cc/G4U6-U8G8>].

180. IPR exports are calculated by the amount spent by foreigners to utilize patents, trademarks, copyrights, and other IPRs owned by Colombian residents. IPR imports are calculated by the amount spent by Colombian residents to utilize the patents, trademarks, copyrights, and other IPRs of foreigners.

FIGURE 2. GDP GROWTH IN COLOMBIA (2004–2013).



Source: World Bank, International Comparison Program database¹⁸¹

Conversely, Colombia has invested little in the development of its own innovative sectors. Investment in research and development over the last decade has seen only minimal increases.¹⁸² One of the country's largest contributions in the technology sector is in software development, in which over 6,500 companies are engaged in Colombia.¹⁸³ However, ninety-three percent of these are small firms (fewer than ten employees), and they focus primarily on domestic sales rather than exports.¹⁸⁴

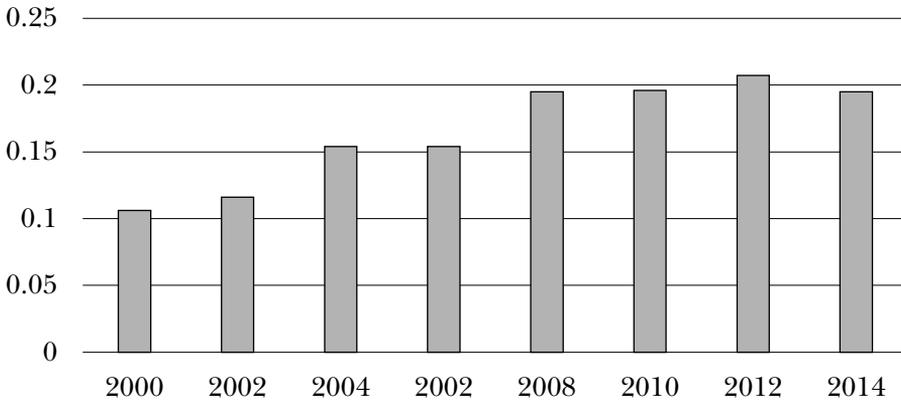
181. Figure 2 is available at <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=CO> [<https://perma.cc/9ML8-XPJU>].

182. See Figure 3.

183. *Id.*

184. Carlos Bohorquez et al., *The Bogota Software Cluster*, HARV. BUS. SCH. 15 (2013), http://www.isc.hbs.edu/resources/courses/moc-course-at-harvard/Documents/pdf/student-projects/Colombia_Software_2013.pdf [<https://perma.cc/Z6LU-4G3F>]; see also *id.* at 17 n1.

FIGURE 3. COLOMBIA - SPENDING ON RESEARCH AND DEVELOPMENT AS A PERCENTAGE OF GDP



Source: World Bank; UNESCO¹⁸⁵

The United States has been a major player in increasing technology exports to Colombia.¹⁸⁶ Overall, global imports to Colombia between 2003 and 2012 increased by more than three hundred percent.¹⁸⁷ Of those exports, roughly US\$2.2 billion are classified as technology exports.¹⁸⁸ Registered U.S.-owned patents in Colombia in 2007 were 2,762, compared to Colombian-owned patents, which numbered 236.¹⁸⁹ But as exports of IP-intensive goods to Colombia increase, the risk of piracy and counterfeiting surges.

Infringement of foreign-owned IPRs in Colombia is extensive. US\$396 million is estimated to have been “lost” in the sale of pirated music, software, and books in 2013.¹⁹⁰ However, compared to other countries in the region which reach above eighty percent, this is one of the lowest rates of lost profits from piracy in Latin

185. Figure 3 is available at <http://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS?locations=CO&view=chart> [<https://perma.cc/UL4R-3S89>].

186. In 1999, the United States exported US\$3.6 billion in goods to Colombia. *Fact Sheet: U.S.-Colombia Economic and Trade Relationship*, U.S. INT'L TRADE ADMIN. (2013), <http://www.trade.gov/press/press-releases/2013/colombia-factsheet-051513.pdf> [<https://perma.cc/8FRW-PABH>]. In 2012, that number rose to US\$16.4 billion, increasing more than 360 percent. *Id.*

187. *Id.*

188. *See id.*

189. *See* ECONOMIST INTELLIGENCE UNIT REPORT, INTELLECTUAL-PROPERTY ENVIRONMENT IN COLOMBIA 10 (2010), <http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=2147491162> [<https://perma.cc/6L5H-LRSG>].

190. *See* Nina Damsgaard, *Colombia's Software Piracy Rate 2nd Lowest in Region, Still Loses Nearly \$400M: Study*, COLUMBIA REPS. (June, 27, 2014), <http://colombiareports.com/colombias-piracy-rate-2nd-lowest-region-loses-nearly-400-million-international-study/> [<https://perma.cc/R966-YANC>].

America.¹⁹¹ Colombia is also one of the only countries in the region engaged in a furtive effort to strengthen relations with the United States, which means passing and enforcing effective anti-piracy laws.¹⁹²

Colombia has had anti-piracy laws in place since at least 1975. Law 48 of 1975 requires Colombia to take all necessary action to protect the rights of authors.¹⁹³ Similarly, Law 23 of 1982 establishes copyright as a social interest to be protected.¹⁹⁴ And Decision 351 of the Andean Agreement requires adequate and effective protection for the rights of authors.¹⁹⁵ However, these laws saw minimal enforcement in the years following their passage.¹⁹⁶

In a further effort to strengthen ties between the United States and Colombia, the two countries signed a Free Trade Agreement in 2006 containing numerous provisions focused on the protection of foreign-owned intellectual property.¹⁹⁷ Article 16 of that agreement required Colombia to adopt strict new anti-piracy laws and to criminalize violations of IPRs.¹⁹⁸ In 2012, just prior to a visit from President Obama, Colombia signed domestic legislation, Law

191. Colombia con el más bajo índice de piratería en América Latina [*Colombia with the Lowest Piracy Rate in America*], DINERO (May 5, 2011), <http://www.dinero.com/negocios/articulo/colombia-bajo-indice-pirateria-america-latina/119620> [<https://perma.cc/82QV-F7BY>].

192. See, e.g., *Fact Sheet: U.S.-Colombia Economic and Trade Relationship*, U.S. INT'L TRADE ADMIN. (May 15, 2013), <http://www.trade.gov/press/press-releases/2013/colombia-fact-sheet-051513.pdf> [<https://perma.cc/ZE5Q-TRGD>] (highlighting the strategic importance of Colombia to the United States).

193. L. 48/75, diciembre 12, 1975, DIARIO OFICIAL [D.O.] (Colom.).

194. L. 23/82, enero 28, 1982, DIARIO OFICIAL [D.O.] (Colom.). For details on how copyright is protected under Colombian law, see generally L. 48/75, [D.O.]; L. 33/87, octubre 26, 1987, DIARIO OFICIAL [D.O.]; L. 44/93, febrero 5, 1993, DIARIO OFICIAL [D.O.]; Decision No. 351: Common Provisions on Copyright and Neighboring Rights, Bol.-Chile-Colom.-Ecuador-Peru, Dec. 21, 1993, *Gaceta Oficial del Acuerdo de Cartagena*, X—No. 145.

195. Decision No. 351: Common Provisions on Copyright and Neighboring Rights, Bol.-Chile-Colom.-Ecuador-Peru, Dec. 21, 1993, *Gaceta Oficial del Acuerdo de Cartagena*, X—No. 145.

196. See, e.g., Edgardo Buscaglia & Clarisa Long, *U.S. Foreign Policy and Intellectual Property Rights in Latin America*, HOOVER INSTITUTION ON WAR, REVOLUTION, AND PEACE: ESSAYS IN PUBLIC POLICY (1997) (explaining the weak enforcement of IP laws in Latin America).

197. See Colombia FTA, *supra* note 158.

198. *Id.* art. 16; Office of the United States Trade Representative, *U.S.-Colombia Trade Agreement: Increasing American Competitiveness*, <http://www.ustr.gov/uscolombiatpa/ipr> [<https://perma.cc/W999-34AJ>] (last visited Dec. 1, 2016).

201,¹⁹⁹ which implemented the provisions of the trade agreement requiring stronger IP enforcement.²⁰⁰

Law 201 creates extensive criminal sanctions for copyright infringement in Colombia, including a minimum four-year prison sentence for intentional infringement.²⁰¹ The law also establishes similar measures to the U.S. Digital Millennium Copyright Act, which prohibits not only the copying of protected software, e-books, music, and movies, but also prohibits the sale or use of devices that would allow circumvention of such protections.²⁰²

The sanctions implemented through Colombia's new laws made international headlines when, in 2014, a biology student at Colombia's University of Quindío was arrested and criminally charged for violating Colombian IP laws.²⁰³ It is alleged that the student uploaded a research paper authored by someone else and intended to share the research with others in his field.²⁰⁴ The author found the paper on the website Scribd and sued the student.²⁰⁵ The student faces up to eight years in prison for his act.²⁰⁶

V. INFRINGEMENT IN COLOMBIA

In most parts of the world, a savvy computer user can unlawfully access or even download pirated versions of films, music, software, and other protected goods.²⁰⁷ And in some cases, they can access

199. Proyecto L. 201/12, marzo 20, 2012 (Colom.). This law is nicknamed Ley Lleras 2.0, referring to the failure of the first Lleras law (named after the former Minister of the Interior and Justice), Proyecto L. 241/11, abril 4, 2011 (Colom.), to successfully pass the Colombian Congress.

200. See Juan Martin, *Gobierno radica proyecto para implementar TLC con EE.UU.* [Government Establish Project to Implement TLC with U.S.], SENADO.GOV (Mar. 20, 2012), <http://senado.gov.co/sala-de-prensa/noticias/item/13410-gobierno-radica-proyecto-para-implentar-tlc-con-eeuu?tmpl=component&print=1> [<https://perma.cc/P7TN-ENJX>]. See generally Marcela Cristina Blanco, *Colombia's New Copyright Law*, DIAZ REUS (Sept. 1, 2012), <http://diazreus.com/colombias-new-copyright-law-an-achievement-or-a-shortcoming/> [<https://perma.cc/TMG5-HM78>].

201. See Blanco, *supra* note 200 (explaining that Colombian Law 201 is more restrictive than required by the U.S.-Colombia Trade Promotion Act).

202. L. 201/12, [D.O.] (Colom.), art. 14.

203. Joe Kloc, *Colombian Student Facing Prison for Sharing Research Paper Online*, NEWSWEEK (Aug. 7, 2014), <http://www.newsweek.com/colombian-biology-student-falls-afoul-hollywoods-copyright-laws-263357> [<https://perma.cc/4BVX-2E86>]; see also Craig Corbett, *Colombia Student Could Face More Jail Time Than Sex Offenders After Sharing Copyright Amphibian Article*, COLOM. REPS. (Aug. 19, 2014), <http://colombiareports.com/colombia-student-face-jail-sentence-length/> [<https://perma.cc/S6F3-2KX5>].

204. Kloc, *supra* note 203; Corbett, *supra* note 203.

205. Kloc, *supra* note 203; Corbett, *supra* note 203.

206. Kloc, *supra* note 203; Corbett, *supra* note 203.

207. See, e.g., Online Piracy Report, UNIV. N.C., <http://piracy.web.unc.edu> [<https://perma.cc/2WY7-JQEG>] (last visited Dec. 20, 2016).

counterfeit versions of Gucci bags or Coach sunglasses at street markets in big cities.²⁰⁸ The unlawful downloads are monitored by owners of the IP, such as the MPAA and the RIAA.²⁰⁹ These entities, which profit generously from ownership of copyrighted works, track the Internet protocol addresses of users and use these as fingerprints to trace the origin of downloads.²¹⁰ They use this evidence to bring lawsuits against major infringers. As an example, the Eighth Circuit Court of Appeals upheld a jury award of US\$220,000 against an individual who downloaded twenty-four songs in violation of the owner's rights.²¹¹

Legitimate business entities in Colombia are regulated in much of the same way as in the United States.²¹² Their sales of software, movies, music, and books, are in most cases lawful and compliant with Colombia's strict IP laws.²¹³ However, legitimate, regulated firms constitute the minority of firms selling goods in Colombia.²¹⁴ As much as sixty percent of Colombia's commerce is conducted by unregulated, or informal, firms.²¹⁵ This includes street vendors, small shops, and individuals that survive by selling lower-cost and often illegal copies of IP-intensive goods.²¹⁶

Accordingly, stopping the majority of IP theft in Colombia would require aggressive enforcement actions against firms in the informal economy. Given that these firms are already violating several laws by operating without a license,²¹⁷ there should be no dispute

208. Information about how to access counterfeit goods in New York City is even available in a tourist guide. See *Guide to Buying Fake Handbags in New York City*, N.Y. TV SHOW TICKETS INC., <http://www.nytx.com/NewYorkCity/articles/handbags.html> [https://perma.cc/2VVG-MK2S] (last visited Dec. 20, 2016).

209. Marcy Mason, *Fighting Film Thieves*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/frontline/fighting-film-thieves> [https://perma.cc/SY9E-MYLM] (last visited Dec. 20, 2016).

210. See Jeff Stone, *How People Are Caught Illegally Downloading Music, Movie Torrents*, INT'L BUS. TIMES (Sept. 12, 2012).

211. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 910 (8th Cir. 2012).

212. Kevin J. Fandl, *Beyond The Invisible: The Impact Of Trade Liberalization and Formalization On Small Businesses In Colombia*, 141-42 (Apr. 26, 2010) (unpublished Ph.D. dissertation, George Mason University) (on file with author).

213. See, e.g., *OEM Partner Center*, MICROSOFT https://www.microsoft.com/OEM/en/Pages/distributors.aspx#fbid=_J_IfsZVeT8 [https://perma.cc/U5X3-88MN] (last visited Dec. 1, 2016) (identifying the partner firms in Colombia selling licensed software).

214. See, e.g., Juana Paola Bustamante Izquierdo & Kevin J. Fandl, *Incentivizing Gray Market Entrepreneurs in Emerging Markets*, NW. J. INT'L L. & BUS. 12 (forthcoming 2016).

215. *Id.* at 35.

216. *Id.* at 22.

217. See Kevin J. Fandl & Juana Paola Bustamante, *The Wrong Incentive: Luring Informal Firms into the Formal Marketplace by Easing Regulatory Burdens*, NW. J. INT'L L. & BUS. (forthcoming 2017).

about the culpability of such firms when they sell infringing goods. However, because those firms are operated by individuals who have little ability to find reasonable legitimate work in the legal or formal economy, enforcement action against them becomes a legal and policy dilemma.

A. *The Right to Earn a Living*

Like many Latin American constitutions, Colombia's constitution protects an individual's right to work.²¹⁸ Article 25 states, "Work is a right and a social obligation and in all its forms enjoys the special protection of the state. Every person is entitled to a job under dignified and equitable conditions."²¹⁹

The state sees the protection of work as paramount over conflicting interests, and given the high rate of unemployment in Colombia,²²⁰ this means protecting both formal and informal enterprises. The Constitutional Court of Colombia decided in 1992 that informal vending in public space is part of the "work" that Article 25 seeks to protect.²²¹ This strengthens the argument that the state cannot prevent an informal vendor from earning a living by selling goods in an unregulated manner.

A conflict arises when the vendor earns a living by selling goods that infringe IPRs protected by the laws discussed earlier.²²² Does the state have an obligation to ignore these violations in the interest of protecting the seller's right to work? Or does Colombia have an international obligation to enforce its laws and punish these

218. See *Colombia's Constitution of 1991 with Amendments through 2005*, CONSTITUTE PROJ. 7 (Apr. 18, 2016), https://www.constituteproject.org/constitution/Colombia_2005.pdf [<https://perma.cc/YFQ3-DMW2>].

219. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 25.

220. Though the official unemployment rate in Colombia is under nine percent, a significant informal economy suggests that formal jobs are far less available than the official rate supports. See Nina Damsgaard, *Colombia's Unemployment Rate Lowest in 14 Years: Govt*, COLOM. REPS. (June 27, 2014), <http://colombiareports.com/156000-jobs-created-may-colombias-national-statistics-agency/> [<https://perma.cc/W7LR-HQ7R>] (reporting an official unemployment rate of 8.8 percent in 2014); Ximena Pena, *The Formal and Informal Sectors in Colombia: Country Case Study on Labour Market Segmentation* (Int'l Lab. Org. Employment, Working Paper No. 146, 2013) (reporting an informal employment rate that explains the substantial number of workers not captured by the official unemployment statistics).

221. Corte Constitucional [C.C.] [Constitutional Court], junio 17, 1992, Sentencia T-225/92, Gaceta de la Corte Constitucional [G.C.C.] (vol. 2, p. 129) (Colom.); see also Rodrigo Meneses-Reyes & Jose A. Caballero-Juarez, *The Right to Work on the Street: Public Space and Constitutional Rights*, PLANNING THEORY 1 (2013), <http://plt.sagepub.com/content/early/2013/09/18/1473095213503967.full.pdfhtml> [<https://perma.cc/YPN4-RPWQ>].

222. See *supra* Part IV.

sellers? The issue was raised as one of many complaints in a class action lawsuit in Colombia in 2003.²²³

The class action lawsuit was brought against the Mayor of Bogotá and a number of firms that import goods often sold by informal street vendors, such as potato chips, soda, and cigarettes.²²⁴ The goal of the class action suit was to remove informal vendors from public spaces, especially sidewalks, where they interrupt the flow of formal business.²²⁵ Among the numerous claims in the complaint, one raised a concern over the informal sale of IP-infringing goods.²²⁶

The complainant, Roberth Lesmes Orjuela, argued that many of the vendors occupying public space violated Colombia's copyright laws by selling pirated works.²²⁷ However, the lower court found and the appellate court affirmed that Lesmes failed to present any proof of specific violations amounting to infringement.²²⁸

As part of the lower court's efforts to mitigate the negative effects of informal sales of infringing goods, and simultaneously balance the rights of authors with those of informal workers, the court ordered the Mayor of Bogotá to implement both a program to help informal workers find formal means of employment and a special policy to mitigate the negative impact that the sale of infringing goods has on public space.²²⁹

Colombia has taken steps to implement several programs aimed at reducing informality and inducing workers into the formal, regulated marketplace—a goal that would also benefit the rights of intellectual property owners worldwide. The Ministry of Industry

223. See Corte Constitucional [C.C.] [Constitutional Court], junio 10, 2003, Sentencia C-479/03, Gaceta de la Corte Constitucional [G.C.C.].

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. The goal of the program is to provide access to employment development programs offered by the Colombian's government's Institute of Economic and Social Policy (IPES). Sentencia No. 25000-23-15-000-2003-02530-01 (AP) de Consejo de Estado at 210 [Decision No. 25000-23-15-000-2003-02530-01 (AP) of the Council of State] (ORDENASE a la Alcaldía Mayor de Bogota, que en un termino maximo de cuatro (4) meses, implemente una política especial para mitigar el impacto negativo que genera la venta de productos que violan los derechos de autor en el espacio publico, y cuyas consideraciones tengan como finalidad encausar a los vendedores ambulantes a acogerse a los programas ofrecidos por el IPES) [Order to the Mayor of Bogotá that, in a maximum of four months, implement a special policy to mitigate the negative impact generated by the sale of products that infringe copyright on public space, taking into consideration the effects on street vendors benefiting from programs offered by IPES].

and Commerce leads one of the most prominent programs recently implemented. The program, discussed in more detail below, invests in small, informal businesses with the potential to succeed if given adequate investment and training.²³⁰ Yet this may not be enough to combat the culture of law evasion to earn a living.

B. *The Effect of Culture*

This Article began with an anecdote about the operation of a San Andresito—a place where largely unlawful products are sold by largely unregulated vendors.²³¹ According to the U.S. Trade Representative, “Colombia’s San Andresitos markets remain rife with counterfeit and pirated products and were again named in USTR’s Notorious Markets List in 2013. Greater enforcement attention is needed to disrupt organized distribution of illicit goods, including in the border areas.”²³²

Complicating matters further is the wide cultural acceptance of infringement in Latin America. Based on the author’s discussions with private sector firms, government agencies, law firms, and the general public in Colombia, infringement of foreign IPRs is acceptable in practice and should not be a high priority for law enforcement.²³³ Several rationales emerge to justify this attitude: (1) protecting IPRs does not benefit Colombia in any real manner; (2) foreign owners of IPRs benefit from infringement by generating interest in their products, potentially leading to more legitimate sales later; and (3) prices of legitimate goods are unreasonably high compared to the income of many Latin Americans.²³⁴

The enforcement picture is changing, however. In both Colombia and Chile, numerous anti-piracy and anti-counterfeiting laws

230. See, e.g., *Quienes Somos [About Us]*, COLOMBIA SE FORMALIZA [COLOMBIA FORMALIZES], <http://colombiaseformaliza.com/quienes-somos/> [<https://perma.cc/5GGD-5JP2>] (last visited Dec. 1, 2016).

231. See *supra* Introduction.

232. U.S. TRADE REPRESENTATIVE, 2014 SPECIAL 301 REPORT (Apr. 2014), <https://ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf> [<https://perma.cc/3P4W-8B6R>].

233. Based upon author’s informal discussions with officials in Colombia while conducting research with the support of the Center for International Business Education Research.

234. See, e.g., Carsten Fink & Keith E. Maskus, *Why We Study Intellectual Property Rights and What We Have Learned*, in *THE WORLD BANK INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH* 6–13 (Carsten Fink & Keith E. Maskus eds., 2005) (explaining that stronger IPR regimes does not lead, on its own, to automatic boost of foreign investment).

exist, as discussed above.²³⁵ And new laws continue to be enacted to stem the rising tide of IPR theft.²³⁶ In addition, although the fight in the courts is slow and rarely results in justice for the rightholder,²³⁷ new fast-track court procedures have been implemented in Colombia to allow complainants to bring claims against infringers more efficiently.²³⁸

Additionally, beginning in 2013, the Business Software Alliance (BSA) in Colombia began coordinated efforts with regional and national government entities to promote awareness of the economic impact of piracy.²³⁹ They delivered seminars, ran public campaigns, and in some cases even helped the government pursue individual cases of piracy.²⁴⁰ With the help of the International Data Corporation, the BSA conducted a survey following these efforts and found widespread support for protection of author rights and preference for legitimate software over pirated versions.²⁴¹ Of course, these opinions may not be shared by those who make a living selling infringing goods.

In addition, the private sector and government teamed up in their efforts to combat the broader problem of cultural ignorance of the need to protect IPRs. One of these efforts is known as *Juego Limpio* (Fair Play), initiated in Colombia as a marketing campaign to convince businesses to follow laws respecting IPRs, business regulations, and related formal requirements.²⁴² The effort was

235. See discussion *supra* Part IV.

236. See, e.g., *Así funcionará la nueva ley que combate el contrabando* [Here is How the New Anti-contraband Law Combats Contraband], EL TIEMPO (June 19, 2015), <http://www.eltiempo.com/economia/sectores/ley-anticontrabando-asi-funcionara-la-nueva-ley-que-combate-el-contrabando/15972195> [<https://perma.cc/L37H-K6R6>].

237. Based upon author's informal discussions with officials in Colombia while conducting research with the support of the Center for International Business Education Research; see Bureau of Econ. & Bus. Affairs, *2015 Investment Climate Statement—Colombia*, U.S. DEP'T STATE (May 2015), <http://www.state.gov/e/eb/rls/othr/ics/2015/241520.htm> [<https://perma.cc/4LXB-NP3A>].

238. See *supra* note 237.

239. See Diego Salazar, *BSA Signs MOU with National Association of Colombian Business Owners (ANDI)*, VERAFIRM (Oct. 31, 2013), <http://www.verafirm.org/bsa-signs-mou-andi/> [<https://perma.cc/Z38H-UJLX>].

240. The Business Software Alliance works with government agencies and the private sector to combat piracy and promote software development. See *BSA Encuesta Global de Software 2016*, BSA, http://www.bsa.org/?sc_lang=RE-la [<https://perma.cc/K94R-VHXW>] (last visited Dec. 1, 2016).

241. See *Colombia With the Lowest Piracy Rate in Latin America*, DINERO (May 20, 2011), <http://www.dinero.com/negocios/articulo/colombia-bajo-indice-pirateria-america-latina/119620> [<https://perma.cc/JE7U-N3A9>].

242. *Yo Juego Limpio [I Play Fair]*, YO LE JUEGO LIMPIO A COLOMBIA (Sept. 1, 2013) <http://www.yolejuegolimpioacolombia.gov.co/ABCjuegolimpio/Paginas/principios.aspx> [<https://perma.cc/SJ57-9ZZC>].

started with the support of companies such as Microsoft, which stand to lose significant revenue if piracy continues to grow in the region.²⁴³ In 2008, Microsoft opened its ninth anti-piracy center, and its first in Latin America, in Colombia's capital, Bogotá.²⁴⁴ The center is responsible for identifying and investigating cases of software piracy around Latin America and, if necessary, bringing legal action against the offending party.²⁴⁵

Despite these efforts, piracy continues to flourish in Latin America. Attitudes toward IPRs have nominally changed, and access to pirated and counterfeit goods is often as easy as going to an unlicensed product shopping center.²⁴⁶ The next Part examines the distribution network for large quantities of unlawful goods—the informal IP economy.

VI. THE INFORMAL IP ECONOMY

The informal economy is the segment of economic activity that functions in a partially or completely unregulated manner.²⁴⁷ Though relatively small in most developed economies, the informal economy constitutes a substantial, if not the majority, of most emerging economies.²⁴⁸ The unregulated marketplace is an IPR pirate's ideal sales venue.²⁴⁹

243. For a report on software piracy by Microsoft, see *Addressing Global Software Piracy: Partnering with Governments, Industry, and Customers to Strengthen Economies, Drive Innovation, and Protect Information Systems*, MICROSOFT 2–3, <https://news.microsoft.com/download/archived/presskits/antipiracy/docs/piracy10.pdf> [<https://perma.cc/3HAP-VLR9>] (last visited Dec. 1, 2016).

244. See Manuel Moreno, *Microsoft Abre un Centro Antipirateria en Colombia* [Microsoft Opens an Antipiracy Center in Colombia], ITESPRESSO (Oct. 22, 2008), <http://www.itespresso.es/microsoft-abre-un-centro-antipirateria-en-colombia-36948.html> [<https://perma.cc/32J7-L8GN>].

245. See *Microsoft Opens Anti-Cybercrime Office in Colombia, Home to 6 Million Victims a Year*, FOX NEWS LATINO (Nov. 20, 2013), <http://latino.foxnews.com/latino/news/2013/11/20/microsoft-opens-office-to-combat-cybercrime-in-colombia-where-6-million-are/> [<https://perma.cc/C6M4-FUY7>].

246. See, e.g., SAN ANDRESITO DE LA 38 CENTROS COMERCIALES [SAN ANDRESITO OF THE 38 SHOPPING MALLS], <http://www.sanandresitodela38.com/site/> [<https://perma.cc/M85G-ZYRA>] (last visited Dec. 1, 2016) (explaining the three *San Andresito* shopping centers in Bogotá are known for distributing contraband, but operate largely free of police interference).

247. See, e.g., Fandl, *supra* note 212, at 9–10.

248. See GLOBAL FAIRNESS INITIATIVE, *INFORMALITY IN EMERGING MARKETS: A CROSS-COUNTRY EXAMINATION* (2012), <http://www.globalfairness.org/downloads/2012%20Informality%20FINAL.pdf> [<https://perma.cc/W58E-P4L6>].

249. See, e.g., *Violentos Disturbios en San Andresito de San Jose en Bogotá* [Violent Disturbances in San Andresito of San Jose, Bogotá], EL TIEMPO (Colom.) (Nov. 20, 2015), <http://www.eltiempo.com/bogota/disturbios-en-san-andresito/16436461> [<https://perma.cc/SY79-LRK6>].

Some studies have shown that larger informal economies are directly associated with an increased incidence of piracy.²⁵⁰ Others have suggested that it is the low income level associated with large informal economies that drives piracy.²⁵¹ Alternatively, this Article suggests the reason piracy is substantial in many developing countries is the lack of incentives for domestic enforcement of existing anti-piracy laws, which in turn creates an informal IP economy that thrives, free of legal intervention, at the expense of foreign rightholders. And, contrary to the numerous enforcement efforts employed by the United States to combat piracy abroad, the Article further suggests that the existence of an informal IP economy is not necessarily a bad thing. To understand the rationale behind this opinion, it is important to examine the logic of strategic compliance in firm behavior—in this case, informal firms.

In a country replete with laws protecting rightholders, high demand for protected goods, and wide access to those goods, logic would suggest that IPRs would be respected widely. However, two factors undermine this presumption. The first is the level of domestic innovation. As discussed above, when IPRs are primarily owned by foreigners and domestic innovation remains low, a disincentive to protect IPRs emerges.²⁵² But the second reason—weak rule of law—is unique to Latin America and sets it apart from other emerging markets, such as China. Whereas in the United States, Europe, or China, consumers fear the legal consequences of infringement, that fear is largely non-existent in Latin America.²⁵³

A. *Strategic Compliance*

Any business, from a street vendor in Bogotá to Walmart in Bentonville, Arkansas²⁵⁴ faces the decision of whether to comply with

250. Rajeev K. Goel & Michael A. Nelson, *Shadow Economy and International Software Piracy*, 22 APPLIED FIN. ECON. 1951, 1951 (2012).

251. See Harbi et al., *supra* note 175, at 433, 435, 450.

252. See, e.g., OECD, COLOMBIA: POLICY PRIORITIES FOR INCLUSIVE DEVELOPMENT 32, 44 (2015) <https://www.oecd.org/about/publishing/colombia-policy-priorities-for-inclusive-development.pdf> [<https://perma.cc/54L8-U3VE>] (finding that Colombia is working to improve its enforcement environment for IP following the implementation of the U.S.-Colombia Trade Promotion Agreement after years of “endemic” piracy).

253. *Id.* at 44; Erika Fry, *IP Protection in China is Finally Changing. Or So it Seems*, FORBES (Oct. 18, 2016), <http://fortune.com/2016/10/18/ip-intellectual-property-china-michelle-lee/> [<https://perma.cc/4PV7-L6V6>]; *Enforcement of Intellectual Property Rights*, EUROPEAN COMM’N, http://ec.europa.eu/growth/industry/intellectual-property/enforcement_en [<https://perma.cc/NKV9-QFNB>] (last updated Dec. 21, 2016).

254. Bentonville, Arkansas is the corporate headquarters of Walmart. See *Wal-Mart Stores Inc.*, WALL ST. J. (2016), <http://quotes.wsj.com/WMT/company-people> [<https://perma.cc/3X3B-5PK8>] (last visited Dec. 22, 2016).

laws and regulations. For instance, a business must decide whether it will adhere to labor laws, environmental regulations, and financial reporting requirements. Some of these laws should be complied with because they are generally accepted as valid and necessary (*malum in se*), whereas others may be avoided if the violator is willing to pay the penalty for doing so (*malum prohibitum*). Scholar Daniel Ostas differentiates these two categories into “prohibition” laws and “price” laws, respectively.²⁵⁵

Consider traffic laws: If an individual chooses to drive faster than the speed limit on a given road, they are taking a risk that they will be caught and subject to a penalty for that violation. However, society may view that action (if still a reasonable speed) as ethically acceptable, and police will be less likely to enforce such a law as a result. In contrast, consider intoxicated driving laws: Society generally rejects the violation of these laws, and police are more likely to take aggressive enforcement actions as a result.

Businesses do not speed nor drive drunk. But they do enter contracts, pay taxes, and engage in other behavior that may lend itself to this argument. If a firm were to violate a business regulation, such as failing to report a chemical spill, they would be subject to a penalty.²⁵⁶ Yet if that regulation is rarely enforced and the enforcement agency never learns of the spill, and the firm has become more profitable by violating that law, they *may* choose to avoid the regulation if it is economically advantageous to do so.

Similarly, if the firm decides to breach a contract because the expected settlement amount or judicial damages would be less than the expected gain from the breach, many would do so.²⁵⁷ This common practice, known as “efficient breach” or “strategic breach,” raises few eyebrows even though it is unlawful.²⁵⁸ In fact,

255. Daniel T. Ostas, *Exploiting Under-Enforced Laws: An Economic and Ethical Assessment of Corporate Legal Strategy*, ACAD. LEGAL STUD. BUS. ANN. CONF. 3–4 (2008), <http://alsb.roundtablelive.org/Resources/Documents/NP%202008%20Ostas.pdf> [<https://perma.cc/ZLK7-9HXL>].

256. Consider, for instance, Freedom Industries, which improperly stored chemicals that ultimately leaked into drinking water, affecting 300,000 people in West Virginia in 2014. *\$11K Fine for West Virginia Company That Poisoned Water For 300K People*, RT (July 9, 2014), <https://www.rt.com/usa/171612-wviregina-water-spill-fine/> [<https://perma.cc/5D4L-6HRC>]. The company was fined US\$11,000 by the Occupational Safety and Health Administration. *Id.*

257. See, e.g., Tuomas W. Sandholm & Victor R. Lesser, *Leveled Commitment Contracts and Strategic Breach*, 35 GAMES & ECON. BEHAV. 212, 212–15 (2001); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 634 (1988).

258. See Ostas, *supra* note 255, at 3.

two authors suggest that firms should be encouraged to engage in such behavior if it is profitable to do so.²⁵⁹

Yet regardless of whether one views this practice as ethical, unethical, or somewhere in the middle, it is still unlawful. Ostas suggests that “[t]here is a hierarchy in law[:] some rules demand obedience even if under-enforced; others do not.”²⁶⁰ In other words, the nature of the violation should determine the economic bases for committing the violation.

Applying these principles globally presents new challenges. In the United States and most other developed countries, rule of law is strong; most rules worth enforcing are enforced and respected by the citizenry.²⁶¹ Penalties are usually clear and swiftly imposed, making an economic tradeoff between compliance and penalty both transparent and predictable.²⁶²

The same cannot be said in developing countries. Under-enforcement of laws and regulations in many developing countries is rampant; rule of law and respect for enforcement authorities is weak; and there is little certainty about the penalty that will be imposed when a rule is violated, given lengthy court proceedings and high levels of corruption in the legal process.²⁶³ Accordingly, firms appear to make significantly more decisions to circumvent legal rules in the interest of profitability in developing countries than they do in developed countries.²⁶⁴

There are clear examples of this principle that result in severe effects on society, yet yield minimal penalties. One recent example involves the Rana Plaza factory that collapsed in Dhaka, Ban-

259. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1156–57 (1982).

260. Ostas, *supra* note 255, § 2.

261. Whether they are respected because they are enforced or enforced because they are respected is an interesting question that is beyond the scope of this Article.

262. See, e.g., Terry Masters, *Punishment for Violating Copyright Laws*, HOUS. CHRON., <http://smallbusiness.chron.com/punishment-violating-copyright-laws-55157.html> [<https://perma.cc/EE2Q-SFGA>] (last visited Dec. 1, 2016) (noting legal basis for federal suit as soon as register copyright, and a predetermined damage scheme for copyright violation).

263. See MARK UNGER, *ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA* (2002); Simon Johnson, Daniel Kaufmann & Pablo Zoido-Lobaton, *Regulatory Discretion and the Unofficial Economy*, 88 AM. ECON. REV. 387, 389–91 (1998) (finding weak rule of law as measured by limited property rights, access to justice, and high levels of corruption).

264. See, e.g., Alejandro Gaviria, *Assessing the Effects of Corruption and Crime on Firm Performance: Evidence from Latin America*, 3 EMERGING MARKETS REV. 245, 262 (2002) (finding that firm corruption substantially reduces firm profitability).

gladesh in 2013, killing more than 1,100 garment workers.²⁶⁵ The factory produced goods for U.S. firms such as Benetton and Walmart.²⁶⁶ It was built above a shopping plaza, without a permit and in violation of numerous building codes.²⁶⁷ Families of the deceased will receive up to three months' salary as compensation.²⁶⁸ Whether the U.S. companies were aware of the building violations is unclear, but the factory owners no doubt felt that lack of enforcement of building codes (and bribery of officials) was reasonable in light of the reduction in operating costs that it produced.²⁶⁹

What is it that drives some countries to avert enforcement of laws enacted by their legislatures? Ostas suggests that "the lack of active enforcement by the government implies a lack of social consensus regarding the wrongfulness of the act."²⁷⁰ This Article argues, however, that this is only part of the reason laws are underenforced in countries with weak rule of law and ineffective governmental institutions. Citizens throughout Latin America recognize the wrongfulness of acts such as piracy, but ease of access to low-cost alternatives to lawful products and general cultural minimization of the gravity of IP offenses merge to create an environment of acceptable unlawfulness.

Protecting individuals against harm would seem to fall on the *malum in se* side of the scale in any reasonable analysis. But can the same be said for the protection of ideas? Theft of IP in developing countries is rampant, yet if one applies the law and ethics analysis applied above to U.S. firms that strategically violate the law, might

265. *Bangladesh Police Charge 41 With Murder Over Rana Plaza Collapse*, N.Y. TIMES, (July 1, 2015), http://www.nytimes.com/2015/06/02/world/asia/bangladesh-rana-plaza-murder-charges.html?_r=0 [https://perma.cc/ZK2L-QTZW] (noting that, while the owners and related parties were charged, there is little expectation of justice for the victims of the building collapse).

266. *How Benetton Faced Up To the Aftermath of Rana Plaza*, FIN. TIMES (Apr. 20, 2015), <http://www.ft.com/intl/cms/s/0/f9d84f0e-e509-11e4-8b61-00144feab7de.html#axzz3v5IZBOB5> [https://perma.cc/3PKK-YXAK].

267. Syed Zain Al-Mahmood & Tom Wright, *Collapsed Factory was Built Without Permit*, WALL ST. J., (Apr. 25, 2013), <http://www.wsj.com/articles/SB10001424127887323789704578444280661545310> [https://perma.cc/68XX-3WCM].

268. See, e.g., Irene Ogrodnik, *6 Months Later: What has Changed Since the Rana Plaza Factory Disaster?*, GLOBAL NEWS (Oct. 24, 2013), <http://globalnews.ca/news/922926/6-months-later-what-has-changed-since-the-rana-plaza-factory-disaster/> [https://perma.cc/BWX6-DJAB].

269. See *Disaster at Rana Plaza*, ECONOMIST (May 4, 2013), <http://www.economist.com/news/leaders/21577067-gruesome-accident-should-make-all-bosses-think-harder-about-what-behaving-responsibly> [https://perma.cc/GR3H-AUZF] (highlighting the role of corruption in bypassing existing building regulations).

270. Ostas, *supra* note 255, § 3.

one also conclude that firms selling goods that violate foreign IPRs are justified in their behavior if they cause no physical harm and are willing to pay the cost if caught?

Intellectual property laws exist in most developing countries, and even if they are not extensively written into domestic law, most developing countries subscribe to international IP treaties that require recognition of claims by foreign rightholders.²⁷¹ Yet these laws are minimally enforced in developing countries.²⁷² In any country, resources prohibit the enforcement of every law all the time. Countries selectively prioritize the use of their enforcement resources to those laws that society has determined to be most important to them. These priorities differ dramatically across countries. In the United States, for instance, a well-developed domestic enforcement regime has been organized to protect rightholders in response to the demands of those rightholders and in the interest of economic growth.²⁷³ Yet in most developing countries, investing in such a regime may seem wasteful in the face of seemingly more serious enforcement problems, such as enforcing building codes.²⁷⁴ And given the lack of domestic innovation in these latter countries, there is little internal push for increased enforcement, even if the general population recognizes the wrongfulness of violations.

271. See *supra* notes 96, 101 and accompanying text.

272. See, e.g., Edgardo Buscaglia, *U.S. Foreign Policy and Intellectual Property Rights in Latin America*, HOOVER INST. (Apr. 1, 1997), <http://www.hoover.org/research/us-foreign-policy-and-intellectual-property-rights-latin-america> [<https://perma.cc/P83R-HB5B>] (“[T]he costs of enforcing intellectual property rights are seen by politicians in less-developed countries as a short-term liability hampering their chances for re[-]election and, among other things, reducing campaign contributions made by lobbies representing local pirate industries.”); Harbi et al., *supra* note 175 (describing weak enforcement efforts to prevent IPR theft in Colombia).

273. For information on some of the organizations that lead U.S. law enforcement efforts, see Off. of Intell. Prop. Enforcement, *Intellectual Property Enforcement*, U.S. DEP’T OF STATE, <http://www.state.gov/e/eb/tpp/ipe/> [<https://perma.cc/E3J4-NWT3>] (last visited Dec. 1, 2016); Nat’l Intell. Prop. Rts. Coordination Ctr., *Intellectual Property Rights*, U.S. DEP’T OF HOMELAND SEC., <https://www.ice.gov/iprcenter> [<https://perma.cc/V76N-4C9F>] (last visited Dec. 1, 2016); *Intellectual Property (IP) Attaché Program*, U.S. PATENT & TRADE-MARK OFF., <https://www.uspto.gov/learning-and-resources/ip-policy/intellectual-property-rights-ipr-attach-program/intellectual> [<https://perma.cc/U9RA-4XVA>] (last visited Dec. 1, 2016). The White House oversees these efforts through the Office of the U.S. Intellectual Property Enforcement Coordinator, U.S. OFF. OF MGMT. & BUDGET, <https://www.whitehouse.gov/omb/intellectualproperty> [<https://perma.cc/88LL-ZGSM>] (last visited Dec. 1, 2016).

274. See, e.g., Harbi et al., *supra* note 175, at 451 (suggesting that developing country governments may develop a “Robin Hood” mentality whereby they steal from foreign IP rightholders in order to help their own citizens).

B. *Strategic Underenforcement?*

Advocates from developed countries have frequently pushed for increased protection for their own rightholders abroad as a way to promote economic growth in those developing countries.²⁷⁵ The logic of their argument is that by enforcing foreign rightholders' interests, these countries will simultaneously protect the interests of their own rightholders and will thus encourage more domestic innovation.²⁷⁶ Additionally, their enforcement efforts will encourage more technology transfers from developed to developing countries, making previously unavailable imports widely accessible.²⁷⁷

Empirical evidence to support the claim that all developing countries should enhance their enforcement of foreign IPRs in order to boost their own innovation is weak. One study concluded that the level of economic development is positively correlated with the level of IP protection.²⁷⁸ However, this analysis only examines the end state of a developed country without considering the transition from a weak to a strong enforcement regime and the factors that encourage enhanced enforcement. A more recent study suggests that a regime protective of rights only emerges after a country has reached a certain level of GDP per capita, at which point their citizens have the means to invest in legitimate intangible goods.²⁷⁹ To date,²⁸⁰ no study has conclusively shown that immediate enhancement of IP protections, as the enforcement measures discussed above encourage, will economically benefit the target developing country.

Contrary to the assertions above, enforcement of IPRs in low-income countries where domestic innovation is minimal may in fact be counterproductive economically.²⁸¹ A study published in the *Review of Law and Economics* suggests that piracy will increase as a country moves beyond the lowest economic development stages and when demand by at least a portion of the population is suffi-

275. See, e.g., International Bureau of the WIPO, *The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, WIPO, http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf [<https://perma.cc/W9QF-BZUT>] (last visited Dec. 1, 2016) (arguing that compliance with such treaties will foster domestic innovation, among other benefits).

276. *Id.*

277. *Id.*

278. Rapp & Rozek, *supra* note 43, at 77.

279. See Harbi et al., *supra* note 175, at 451.

280. Current as of December 21, 2016.

281. See Harbi et al., *supra* note 175, at 434 (“[W]e suspect that when income increases, piracy increases too, reaches a maximum, then decreases.”).

cient to justify a limited supply of IP imports.²⁸² Pirates will quickly capitalize on this lucrative and growing marketplace by turning to counterfeiting and reverse engineering for profit.²⁸³

However, the study goes on to say that while piracy will increase in these initial economic development stages, it will turn a corner somewhere around US\$2,000 GDP per capita, at which point the population will have earned sufficient income to demand legitimate forms of the previously counterfeit products.²⁸⁴ In effect, the previous demand for unlawful versions of IP goods served to generate demand for the legitimate versions that will ultimately earn profits for the rightholders.

Just as a firm may selectively comply with legal rules affecting its profitability, a country may feel justified in selectively complying with its own international legal obligations.²⁸⁵ By failing to implement an effective IPR enforcement regime, developing countries may be in violation of the Berne Convention as well as the WIPO treaties, if they have subscribed to them.²⁸⁶ However, it is domestic law that establishes how these provisions will be implemented and enforced, and how violations will be prosecuted.²⁸⁷

VII. DISMANTLING THE ECONOMIC INCENTIVE

To make a reasonable claim that it can violate a law without running afoul of ethical obligations, a business must have an economic incentive for doing so, as well as the other factors discussed above. To injure another party for the sake of injuring them is clearly unethical and likely malicious behavior. If society determines that violation of a given law (such as building codes) is no longer acceptable, resources will be devoted to enforcement of that law and making violation unprofitable.

This happened across many firms found to have subcontracted to companies that utilized child labor in the 1990s and 2000s. Major exposés on companies such as Gap, Nike, and Apple led

282. *See id.* at 433.

283. *Id.* at 436.

284. *See id.* at 449.

285. *See id.* at 451 (arguing that developing countries are reluctant to take enforcement actions that would harm their citizens); *see also* Donald Marron & David Steel, *Which Countries Protect Intellectual Property? The Case of Software Piracy*, 38 *ECON. INQUIRY* 159, 159 (2000) (finding that countries with strong contract and property enforcement tend to protect IP more readily than others).

286. *See* Berne Convention art. 15; WIPO Copyright Treaty art. 11; WPPT art. 23.

287. *See, e.g., Colombia*, WIPO, <http://www.wipo.int/wipolex/en/profile.jsp?code=CO> [<https://perma.cc/A7M6-5Z8W>] (last visited Dec. 1, 2016) (describing the domestic legislation in Colombia implementing international treaty obligations related to IP).

them to modify their practices of circumventing international labor regulations, because it had become less profitable to do so.²⁸⁸ “Corporate social responsibility” became the catch phrase of this trend of moving away from bad practices that had turned unprofitable.²⁸⁹

Piracy is an economic crime and rarely, if ever, leads to physical injury.²⁹⁰ Informal firms in developing countries justify the practice of selling pirated goods as part of their right to earn a living; consumers benefit from the ease of access to goods they demand; and law enforcement and the judiciary see little reason to prioritize enforcement of laws that do little to improve their society. This trifecta perpetuates the culture of disrespect for IPRs.

In the author’s meetings with government officials, lawyers, and consumers in Colombia, they repeatedly reported that the law is not the problem—the problem is the culture in Latin America.²⁹¹ In Colombia, the Attorney General’s office does not treat sales of infringing goods, usually by informal vendors, as criminal (even though they are).²⁹² Enforcement actions against infringers are expensive, cases last three to four years, and damages, if awarded, are minimal.²⁹³ The culture of acceptance has filtered into the judicial process and makes protection of foreign IPRs exceedingly difficult.

288. See, e.g., *Gap Moves to Recover from Child Labor Scandal*, N.Y. TIMES (Nov. 15, 2007), <http://www.nytimes.com/2007/11/15/business/worldbusiness/15iht-gap.1.8349422.html> [<https://perma.cc/BU7Z-VLRG>] (explaining that Gap is rebuilding its reputation after allegations that it utilized child labor in Delhi). But see Institute for Global Labor and Human Rights, *Children Found Sewing Clothing For Wal-Mart, Hanes & Other U.S. & European Companies*, LABOR & WORKLIFE PROGRAM AT HARV. L. SCH., http://www.law.harvard.edu/programs/lwp/NLC_childlabor.html [<https://perma.cc/CQ4N-VSKW>] (last visited Nov. 11, 2016) (finding the Harvest Rich factory in Bangladesh, which was at the heart of the Walmart scandal in 1996, was again violating international labor standards while still producing goods for Walmart).

289. Note that corporate social responsibility as a concept has been recognized since Howard Bowen’s famous text, *Social Responsibilities of the Businessman*. HOWARD ROTHMANN BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* (Univ. of Iowa Press 2013) (1953).

290. But see *Intellectual Property Theft: Get Real – Facts and Figures*, NAT’L CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/intellectual-property-theft/facts-and-figures-1> [<https://perma.cc/LHE7-653W>] (last visited Dec. 1, 2016) (explaining that counterfeiting may lead to injury where faulty products are sold or produced).

291. Based upon author’s informal discussions with officials in Colombia while conducting research with the support of the Center for International Business Education Research.

292. *Id.*

293. *Id.*

This cultural acceptance, however, has not deterred companies like Microsoft from making efforts to protect their property.²⁹⁴ Their focus remains on larger violators, such as universities or corporations, where legal action may be more economically feasible.²⁹⁵ Microsoft's legal department in Bogotá noted that once it commences legal action, most of these larger entities prefer to settle to avoid drawn-out litigation.²⁹⁶

In order for effective protection of foreign rightholders' property to exist in Latin America, the cultural acceptance of piracy must evolve.²⁹⁷ But as with any cultural shift, this takes time and the right incentives.²⁹⁸ The key to successful enforcement may be dismantling the economic incentive for informal firms to violate IPRs. In the case of sales of IP infringing goods in developing countries, this Article observes three potential strategies for reducing the number of infringing products sold in a developing market such as Colombia: reprioritization of enforcement resources toward informal IP firms, reduction of consumer demand for the goods sold by those firms, or incentivization of a transition to legitimate goods. Each of these can work independently or in unison with the others. However, only the latter two approaches are viable in an emerging market, as the following Sections explain.

A. *Reprioritizing Enforcement Resources*

The enforcement approach, preferred by industries in the United States which export a great deal of the intellectual property to developing countries, involves an increase in local law enforcement actions against infringers.²⁹⁹ In a developed country such as the United States, a strong law enforcement approach, utilizing police raids, financial sanctions, and judicial action, can be highly

294. See, e.g., MICROSOFT, *supra* note 70 and accompanying text (explaining the anti-piracy campaigns structured by Microsoft in Colombia and throughout the region).

295. Based upon author's informal discussions with officials in Colombia while conducting research with the support of the Center for International Business Education Research.

296. *Id.*

297. See, e.g., Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 *AZ. L. REV.* 1082, 1107–08 (discussing distinctions between U.S. and Chinese systems of property as the reason why enforcement of IPRs in China has historically been challenging).

298. See, e.g., Bustamante & Fandl, *supra* note 214 (discussing the governmental approach to incentivizing compliance with business regulations in Colombia).

299. See, e.g., C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 *VAND. J. TRANSNAT'L L.* 209, 235 (1997) (discussing enforcement obligations imposed by the TRIPS agreement).

effective in deterring violations of intellectual property rights.³⁰⁰ But in a developing country, limited resources to devote to enforcement, collect sanctions, or pursue cases that might be considered low priority, combined with an informal economy that depends greatly on the sale of these infringing goods for survival, points to unlikely long-term success utilizing an enforcement strategy alone. However, maintaining the threat of sanctions alongside the approaches below may prove more effective in the end.

B. *Reducing Consumer Demand Through Disincentives*

Reducing consumer demand for unlawful goods does not mean reducing the demand for the underlying product—only the unlawful sales of the product. Thus, removing such goods from the marketplace entirely not only ceases sales of the unlawful good, it eliminates potential profits from lawful sales as well. One approach to reducing unlawful sales without cutting into consumer demand for the underlying product would be to develop demand-side approaches that disincentivize the purchase of unlawful goods, while maintaining wide availability (supply-side) of the goods.

Consumers who have enjoyed the benefits of infringing goods have the potential to become the most loyal consumers of lawful goods in the future and should not be discouraged from demanding the lawful version of such products. It follows that they should be disincentivized to purchase pirated products. To appreciate this supposition, one must presume that consumers, like vendors, pass through the informal economy early in their lives when they lack the economic means to participate fully in the regulated economy. Much as the informal economy in general can serve as a transitional mechanism to allow new businesses to ‘test the waters’ before launching legitimate, regulated enterprises,³⁰¹ the informal economy serves as a marketplace to expand access for primarily low-income consumers who would not have otherwise sought out such goods. As the incomes of these consumers rise, their demand for legitimate versions may rise as well. With time and economic growth, these consumers will likely transition into the fully regu-

300. See, e.g., David Swerdloff & Benjamin Wiles, *Doing Business in CT: Failure to Register Proves Costly*, MONDAQ (July 25, 2013), <http://www.mondaq.com/unitedstates/x/254074/tax+authorities/Doing+Business+CT+Failure+Register+Proves+Costly> [https://perma.cc/HJF8-ZANB] (citing fines of up to US\$54,000 for businesses that operate informally in Connecticut).

301. *Beyond The Invisible*, *supra* note 212 at 29–30.

lated economy and continue to expect the same goods, including brand name, IP-intensive products.

As a recent example of the disincentive approach, one can look to efforts in the software industry. The Business Software Alliance (BSA) found that forty-three percent of software installed worldwide is unlicensed, costing the industry US\$62.7 billion in revenue losses.³⁰² To combat this, the BSA advertised widely that unlicensed software is highly subject to malware and other security threats that could affect users.³⁰³ The same approach was carried out by Microsoft in 2013 in an effort to combat growing piracy rates,³⁰⁴ and was furthered by news sources³⁰⁵ and government agencies.³⁰⁶ Though no data yet exists on the success of this approach, it is becoming increasingly clear that a shift in culture, even if artificially created, holds more potential for reducing piracy than a purely legalistic approach.

C. *Incentivizing the Transition to Legitimacy*

Economic development brings macroeconomic gains to the overall economy as well as individual gains for citizens. As the economic well-being of citizens improves, the opportunity for creating consumer demand for legitimate goods increases. But while the cost barrier to purchasing legitimate goods may be reduced as incomes rise, many consumers may have become accustomed to the use and price of illegitimate goods and will need further incentives to move into the formal IP economy.

Foreign rightholders benefit from the increased access to their goods, even if they are distributed through illegitimate channels. Particularly, young people and those with limited economic resources may choose to access intellectual property initially in an

302. *The Compliance Gap: BSA Global Software Survey*, BSA 2 (June 2014), http://globalstudy.bsa.org/2013/downloads/studies/2013GlobalSurvey_Study_en.pdf [<https://perma.cc/8LTL-4XYB>].

303. See John F. Gantz et al., *White Paper: Unlicensed Software and Cybersecurity Threats*, BSA (Jan. 2015), http://globalstudy.bsa.org/2013/malware/study_malware_en.pdf [<https://perma.cc/8Z7H-TFVC>].

304. See John F. Gantz et al., *White Paper: The Dangerous World of Counterfeit and Pirated Software*, MICROSOFT (Mar. 2013), <https://news.microsoft.com/download/presskits/antipiracy/docs/IDC030513.pdf> [<https://perma.cc/NT39-6UGT>].

305. See, e.g., Amy Kraft, *A Third of Pirated Movie Sites Spread Malicious Software*, Report Says, CBS NEWS (Dec. 14, 2015), <http://www.cbsnews.com/news/pirated-movie-video-download-sites-spread-malicious-malware/> [<https://perma.cc/CR2Y-T8AP>].

306. See, e.g., *Consumer Alert: Pirated Software may Contain Malware*, FBI (Aug. 1, 2013), <https://www.fbi.gov/news/stories/pirated-software-may-contain-malware1> [<https://perma.cc/YHU6-AE59>].

illegitimate manner. Consider a university student, for instance, with limited resources, who desires access to Microsoft Office products. That student may initially purchase an unlicensed copy in order to complete his assignments, making him a Microsoft user but not yet a Microsoft customer. When that student graduates from the university, he is likely to continue using the products he is accustomed to and, despite improvements in income, he may continue to purchase unlicensed versions of those products.

Rather than penalize consumers for the use of illegitimate or unlicensed products, a firm may instead implement an amnesty and transition policy by which the consumer can trade in their illegitimate product for temporary access to a legitimate version. A firm needs to provide incentives that would entice a consumer who has the financial means to transition from the informal to the formal IP economy. In the case of a good, such as software, these incentives might include new features, upgrades, technical support, and other benefits that an illegitimate copy would not have. The consumer would be given an opportunity to use the legitimate version for a trial period and then offered permanent access for a discounted price. This approach takes one illegitimate good off the market and turns one former user into a customer. Firms in the software industry have begun implementing this method,³⁰⁷ but it might also be applied in other IP-intensive industries, such as those that produce sporting goods, music, books, and movies.

Developing governments benefit by having the freedom to devote their resources to effective reform, rather than targeted enforcement activities that benefit foreigners almost exclusively. As former pirates lose market share to legitimate goods, and their pirated goods become less valuable, they will be forced to either shift into another market or innovate to create affordable, alternative solutions of their own. This process, ideally, may lead some pirates to become entrepreneurs, investing in innovations that create jobs and generate economic growth.³⁰⁸ And while this transi-

307. See, e.g., Harish Jonnalagadda, *Microsoft Will Let You Upgrade to Windows 10 for Free, Even if You're Running a Pirated Version*, *Windows Central*, WINDOWS CENTRAL (Mar. 19, 2015), <http://www.windowscentral.com/you-can-upgrade-windows-10-free-even-if-youre-using-pirated-version-windows> [<https://perma.cc/5VLC-EPBJ>] (reporting that Microsoft was allowing a free software upgrade, even for users of pirated software).

308. See Daniel Lederman, et al., *Latin American Entrepreneurs: Many Firms but Little Innovation*, WORLD BANK LATIN AM. & CARIBBEAN STUD. 2 (2014), <http://www.worldbank.org/content/dam/Worldbank/document/LAC/LatinAmericanEntrepreneurs.pdf> [<https://perma.cc/T7PW-VJ96>] (“Creative entrepreneurs are typically behind the most dynamic and productive firms—the ones that innovate, expand production, and generate jobs at a

tion takes place, innovative investors both domestic and foreign may begin to see the entrepreneurial environment in Latin America as more hospitable and introduce innovative ideas with the support of the government.³⁰⁹

CONCLUSION

Rightholders in developed countries have a legitimate interest in both marketing their goods globally and protecting their rights when they do. However, the legalistic strategy employed by IP host countries to enforce these rights may be misdirected and counterproductive. Political incentives to encourage changes in the law through, for example, the Special 301 process, have reached a saturation point. Appropriate protective laws already exist in much of Latin America. Joint operations or increased law enforcement targeting pirate operations do more to disrupt informal economic activity than to dismantle the incentive for selling pirated goods.

The cultural acceptance of violating IPRs in much of Latin America remains a significant impediment to the realization of both a broad formal IP marketplace and an environment receptive to the development of new innovations. However, one must recognize that a country that innovates and enjoys the benefits that protection of that innovation brings may have a different perspective on IPR enforcement than a developing country reaping minimal rewards for investment in innovation. A cultural shift depends not only on explaining the benefits of having legitimate products, but also on the recognition of the value of intangible property rights. A country that benefits little from such rights will have a hard time convincing its citizens to respect those rights, especially when they are largely owned by foreigners.

True cultural change will only be possible when countries like Colombia develop sufficient intellectual property markets domestically to justify broader enforcement mechanisms. Latin American countries have a long history of national pride.³¹⁰ Protecting

comparatively rapid pace. These firms not only create employment opportunities, they also create better employment.”).

309. See, e.g., OECD, *Startup Latin America Progress Report 7*, 10 (2015), <http://www.oecd.org/dev/americas/ProgressReport.pdf> [<https://perma.cc/S2PQ-Z37G>] (discussing the success of start-up programs in Chile, Colombia, and Peru in fostering an environment of innovation and entrepreneurship).

310. See, e.g., *World's Most Patriotic Countries*, FORBES (July 2, 2008), http://www.forbes.com/2008/07/02/world-national-pride-oped-cx_sp_0701patriot_slide_10.html [<https://perma.cc/QH3W-9ADV>] (showing Venezuela tied at for first place in a list of the most patriotic countries).

domestic innovation will undoubtedly be a national priority if it means protection of its countrymen. Judicial recognition, enforcement prioritization, and strategic investment in research and development will follow. But to get there, governmental investments in science, engineering, and technology will boost the potential for the next major innovator to emerge from Latin America.

The incentive to protect innovation in Latin America will grow as domestic innovation expands in the region and innovators demand more protection. At present, there appears to be insufficient demand for IP protection to warrant a shift in law enforcement resources away from more heinous criminal activity. At lower levels of economic activity, sales of pirated and counterfeit goods will continue, potentially expanding the awareness of the existence of IP-protected goods. As incomes improve, the risks of owning pirated or counterfeited goods begin to exceed the benefits of low cost. Familiarity and loyalty to brands or products may engender a seamless transition from unlawful to lawful goods, thereby expanding both demand and supply of the legitimate products.

Thus, the informal IP economy serves a necessary role in the economic development process. While the sale of pirated and counterfeit goods is unlawful, blocking those sales may have negative effects on buyers and sellers. Increased enforcement would limit the economic opportunity for the vendors selling the goods, reduce access to affordable goods for many consumers, and cut off a viable, albeit unlawful, means of marketing for the rightholder, whose goods gain exposure to a wider audience of consumers via these informal sales. In addition, as with any in demand product, shutting down one group of sellers will merely give rise to another to satisfy existing demand. A better approach would be for U.S. firms to work to develop innovation sectors in Latin America and to provide information about their products, including the benefits of owning legitimate versions. And Latin American governments must prioritize investments in education to encourage domestic innovation.