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INTELLECTUAL PROPERTY ENFORCEMENT: A REALITY GAP (INSUFFICIENT ASSISTANCE, INEFFECTIVE IMPLEMENTATION)?

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ABSTRACT

The World Trade Organization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") promised to standardize world-wide intellectual property rights ("IPR") enforcement procedures, and thus, facilitate trade and commerce between member nations. However, the TRIPS implementation transition of many less developed and developing nations has resulted in a much lower IPR enforcement standard than the drafters of TRIPS envisioned. This, coupled with increased world-wide trade in counterfeit goods, has created friction between the developing nations with lower IPR enforcement and the developed nations with higher IPR enforcement. Consequently, many nations, including the United States, have entered into Free Trade Agreements ("FTA") to further raise the IPR enforcement standards that TRIPS laid out. Nonetheless, there are still concerns with the new FTAs, most importantly, with training the many different customs officials to recognize the multitude of IPR violations. Not until customs and other enforcement officials realize that the protection of IPR brings value and stability to their economies, will there be an adequate standardized system of IPR enforcement.

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INTELLECTUAL PROPERTY ENFORCEMENT: A REALITY GAP (INSUFFICIENT ASSISTANCE, INEFFECTIVE IMPLEMENTATION)?

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INTRODUCTION

The World Trade Organization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")¹ held the promise of great strides in the ability to protect and enforce intellectual property.² From a strict enforcement perspective, the TRIPS provisions addressing requirements for civil, criminal, and border enforcement³ procedures were major strides forward because they required national laws to include some basic provisions regarding civil enforcement of intellectual property, actions to stop the importation of certain infringing goods, and imposition of criminal penalties for certain violations of intellectual property rights ("IPR").⁴

The combination of evolving and increased trade in counterfeit and pirate goods and experience with the implementation of the TRIPS requirements have exposed the fact that the manufacturers and distributors of infringing goods are creative and that TRIPS may suffer from vagueness and ambiguity resulting in less than effective IPR enforcement.⁵ The experience of companies and governments in addressing IPR violations has resulted in a trend among some members of the WTO to raise the

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement], *available at* http://www.wto.int/english/docs_e/legal_e/27-TRIPS.pdf.

² *See generally id.* (attempting to reduce distortions in international trade by promoting the protection and enforcement of intellectual property rights).

³ *Id.* arts. 41–61.

⁴ *Id.* art. 1.1; *see, e.g., id.* arts. 41.1 (civil enforcement), 44.1 (injunction to prevent imports), 61 (criminal penalties).

⁵ Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 386–87 (1998) (describing that opposing countries may each interpret vague terms in the TRIPS Agreement in their own favor); Doris Estelle Long, "Democratizing" Globalization: *Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT'L & COMP. L. 217, 264 (2002) (suggesting that the "ambiguity in TRIPS may be the result of a desire to 'patch over' differences in an effort to achieve the appearance of agreement"); Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 438 (2000) (listing a number of problems resulting from the vague and ambiguous terms of TRIPS); Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS, and Post-TRIPS Strategies*, 10 CARDOZO J. INT'L & COMP. L. 79, 104 (2002) (noting that a number of scholars have pointed out that vagueness, ambiguities, and loopholes are commonplace in the TRIPS Agreement).

standards of enforcement beyond the internationally recognized minimum standards established by TRIPS.⁶

Thus, as some WTO members seek aggressive enforcement and negotiate higher standards of IPR enforcement, “TRIPS-plus” (“TRIPS+”), there are other WTO members that lag behind in effective implementation of TRIPS requirements, leading to ineffective IPR enforcement as perceived by some IPR owners and governments.⁷ As a result, friction has been created between governments seeking the so-called TRIPS+ enforcement standards and other governments that are willing to implement TRIPS level enforcement, but resist enforcement standards above the TRIPS minimum standards.⁸

In the following pages, this article will identify some select provisions of TRIPS and how TRIPS provisions can contribute to confusion concerning implementation of these minimum standards and why there is a trend among some WTO members to heighten enforcement standards. In addition, an attempt will be made to explain why there may be resistance to heightened standards. In an effort to highlight some of these problems, the article will rely on the TRIPS border measures provisions, but not exclusively, as the bases for discussion. Finally, the article will address briefly some IPR-related training and education issues that arise from the enforcement focus.

I. TRIPS: PROMISE V. PRACTICE

At the outset, it is necessary to understand that not all WTO members were required to bring the enforcement provisions to life at the same time.⁹ TRIPS, Part VI, contained transition periods for developed, developing, and least developed countries so that governments would have time to amend national laws and implement the new requirements.¹⁰ Moreover, governments could self-designate the

⁶ Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 867–68 (2007) (describing TRIPS-plus and TRIPS-extra agreements).

⁷ Brook K. Baker, *Arthritic Flexibility for Accessing Medicines: Analysis of WTO Action Regarding Paragraph 6 of the DOHA Declaration on the TRIPS Agreement and Public Health*, 14 IND. INT'L & COMP. L. REV. 613, 622–23 (2004) (noting how the United States has threatened some developing countries for failing to grant TRIPS-plus rights to patent holders).

⁸ *Id.*

⁹ TRIPS Agreement arts. 65–66.

¹⁰ *Id.*

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.
2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.
3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.
4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its

group into which they belonged: developed, developing, or least developed.¹¹ Based on the language of Article 65.1, developed countries such as the United States, Japan, the United Kingdom, France, and others were expected to apply the provisions as of January 1996, which was a year after entry into force of the WTO agreement.¹² Accordingly, developing countries, having an additional four years, had a total of five years for their transition period.¹³

In part, the transition periods were meant to provide governments with time to amend and incorporate necessary provisions into national law, but also to train and educate relevant government officials about new tasks, missions, and obligations.¹⁴ WTO members anticipated the need for training and education as evidenced by the TRIPS provision regarding technical cooperation.¹⁵ It is important to note that Article 67 states:

territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Id. art. 65.

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Id. art. 66.

¹¹ *Id.*; see also Michael S. Mireles, *The Bayh-Dole Act and Incentives for the Commercialization of Government-Funded Invention in Developing Countries*, 76 UMKC L. REV. 525, 525 n.3 (2007) (stating that “there is no universal definition of what constitutes ‘developed’ or ‘developing’ country”).

¹² Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations ¶ 3, Apr. 15 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act], available at http://www.wto.int/english/docs_e/legal_e/03-fa.pdf.

3. The representatives agree on the desirability of acceptance of the WTO Agreement by all participants in the Uruguay Round of Multilateral Trade Negotiations (hereinafter referred to as “participants”) with a view to its entry into force by 1 January 1995, or as early as possible thereafter. Not later than late 1994, Ministers will meet, in accordance with the final paragraph of the Punta del Este Ministerial Declaration, to decide on the international implementation of the results, including the timing of their entry into force.

Id.

¹³ TRIPS Agreement art. 65.2.

¹⁴ *Id.* art. 67.

¹⁵ *Id.*

In order to facilitate the implementation of this Agreement, *developed country Members shall provide*, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.¹⁶

In simple terms, the promise of the TRIPS enforcement provisions in Articles 41 through 61 is that WTO members would have established effective IPR enforcement systems so that owners of the various forms of IPR covered by TRIPS would, at the very least, have more effective procedures in place for civil enforcement of IPR. Additionally, copyright and trademark owners would be able to rely on new and improved measures to stop importation of infringing goods and have criminal remedies available to punish counterfeiters and pirates.

By 2008, the transition periods with regard to the enforcement provisions have expired¹⁷ and WTO members should be providing the level of protection and enforcement that TRIPS outlines in Articles 41–61. Generally, national laws have been amended to incorporate the changes necessary.¹⁸ Regarding actual implementation and how governments are affording IPR owners with protection and enforcement, there are no WTO panel decisions at the time of this writing to provide insight into how TRIPS enforcement provisions are interpreted.¹⁹ Countries have

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* art. 66.1.

¹⁸ Notification of Mutually Agreed Solution, *Sweden—Measures Affecting Enforcement of Intellectual Property Rights*, WT/DS86/2 (Dec. 11, 1998) [hereinafter Sweden-Solution]. In 1997, the United States initiated consultations with Denmark and Sweden because their national laws failed to provide IPR owners with the possibility of obtaining provisional measures for the protection of IPR in accordance with TRIPS, Article 59. *Id.*; Notification of Mutually Agreed Solution, *Denmark—Measures Affecting Enforcement of Intellectual Property Rights*, WT/DS83/2 (June 13, 2001) [hereinafter Denmark-Solution]. Both cases were resolved without the need for full proceedings under the WTO's Dispute Settlement Understanding. Sweden-Solution, *supra*; Denmark-Solution, *supra*.

¹⁹ Notification of Mutually Agreed Solution, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/2 (Mar. 26, 2001) [hereinafter Eur. Cmtys.-Solution]; Notification of Mutually Agreed Solution, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/2 (Mar. 26, 2001) [hereinafter Greece-Solution]. U.S. v. European Union and U.S. v. Greece, respectively, dealt with Greece's failure to provide enforcement as required under Articles 41 and 61. Eur. Cmtys.-Solution, *supra*; Greece-Solution, *supra*. The parties reached agreement in March 2001. Eur. Cmtys.-Solution, *supra*; Greece-Solution, *supra*. The U.S. case against China raises several enforcement issues, including the U.S. challenge to China's thresholds to trigger criminal cases of counterfeiting and piracy and the manner of disposition of infringing goods that China customs seizes for infringement. Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, pt. II, WT/DS362/1 (Apr. 16, 2001) [hereinafter China-Solution]. Thus, the U.S. v. China case has the potential of significant enforcement implications in practice in many countries. *See id.*

attempted to do the best they can to come into compliance based on their understanding of the TRIPS text.²⁰

Without looking at every Article of TRIPS Part III,²¹ it is worth examining a sampling of Part III, because of the challenges raised by the text and why some WTO Member States have problems in effective implementation.²² Article 41.1 sets forth ambitious goals for IPR enforcement. It states that

Members *shall ensure that enforcement procedures* as specified in this Part are available under their law so as to permit *effective action* against any act of infringement of intellectual property rights covered by this Agreement, including *expeditious remedies* to prevent infringements and *remedies which constitute a deterrent* to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.²³

An examination of the TRIPS text must be read with many interests in mind. First, how do the various Member States interpret these words? For Member States that have little or no IPR enforcement experience, what do some of these phrases mean and how will they be implemented? From the perspective of IPR owners, specifically, multinational companies, this provision and its lofty goals, albeit general in nature, gives corporate IPR owners expectations as to what they will receive in markets around the world.²⁴ Thus, for the IPR owner, there appears to be the promise of an improved IPR environment.²⁵

But, Article 41 contains a provision that should temper IPR owners' expectations. Article 41.5 reflects the difficulty of negotiating aggressive enforcement provisions without compromise. The negotiators seeking aggressive IPR enforcement provisions must also acknowledge that the TRIPS enforcement provisions are new for many countries and may be beyond the capabilities of many

²⁰ See, e.g., China-Solution, *supra* note 19, pt. III (discussing the attempts of China to come into compliance with certain TRIPS articles).

²¹ TRIPS Agreement arts. 51–60; see generally TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS (Thomson-West 2008) (providing an in depth article-by-article discussion about TRIPS, Part III, Section 4 regarding border measures).

²² While much can be said and debated about the motives of some governments, this discussion will focus strictly on the text and the issues raised by the text itself.

²³ TRIPS Agreement art 41.1 (emphasis added).

²⁴ See Timothy P. Trainer, *IP Enforcement: Agreements, Expectations, and Frustrations?*, 19 WORLD INTELL. PROP. REPORT 12 (2005), <http://pubs.bna.com/NWSSTND/IP/BNA/wipr.nsf/SearchAllView/FC17D3DC43A484FC852570C70060170E?Open&highlight=IP,ENFORCEMENT,AGREEMENTS> (raising issues with TRIPS, while addressing the possibly unrealistic expectations as more free trade agreements are negotiated and concluded).

²⁵ See TRIPS Agreement (“Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade . . .”).

Member States in the short or medium term.²⁶ Thus, the question should be asked as to whether Article 41.5 undermines the very things Part III is supposed to provide. Article 41.5 states that

It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.²⁷

One can understand that no government is required to establish a separate judicial system for IPR, but the last sentence raises an interesting question: If a Member State has no resources dedicated to IPR enforcement, does this mean that once its TRIPS obligations are triggered the Member State is complying with its enforcement obligations by having no resources for IPR enforcement? This issue has not been the subject of any WTO Dispute Settlement case. Thus, until there is a need to obtain an official interpretation, it remains to be seen what Article 41.5 means in practice. Nevertheless, IPR owners are left to wonder what the last sentence means with regard to enforcement, in general, under any national IPR enforcement system if laws are changed to provide for enforcement, but no human resources are provided to take the actions necessary for enforcement at the border or for IPR crimes that require the involvement of law enforcement, prosecutors, and judges.

In the area of border measures, Article 51 creates numerous challenges for Member States that have no pre-TRIPS border enforcement experience.²⁸ The Article states that

Members *shall*, in conformity with the provisions set out below, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members *may* enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members *may* also provide for corresponding procedures concerning the suspension by the customs

²⁶ Roberto Garza Barbosa, *Revisiting International Copyright Law*, 8 BARRY L. REV. 43, 73 (2007) (noting that developing countries cannot be expected to change their entire legal systems simply to bring themselves into compliance with TRIPS).

²⁷ TRIPS Agreement art. 41.5.

²⁸ *Id.* art. 51.

authorities of the release of infringing goods destined for exportation from their territories.²⁹

This provision promises IPR owners that all WTO Member States must have a system that will permit copyright and trademark owners to apply for protection against pirate and counterfeit products that are being imported.³⁰ At first glance, a WTO Member State is confronted by a number of unanswered questions such as:

1. What authorities within the government could be the competent authority for purposes of Article 51?
 - a. Customs?
 - b. Ministry of Trade and Industry (a parent ministry for the government's trademark office)?³¹
 - c. Trademark Office?
 - d. Copyright Office?
 - e. Ministry of Culture (in some governments, the Ministry of Culture is the parent Ministry for copyrights)?³²
 - f. Any other government agency that is selected?
2. Should the application that is lodged for border measures have national effect or will the copyright or trademark owner have to apply for protection at each port of entry in the country?
3. What constitutes valid grounds for suspecting that an importation of infringing goods may take place?

The answers are enough to cause much confusion for a government not experienced in IPR enforcement. Basically, a Member State could designate any court or government agency as the competent authority to receive an application for border enforcement.³³ This may, in fact, be too much flexibility. An IPR owner that

²⁹ *Id.* (emphasis added).

³⁰ *Id.* In addition to copyrights and trademarks, TRIPS covers geographical indications, industrial designs, patents, lay-out designs of integrated circuits, undisclosed information and anti-competitive practices in licensing. *See* TRIPS Agreement arts. 9–40.

³¹ *See, e.g.,* Japan Ministry of Economy, Trade, and Industry, <http://www.meti.go.jp/english/index.html> (last visited Oct. 26, 2008). Japan's Ministry of Economy, Trade, and Industry, is the parent ministry for the Japan Patent Office that also includes the administration of trademark functions. *See* Organization Chart of the Ministry of Economy, Trade, and Industry, http://www.meti.go.jp/english/aboutmeti/data/aOrganizatione/2007/organization_chart.html (last visited Oct. 26, 2008).

³² *See, e.g.,* Copyright and Rights Related to Copyright, No. 83(1) (2003) (Slovk.); Ministry of Culture of the Slovak Republic, <http://www.culture.gov.sk/en/ministry> (last visited Oct. 26, 2008) (explaining that the Slovak Republic's Ministry of Culture's mission includes the administration of copyright law); Ministry of Culture of Lithuania, <http://www.muza.lt/go.php/lit/English> (last visited Oct. 13, 2008) (explaining that Lithuania's Ministry of Culture is also responsible for copyright protection).

³³ TRIPS Agreement art. 51.

operates commercially in many countries is faced with the challenge of determining who the competent authorities are in every country where it operates.³⁴

Here are a few examples of the challenges for IPR owners. A company that wants to file an application for border measures in the United States would file with U.S. Customs and Border Protection.³⁵ In Canada, the IPR owner must apply to a court for border measures and must also notify the Minister of Public Safety.³⁶ In Egypt, it appears that the IPR owner must file with Egyptian Customs,³⁷ but these regulations appear to require that the IPR owner also file the complaint with the Trade Agreements Sector of the Ministry of Foreign Trade and Industry,³⁸ thus raising the question which agency is the “real” competent authority.

In addition, nothing in TRIPS, Article 51, prohibits a Member State from imposing on IPR owners the requirement to file multiple applications at multiple Customs ports of entry within the country.³⁹ In 2002, one U.S.-based trade association, representing dozens of multinational companies, filed comments to the Office of the United States Trade Representative complaining of onerous application filing requirements in order to obtain nationwide border enforcement in Japan.⁴⁰ The possible “prohibition” against onerous application requirements may be to argue that TRIPS’ General Obligations regarding enforcement states that procedures concerning enforcement shall be “fair” and “shall not be unnecessarily complicated or costly.”⁴¹ While this argument may be a good argument, there has not been a WTO dispute settlement case involving the issue of application procedures related to having nationwide effect.

The third point raised above with regard to having valid grounds for suspecting an importation of infringing goods is also an issue that has not been the subject of a WTO dispute settlement case. Thus, a WTO Member State could deny an application for border measures because of an IPR owner’s lack of any grounds to suspect that infringing goods will be imported.⁴² In order to have any understanding of what “valid grounds” might mean, it is helpful to look at TRIPS Article 52 for additional information regarding the application for border measures. Article 52 states that the IPR owner initiating the application procedures for border measures “shall be required to provide adequate evidence to satisfy the competent authorities that . . . there is *prima facie* an infringement of the right holder’s intellectual

³⁴ Cf. Jeffery Latik & Hans Henrik Lidgard, *Embracing Price Discrimination: TRIPS and the Suppression of Parallel Trade in Pharmaceuticals*, 27 U. PA. J. INT’L ECON. L. 1043, 1073–74 (2006) (discussing international trade in pharmaceutical products in comparison to IP rights enforcement).

³⁵ 19 C.F.R. § 133.0 (2007).

³⁶ Memorandum D 19-4-3 from the Can. Border Servs. Agency on Copyrights and Trademarks 2 (June 17, 2008), available at <http://cbsa-asfc.gc.ca/publications/dm-md/d19/d19-4-3-eng.pdf>.

³⁷ Executive Regulation to Implement Import and Export Law, No. 118/1975 (2005) (Egypt), available at http://www.eu-delegation.org.eg/en/EU-Egypt_Trade_issues/Docs/IIEgypt/Ministerial%20Decree%20No.%20770-2005.pdf.

³⁸ *Id.* art 33.

³⁹ See TRIPS Agreement art. 51.

⁴⁰ Submission of the International AntiCounterfeiting Coalition, Inc., to the United States Trade Representative: Special 301 Recommendations 10 (February 14, 2002), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2002/2002_Special_301_Report/asset_upload_file567_6367.pdf.

⁴¹ TRIPS Agreement art. 41.2.

⁴² *Id.* art 41.1.

property right . . .”⁴³ The interaction between Articles 51 and 52 concerning the “valid grounds” related to “prima facie” raise another set of problems for IPR owners because of Article 52’s additional requirement that the IPR owner provide a “sufficiently detailed description of the goods to make them readily recognizable by the customs authorities.”⁴⁴

The inter-relationship between Articles 51 and 52 regarding required information submitted by an IPR owner raises questions regarding the specificity of information about the infringing goods that is necessary for an application to be accepted. How will the IPR owner know what goods will be imported that infringes its copyright or trademark? If too much specificity is required, it will render the procedures meaningless and, in practice, few, if any, IPR owners would be able to get any protection at the border.

TRIPS’ only criminal IPR enforcement provision is another example of raising expectations among IPR owners that governments would begin to initiate criminal enforcement through police actions and prosecutions of trademark counterfeiters and copyright pirates. From a government perspective, the provision includes a few ambiguous terms and created confusion for Member States that have little or no experience in IPR enforcement, attempting to understand the Agreement’s requirements. Article 61 states

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.⁴⁵

Just a few of the questions raised by Article 61 are:

1. How does the Member State determine “commercial scale” counterfeiting or piracy?
2. What level of fine or term of imprisonment will deter this type of conduct?
3. For purposes of establishing penalties, what other crimes are of a corresponding gravity to counterfeiting and piracy?
4. What is meant by “*In appropriate cases*, remedies available shall include . . .”?

⁴³ *Id.* art. 52 (emphasis added).

⁴⁴ *Id.*

⁴⁵ *Id.* art. 61.

The implementation of the words in Article 61 into law and practice is based on what each Member State deems appropriate in its country.⁴⁶ Thus, Member States that had never before enforced IPR through criminal laws were confronting a wholly new type of crime requiring the government's involvement. Perhaps fortunate for many Member States, no specific manner of implementation is non-compliant until a dispute settlement case arises and a panel rules that a particular practice is non-compliant.⁴⁷ At present, the U.S.-China case has placed some Article 61-related issues before a WTO Dispute Settlement panel, but there is no ruling as of the time of this writing.⁴⁸

Based on this superficial examination of a few TRIPS enforcement provisions, it becomes clearer that the TRIPS enforcement text provided little more than a bullet point list of required elements for an IPR enforcement system. Translating these required elements into practice was and continues to be a major challenge. The implementation challenge was supposedly addressed by Article 67 ("Technical Cooperation") including the previously mentioned provision on technical assistance.⁴⁹

II. TRIPS: TECHNICAL ASSISTANCE—HIGH DEMAND, LIMITED RESOURCES

One early development regarding technical and legal assistance was an agreement between two Geneva-based intergovernmental organizations: the WTO and the World Intellectual Property Organization ("WIPO").⁵⁰ On December 22, 1995, the organizations concluded the agreement for cooperation that would formally provide for WIPO to be involved in providing assistance in IPR.⁵¹ Despite this agreement, however, neither WIPO nor WTO had the staff to deliver enforcement training simply because IPR enforcement was not the mission of the organizations.⁵²

Thus, the technical assistance provision of TRIPS⁵³ is critical to any degree of success in the implementation of the enforcement provisions and delivering the promise of effective enforcement to the IPR owners expecting an improved commercial environment around the world. But, in order to understand the reality of what the developed countries could do in the area of technical assistance, it may be

⁴⁶ *Id.* art. 1.1.

⁴⁷ *Id.* art. 68.

Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures.

Id.

⁴⁸ China-Solution, *supra* note 19.

⁴⁹ TRIPS Agreement art. 67.

⁵⁰ Agreement Between the World Intellectual Property Organization and the World Trade Organization, WIPO-WTO, Dec. 22, 1995, 35 I.L.M. 754.

⁵¹ *Id.* art. 4.

⁵² *See id.* pmbl (stating that the desire of the agreement was to establish a mutually supportive relationship).

⁵³ TRIPS Agreement art. 67.

worth reviewing the resources available to one U.S. Government agency in the early and mid 1990s.⁵⁴

The TRIPS border measures raised a number of issues related to government actions that would be necessary to provide effective enforcement. Given the new and significant development of border enforcement,⁵⁵ this is one area in which many governments would need assistance. Many may view the U.S. IPR border enforcement system as an old fixture of Customs enforcement,⁵⁶ but the heightened focus of a more aggressive and “advanced” system is a relatively recent development.⁵⁷ A Customs IPR Task Force was formed in the 1988–1989 time frame⁵⁸ and included three Customs attorneys when the IPR Task Force became a formal “Branch” within Customs’ Office of Regulations and Rulings in 1991.⁵⁹

⁵⁴ This discussion is based upon actual experience in providing IPR technical assistance while working at two U.S. Government agencies, U.S. Customs Service between 1988–1993 and the U.S. Patent and Trademark Office between 1996–1999.

⁵⁵ TRIPS Agreement arts. 51–60.

⁵⁶ Use of the Term Ping Pong, 13 Cust. B. & Dec. 1015 (Dep’t of Treas. June 15, 1978). The basic laws enforced by Customs against the importation of infringing goods have been in place for many years. *See, e.g., id.* One can find Customs administrative infringement rulings dating back to 1978. *See id.* (ruling that imported products must not bear a mark that copies or simulates a registered trademark already recorded with Customs); *see also* Whether Toy Dog Skins and Stuffed Toy Dogs Are Substantially Similar to Copyrighted Cartoon Dog, 13 Cust. B. & Dec. 1334 (Dep’t of Treas. Nov. 16, 1978) (ruling that imported stuffed toy dogs infringed a copyright already recorded with Customs).

⁵⁷ *See* TRAINER & ALLUMS, *supra* note 21, § 1:2 (stating that while U.S. IPR enforcement has been around for many decades, the increased IPR enforcement priority was instituted in the late 1980s).

⁵⁸ *See* Enforcement of Production of Semiconductor Chip Products: Patent Surveys, 54 Fed. Reg. 40,882 (proposed Oct. 4, 1989) (to be codified at 19 C.F.R. pts. 12, 24, 133) [hereinafter Semiconductor-Enforcement] (referencing the submission of comments to the Customs Intellectual Property Rights Task Force).

⁵⁹ *See* “Knott’s Berry Farm”, 56 Fed. Reg. 2064 (Dep’t of Treas. Jan. 18, 1991) (recognizing the change from “Task Force” to “Branch” because of the reference to the “Intellectual Property Rights Branch”); *see also* Reorganization of the Office of Regulations and Rulings, 56 Fed. Reg. 41,159 (Dep’t of Treas. Aug. 19, 1991) [hereinafter Reorganization-Notice] (providing the public with information regarding the divisions and branches within the Office of Regulations and Rulings). The reorganization notice identified the Intellectual Property Rights Branch and described the Branch’s mission as:

Issuing decisions and formulating policy and regulations to ensure the protection of U.S. intellectual property rights (IPR) which encompass trademarks, tradenames, copyrights, patents and trade dress; coordinating the identification of legislative requirements for modernizing, clarifying and strengthening Customs statutory authority in the IPR area; informing the public, principally through existing trade associations and other industry groups, of Customs interest in identifying unfair trade practices and of Customs ability to assist in protecting intellectual property rights; recordation of trademarks, tradenames and copyrights in order to protect against imports which constitute infringement; implementation of exclusion orders issued by the ITC and patent surveys, as a means of protecting patent owners against infringement; resolving issues concerning the entry of restricted or prohibited merchandise, including the importation of seditious, treasonable, obscene or immoral materials; and issuing decisions and guidance concerning the importation or exportation of cultural property, including pre-Columbian art and artifacts and items subject to the UNESCO Convention on Cultural Property.

Reorganization-Notice, *supra*.

The enhanced U.S. Customs IPR program predates the implementation of TRIPS obligations by only a handful of years.⁶⁰ At the time of the formal creation of the IPR Branch, the Branch consisted of only three attorneys, one paralegal and an administrative assistant.⁶¹ In total, only five people were dedicated full time to IPR.⁶² In the description of the IPR Branch's responsibilities published in the Federal Register, one significant role of the Branch is not mentioned: training U.S. Customs officers about Customs regulations, their application to shipments containing suspect goods and the basic forms of intellectual property that are to be protected.⁶³ At the outset, before one begins to consider training of foreign officials, the IPR Task Force had to acquaint U.S. Customs officials about procedures under U.S. regulations and laws.⁶⁴

Thus, in the early 1990s during the same period that negotiators were debating the TRIPS text, U.S. Customs' enhanced IPR enforcement program was still in its early stages. Nevertheless, the few years of experience that U.S. Customs gained between 1989 and 1996, the year in which TRIPS obligations went into effect for developed countries, provided the agency with a small corps of lawyers, inspectors, and agents who gained experience in IPR border enforcement cases.

The reality is that this small corps of U.S. Customs officials would never be sufficient to provide the technical assistance needed in many Member States.⁶⁵ Assuming that the U.S. had one of the most active IPR border enforcement systems in the world as of January 1, 1996, and the staff dedicated solely to IPR enforcement could be counted on two hands, it should not have been a surprise that the global expertise available in the developed countries would never be adequate to prepare scores of developing and least developed countries to both amend laws and to train foreign officials to carry out the daily enforcement activities needed to make a TRIPS border enforcement system function effectively.⁶⁶ In hindsight, if one considers the time and resource commitment that was required to train U.S. Customs officials, it

⁶⁰ Compare Semiconductor-Enforcement, *supra* note 58 (stating that the Semiconductor Chip Protection Act was approved by Congress on September 28, 1989), with 19 U.S.C. § 3511(a), (d)(15) (2006) (stating that TRIPS was implemented by Congress on September 27, 1994).

⁶¹ TRAINER & ALLUMS, *supra* note 21, § 1:2 n.3.

⁶² *Id.*

⁶³ *Id.* § 1:2 (stating that the internal training program is what required the IPR task force to provide instruction to foreign customs officials).

⁶⁴ *Id.*

⁶⁵ Robert M. Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 IDEA 491, 543 (1997); WTO, Members and Observers, http://www.wto.int/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 13, 2008) [hereinafter Current WTO Signatories] (stating that there are currently 153 different GATT signatories). The original 128 governments that had signed the General Agreement on Tariffs and Trade ("GATT") were officially known as "GATT contracting parties." WTO, 1994 GATT Signatories, http://www.wto.int/english/thewto_e/gattmem_e.htm (last visited Oct. 13, 2008). "On 1 January 1995, the WTO replaced GATT, which had been in existence since 1947, as the organization overseeing the multilateral trading system." *Id.* "Upon signing the new WTO agreements (which include the updated GATT, known as GATT 1994), they officially became known as 'WTO members.'" *Id.* As of this writing, there are 153 WTO members. Current WTO Signatories, *supra*.

⁶⁶ See Kirsten M. Koepsel, *How Do Developed Countries Meet Their Obligations Under Article 67 of the TRIPS Agreement?*, 44 IDEA 167, 174 (2004) (discussing the extensive assistance that developed countries would need to provide developing countries or less developed countries).

should have been more obvious that it would be unlikely that effective enforcement would be provided by developing and least developed countries “on time.”⁶⁷

Indeed, the “team” of globe traveling technical assistance providers during the first transition period (1996–2000) that was for the benefit of developing countries was a small cadre of people often known to each other.⁶⁸ A similar training challenge existed for criminal enforcement of IPR.⁶⁹ The new reality was that governments that had never criminalized IPR violations were now required to establish a new set of crimes and needed law enforcement to become familiar with the various forms of IPR and how to identify a possible IPR crime.⁷⁰ Thus, the TRIPS criminal enforcement requirements added to the scope of enforcement falling within the jurisdiction of the police, prosecutors and the courts.

The challenges of limited resources available to be deployed for technical assistance in the area of criminal IPR enforcement were and continue to be similar to that relating to border enforcement.⁷¹ In view of the fact that the TRIPS Article 61 requirement to adopt criminal procedures for copyright and trademark violations was new to many Member States, it is likely that criminal investigations and prosecutions for IPR crimes were not numerous around the world prior to implementation of the TRIPS provision.⁷² In the United States, the U.S. Department of Justice’s Annual Reports indicate that, by comparison, in fiscal years 1997, 1998 and 2007,⁷³ the number of criminal copyright and trademark cases filed were 100, 97, and 200, respectively.⁷⁴

In general, reflecting back on a decade of efforts to assist governments in meeting their respective IPR enforcement obligations, it is somewhat safe to say that negotiating the TRIPS text was easier than the ongoing effort to try and create an effective global IPR enforcement system country-by-country. If statistics and the volume of complaints are any indication, the multilateral effort to create enforcement

⁶⁷ Intellectual Property Rights Enforcement Rules, No. 47.1 (2007) (India) (allowing for the maximum transition periods in Articles 65 and 66, India’s new border enforcement provisions went into effect after the expiration of the transition periods). The Indian implementing instructions regarding the new IPR border enforcement rules were issued in October 2007. See Letter from P. S. Pruthi, Commissioner, Central Board of Excise & Customs, to Chief Commissioners of Customs et al. (Oct. 29, 2007), available at <http://www.cbec.gov.in/customs/cs-circulars/cs-circulars07/circ41-2k7-cus.htm> (discussing the Indian Implementation Instructions).

⁶⁸ See TRAINER & ALLUMS, *supra* note 21, § 1:2 (discussing the educational nature of the IPR branch attorneys when they dealt with Customs officials).

⁶⁹ Mark Wu, *Intellectual Property Rights In Global Trade Framework: IP Trends In Developing Countries*, 98 AM. SOC’Y INT’L L. PROC. 95, 103 (2004).

⁷⁰ TRIPS Agreement art. 61.

⁷¹ TOM PENGELLY, TECHNICAL ASSISTANCE FOR THE FORMULATION AND IMPLEMENTATION OF INTELLECTUAL PROPERTY POLICY IN DEVELOPING COUNTRIES AND TRANSITION ECONOMIES 2 (11th ed. 2005).

⁷² TRIPS Agreement art. 61.

⁷³ 1997 ATT’Y GEN. ANN. REP. 1 n.1; 1998 ATT’Y GEN. ANN. REP. 1 n.1; 2007 ATT’Y GEN. ANN. REP. III-1. The U.S. Federal Government’s fiscal years run from October 1 to September 30. See 1997 ATT’Y GEN. ANN. REP. 1 n.1. Fiscal year 1997 would be from October 1, 1996, to September 30, 1997. *Id.*

⁷⁴ 1997 ATT’Y GEN. ANN. REP. 90; 1998 ATT’Y GEN. ANN. REP. B-6; 2007 ATT’Y GEN. ANN. REP. F-4; see also USDOJ: Office of the Attorney General-Annual Reports, <http://www.usdoj.gov/ag/annualreports.html> (last visited Oct. 26, 2008). Each annual report, beginning from 1997, has a statistical summary of IPR cases. See, e.g., 1998 ATT’Y GEN. ANN. REP. B-1.

“standards” has not had the effect that many may have expected in view of the volume of trade in infringing goods.⁷⁵ The European Commission’s official statements reference a growing, not lessening, threat posed by counterfeit and pirated products.⁷⁶ U.S. Customs and Border Protection’s May 2008 IPR overview also references a growing problem in counterfeit and pirate products.⁷⁷ The World Customs Organization has also stated that the negative impact of counterfeit goods on the global economy is growing every year.⁷⁸ There are also dozens of industry groups that have created special programs and initiatives on IPR enforcement, including the International Chamber of Commerce’s Business Action to Stop Counterfeiting and Piracy (“BASCAP”) that believes that IPR theft is “spiraling out of control.”⁷⁹

A vast majority of today’s 153 WTO Member States and a number of others that are in the process of joining the WTO need technical assistance.⁸⁰ Today’s army of assistance providers has expanded to include government experts from WTO Member States, intergovernmental organizations, companies, industry groups, and others. Despite the expanded group of people who may be involved in providing training, generally, most of the assistance programs consist of a few days or a week of workshops, seminars and lectures, rather than the exception of long-term, on the ground programs.⁸¹ The reality is that practically everyone involved in providing the needed assistance is diverted from his or her “real” job in order to participate in delivering the training, which limits the amount of time available for training.

One conclusion that can be drawn from the experiences of the past dozen years is that the technical assistance needs were not fully considered.⁸² The inadequacies

⁷⁵ Compare Yearly Comparisons: Seizure Statistics for Intellectual Property Rights, http://www.cbp.gov/xp/cgov/trade/priority_trade/ipr/seizure/seizure_stats.xml (last visited Oct. 26, 2008) (stating the U.S. Customs and Border Protection’s annual seizure statistics), with Eur. Comm’n for Tax & Custs. Union, *Report on the Community Customs Activities on Counterfeit Piracy: Results at the European Border*, at 7–8 (2007), available at http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics2007.pdf (stating the European Community’s Customs IPR seizure statistics by country and products).

⁷⁶ See European Commission, Counterfeiting and Piracy, http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/combating/index_en.htm (last visited Oct. 26, 2008).

⁷⁷ See U.S. Customs & Border Protection, Intellectual Property Rights Overview, http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/trade/ipr_fact_sheets/ipr_facts_overview.xml (last visited Oct. 26, 2008).

⁷⁸ WCO Protection of Intellectual Property Rights, http://www.wcoomd.org/home_wco_topics_epoverviewboxes_responsibilities_epipr.htm (last visited Oct. 26, 2008).

⁷⁹ Int’l Chamber of Commerce, World Business Organization & BASCAP, <http://www.iccwbo.org/bascap/id883/index.html> (last visited Oct. 26, 2008).

⁸⁰ See Yu, *supra* note 6, at 888–89 (stating that TRIPS does not guarantee technical assistance to less developed countries).

⁸¹ See U.S. Dept. of State, Intellectual Property Training Programs Funded, <http://www.state.gov/r/pa/prs/ps/2007/sep/92653.htm> (last visited Oct. 26, 2007). In September 2007, the U.S. State Department announced funding for a number of programs, including a program for Indonesia for two full-time U.S. senior technical advisors to assist Indonesia in implementing new optical disc anti-piracy laws. *Id.*

⁸² See Yu, *supra* note 6, at 888–89 (stating that TRIPS does not guarantee technical assistance to less developed countries).

regarding funding and human resources dedicated to training and education⁸³ reflect the lack of priority on these issues at the time of negotiations. The result has been an increasingly visible tension over IPR enforcement in many countries.⁸⁴

III. U.S. FTAs: RAISING THE ENFORCEMENT BAR—RESOLVING AMBIGUITIES

In the absence of any new global multilateral trade agreement in recent years, governments around the world have engaged in negotiating free trade agreements (“FTA”) or economic partnership agreements (“EPA”) in order to improve trade relations for mutual trade benefits.⁸⁵ The FTAs and EPAs have often included IPR, which has resulted in some effort to strengthen enforcement provisions.⁸⁶ The following discussion will reference primarily the FTAs concluded between the United States and its trading partners to illustrate some trends based upon what has been learned by operating under the TRIPS IPR enforcement provisions.

In the post-TRIPS period, i.e., since the implementation date of the TRIPS obligations, the United States has concluded numerous FTAs.⁸⁷ In many of these FTAs, the United States has undertaken efforts to eliminate ambiguities in the TRIPS enforcement provisions and to raise the enforcement standards.⁸⁸ As attempted in the discussion above, a few examples of ambiguous or troublesome TRIPS provisions were provided. Turning to the FTAs, some comparisons will be provided between the TRIPS text and the FTA texts in order to highlight the effort to increase the level of IPR enforcement and to clarify TRIPS.

First, it is worth noting that the United States has entered into and concluded FTAs with trading partners whose level of economic development vary broadly.⁸⁹ Nevertheless, the United States has attempted to build upon the TRIPS IPR enforcement text by negotiating stronger IPR enforcement provisions.⁹⁰ Second, it is important to be aware of the subtle changes from one FTA to another. While many of the FTA texts may appear similar or identical, it is important to be cognizant of the fact that FTAs are rarely identical.

⁸³ PENGELLY, *supra* note 71, at 2.

⁸⁴ *See, e.g.*, China-Solution, *supra* note 19, pt. I (documenting the tension between the U.S. and China in TRIPS enforcement).

⁸⁵ Nina Rohe, *The Central American Free Trade Agreement—A Survey and Comparison to the Treaty of the European Community*, 12 L. & BUS. REV. AM. 73, 74 (2006).

⁸⁶ *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., art. 102.1(d), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

⁸⁷ Anselm Kamperman Sanders, *Intellectual Property, Free Trade Agreements And Economic Development*, 23 GA. ST. U. L. REV. 893, 897 (2007); U.S. Trade Agreements, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Oct. 26, 2008).

⁸⁸ Susan Scafidi, *The “Good Old Days” of TRIPS: The U.S. Trade Agenda and the Extension of Pharmaceutical Test Data Protection*, 341 YALE J. HEALTH POL’Y L. & ETHICS 341, 343 (2004).

⁸⁹ *See* Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade And The Protection Of Public Health*, 99 AM. J. INT’L L. 317, 349 (2005) (“[T]he United States has negotiated various free trade agreements (FTAs) with developing (and developed) countries that include chapters addressing intellectual property rights.”).

⁹⁰ Sanders, *supra* note 87, at 897 (discussing inclusion of TRIPS-plus provisions in free trade agreements and indicating that the United States negotiates high levels of protection for international intellectual property rights).

A. U.S.-Jordan FTA

The U.S.-Jordan FTA was concluded in October 2000.⁹¹ This was the third FTA that the United States had concluded.⁹² Being one of the early FTAs, the IPR provisions and its enforcement text are less detailed than more recently concluded FTAs. The FTA, however, recognizes IPR developments subsequent to the conclusion of the Uruguay Round that resulted in TRIPS and imposes mutual obligations for IPR protections.⁹³ Specifically, trademark owners could expect increased protections for famous trademarks,⁹⁴ patent protections extended to plant varieties,⁹⁵ and copyright owners would have added protections because of the FTA's incorporation of copyright treaties addressing the internet and digital content issues.⁹⁶

In the civil enforcement provisions, the FTA makes clear that "injury to the right holder shall be based upon the value of the infringed-upon item, according to the suggested retail price of the legitimate product, or other equivalent measures established by the right holder for valuing authorized goods."⁹⁷ The TRIPS text has no such specificity regarding the basis for this type of valuation. In addition, the FTA created a presumption of copyright in favor of the "natural person or legal entity whose name is indicated as the author, producer, performer or publisher of a work,"⁹⁸ which is not in TRIPS.

Concerning border measures and criminal IPR enforcement, the FTA imposed a requirement that the authorities responsible for border and criminal enforcement be given the legal authority to undertake enforcement actions against copyright piracy and trademark counterfeiting without the need for a formal complaint, i.e. *ex officio* authority.⁹⁹ TRIPS Article 61, dealing with criminal procedures, does not address this issue as it is silent about a complaint requirement.¹⁰⁰ Because Article 61 does not address the issue of a complaint requirement, WTO Member States have been free to choose whether or not to impose a complaint requirement in cases involving criminal piracy and counterfeiting.¹⁰¹ The FTA text makes clear that the authorities must be empowered to undertake criminal enforcement on their own initiative.¹⁰²

The FTA's requirement that authorities also have *ex officio* authority to stop the importation of pirate and counterfeit goods imposes another TRIPS+ requirement.

⁹¹ Establishment of a Free Trade Area, U.S.-Jordan, art. 19.2, Oct. 24, 2002, 41 I.L.M. 63 [hereinafter U.S.-Jordan FTA], available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf.

⁹² Opinion, *Trade Authority: Senate Hands President Timely Victory*, SAN DIEGO UNION-TRIBUNE, May 29, 2002, at B-10; U.S.-Jordan FTA Statistics, http://www.ustr.gov/Trade_Agreements/Bilateral/Jordan/Section_Index.html (last visited Oct. 26, 2008).

⁹³ See U.S.-Jordan FTA, *supra* note 91, art. 4.1(c)-(d) nn.4-5.

⁹⁴ *Id.* art. 4.1(a).

⁹⁵ *Id.* art. 4.1(b).

⁹⁶ *Id.* art. 4.1(c)-(d).

⁹⁷ *Id.* art. 4.24.

⁹⁸ *Id.* art. 4.27.

⁹⁹ *Id.* art. 4.26.

¹⁰⁰ TRIPS Agreement art. 61.

¹⁰¹ Thomas E. Volper, *TRIPS Enforcement in China: A Case for Judicial Transparency*, 33 BROOKLYN J. INT'L L. 309, 321 (2007) (referencing the bar of certain complaints hinders the enforcement of TRIPS).

¹⁰² U.S.-Jordan FTA, *supra* note 91, art. 4.26.

By comparison, TRIPS, Article 51 states that “Members shall . . . adopt procedures to enable a right holder . . . to lodge an application in writing . . . for the suspension”¹⁰³ The FTA requirement that the authorities must be able to act *ex officio* eliminates an absolute application filing requirement.¹⁰⁴ In addition, the FTA text clarifies that the authorities *must* have *ex officio* legal authority to act whereas TRIPS, Article 58 allowed WTO members to choose to give or withhold such legal powers to the competent authorities responsible for border enforcement.¹⁰⁵

Although the IPR enforcement provisions in the U.S.-Jordan FTA are not as detailed and extensive as in more recent FTAs, one can see the beginnings of an effort to raise the TRIPS enforcement standards through the FTA process.

B. U.S.-Chile FTA

The U.S.-Chile FTA was approved by the U.S. Congress in 2003.¹⁰⁶ This FTA makes major strides in raising IPR enforcement beyond what appears in the U.S.-Jordan FTA and, therefore, includes significant TRIPS+ provisions.¹⁰⁷

One of the first things attempted to be corrected in the FTA was to improve on the TRIPS Article 41.5 language regarding the dedication of resources for IPR enforcement.¹⁰⁸ While the FTA recognizes that neither government is required to establish an IPR focused judicial system or to redistribute resources for IPR enforcement, the FTA states that neither government is excused from its IPR enforcement obligations arising from the FTA based on decisions made, or not made, regarding resource distribution.¹⁰⁹ The text improves upon TRIPS Article 41.5 by clarifying that the enforcement obligations must be met regardless of how the government decides to dedicate IPR enforcement resources.¹¹⁰ In addition, the FTA makes clear that final decisions on the merits of an IPR case of general application *shall* be in writing,¹¹¹ which clarifies the unusual wording in TRIPS that states that decisions on the merits *shall preferably* be in writing.¹¹²

¹⁰³ TRIPS Agreement art. 51.

¹⁰⁴ U.S.-Jordan FTA, *supra* note 91, art. 4.26.

¹⁰⁵ TRIPS Agreement art. 58 (beginning with “[w]here Members require competent authorities to act upon their *own initiative*” (emphasis added)).

¹⁰⁶ *Compare* Establishment of a Free Trade Area, U.S.-Chile, June 6, 2003, art. 24.5, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter U.S.-Chile FTA] (establishing the free trade area on June 6, 2003), *with* U.S.-Chile FTA Implementation Act, Pub. L. No. 108-77, § 101(a)-(b), 117 Stat. 909, 910-11 (2003) (approving the U.S.-Chile FTA on July 15, 2003 and entering it into force on January 1, 2004).

¹⁰⁷ *See* U.S.-Chile FTA, *supra* note 106, art. 16.9 (“Desiring to build on the foundations established in existing international agreements in the field of intellectual property, including the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and affirming the rights and obligations set forth in the TRIPS Agreement”).

¹⁰⁸ *Compare id.* art. 17.11 (requiring a judicial system of enforcement), *with* TRIPS Agreement art. 41.5 (requiring no obligation to put a judicial system of enforcement in place).

¹⁰⁹ U.S.-Chile FTA, *supra* note 106, art. 17.11.1.

¹¹⁰ *Id.* art. 17.11.2.

¹¹¹ *Id.* art. 17.11.3 (emphasis added).

¹¹² TRIPS Agreement art. 41.3 (emphasis added).

One interesting difference between the U.S.-Jordan FTA and the U.S.-Chile FTA, which may be viewed as a retreat by IPR owners, is that the U.S.-Jordan FTA stated that “injury to the right holder *shall be* based upon the value of the infringed-upon item . . . ,”¹¹³ but the U.S.-Chile FTA states that “in determining injury to the right holder, the judicial authorities shall, *inter alia*, consider the legitimate retail value of the infringed goods.”¹¹⁴ This is a significant difference in practice as judges can easily consider something and disregard it. Thus, this provision is one reason for cautiously reviewing FTAs and keeping in mind that the texts are always negotiated between the governments and compromises are made in the process.

Another of the many improvements made in the U.S.-Chile FTA is the requirement that the judicial authorities are required to have the authority to order an infringer to provide information it may possess regarding others involved in the infringement activity.¹¹⁵ Related to the new legal power of the judiciary, the FTA requires that the judiciary be empowered to impose fines or terms of imprisonment on infringers who fail to comply with the court’s order.¹¹⁶ Interestingly, TRIPS gave Member States the option of empowering the judiciary in this manner.¹¹⁷ Thus, a WTO Member State that prefers meeting its absolute minimum requirements would not have changed its law to require that the courts have the power to order disclosure of information regarding others involved in the infringement and, thereby, limit the ability to take actions against potentially large infringement operations.

Regarding border measures, several developments are reflected in the U.S.-Chile FTA. First, language appears in the text to try and prevent onerous and overly burdensome information requirements imposed on IPR owners seeking border measures.¹¹⁸ As discussed above relating to TRIPS Article 52, the IPR owner is supposed to provide information that will make the possibly infringing goods readily recognizable to customs.¹¹⁹ But, what does it mean to have information making possibly infringing goods readily recognizable?

The World Customs Organization (“WCO”) attempted to answer the question for customs agencies when it issued its Model Provisions regarding the implementation of TRIPS.¹²⁰ In its notes related to IPR owners’ applications requesting border

¹¹³ U.S.-Jordan FTA, *supra* note 91, art. 4.24 (emphasis added).

¹¹⁴ U.S.-Chile FTA, *supra* note 106, art. 17.11.8(b).

¹¹⁵ *Id.* art. 17.11.13 (“In civil judicial proceedings, each Party shall provide that the judicial authorities shall have the authority to order the infringer to provide any information the infringer may have regarding persons involved in the infringement, and regarding the distribution channels of infringing goods”).

¹¹⁶ *Id.*

¹¹⁷ TRIPS Agreement art. 47.

¹¹⁸ U.S.-Chile FTA, *supra* note 106, art. 17.11.17 (stating that requirements related to border measures “shall not unreasonably deter recourse to these procedures”).

¹¹⁹ TRIPS Agreement art. 52.

¹²⁰ World Customs Organization [WCO], *Model Provisions for National Legislation to Implement Fair and Effective Border Measures Consistent With the Agreement on Trade-Related Aspects of Intellectual Property Rights*, at 1 (May 19, 2004), available at <http://www.wcoipr.org/wcoipr/gfx/ModelLawfinal.doc>. The 2004 Model Provisions were preceded by an earlier version that is no longer available on the World Customs Organization website, but is reproduced in *Border Enforcement of Intellectual Property*, Oceana Publications, Inc. (2000). *Id.* The 2004 Model Provisions recommend that customs administrations raise the enforcement standards above the TRIPS minimums. *Id.*

enforcement, the WCO suggested the following as information that would assist customs officers in readily recognizing possibly infringing goods:

- The name and business address of the importer(s) and/or consignee(s) of the allegedly infringing goods;
- *A sufficiently detailed description of the suspect goods in order to make them readily recognisable by Customs, including a sample of the infringing article(s), a photograph or other likeness;*
- The country or countries of origin of the suspect goods or the country or countries of manufacture of the allegedly infringing goods;
- The name and principal business address of each foreign person or business entity involved in the manufacture and/or distribution of suspect goods;
- The mode of transportation and the identity of the transporter(s) of the allegedly infringing goods; and
- The Customs office where it is anticipated that the suspect articles will be presented to Customs.¹²¹

Because these data elements were the WCO's recommendation, some WTO Member States adopted these data elements as a requirement for applications requesting border measures.¹²² The result was that IPR owners were confronted by a process that included an insurmountable obstacle. How would IPR owners obtain the information listed? In many cases, IPR owners would be unable to meet the application requirements without first engaging in activities that are more appropriate for an undercover criminal investigation, which in some countries might be illegal.¹²³

Upon realizing that Member States had adopted WCO recommendations as part of the formal procedures, the U.S.-Chile FTA attempted to incorporate language to eliminate or clarify the TRIPS text.¹²⁴ The result is that the information required of the IPR owner requesting border enforcement "shall not unreasonably deter recourse to these procedures."¹²⁵ The new FTA text implies that the WCO's list of recommended data elements is unreasonable and should not be expected from IPR owners hoping to employ border measures as part of an overall enforcement program.

The border enforcement provisions retained the required *ex officio* enforcement authority found in the early U.S.-Jordan FTA, but expanded on this by requiring the

¹²¹ *Id.* at 12. Generally, these same notes appeared as a note to Article 6 in the initial set of Model Provisions. *Id.*

¹²² See An Qinghu, *Well-Known Marks & China's System Of Well-Known Mark Protection*, THE TRADEMARK REPORTER, May-June, 2005, at 754-57 (detailing China's adoption of similar elements in its Regulation of the People's Republic of China on the Customs' Protection for Intellectual Property Rights).

¹²³ Cf. Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 100 (stating that enforcement is lacking in countries where injunctive relief is not available in certain member countries).

¹²⁴ See Haochen Sun, *The Road To Doha And Beyond: Some Reflections On the TRIPS Agreement And Public Health*, 15 EUR. J. INT'L LAW 123, 146 (2004) (indicating that the US-Chile FTA modified the protection afforded in TRIPS, resulting in the highest level of protection and enforcement standards yet achieved by an FTA).

¹²⁵ U.S.-Chile FTA, *supra* note 106, art. 17.11.17.

border enforcement authorities to have the legal authority to exercise this power with regard to suspected infringing goods whether they are imported, destined for export, or moving through the country in-transit.¹²⁶ Thus, this is a major TRIPS+ provision as it subjects exports and goods in-transit to border measures whereas the TRIPS minimum requirement is to subject imports only to border enforcement based upon an underlying application.¹²⁷

The criminal enforcement provisions retained the U.S.-Jordan FTA requirement that the law enforcement authorities have *ex officio* authority to initiate criminal investigations and prosecutions, i.e., without a formal complaint filed by an IPR owner.¹²⁸ Additionally with regard to criminal enforcement, each Party must ensure that

- Willful infringement of copyright and related rights for a commercial advantage or financial gain is subject to criminal procedures and penalties;
- Copyright or related rights piracy on a commercial scale includes the willful infringing reproduction or distribution, including by electronic means, copies with a significant aggregate monetary value, calculated based on the legitimate retail value of the infringed goods;
- Remedies include imprisonment and/or monetary fines that are sufficient to provide a deterrent to future infringements;
- Judicial authorities have the authority to order the seizure of suspected counterfeit and pirated goods, assets legally traceable to the infringing activity, documents and related materials, and implements that constitute evidence of the offense;
- Items that are subject to seizure pursuant to a search order need not be individually identified so long as they fall within general categories specified in the order; and
- Judicial authorities have the authority to order the forfeiture of any assets legally traceable to the infringing activity and the destruction of all counterfeit and pirated goods.¹²⁹

The criminal procedures and remedies have been expanded to require that the courts have more authority and that criminal procedures and remedies extend to encompass other assets that can be proved to be ill-gotten gains.¹³⁰ In addition, the FTA reduces the burden on IPR owners upon conducting an enforcement action and seizing thousands of items because the FTA text provides that IPR owners need not identify each individual item seized, but allows for seizure of goods that generally fall within the category specified in the order.¹³¹

The criminal provisions also recognize the development of the internet as a tool used by infringers with the reference to copying and distribution by electronic

¹²⁶ *Id.* art. 17.11.20.

¹²⁷ TRIPS Agreement art. 51.

¹²⁸ U.S.-Chile FTA, *supra* note 106, art. 17.11.22(e).

¹²⁹ *Id.* art. 17.11.22.

¹³⁰ *Id.* art. 17.11.22(c)-(d).

¹³¹ *Id.*

means.¹³² At the time of the TRIPS negotiations, the issue of internet based criminal conduct was not an issue and, therefore, not addressed.¹³³

The U.S.-Chile FTA, similar to the subsequent FTA with Central America that the Office of the U.S. Trade Representative signed in August 2004, provides for a more aggressive approach to IPR enforcement and requires that the U.S.'s trading partners actively undertake increased enforcement activity.¹³⁴

C. U.S.-South Korea FTA ("KORUS")

KORUS builds on previous FTAs and is one of the most recent IPR chapters in a FTA.¹³⁵ Although the basic provisions appear to be the same, it is, again, worthy of mention that FTAs do change and changes occur due to the varying negotiating positions that different governments have with respect to specific issues.

In the civil enforcement provisions, KORUS appears to be broader in scope regarding court costs, fees and attorney's fees.¹³⁶ While the U.S.-Chile FTA provides that the judicial authorities must have the authority to order payment of costs or fees and reasonable attorney's fees to the prevailing right holder in an infringement action involving copyright, related rights or trademark counterfeiting case,¹³⁷ KORUS expands on this by stating that the prevailing patent owner should also receive reimbursement of costs or fees.¹³⁸ KORUS does instruct that the judicial authorities must have the authority to order payment of reasonable attorney's fees to a winning patent owner in a civil infringement case if exceptional circumstances exist.¹³⁹ However, one must bear in mind that a court that has such authority is not required to exercise it.¹⁴⁰

The border measures provisions are also improved. Whereas TRIPS and most of the previous FTAs require border measures for protection against copyright pirated goods and trademark counterfeit goods, KORUS requires border measures to protect against confusingly similar marks, thereby expanding the scope of protection for trademark owners.¹⁴¹ Moreover, the agreement makes clear that an application that

¹³² *Id.*

¹³³ *See generally* TRIPS Agreement (neglecting to mention the Internet or the World Wide Web because the role of the internet was relatively insignificant during 1987–1993, the time period corresponding to the TRIPS negotiations).

¹³⁴ *See* The Dom. Rep.-Cent. Am.-U.S. Free Trade Agreement, Statement of Administrative Action, http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Transmittal/asset_upload_file816_7815.pdf. The Central American countries are Costa Rica, Guatemala, Honduras, and El Salvador. *Id.*

¹³⁵ Establishment of a Free Trade Area, U.S.-S. Korea, art. 24.6, June 30, 2007, http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html [hereinafter KORUS FTA]. The U.S. and the Republic of Korea both signed the agreement, however, the agreement has not been acted upon by the U.S. Congress. *Id.*

¹³⁶ *See id.* art. 18.10.7 (obligating the losing party to pay the winning party's court costs, attorney and other fees).

¹³⁷ U.S.-Chile FTA, *supra* note 106, art. 17.11.10.

¹³⁸ KORUS FTA, *supra* note 135, art. 18.10.7.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* art. 18.10.19.

is accepted shall apply to all points of entry to its territory, i.e., have national effect.¹⁴²

The criminal procedures and remedies are also broader in scope. KORUS obligates both governments to apply criminal procedures and penalties even absent willful counterfeiting and piracy if there is knowing trafficking in counterfeit or illicit labels and counterfeit documentation or packaging.¹⁴³ Criminal penalties must also be available to be applied “against any person who, without authorization, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of the motion picture or other audiovisual work from a performance of the motion picture or other audiovisual work in a public motion picture exhibition facility.”¹⁴⁴

A lengthy provision is included regarding the liability of internet service providers,¹⁴⁵ which builds on the provisions that are also included in the U.S.-Chile FTA.¹⁴⁶ Because of the developments related to copyright infringement on the internet occurring in the post-TRIPS years, these extensive provisions attempt to give copyright owners measures to protect content, but to balance the protections by including some limitations on liability for service providers.¹⁴⁷

The challenges of the internet related to online infringement also prompted the inclusion of a letter as part of the IPR enforcement commitment. The June 30, 2007 letter to the U.S. Trade Representative obligates South Korea to take criminal enforcement actions to shut down internet sites that permit unauthorized downloading of copyrighted works and increased efforts to shut down peer-to-peer services.¹⁴⁸

KORUS continues to build upon prior FTAs and includes numerous provisions that provide for stronger IPR enforcement. In an April 2007 report to the Bush Administration and the U.S. Congress, the Industry-Trade Advisory Committee for Intellectual Property stated that the KORUS intellectual property provisions are very supportive of the IPR chapter in the agreement.¹⁴⁹

IV. FTAS: TECHNICAL ASSISTANCE—HIGH DEMAND, LIMITED RESOURCES

The “success” of the FTAs concluded by the United States is that higher IPR enforcement standards have become the norm. There have been clarifications of TRIPS provisions and expansion of the scope of protection to address developments in the post-TRIPS period.¹⁵⁰

¹⁴² *Id.*

¹⁴³ *Id.* art. 18.10.28.

¹⁴⁴ *Id.* art. 18.10.29.

¹⁴⁵ *Id.* art. 18.10.30.

¹⁴⁶ U.S.-Chile FTA, *supra* note 106, art. 17.11.23.

¹⁴⁷ KORUS FTA, *supra* note 136, art. 18.10.30(a)(ii).

¹⁴⁸ *Id.* art. 18. Confirmation Letter (Online Piracy Prevention).

¹⁴⁹ Report of the Industry Trade Advisory Committee on Intellectual Property Rights 2 (April 27, 2007), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/asset_uplo_ad_file196_12780.pdf.

¹⁵⁰ Sanders, *supra* note 87, at 897–99 (discussing inclusion of TRIPS-plus provisions in free trade agreements and indicating that the United States negotiates high levels of protection for international intellectual property rights).

The heightened levels of required IPR enforcement are accompanied by the same technical assistance challenges that existed at the time that TRIPS was agreed to and entered into force.¹⁵¹ The extreme challenge of providing adequate assistance arises from some unspoken realities.

First, when one looks at the FTAs concluded by the U.S. or bilateral FTAs and EPAs concluded between other governments,¹⁵² are there IPR enforcement obligations being imposed on trading partners who had failed to implement effectively their TRIPS obligations and are now expected to meet TRIPS+ standards?

Second, if there was inadequate technical assistance to help developing and least developed countries to meet their TRIPS obligations during the TRIPS transition periods, how will additional transition periods in FTAs/EPAs help countries reach TRIPS+ enforcement levels absent increased technical assistance resources?

Third, what human and monetary resource commitments are being made explicitly by the governments/industries that seek higher enforcement standards so that future disputes over the IPR obligations can be averted?

Finally, taking into consideration the current state of IPR enforcement in a developing country (not yet providing TRIPS level enforcement effectively) and the new TRIPS+ standards required by an FTA or EPA, how does widening the gap that must be bridged improve IPR enforcement?

Essentially, what has occurred is a successful effort by various industries to get some governments to negotiate high IPR enforcement standards. The technical assistance issue is a real problem that has not been satisfactorily confronted. For some governments that had practically no national IPR enforcement systems in place, they have agreed to TRIPS+ enforcement regimes that are complicated and require significant resources.¹⁵³

As illustrated by the few examples above, the civil enforcement systems have had additional elements added in order to provide better civil enforcement mechanisms for IPR owners.¹⁵⁴ The additional elements impose increased duties on the court systems of these countries.¹⁵⁵ Moreover, expanded protections for different forms of IPR means that there will be more complicated legal challenges before the courts, which requires increased training for judges on various complex IPR issues so

¹⁵¹ TRAINER & ALLUMS, *supra* note 21, § 1:2; Christine Thelen, Comment, *Carrots And Sticks: Evaluating The Tools For Securing Successful TIPS Implementation*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 519, 525 (2005). Although the term “capacity building” is now popular to use in place of “technical assistance,” the older term will be used. *See, e.g., id.*

¹⁵² Kristy L. Balsanek et. al., *International Legal Development In Review: 2005 Business Regulation*, 40 INT’L LAW. 217, 222 (2006). The Japan-Philippine Economic Partnership Agreement reached in 2006, obligates the Philippines to extend border enforcement to patents, utility models and industrial designs and to provide criminal penalties for all IPRs. JAPAN MINISTRY OF ECONOMY TRADE AND INDUSTRY, REPORT ON COMPLIANCE WITH MAJOR TRADING PARTNERS WITH TRADE AGREEMENTS 597 (2007), *available at* www.meti.go.jp/english/report/downloadfiles/2007WTO/3-4IntellectualProperty.pdf.

¹⁵³ *See* TRIPS Agreement arts. 65–66 (providing transitional periods for developing and least developed countries, who did not have or merely had limited IPR enforcement mechanisms at the time TRIPS was enacted).

¹⁵⁴ *See, e.g.,* Julia Cheng, *China’s Copyright System: Rising To The Spirit of TRIPS Requires An Internal Focus And WTO Membership*, 21 FORDHAM INT’L L.J. 1941, 1988 (1998) (indicating the additional mechanisms that courts in China developed in order to provide an adequate civil enforcement system for intellectual property rights).

¹⁵⁵ *Id.*

that the courts can properly consider the various issues and issue well-reasoned decisions.

For judicial systems that require judges to hear cases in numerous legal areas, the IPR area has grown increasingly complicated because of the internet and scientific areas.¹⁵⁶ The pressures on the judiciary will require constant training in technical areas because of the increasingly technical issues arising in IPR cases. Thus, even in countries that have judicial training centers, they require constant upgrading in training and education content. The question is whether there are sufficient resources for this to occur and to what extent have developed countries committed to an ongoing program of assistance while a country's judiciary works to reach a minimum level of competence in IPR.

Turning to the enforcement authorities, police and prosecutors may be able to take their criminal investigative and prosecutorial experiences and apply them to criminal IPR cases, but they will still need to understand the fundamental IPR issues and what constitutes criminal conduct.¹⁵⁷ Unlike "traditional" crimes such as assault with a weapon, bank robbery, and other such crimes, IPR crimes may not be as obvious given the type of conduct that constitutes criminal conduct. Therefore, prosecutors and police will need training to understand the conduct that rises to the level of a crime. In addition, the constant improvements in technology have shown the adaptability of IPR infringers to use new technologies to commit IPR crimes, which means that the technical assistance program should be a long-term commitment that will require significant funding.¹⁵⁸ It is important to remind the international community that an international standard mandating criminal enforcement of any forms of IPR occurred for the first time in TRIPS, which is still a recent development.¹⁵⁹

In view of the rather recent developments regarding the criminalization of IPR-related conduct, it should not come as a surprise that many developing countries have had problems, first, in creating new IPR crimes and, second, putting into

¹⁵⁶ See, e.g., David Ludwig, *Shooting the Messenger: ISP Liability for Contributory Copyright Infringement*, 2006 B.C. INTELL. PROP. & TECH. F. 478, 478 (2006) (stating that the Digital Millennium Copyright Act's purpose was to strengthen copyright protection).

¹⁵⁷ See Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 22 (1999). The Internet causes a difficulty of the choice of law with many international courts. *Id.* Thus, one country's courts may be dictating the law in another country. *Id.*

¹⁵⁸ Cf. Matthew Helton, *Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce*, 40 COLUM. J.L. & SOC. PROBS. 1, 36-37 (2006) (concluding that there should be an initiative to aid industries with new technologies, instead of having these technologies destroy these industries with copyright infringement).

¹⁵⁹ Maureen Walterbach, *International Illicit Convergence: The Growing Problem Of Transnational Organized Crime Groups' Involvement In Intellectual Property Rights Violations*, 34 FLA. ST. U. L. REV. 591, 608-09 (indicating the threat posed to organized crime's intellectual property right violations due to criminal enforcement provisions included in TRIPS). By way of comparison, Section 2319 of the Criminal Infringement of Copyright, was made part of Title 18, United States Code, in 1982, only a dozen years before the signing of the agreements creating the WTO and TRIPS. Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (1982). Section 2320 of Trafficking in Counterfeit Goods, was made part of Title 18, United States Code, in 1984. Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, § 1502(a), 98 Stat. 1837 (1984).

practice the criminal enforcement activities that have to be undertaken by police, prosecutors and the courts.¹⁶⁰ Adding to the basic challenge of creating a criminal IPR enforcement system is the fact that there are no permanent on-the-ground technical assistance teams that stay with any country's criminal enforcement teams for extended periods of time, e.g., six to twelve months.

The expanded scope of border enforcement measures to include exports and goods in-transit will also add to the technical assistance needs.¹⁶¹ More importantly, the expansion requires an increased level of government-industry cooperation in order for border enforcement authorities to learn more about IPR and maintain information about ways to detect suspect goods.¹⁶² The increased responsibilities at the border highlight the necessity of an internal system so that customs offices can communicate through information dissemination regarding specific IPRs. Thus, not only are border enforcement authorities in need of basic IPR training regarding the different types of IPR, but also about ways to develop and maintain a database of IPRs as well as a database that includes information about importers, shippers, and other "persons" who are found to be involved in the import and export of infringing goods.¹⁶³

Essentially, the FTAs have raised the enforcement bar as it relates to civil, criminal and border enforcement.¹⁶⁴ Along with the increased levels of enforcement, there is likely to be an expectation by IPR owners that they will receive heightened levels of enforcement as the FTAs intend. While the IPR owning community may have some patience as developing countries work to improve their enforcement systems, the past teaches that patience is limited. Thus, the question that should be at the center is whether the governments and IPR industries that expect to receive the benefits of increased levels of enforcement can provide the necessary technical assistance that will help developing governments deliver on the promises made.

In blunt terms, one must question why developing countries are expected to meet their TRIPS+ obligations, even with the benefit of transition periods, when they had not been providing TRIPS level enforcement at the time of committing to TRIPS+. There is little to indicate that the type or form of technical assistance that will be provided is any different from past practice and, looking back, it is apparent

¹⁶⁰ Robert M. Sherwood, *Intellectual Property Systems And Investment Stimulation: The Rating Of Systems In Eighteen Developing Countries*, 37 IDEA 261, 288, 291, 293, 295, 298–99, 301, 304, 306–07, 309–10, 312, 314–16, 318–19, 322, 325–26, 329, 331–32, 337, 341 (1997) (detailing the civil enforcement systems for intellectual property rights, and challenges facing enforcement authorities in eighteen countries, including Argentina, Bahamas, Barbados, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, India, Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, South Korea, and Uruguay).

¹⁶¹ See Kearston G. Everitt, *The Latin American Musician's "Life Would Be Meaningless Without Music": The Fight Against CD Piracy In Latin America*, 27 WHITTIER L. REV. 495, 525–26 (2005) (detailing technical assistance needs of Latin American countries regarding border enforcement measures as well as attempts to improve border enforcement procedures).

¹⁶² *Id.*

¹⁶³ See Maria Nelson, Michelle Vizurraga, & David Chang, *Counterfeit Pharmaceuticals: A Worldwide Problem*, 96 TRADEMARK REP. 1068, 1088 (2006) (discussing improvements in customs procedures enacted in the European Union in February, 2005).

¹⁶⁴ See Yu, *supra* note 6, at 866–67 (explaining the implications of TRIPS+ agreements in FTAs).

that the resources available were not sufficient given the continuing complaints of high rates of IPR infringement.¹⁶⁵

V. BEYOND FTAS—ACTA

In October 2007, the U.S. Trade Representative announced that negotiations on an Anti-Counterfeiting Trade Agreement (“ACTA”) would begin and include the United States, European Union, Japan, Canada, South Korea, Mexico, New Zealand and Switzerland.¹⁶⁶ Why an ACTA? The Office of the U.S. Trade Representative made clear in announcing the launch of the ACTA initiative that it will not involve any changes to TRIPS.¹⁶⁷ “Rather, the goal is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis.”¹⁶⁸ “The negotiations represent a cooperative effort by the governments involved, and will not be conducted as part of any international organization.”¹⁶⁹

The Government of New Zealand provides some of the reasons for pursuing ACTA:

The proliferation of infringements of intellectual property rights (“IPR”) particularly in the context of counterfeiting and piracy poses an ever-increasing threat to the sustainable development of the world economy. The consequences of such IPR infringements include (1) depriving legitimate businesses and their workers of income; (2) discouraging innovation and creativity; (3) threatening consumer health and safety; (4) providing an easy source of revenue for organized crime; and (5) loss of tax revenue.¹⁷⁰

The Government of New Zealand adds that the goals of ACTA are to:

Establish, among nations committed to strong IPR protection, a common standard for IPR enforcement to combat global infringements of IPR particularly in the context of counterfeiting and piracy that addresses today's challenges, in terms of increasing international cooperation, strengthening the framework of practices that contribute to effective

¹⁶⁵ *Id.* at 866–70 (indicating that many developing countries were still determining how they could achieve compliance under the minimum TRIPS requirements when developed countries began utilizing agreements with more stringent requirements).

¹⁶⁶ Press Release, Office of the U.S. Trade Rep., U.S. Will Seek Anti-Counterfeiting Trade Agreement (Oct. 23, 2007), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab_Announces_US_Will_Seek_New_Trade_Agreement_to_Fight_Fakes.html [hereinafter Press Release on ACTA]; European Comm’n, Sectoral Trade Issues on Intellectual Property (Oct. 23, 2007), http://ec.europa.eu/trade/issues/sectoral/intell_property/pr231007_en.htm.

¹⁶⁷ Press Release on ACTA, *supra* note 166.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Ministry of Econ. Dev. of N.Z., Information Sheet: Anti-Counterfeiting Trade Agreement, http://www.med.govt.nz/templates/MultipageDocumentTOC___34358.aspx.

enforcement of IPRs, and strengthening relevant IPR enforcement measures themselves.¹⁷¹

The number of countries that are participating in the discussions has increased since the initial October 2007 announcement and by August 2008 the additional governments included Australia, Morocco and Singapore.¹⁷² Although the actual details of the July 2008 meetings were not disclosed, the U.S. Trade Representative's Office did provide a summary indicating that meeting participants discussed civil remedies for infringements of intellectual property rights, including the availability of preliminary measures, preservation of evidence, damages, legal fees, and costs.¹⁷³ They also continued their previous discussions of border enforcement.¹⁷⁴

From the perspective of the United States, it has FTAs with Australia, Morocco and Singapore.¹⁷⁵ The three FTAs include significant IPR provisions, many that are similar to those discussed above. The United States is also a Party to the North American Free Trade Agreement (NAFTA) with Canada and Mexico,¹⁷⁶ but the IPR enforcement provisions of NAFTA track closely to TRIPS.¹⁷⁷

Canada and Mexico have come under strong industry criticism concerning their IPR enforcement regimes. In February 2008, the International Intellectual Property Alliance ("IIPA"), in its Special 301 submission to the Office of the U.S. Trade Representative, recommended that Canada be designated as a Priority Watch List country because Canada has taken no meaningful steps to modernize its copyright law, has an ineffective border enforcement system and insufficient enforcement resources.¹⁷⁸ Regarding Mexico, the IIPA stated that at the macro level copyright piracy levels remain high and there is no deterrent effect in curtailing the pervasive economic crime of piracy.¹⁷⁹

Going forward in the negotiations, it will be interesting to monitor developments. Given the ACTA's focus on IPR enforcement, USTR's annual report,

¹⁷¹ *Id.*

¹⁷² Press Release, Office of the U.S. Trade Rep., Statement from Spokesperson Scott Elmore on ACTA 1 (Aug. 1, 2008), *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2008/August/asset_upload_file308_15055.pdf.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Establishment of a Free Trade Area, U.S.-Morocco, June 15, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html; Establishment of a Free Trade Area, U.S.-Austl., May 18, 2004, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf; Establishment of a Free Trade Area, U.S.-Sing., May 6, 2003, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

¹⁷⁶ NAFTA, *supra* note 86, pmb1.

¹⁷⁷ *Id.* art 102.1(d).

¹⁷⁸ Press Release, Office of the U.S. Trade Rep., Special 301 Report: Canada, Int'l Intellectual Prop. Alliance 8 (Feb. 11, 2008), *available at* <http://www.iipa.com/rbc/2008/2008SPEC301CANADA.pdf>.

¹⁷⁹ Press Release, Office of the U.S. Trade Rep., Special 301 Report: Mexico, Int'l Intellectual Prop. Alliance 51 (Feb. 11, 2008), *available at* <http://www.iipa.com/rbc/2008/2008SPEC301MEXICO.pdf>.

i.e., Special 301,¹⁸⁰ is insightful as to some of the challenges that may face the governments participating in the negotiations. For example, USTR has reported that Mexico should increase border enforcement efforts and pass legislation that empowers law enforcement and customs to take ex officio enforcement actions.¹⁸¹ Concerning Canada, USTR stated that Canada should improve its enforcement system to enable authorities to take effective action against the trade in counterfeit and pirated products as well as curb the volume of infringing goods that are transshipped and transiting Canada, identifying its weak border enforcement and need for stronger legislation to empower customs.¹⁸²

In view of the USTR annual report, which is based, in part, on the experiences of IPR owners doing business in foreign countries and, therefore, reflects what obstacles exist, can an improved enforcement system be provided within a year or two years after an agreement is formally reached? Given the fact that the TRIPS enforcement obligations went into effect in some of these countries on January 1, 1996,¹⁸³ and there are still fundamental problems in enforcement systems among the ACTA negotiating countries, IPR owners would be prudent to temper their expectations.

Moreover, the question needs to be asked, how far are the governments willing to go to strengthen criminal IPR provisions. As recently as May 2008, the European Commission's Commissioner for the Internal Market ruled out the possibility of new legislation to combat piracy.¹⁸⁴

Thus, the ACTA discussions may involve more negotiating than the parties expected at the outset. In view of the IPR enforcement provisions found in FTAs concluded between the United States and its trading partners, and especially the more recently concluded FTAs, the question is: Whether ACTA will contain aggressive enforcement text that mirrors the U.S. FTAs or something less?

Finally, it is important to be reminded that ACTA is an initiative that allows governments to voluntarily commit themselves to whatever TRIPS+ standards are agreed.¹⁸⁵ This raises the old question concerning technical assistance and to what degree are the developed countries committing resources to assist developing countries that voluntarily submit to new enforcement standards. If ACTA is to be meaningful and welcoming to developing countries (or developed countries that are having implementation problems) that voluntarily agree to new and higher standards, there must be an assistance program that is better developed than what has been available in the past.

Developing countries that wish to be a part of ACTA and commit to higher enforcement standards may need significant assistance in all aspects of

¹⁸⁰ See 19 U.S.C. § 2242(a) (2006) (requiring the U.S. Trade Representative to submit a report to Congress that identifies countries that deny adequate and effective IPR protection). Special 301 reports are *available at*

http://www.ustr.gov/Trade_Sectors/Intellectual_Property/Section_Index.html.

¹⁸¹ 2008 USTR SPEC. 301 REP. 43 [hereinafter 2008 301-REP.], *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file553_14869.pdf.

¹⁸² *Id.* at 39.

¹⁸³ See TRIPS Agreement, art. 1.

¹⁸⁴ See Nikki Tait, *EU to Rule Out New Piracy Laws*, FIN. TIMES (London), May 13, 2008, at 5.

¹⁸⁵ Press Release, Office of the U.S. Trade Rep., Fact Sheet: Anti-Counterfeiting Trade Agreement 1 (Oct. 23, 2007), *available at* http://ustr.gov/assets/Document_Library/Reports_Publications/2007/asset_upload_file122_13414.pdf

enforcement.¹⁸⁶ Thus, while ACTA may look inviting for some developing countries to be part of this effort, technical assistance shortcomings of the past with regard to assistance in helping willing developing countries should be avoided by an upfront commitment to provide more resources than has been available in the past. There is a need for training teams made up of people with different areas of expertise able to be on the ground in countries for extended periods of time in order to assist in implementation of day-to-day enforcement activities.¹⁸⁷

As always, translating words in an agreement into action is a formidable task. The past dozen years of experience with TRIPS should be a constant reminder of this difficulty and the consequences of failing to devote resources to assistance.

VI. COUNTERFEITING·PIRACY: THE TRAINING/EDUCATION/AWARENESS DILEMMA

One reference to the current state of global counterfeiting and piracy is that it is spiraling out of control.¹⁸⁸ In its annual report, the U.S. Trade Representative's Office reported that the continuing growth in IPR theft and trade in fakes and pirated materials threatens innovative and creative economies worldwide.¹⁸⁹ As a result, stronger and more effective criminal and border enforcement is required to stop the manufacture, import, export, transit, and distribution of pirate and counterfeit goods.¹⁹⁰ The office of the Australian Minister of Trade indicated that Australia would join the ACTA negotiations because the negative impacts of the counterfeit and pirate trade are wide-ranging, creating significant costs for governments, consumers and businesses.¹⁹¹

From an industry perspective, the International Chamber of Commerce ("ICC") has:

[R]ecommended that G8¹⁹² ministers commit the resources and political direction necessary for the Heiligendamm Process to work effectively against intellectual property theft and facilitate innovation and economic development. The Heiligendamm Process was established at . . . [the 2007]

¹⁸⁶ Press Release, Office of the U.S. Trade Rep., Fact Sheet: Anti-Counterfeiting Trade Agreement 3 (Aug. 4, 2008) [hereinafter Aug. 4-Press Release], *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/asset_upload_file760_15084.pdf

¹⁸⁷ See Yu, *supra* note 6, at 847.

¹⁸⁸ Charlie McCreevy, European Comm'r for Internal Market and Servs., Speech 08/237 at Conference on Counterfeiting and Piracy (May 13, 2008) (transcript available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/237&format=HTML&aged=0&language=EN&guiLanguage=en>); see The 2008 High Level Conf. on Counterfeiting and Privacy, http://ec.europa.eu/internal_market/iprenforcement/index_en.htm (last visited Oct. 26, 2008).

¹⁸⁹ 2008 301-REP., *supra* note 181, at 6.

¹⁹⁰ *Id.*

¹⁹¹ Austl. Minister for Trade, Australia to Negotiate an Anti-Counterfeiting Trade Agreement (February 1, 2008), http://www.trademinister.gov.au/releases/2008/sc_012.html (last visited Oct. 26, 2008).

¹⁹² G8 Members, <http://www.g8.gc.ca/members-en.asp> (last visited Oct. 26, 2008) (stating that the G8 is made up of Canada, France, Germany, Italy, Japan, Russian Federation, United Kingdom, and the United States).

G8 Summit in Germany to address the issues of product counterfeiting and copyright piracy.”¹⁹³

The ICC has stated that “While we’re pleased that protection of intellectual property rights will be tabled in Japan, we’re just not seeing the political attention warranted by a problem of this global scale.”¹⁹⁴

The number of IPR enforcement training programs that are delivered globally is extremely difficult, if not impossible, to monitor because there are many and they are provided by numerous different governments, intergovernmental organizations, and industry groups.¹⁹⁵ One effort to capture this activity is the U.S. State Department’s IPR training database.¹⁹⁶ For an example of European Union Activity, IPR related assistance programs are included in a list that identifies programs under the EU-ASEAN Technical Assistance ECAP II.¹⁹⁷ The World Customs Organization makes a brief reference to its efforts in describing its IPR program.¹⁹⁸ INTERPOL’s involvement began in 2000 and has steadily increased its activity regarding training and other efforts.¹⁹⁹

Generally, there has been a great emphasis on IPR enforcement training since the creation of the WTO. To a large extent, it seemed reasonable to focus on IPR enforcement training because of the requirements to create national IPR enforcement systems that complied with the enforcement elements as outlined in TRIPS.

In view of some of statements being made today by governments, industry representatives, and intergovernmental organizations that the problem of IPR crimes continues to grow, it would seem to suggest that the IPR enforcement training strategy employed since 1995 needs to be reassessed. At a time when the TRIPS enforcement provisions are ineffectively implemented by many governments,²⁰⁰ when some governments are committing to TRIPS+ standards, despite their inability to provide TRIPS level enforcement,²⁰¹ and an ACTA is being negotiated, why should

¹⁹³ Int’l Chamber of Commerce, ICC targets ministers to advance IP protection at G8 summit (June 6, 2008), <http://www.iccwbo.org/bascap/iccpcbcee/index.html> (last visited Oct. 26, 2008).

¹⁹⁴ *Id.*

¹⁹⁵ 2004 USTR. SPEC. 301 REP. 4 [hereinafter 2004 301-REP.], *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file963_5996.pdf?ht= (noting the several agencies within the U.S. government that provide “technical assistance and training” on the implementation of TRIPS and other international IP agreements).

¹⁹⁶ *See* Intellectual Property Rights Training Program Database, <http://www.training.ipr.gov/> (last visited Oct. 26, 2008).

¹⁹⁷ *See* List of All Activities and Events, <http://www.ecap-project.org/activitiesevents.html> (last visited Oct. 26, 2008).

¹⁹⁸ *See* WCO Responsibilities, http://www.wcoomd.org/home_wco_topics_epoverviewboxes_responsibilities_epipr.htm (last visited Oct. 26, 2008).

¹⁹⁹ *See* INTERPOL Intellectual Property Crime, <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Default.asp> (last visited Oct. 26, 2008).

²⁰⁰ 2004 301-REP., *supra* note 195, at 2.

²⁰¹ 2007 USTR ANN. CHINA REP. 6, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/asset_upload_file625_13692.pdf.

IPR owners expect that there will be significant improvements in IPR enforcement results?

Since 1995, there has been an unending wave of workshops, seminars and conferences addressing IPR enforcement around the world, but there has also been a constant chorus of complaints from the IPR industries and owners that IPR enforcement is inadequate.²⁰² Some of the possible explanations for this are:

1. those delivering the training may be ineffective;
 - a. Lack sufficient experience/expertise, and
 - b. Utilize ineffective training formats;
2. the content of the training is deficient or inadequate;
3. the people attending are not the “right” people to receive the training;
4. the people attending have no interest in IPR enforcement; and
5. insufficient time committed to specific country deficiencies.

There are many potential reasons for ineffective IPR enforcement systems, including issues such as the lack of political will or corruption.²⁰³ Nevertheless, there must be some serious assessments made to consider what fundamental changes may be necessary to make IPR training and education more effective. The statements issued by governments, industry representatives, and others would suggest that, fundamentally, something needs to change because the training that has been provided is not having the desired effect.

While IPR enforcement is important, how have training programs demonstrated and shown the link between IPR enforcement and economic development in developing and least developed countries? Or, have there been serious and sustained attempts to provide IPR training that emphasize the important role of IPR recognition and use to generate business revenues and, thereby, contribute to local governments and economies? Has the idea of IPR enforcement as a tool for economic development been simply stated, but not shown and demonstrated?

Has the IPR community over-emphasized enforcement to its own detriment? Has the IPR community failed to project an image of wanting to be helpful to all potential beneficiaries, not just a select few industries from developed countries? After a dozen years, has the IPR community tainted itself with a perceived over-emphasis on enforcement and lack of programs that demonstrate the more positive aspects of IPR?

Another issue that must be considered is the target of all this IPR enforcement training. While it is obvious that IPR enforcement training is necessary for police,

²⁰² See, e.g., Press Release, Office of the U.S. Trade Rep., U.S. Expands Outreach in Campaign to STOP! Trade in fakes (June 6, 2005), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/June/US_Exps_Outreach_in_Campaign_to_STOP!_Trade_in_Fakes.html (stating that in June 2005, several officials from U.S. Government agencies traveled to Europe to meet with officials from Germany, UK, France and other European nations to address strategies for improving IPR enforcement strategy in the form of a crackdown on global piracy and counterfeiting).

²⁰³ 2003 USTR SPEC. 301 REP. 10, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_Special_301_Report/asset_upload_file665_6124.pdf (discussing the political corruption influence on IPR enforcement in China).

prosecutors, judges, customs officers, and any other government agency officials involved in IPR enforcement, a focus on government agencies and officials overlooks and ignores a country's IPR generating sectors.²⁰⁴ To generate a greater respect and appreciation for IPR protection and enforcement, it may be necessary to spend as much time with college-aged students, business groups, and others from the private sector in order to demonstrate how pervasive IPR can be in practically any endeavor that is pursued and, thus, the relationship between IPR creation, the need to consider protection and how enforcement contributes to generating increased revenues in the long term.

IPR enforcement training and education that is provided in a vacuum, without demonstrating its role in an IPR/commercial/economic system, is lost on those who can not appreciate its potential value. Indeed, the government's IPR enforcement authorities may never appreciate the linkage because they have never or will never be creators and entrepreneurs who will have any direct benefits from IPR.

CONCLUSION

The IPR enforcement issue and how it is to be pursued in the future needs to be re-examined. Although ACTA seeks to raise minimum IPR enforcement standards,²⁰⁵ it is an initiative that is, generally, one involving developed countries.²⁰⁶ If the 2006 WTO TRIPS Council meeting is an indicator that there is a divide between developed and developing countries on this issue, then it appears that new approaches to the IPR enforcement issue need to be added to existing training and education efforts.²⁰⁷

²⁰⁴ See Susan C. Schwab, U.S. Trade Rep., Remarks on Anti-Counterfeiting Trade Agreement 2 (Oct. 23, 2007) (transcript available at http://www.ustr.gov/assets/Document_Library/Transcripts/2007/October/asset_upload_file110_13428.pdf) (noting that those with jobs in sectors such as software, pharmaceuticals, movies, music and literature "depend on strong intellectual property protection").

²⁰⁵ Aug. 4-Press Release, *supra* note 186, at 1 (indicating the goal of the ACTA effort is to strengthen legal frameworks, enforcement, and cooperation initiatives regarding intellectual property rights).

²⁰⁶ *Id.* at 2 (indicating participants in the first round of negotiations as including Australia, Canada, EU, Japan, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, the United Arab Emirates and the United States).

²⁰⁷ See *TRIPS Council Discussions Fall Apart Over Enforcement Issue*, BRIDGES WKLY. TRADE NEWS DIG., Nov. 1, 2006, at 1, <http://ictsd.net/downloads/bridgesweekly/bridgesweekly10-36.pdf>. At the TRIPS Council meeting, developing countries opposed the European Union's ("EU") initiative to introduce the enforcement topic in the Council, arguing that this was an issue subject to domestic jurisdictions alone. *Id.* "The EU highlighted the need for intervention from the TRIPS Council to assist efforts to curb the rapid increase in piracy and counterfeiting world wide." *Id.* While the EU recognized that WTO Members are allowed to implement enforcement provisions domestically, it felt that such measures must ultimately help to achieve the objectives of the TRIPS Agreement. *Id.* at 1-2. "The EU has previously submitted a paper suggesting that the Council should assess Members' compliance with the TRIPS Agreement's enforcement provisions." *Id.* at 2. Several developing countries, including China, Chile, India, South Africa, Argentina and Brazil, strongly opposed the initiative and objected to a presentation by the EU on its experiences, which they felt would amount to implicitly accepting the EU's proposal to share country experiences. *Id.* The developing countries felt that enforcement was an issue outside the scope of the TRIPS Agreement. *Id.*

As we move toward nearly a decade and a half of IPR enforcement training that has not achieved the desired effect, it should be clear that IPR enforcement needs new and fresh approaches. This is not to say that existing content needs to be eliminated, but it may be time to press the “refresh” key so that something new and different can be added.

It is a difficult task to clarify ambiguities of existing standards and to raise minimum levels of IPR enforcement when IPR education programs do not adequately expand to include potential local beneficiaries.²⁰⁸ IPR enforcement training and education, which is a complex task, needs to have sufficient flexibility in content so that there is something demonstrable that links the enforcement to business and economic development.

Finally, those involved in training and education should consider greater use of today’s technologies in reaching out to more people and beyond the usual enforcement community. Looking at IPR enforcement training and education in its broadest sense, some progress in attaining higher levels of protection and education may occur if more local beneficiaries in developing and least developed countries are convinced to become proponents of IPR protection and enforcement because they understand how IPR can be “practiced” through use of these concepts in their day-to-day commercial activities.²⁰⁹

Thus, while efforts at clarifying existing IPR requirements and raising standards are worthy objectives, the fact that governments and IPR owners continue to see a worsening situation is indicative of a need for reassessment of IPR enforcement training programs. After years of repeating the notion that IPR enforcement contributes to economic development, it may be time to restate the idea in order to focus on demonstrating that the use and application of intellectual property concepts should generate value to a company, the local economy in which it operates and, thereby, necessitate protection and enforcement.²¹⁰ The need is to emphasize that IPR is important in and of itself.

²⁰⁸ See TRAINER & ALLUMS, *supra* note 21, § 1:2 (discussing the difficulty in educating the local customs officials on how to protect intellectual property); see also Ruth L. Okediji, *The Institutions of Intellectual Property: New Trends in an Old Debate*, 98 AM. SOC’Y INT’L L. PROC. 219, 221 (2004) (discussing the impact of TRIPS on the ability of developing countries to ensure the welfare of their citizens).

²⁰⁹ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 2 (2004) (stating that the proponents of TRIPS argue that strong intellectual property rules are essential to a country’s economic growth and development); see also Thelen, *supra* note 151, at 528 (“[C]arrots’ dangled by . . . developed nations would be significant motivators for developing countries to comply with the TRIPS agreement. These positive incentives focus on providing support in the implementation of TRIPS through technical assistance and additional time to become compliant as well as creating short and long-term economic incentives.”).

²¹⁰ Helfer, *supra* note 209, at 2–3 (stating that the proponents of TRIPS argue that strong intellectual property rules are essential to a country’s economic growth and development). For further reading, the reader should review www.galaxysystemsinc.com for a new initiative and IPR tool that attempts to inject “fun” into IPR learning.