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Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere

Aaron Schwabach*

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*"There is probably more misinformation about China than about any other country in the world."*¹

I. The Perception Gap

There is a widespread but incorrect perception in the United States that intellectual property (IP) piracy is only or primarily a problem in developing countries, especially East Asian countries, and most especially China. This misperception is most evident in the screeching China-bashing of the mainstream media and some elected representatives, but it pervades discourse at every level. I recently encountered a discomforting example when my publisher sent me a proposed cover

*Professor of Law, Thomas Jefferson School of Law, aarons@tjsl.edu. This paper grew from a talk I gave at the *Conference on the World Trade Organization: Dislocations and Solutions* at Southwest University of Political Science and Law, in Chongqing, China, on Dec. 2, 2006: "Perception Gaps between Developed and Developing Countries on Intellectual Property Piracy." I would like to thank Professor Wang Heng, who organized the conference, and all of the many faculty and staff members of Southwest University who helped make the conference possible.

1. EUNICE TIETJENS & LOUISE STRONG HAMMOND, BURTON HOLMES TRAVEL STORIES: CHINA 209 (William H. Wheeler & Burton Holmes eds., Wheeler Publishing Co. 1931).

for a book on intellectual property law.² The cover showed a card table covered with DVDs and VCDs, presumably offered for sale. The DVDs, labeled in Chinese, were recognizable as recent Hollywood movies.

I rejected the cover, partly because the book was a general overview of IP law, and DVD piracy (or even IP piracy generally), for all of the media coverage it receives, is only a very small part of IP law and receives only brief discussion in the book. My initial reaction to the picture, however, was not so calmly reasoned, but visceral: It looked sinophobic to me. The publisher had not initially realized what message the picture would send, but agreed that it had no wish to send that message; instead, it substituted a rather pleasant picture of an approved U.S. patent application.

Shortly afterward, Professor Wang Heng of Xinan (Southwest) University of Political Science and Law invited me to speak on international intellectual property law at a conference on the WTO in Chongqing. The conference organizers expected, another professor later told me, "yet another dreary scolding on IP piracy," but I knew at once what I had to say: The problem of IP piracy in China is really not as bad as all that.

Politicians in search of a safe, non-voting scapegoat often target foreigners. The unfortunate xenophobia that characterizes public political discourse on everything from immigration to trade policy, not just in the U.S. but worldwide, is the result of this cost-minimizing behavior by politicians. It will always be safer for a senator from Michigan to blame Detroit's economic woes on Japanese carmakers (for somehow competing unfairly) than on Detroit's carmakers for making lousy cars. Lawyers and legal academics are not politicians, however, and have no such excuse. Indeed, it is our duty to counteract political hyperbole with facts and reason, rather than buying into it.

A welcome example of the facts-and-reason approach is Peter K. Yu's 2003 article *Four Common Misconceptions about Copyright Piracy*.³ The four misconceptions referred to in the title are that "(1) copyright piracy is merely a cultural problem, (2) copyright piracy is primarily a development issue, (3) copyright piracy is a past phenomenon for technologically-advanced countries, and (4) copyright piracy is a necessary byproduct of authoritarian rule."⁴ As applied to China (and

2. AARON SCHWABACH, *INTELLECTUAL PROPERTY: A REFERENCE HANDBOOK* (ABC-CLIO, Inc. 2007).

3. Peter K. Yu, *Four Common Misconceptions about Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127 (2003).

4. Yu, *supra* note 3, at 130.

my apologies to Professor Yu if I stretch his points too far) (1) there has been a frequent and inaccurate portrayal in English-language publications, including scholarly publications, of IP piracy as somehow rooted in Chinese culture and Otherness; (2) China's rapidly-increasing level of economic development is not directly (or inversely) related to IP piracy rates; (3) technological advances in the U.S. have actually brought about a resurgence in U.S. IP piracy; and (4) authoritarian rule may actually have a dampening effect on IP piracy. This article addresses these ideas and their consequences: Not only is copyright piracy in China (and perhaps other countries with similar development profiles) less of a problem for U.S. copyright holders than it is often portrayed as being, but copyright piracy in developed countries is a much greater problem.

II. Blaming China

The upcoming 2008 presidential election has brought on a wave of China-bashing from presidential candidates. On August 7, 2007, Hillary Clinton declared "I do not want to eat bad food from China...or have my children having toys that are going to get them sick."⁵ While voters may be accustomed to taking everything said by candidates for office with several grains of salt, when Ms. Clinton expressed this concern, her only child, Chelsea, was 27 years old.⁶ In the same debate, Barack Obama declared, somewhat more moderately, "China is a competitor, but they don't have to be an enemy."⁷ Someone who hijacks airplanes and flies them into buildings full of people is an enemy. Someone who sells pirated copies of *Rush Hour 3* is not. Apparently, though, political discourse in the U.S. has grown so irrational that concerns about intellectual property rights, currency exchange rates and leaded paint add up to enmity. And China-bashing, like Japan-bashing before it, has become an industry from which people can make money.⁸

5. Bronwen Maddox, *Democrats Found Wanting as China-bashing Comes to Fore*, THE TIMES, Aug. 9, 2007, available at http://www.timesonline.co.uk/tol/comment/columnists/bronwen_maddox/article2224879.ece.

6. Chelsea Clinton was born on February 27, 1980. The toy danger may have been exaggerated by an American company, Mattel, erring on the side of over-recalling. See Ben Blanchard, *Mattel Apologizes to China for Toy Recalls*, REUTERS, Sept. 21, 2007, available at <http://www.reuters.com/article/topNews/idUSPEK10394020070921?rpc=92>.

7. Maddox, *supra* note 5.

8. See, e.g., PETER NAVARRO, *THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON* (Keith Cline ed., Financial Times Press 2d. 2007); RAY EBERTS & CINDELYN EBERTS, *THE MYTHS OF JAPANESE QUALITY* (Lynne Lackenbach ed., Prentice Hall 1995).

When it comes to intellectual property rights, *Business Week* magazine has been among the reliable beaters of the China-scare drum. A sample of headlines from the past few months includes *China: Putting a Stop to IP Piracy*;⁹ *Chinese Fakes: Tough to Police*;¹⁰ *U.S. Takes Piracy Pushback to WTO—Intellectual-Property Rights Violations in China Cost the U.S. Billions Each Year, Leading to Complaints to the World Trade Organization*;¹¹ *Deaf to Music Piracy: Chinese Search Engines Make It Easy to Steal Net Tunes*;¹² and *How to Win the China Piracy Battle*.¹³ *Business Week* often portrays IP piracy as an Asian issue, even when China is not specifically mentioned: *Asia: The Steep Cost of Software Piracy*;¹⁴ *Software Piracy Still a Scourge in Asia*;¹⁵ *Asia's Digital Music Free-For-All*;¹⁶ *Asia's Maddening Music Biz—Universal Music Is on a Star Search for Hot Acts in China and Japan, but Illegal File-sharing and CD Piracy Woes Present Major Headaches*.¹⁷ Russia

9. Alistair J. Nicholas, *China: Putting a Stop to IP Piracy*, BUS. WK., March 22, 2007, available at http://www.businessweek.com/globalbiz/content/mar2007/gb20070322_286139.htm?chan=search.

10. Frederik Balfour, *Chinese Fakes: Tough to Police*, BUS. WK., Apr. 9, 2007, available at http://www.businessweek.com/globalbiz/content/apr2007/gb20070409_915993.htm?chan=search. The article, like many mentioned here, praises the Chinese government for its sincere anti-piracy efforts. The unfortunate cumulative effect of the headlines is the report of an editorial choice made by the magazine, rather than of the individual authors.

11. Frederik Balfour, *U.S. Takes Piracy Pushback to WTO—Intellectual-Property Rights Violations in China Cost the U.S. Billions Each Year, Leading to Complaints to the World Trade Organization*, BUS. WK., April 10, 2007, available at http://www.businessweek.com/globalbiz/content/apr2007/gb20070410_466097.htm?chan=search.

12. Bruce Einhorn & Xiang Ji, *Deaf to Music Piracy: Chinese Search Engines Make It Easy to Steal Net Tunes*, BUS. WK., Sept. 10, 2007, available at http://www.businessweek.com/globalbiz/content/aug2007/gb20070830_502991.htm?chan=search or http://www.businessweek.com/magazine/content/07_37/b4049058.htm?chan=search (same article). The (absurd) implication is that using English-language search engines to aid copyright piracy is somehow difficult.

13. Shaun Rein, *How to Win the China Piracy Battle*, BUS. WK., June 20, 2007, available at http://www.businessweek.com/globalbiz/content/jun2007/gb20070620_006304.htm?chan=search.

14. Eileen Yu, *Asia: The Steep Cost of Software Piracy*, BUS. WK., May 16, 2007, available at http://www.businessweek.com/globalbiz/content/may2007/gb20070516_812794.htm?chan=search.

15. Jeanne Lim, *Software Piracy Still a Scourge in Asia*, BUS. WK., May 24, 2006, available at http://www.businessweek.com/globalbiz/content/may2006/gb20060524_858766.htm?chan=search. The article does observe that: "The incidence [of IP piracy] has dropped in India and China...." The justification for the headline is that "in the Asia-Pacific region as a whole, [IP piracy has] risen, says a new study." *Id.* The article includes a figure of \$6.9 billion for software piracy losses in the U.S., as against \$3.9 billion in China and \$3.2 billion in France. *Id.*

16. Brian Bremner, *Asia's Digital Music Free-For-All*, BUS. WK., May 30, 2007, available at http://www.businessweek.com/globalbiz/content/may2007/gb20070530_090440.htm?chan=search.

17. Brian Bremner, *Asia's Maddening Music Biz—Universal Music Is on a Star Search for Hot Acts in China and Japan, but Illegal File-sharing and CD Piracy Woes Present*

also merits mention: *Software Piracy: Will Russia Crack Down?*¹⁸ It is rare, however, to see piracy linked to a developed European or North American country, although there are occasional exceptions: *Software Piracy Still Rife in Britain*.¹⁹

In the slightly more distant past, *Business Week* has even linked IP piracy to national security, as if unlicensed copies of *Shrek the Third* might bring down the American political-economic system.²⁰

The reality is somewhat different. Just as more Americans have died from contaminated American-grown spinach than from imported Chinese produce,²¹ domestic piracy probably costs the U.S. content industry more money than piracy in any other country (although not more than in all other countries combined). And many developed countries continue to engage in more piracy, per capita, than many developing countries. While much of this piracy may escape media attention

Major Headaches, BUS. WK., July 23, 2007, available at http://www.businessweek.com/globalbiz/content/jul2007/gb20070723_879431.htm?chan=search.

18. Renate Zoeller, *Software Piracy: Will Russia Crack Down?*, BUS. WK., August 28, 2007, available at http://www.businessweek.com/globalbiz/content/aug2007/gb20070828_851680.htm?chan=search.

19. Sylvia Carr, *Software Piracy Still Rife in Britain*, BUS. WK., May 23, 2006, available at http://www.businessweek.com/globalbiz/content/may2006/gb20060523_033850.htm?chan=search. The article even compares Britain unfavorably to China, India, and Russia, noting that while software piracy had decreased in those countries, it had not decreased in Britain. A recent article in the Wall Street Journal also provides a welcome respite: Anil K. Gupta & Haiyan Wang, *How to Get China And India Right*, WALL ST. J., Apr. 28-29, 2007, at R4. The article advises businesses "Don't obsess over intellectual property." *Id.* In the print edition, however, the effect is somewhat undercut by the China-scare ad that appears on the back of the page: A full-page black rectangle with a tiny red airplane and the nonsensical question: "If a plane departs Shanghai at 9:00 pm and flies due west at 500 mph, how much time do you have to stop a deadly pandemic?" *Id.* at R3. The ad provides a link to an equally meaningless IBM video on bird flu, filled with talking heads saying things like: "The influenza virus is a nasty virus" over scary-movie background music. It is hard to tell what purpose the ad serves, other than labeling China a source of disease and danger. *Id.*; http://www.03.ibm.com/innovation/us/adv/special/index.shtml?maven_referralPlaylistId=cca2c88b3aa9f6a51bc2eb35c9645964539b55a4&maven_referralObject=441250499 (last visited Sept. 14, 2007). It also shows contempt for the intelligence of the Wall Street Journal's readers: A plane flying due west from Shanghai is on a very short domestic flight, or might be a special-purpose military or scientific flight. Westbound long-distance flights in the northern hemisphere generally follow great circle routes, and there are no great circle routes originating in Shanghai and initially heading due west, because Shanghai is not on the equator. A plane flying from Shanghai to London, for example, would start out flying somewhat north of northwest. (Eastbound flights in the northern hemisphere may deviate from great circle routes, to take advantage of the jet stream.)

20. Patricia O'Connell, *Piracy and "Economic National Security": From Lost Jobs to Shrunk Profits, Intellectual Property Theft Is a Major Threat to the U.S.*, *Says the Justice Dept.'s David Israelite*, BUS. WK., Aug. 2, 2004, available at http://www.businessweek.com/bwdaily/dnflash/aug2004/nf2004082_1497.htm?chan=search.

21. In 2006 three Americans died from eating contaminated spinach grown and packed in the U.S. Nor has the problem of contaminated U.S. food been resolved. In Sept. 2007, Dole Food Co., a U.S. company, recalled more than 5,000 bags of salad vegetables

because it is online and thus less visible, the card table covered with pirated DVDs and CDs is still more common in the U.S. than one might expect from the public, political and scholarly discourse on the topic.²²

Even in reports of piracy within the U.S., the identification of IP piracy with the Other continues. Latin music, in particular, is singled out, giving the casual reader the impression that IP piracy within the U.S. is confined to an immigrant, "foreign" subculture.²³ It is common to read reports of arrests at swap meets containing gratuitous references to the seized discs as containing "100% Latin" music, while in other arrests the content is simply not described,²⁴ seeing the content described as "100% Anglo music," even if accurate, is about as likely as reading an account describing the French Revolution as "white-on-white violence."

GrayZone, a private anti-piracy firm, provides monthly lists of "RIAA Anti-Piracy Seizure Information" on its website. A particularly egregious example is the listing for September 2003, which describes 48 enforcement actions within the U.S. and in doing so uses the phrase "Latin" nineteen times, including "100% Latin" six times.²⁵ The same list also describes three enforcement actions in the Dominican Republic, a Spanish-speaking country, and notes, perhaps unnecessarily, that all of the music seized in each of the three raids was also "Latin."²⁶ The list notes sixteen raids in which "urban" CDs were seized, while the terms "country" and "pop" appear on the list once each, in describing a raid that also included Latin and urban music.²⁷ Twenty-four items do not describe the type of music seized. These twenty-four non-specific descriptions may simply be examples of responsible law enforcement, but it still seems a bit odd that Latin and urban music merit such frequent

grown in the U.S. after a sample tested in Canada was found to be contaminated with bacteria. *Dole Recalls Salad Mix for E. Coli Risk: About 5,000 Bags of Hearts Delight Sold in Nine States and Parts of Canada Affected by Recall*, CNNMONEY.COM, Sept. 17, 2007, available at <http://money.cnn.com/2007/09/17/news/companies/bc.lettucerecall.ap/index.htm?cnn=5> yes. Although the article is about contamination originating in the U.S. affecting other countries as well as the U.S., on September 18, 2007, the CN-NMoney article nonetheless includes links stating: "*China starts recall system for food, toys*" and "*A new legislative initiative requires detailed labeling on food products about countries of origin.*"

22. See, e.g., *25 Busted at Swap Meet*, NORTH [SAN DIEGO] COUNTY TIMES, Nov. 17, 2005, available at http://www.nctimes.com/articles/2005/11/18/news/sandiego/21_43_5911_17_05.txt.

23. Latino-bashing and Mexico-bashing, unfortunately, are also on the rise—mainstream media figure Lou Dobbs, for one, seems determined to make a career of them.

24. See, e.g., GrayZone, RIAA Anti-Piracy Seizure Information, <http://www.grayzone.com/usabusts.htm> (last visited Sept. 12, 2007).

25. *Id.*

26. *Id.*

27. *Id.*

mention in connection with piracy.²⁸ (The discs are also variously described as “counterfeit,” “pirated,” and “piratical,” the last term conjuring up images of Captain Jack Sparrow, or perhaps Errol Flynn.)

III. Measuring Piracy

As with any illegal activity, it is difficult to get reliable information on how much digital piracy actually takes place. In addition to this reporting problem, there’s also a problem of valuation: The record industry might like to believe that a single downloaded song (“Sci-Fi Wasabi,” by Cibo Matto) represents a lost \$19 album sale. More realistically, it might represent a lost 99¢ iTunes sale, although even that may be too high: Many who download music for free do so out of curiosity, and would not listen to the song if doing so cost even a small amount of money. These free riders benefit from the willingness of someone, somewhere, to pay for the song and of someone (possibly not the same person) to make it available for download, but as the downloaders would not otherwise have bought the song, they do no direct economic harm.²⁹

Free-rider downloading also serves an advertising function that may actually benefit music-copyright owners: Some free-rider downloaders may like “Sci-Fi Wasabi” enough to go out and spend 99¢ per song for other Cibo Matto tunes from iTunes, or even \$11 for the album *Stereo Type A* or \$19 for *Pom Pom: The Essential Cibo Matto*. If the downloader (or another who hears the downloaded copy) becomes a fan, hundreds of dollars in sales may result; if no download takes place, all of these

28. *Id.*

29. The problem of valuation and displaced sales has been extensively discussed elsewhere. See, e.g., Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC’Y U.S.A. 497, 505-08 (1998); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1914 (2007); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U.L. REV. 975, 983 (2002); Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795 (2006); Rafael Rob & Joel Waldfogel, *Piracy on the High C’s: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29 (2006); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 936-39 (1994) (Jacobs, J., dissenting) (“[O]ne cannot put a finger on any loss suffered by the publisher in the value of the individual articles or in the traditional market for subscriptions and back issues. The district court found that Texaco would not purchase back-issues or back volumes in the numbers needed to supply individual copies of articles to individual scientists.”); *Duffy v. Penguin Books USA Inc.*, 4 F.Supp.2d 268, 275 (S.D.N.Y. 1998) (“Because Fashion Formula was out-of-print at the time, Nanfeldt was unable to purchase the book. Thus, Duffy lost nothing as a result of Nanfeldt’s decision to photocopy portions of the book.”). See generally Susan Tiefenbrun, *The Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects Upon International Trade: A Comparison*, 461 BUFFALO L. REV. 1 (1998).

potential future sales would be lost.³⁰ Even if the total number of such sales represents only a tiny portion of downloads, it still exceeds the number of sales in the absence of downloading, which would be zero.

Movie piracy is somewhat easier to quantify. The same problem of reporting exists: People are unlikely to be truthful about their illegal downloading habits, and police detection of illegal downloads or DVD seizures can provide only a very rough estimate of actual downloads and sales. The valuation problem is simpler, however: Typically a DVD contains only one movie, so the downloader or purchaser of an unlicensed copy is not likely to buy a licensed copy of the DVD. The free-rider problem still remains: Not every unlicensed copy necessarily represents a lost sale. Many who might have been willing to pay 60 cents for a pirated³¹ DVD of the mind-numbingly awful conclusion to the *Pirates of the Caribbean* trilogy³² would have been unwilling to pay \$22 for a licensed copy, or \$11 per person to see the movie in a theater—or would have demanded their money back if they had. And there is still the possibility of legitimate sales resulting from initial introduction through unlicensed copies: A friend's recommendation may lead a curious teenager to download *Porco Rosso*,³³ in turn leading to a lifelong interest in anime and the spending of hundreds of dollars on the work of Hayao Miyazaki and Studio Ghibli alone, and may lead to other interests: If, for example, the hypothetical downloader is a German speaker, the discovery that Sidonie von Krosigk (the voice of Chihiro in the German release of *Spirited Away*³⁴) also starred in two German fantasy films, *Bibi Blocksberg*³⁵ and its sequel, *Bibi Blocksberg und das Geheimnis der blauen Eulen*,³⁶ may lead to the purchase of licensed copies of those films as well as of recordings of the many, many episodes of the long-running Bibi Blocksberg television cartoon.

IV. Movie Piracy by Country: Motion Picture

Association Study Results

In May 2006 L.E.K. Consulting, a multinational business consultancy, completed a study commissioned by the Motion Picture Association (MPA; the international counterpart of the Motion Picture Association

30. Kurlantzick & Pennino, *supra* note 29, at 511.

31. Or piratical.

32. *Pirates of the Caribbean: At World's End* (Walt Disney Pictures 2007).

33. *Porco Rosso* (Studio Ghibli 1992 (in Japan, as *Kurenai no Buta*; U.S. release 2005)).

34. *Chihiros Reise ins Zauberland* (Studio Ghibli 2003).

35. *Bibi Blocksberg* (Kiddinx Entertainment GmbH 2003).

36. *Bibi Blocksberg und das Geheimnis der blauen Eulen* (Bibi Blocksberg and the Secret of the Blue Owls) (Kiddinx Entertainment GmbH 2005).

of America (MPAA)) on the global cost of movie piracy.³⁷ L.E.K. surveyed more than 20,000 consumers in twenty-two countries and territories: Australia, Brazil, Canada, China, France, Germany, Hong Kong, Hungary, India, Italy, Japan, Korea,³⁸ Mexico, the Netherlands, Poland, Russia, Spain, Sweden, Taiwan, Thailand, the United Kingdom, and the United States. The study looked at piracy of all movies, with a special focus on movies produced by the MPA member studios: Buena Vista (Walt Disney), MGM, Paramount, Sony, Twentieth Century Fox, Universal City Studios, and Warner Brothers. The study concluded that in the preceding calendar year (2005) the MPA movie studios had lost \$6.1 billion to piracy, 80% of it outside the U.S.³⁹ This figure is subject to the uncertainties described above, and the report's description of the method used for valuation does not make it clear whether each pirated copy is counted as a lost sale, or perhaps more than one lost sale: "The study's piracy loss calculation is based on the number of legitimate movies—movie tickets, legitimate DVDs—consumers would have purchased if pirated versions were not available."⁴⁰

Even with these reservations, however, the results show piracy to be a more multi-sided problem than is often assumed. Of the supposed \$6.1 billion in losses to U.S. studios, 2.3 billion, or 38%, were lost to Internet piracy, while 3.8 billion, or 62%, were lost to hard-goods piracy.⁴¹ The three countries in which the losses to U.S. studios were highest were not East Asian countries, and two of them were not developing countries: Mexico, the United Kingdom, and France accounted for over \$1.2 billion in lost revenues, or 25% of the non-U.S. total—and slightly less than the U.S. total of \$1.3 billion.⁴² The three countries have a combined population of about 225 million, somewhat less than the United States' 293 million, giving them a slightly higher per capita piracy rate.⁴³

V. MPA Members' Lost Revenues, Per Capita

Russia came in fourth on the L.E.K. Report's dollar-value list, while China came in sixth. When population is taken into account, the differences are still more dramatic:

37. L.E.K. CONSULTING, THE COST OF MOVIE PIRACY (May 2006), http://www.mpa.org/2006_05_03leksumm.pdf [hereinafter L.E.K. Report].

38. In the L.E.K. Report and throughout this paper, "Korea" refers to South Korea.

39. L.E.K. Report, *supra* note 37, at 4.

40. *Id.* at 13.

41. *Id.* at 4.

42. *Id.* at 7.

43. *Id.* at 7; THE 2005 WORLD ALMANAC AND BOOK OF FACTS 776, 802, 841, 843 (2005).

Country	Revenues lost by U.S. MPA members ⁴⁴ (in millions)	Population ⁴⁵ (in millions)	Loss per capita
USA	\$1,311	293	\$4.47
Mexico	\$483	105	\$4.60
UK	\$406	60	\$6.77
France	\$322	60	\$5.37
Russia	\$266	144	\$1.85
Spain	\$253	40	\$6.33
China	\$244	1,299	\$0.19
Japan	\$216	127	\$1.70
Italy	\$161	58	\$2.78
Germany	\$157	82	\$1.91
Thailand	\$149	65	\$2.29

In only four of the countries listed in the L.E.K. Report as the top ten markets for losses to U.S. producers does the average person steal more from U.S. studios than do the Americans themselves. Three of these four countries are developed members of the European Union: France, Spain, and the United Kingdom. Mexico aside, the developing countries on this list have far lower per capita piracy rates. (As a percentage of total sales, however, these countries' rates are still high, because they also have lower per capita legitimate sales rates.⁴⁶) Russia, often portrayed in the media as a lawless Wild West dotted with organized-crime fiefdoms, has a per-capita rate only slightly higher than that of notoriously law-abiding Japan, and lower than that of equally staid Germany.⁴⁷

With China, the difference is exceptionally stark: The per capita cost of piracy is negligible, an order of magnitude lower than Germany's. While it might be that a significant percentage of China's 1.3 billion people are excluded from participation in the modern information society—that is, don't have televisions and DVD or VCD players, let alone broadband Internet access—the probable explanation lies elsewhere. China has over 400 million televisions (approximately one for every 3.25 people), which suggests that most people have access to video entertainment.⁴⁸ And even if only the wealthiest one-tenth of China's population is considered, the

44. L.E.K. Report, *supra* note 37, at 7.

45. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 763, 776, 778, 789, 790, 802, 823, 831, 836, 841, 843 (2005).

46. See generally L.E.K. Report, *supra* note 37, at 6.

47. This is not to suggest, of course, that Japan is actually unusually law-abiding (whatever the crime statistics may show) or that Germany is staid, but only that the publicly perceived images of these countries—their national brands—incorporate these stereotypes.

48. China Press, Media, TV, Radio, Newspapers, n.d., <http://www.pressreference.com/Be-Co/China.html> (last visited Sept. 20, 2007).

per-capita cost of piracy would be no higher than Germany's. It seems that if any countries are systematically looting U.S. intellectual property rights in movies, they are to be found not in Asia but in the European Union.

Language might be one reason. There is more incentive to buy and steal English-language movies if you speak English. No matter what Rex Harrison might have said, nearly everyone in the U.K. does; many people in Europe do; few people in Russia or China do. China also has a robust film industry of its own, producing films in Chinese and more closely suited to the tastes of Chinese audiences than imported films.⁴⁹ Video piracy is indeed a serious problem in China, but piracy of U.S. movies is only a tiny part of it.

A look at the data for the remaining twelve countries in the study provides partial support for the hypothesis that persons in countries with a large domestic film industry are less likely to pirate U.S. films:

Country	Revenues lost by U.S. MPA members ⁵⁰ (in millions)	Population ⁵¹ (in millions)	Loss per capita
USA	\$1,311	293	\$ 4.47
Canada	\$118	33	\$3.58
Hungary	\$102	10	\$10.20
Poland	\$102	39	\$2.62
Brazil	\$101	184	\$0.55
Taiwan	\$98	23	\$4.26
Australia	\$93	20	\$4.65
Netherlands	\$36	16	\$2.25
Sweden	\$32	9	\$3.56
Korea	\$9	49	\$0.18
India	\$7	1,065	\$0.01
Hong Kong	\$4	7	\$0.57

49. Protectionism may be another reason: Chinese law severely limits the theatrical release of foreign films, possibly reducing demand for those films on DVD—although, as many films are thus available only on DVD, the effect of protectionism might actually be to increase demand for certain DVDs. China has the highest percentage of MPA members' potential market lost to piracy—90%—of any country in the study, possibly because the legitimate outlets for MPA movies are restricted in order to protect China's film industry, forcing viewers to purchase unlicensed copies if they want to see certain movies at all. See L.E.K. Report, *supra* note 37, at 6. On unfair non-IP-related trade practices in the international film industry generally, see Claire Wright, *Fugitive Production*, L.A. DAILY JOURNAL, Sept. 12, 2007, at 6. Pirated movies may also be manufactured for export; exporting these movies to the U.S. market would be easier from Mexico or Canada than from China or Russia.

50. E-mail from Julie Kenworth, Motion Picture Association of America, to Aaron Schwabach (Oct. 1, 2007) (on file with author).

51. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 783, 784, 793, 806, 821, 833, 835, 843 (2005).

India, with the world's largest film industry, has a per-capita loss rate for U.S. filmmakers even lower than China's; the other East Asian country on the list, Korea, has a rate similar to China's, while the rate for the Chinese territory of Hong Kong is also low; Korea and Hong Kong also have commercially significant film industries. Tiny Hungary, on the other hand, leads the piracy league by this measure. Conditions in Hungary may be ideally conducive to piracy of U.S. movies: Near-universal access to home video entertainment⁵² and no commercially significant domestic film industry.⁵³

VI. MPA Members' Lost Consumer Spending Due to Movie Piracy, Per Capita

Looking at the L.E.K. Report's figures for lost consumer spending (as opposed to MPA members' lost revenues) gives different numbers, still falling in to the same general groupings:

Country	Total MPA member consumer spending lost to movie piracy ⁵⁴ (in millions)	Population ⁵⁵ (in millions)	Loss per capita
USA	\$2,561	293	\$8.74
Mexico	\$954	105	\$9.09
UK	\$787	60	\$13.12
Russia	\$622	144	\$4.32
France	\$604	60	\$10.07
China	\$565	1,299	\$0.43
Spain	\$478	40	\$11.95
Japan	\$375	127	\$2.95
Germany	\$353	82	\$4.30
Italy	\$316	58	\$5.45
Thailand	\$271	65	\$4.17
Taiwan	\$220	23	\$9.57

52. Nearly 90% of households in Hungary have at least one color television set. THE ECONOMIST, POCKET WORLD IN FIGURES 92 (2007).

53. Many Hungarian films win international critical acclaim, but the film industry of the land of Béla Tarr has not yet achieved a dependable record of international (or even, for the most part, domestic) commercial success. See, e.g., Nóra Lakos, *Hungarian Films Win Big at Festivals . . . But Who Sees Them? Distribution a Problem for European Films as Hollywood Maintains Grip on Market*, BUDAPEST WK. ONLINE, May 10, 2007, <http://www.budapestweek.com/newsites/trends/trends02.html>.

54. L.E.K. Report, *supra* note 37, at 10; Kenworth, *supra* note 50.

55. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 763, 776, 778, 783-84, 789-90, 793, 802, 806, 821, 823, 831, 833, 835, 836, 841, 843 (2005).

Country	Total MPA member consumer spending lost to movie piracy (in millions)	Population (in millions)	Loss per capita
Canada	\$211	33	\$6.39
Poland	\$200	39	\$5.13
Hungary	\$184	10	\$18.40
Brazil	\$172	184	\$0.93
Australia	\$171	20	\$8.55
Netherlands	\$84	16	\$5.25
Sweden	\$66	9	\$7.33
Korea	\$28	49	\$0.57
India	\$12	1,065	\$0.01
Hong Kong	\$8	7	\$1.14

As with the previous chart, three countries in the top ten—France, Spain and the U.K.—have a significantly higher per capita lost consumer spending rate than the others, with Mexico not too far behind, while one country in the top ten—China—has a significantly lower per capita piracy rate than the next lowest top-ten country, Japan. Hungary's per capita consumer spending loss is the highest of any country on the list, by a wide margin, while Australia and Sweden approach U.S. levels. Per capita loss for Korea and Hong Kong are nearly as low as for China, while per capita loss for India is, again, virtually nil.

The actual difference in piracy rates may be even higher: While assessing the quantity of any illegal activity is difficult, the value of on-line piracy (which does not involve a physical product) is probably even harder to assess than the value of DVD piracy (which does). And online piracy of movies, which requires broadband to be practical, is likely to be more concentrated in countries with greater access to broadband. With only 4 broadband connections per 100 inhabitants as late as June 2006,⁵⁶ compared to about 20 per 100 in the U.S., France and Japan and about 22 per 100 in the U.K., China has a lower percentage of people able to pirate DVDs online. Thus piracy is forced out into

56. See ITFACTS BROADBAND, TOP BROADBAND COUNTRIES IN Q4 2006: USA, CHINA, JAPAN, GERMANY (Apr. 9, 2007), <http://www.itfacts.biz/index.php?id=P8268>; Wikipedia, List of Countries by Broadband Users, http://en.wikipedia.org/wiki/List_of_countries_by_broadband_users#_note-China (last visited Sept. 14, 2007); Organization for Economic Cooperation and Development Directorate for Science, Technology and Industry, OECD Broadband Statistics to December 2006, http://www.oecd.org/document/7/0,3343,en_2649_34223_38446855_1_1_1_1,00.html (last visited Sept. 14, 2007).

the open, relatively speaking: Out to the swap meets and card-table sidewalk vendors, whose wares can be more readily seized and counted.

While this may contribute some error to the assessment of losses due to IP piracy, the greater harm it causes is to public perception. People see street vendors selling DVDs, and they see images of the vendors in the media. They don't see online downloading, which happens inside private homes and would be fairly boring to watch. Online piracy may lead to lawsuits, but rarely to arrests. Even when it does, the arrests are rarely spectacular. But arrests of DVD pirates and vendors are media-genic; they present the spectacle of thousands of videos scattered on the ground, crushed beneath the feet of police officers.⁵⁷ These images—card tables covered with obviously pirated DVDs, street vendors being led away in handcuffs, huge piles of DVDs being destroyed—stand out in the memory. And when the images come mostly from East Asia, the impression left in the public mind is that IP piracy is an East Asian problem, rather than a North American, European, or world problem.

VII. Total Consumer Spending Lost to Movie Piracy, Per Capita

Looking at total lost consumer spending changes things somewhat; people in some countries (the U.S., Australia, and Canada, for example) seem to pirate mostly U.S. movies, while in others (especially China and India, but also France, Hong Kong and Korea) they seem to pirate mostly non-U.S., probably domestic, movies. The L.E.K. Report puts the total loss of consumer spending due to movie piracy in China at \$2,689 million—the highest total amount of any country in the study other than the United States, although far from the highest per capita. Listed by total amounts of consumer spending lost to piracy, rather than just piracy of MPA members' IP, China takes the top spot after the U.S., followed by France, Mexico, the U.K., and Russia.

Country	Total consumer spending lost to movie piracy ⁵⁸ (in millions)	Population ⁵⁹ (in millions)	Loss per capita
USA	\$2,724	293	\$9.30
China	\$2,689	1,299	\$2.07

57. See, e.g., *Police Destroy 2.5 Million Fake VCDs, DVDs*, JAKARTA POST, Sept. 20, 2007, available at <http://www.thejakartapost.com/detailgeneral.asp?fileid=20070912143534&irec=69>.

58. L.E.K. Report, *supra* note 37, at 10; Kenworth, *supra* note 50.

59. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 763, 776, 783-4, 789-90, 793, 802, 821, 823, 831, 833, 835, 836, 841, 843 (2005).

Country	Total consumer spending lost to movie piracy (in millions)	Population (in millions)	Loss per capita
France	\$1,547	60	\$25.78
Mexico	\$1,114	105	\$10.61
UK	\$1,007	60	\$16.78
Russia	\$901	144	\$6.26
Japan	\$742	127	\$5.84
Spain	\$670	40	\$16.75
Germany	\$491	82	\$5.99
Thailand	\$465	65	\$7.15
Italy	\$442	58	\$7.62
Canada	224	33	\$6.79
Hungary	199	10	\$19.90
Poland	272	39	\$6.97
Brazil	198	184	\$1.08
Taiwan	255	23	\$11.09
India	186	1,065	\$0.17
Australia	179	20	\$8.95
Netherlands	130	16	\$8.13
Sweden	107	9	\$11.89
Korea	64	49	\$1.31
Hong Kong	24	7	\$3.43

Once again, China's per capita piracy rate is the lowest among the top ten, but it is about five times as high as the rate of piracy on the previous chart. While that total may include movies from England, France, Japan, and other countries, the majority is probably made up of Chinese movies. Once again France, Spain and the United Kingdom lead the countries in the top ten; of the entire group of twenty-two countries, Hungary's per capita rate is the second highest, after France's. None of the Asian countries on the list reaches U.S. per capita levels except Taiwan; the sole South American country on the list, Brazil, is similarly low.

The pirating in China of Chinese movies offers the greatest incentive for enforcement of intellectual property protection of movies in China.⁶⁰ A property regime that protects the interests of foreign rather

60. On the problems and practice of intellectual property protection in China, *see generally* DANIEL C. K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 205-49 (Kluwer Law International 2002); DELI YANG, INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA (Pervez N. Ghauri

than domestic stakeholders is unlikely to prove popular in any country, and in China, as in many other countries, such a regime has unpleasant historical associations. China retains bitter memories of the European and Japanese colonialist onslaught of the nineteenth and early twentieth centuries, which saw the country's sovereignty and property handed over bit by bit to foreigners and which China barely survived as a nation. Foreign insistence on enforcement of IP rights arouses an intensity of resentment in China that it does not in France or the U.K. People have apparently been sentenced to death in China in the name of U.S. IP interests;⁶¹ many in China see the penalties imposed on IP pirates as a sacrifice made by their government to appease the U.S. This raises unhappy echoes of the colonialist era, when Chinese civilians were killed at the insistence of foreign powers as reprisals for crimes committed against foreign missionaries (but not committed by the people who were killed). Mark Twain famously condemned the practice in his essay opposing the U.S. imperialist adventure in the Philippines, "To The Person Sitting in Darkness," describing an incident in which Western missionaries in China demanded not only excessive cash reparations, but also 680 human heads.⁶²

VIII. Retail Sales Value of Music Piracy, Per Capita

While, as noted above, music piracy figures are less reliable, they also tend to show a low per-capita piracy rate in China. The figures provided by the International Federation of the Phonographic Industry (IFPI), a recording industry group, probably overstate the actual cost of piracy, but place the per capita level of pirated recording sales at about one-third of the level in the U.S.:

ed., Pergamon 2003); JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 563–617 (ABA Publishing 2d ed. 2005).

61. See WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 91 (Stanford University Press 1997) ("[S]uch undertakings [to enhance IP protection] have led to the imposition of the death penalty on at least four individuals . . ."); see also Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 418–19 (2003); *China Sentences Three To Life In Prison For CD Piracy In Harshest Sanction So Far*, BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY, Dec. 11, 1997, at D2.

62. Mark Twain, *To The Person Sitting in Darkness*, NORTH AMERICAN REV. (1901), reprinted in THE COMPLETE ESSAYS OF MARK TWAIN 282, 283 (Charles Neider ed., Doubleday & Company, Inc. 2000). This practice of collective punishment—that is, the murder of innocent people—was a common tactic of the imperialist nations. See e.g., CAROLINE ELKINS, IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA (Henry Holt & Co. 2005); ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (Mariner Books 1998) (addressing the Belgian Congo, the subject of Mark Twain's *King Leopold's Soliloquy*). In an interesting twist, two Americans have also been sentenced to terms in Chinese prison for DVD piracy. See Michael Janofsky, *2 Americans*

Country	Total retail sales value of pirated recordings ⁶³ (in millions)	Population ⁶⁴ (in millions)	Per capita value of pirated recording sales
China	\$878	1,299	\$0.68
Mexico	\$686	105	\$6.53
Russia	\$646	144	\$4.49
USA	\$612	293	\$2.09
Italy	\$401	58	\$6.91
Japan	\$272	127	\$2.14
India	\$260	1,065	\$0.24
Brazil	\$242	184	\$1.32
UK	\$178	60	\$2.97
Spain	\$114	40	\$2.85
Germany	\$114	82	\$1.39
France	\$103	60	\$1.72
Netherlands	\$87	16	\$5.44
Taiwan	\$67	23	\$2.91
Thailand	\$65	65	\$1.00
Poland	\$61	39	\$1.56
Canada	\$38	33	\$1.15
Australia	\$35	20	\$1.75
Hungary	\$33	10	\$3.30
Korea	\$25	49	\$0.51
Hong Kong	\$16	7	\$2.29
Sweden	\$13	9	\$1.44

Held in China On Charges Of Film Piracy, N.Y. TIMES, July 31, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9503E4DB1E3DF932A05754C0A9629C8B63>; Jonathan Landreth, *China Jails Americans For Piracy*, BILLBOARD LAW NEWSLETTER, April 26, 2005, available at <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4402298-1.html>; Joshua Davis, *The Decline & Fall of Randolph Hobson Guthrie III*, WIRED, Oct. 2005, available at http://www.wired.com/wired/archive/13.10/guthrie.html?pg=1&topic=guthrie&topic_set=.

63. STEPHEN E. SIWEK, *THE TRUE COST OF SOUND RECORDING PIRACY TO THE U.S. ECONOMY*, INSTITUTE FOR POLICY INNOVATION/IPI CENTER FOR TECHNOLOGY FREEDOM POLICY REPORT 188 (August 2007), at 19, [http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/\\$File/SoundRecordingPiracy.pdf?OpenElement](http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement); see also IFPI, *THE RECORDING INDUSTRY 2005 COMMERCIAL PIRACY REPORT* (June 2005), available at <http://www.ifpi.org.uk/content/library/piracy2005.pdf>. The figures are almost certainly exaggerated because they assume that each pirate sale displaced one licensed sale at a prevailing market rate for each country determined by IFPI, while in reality many consumers of pirated goods would not have purchased a licensed copy at that price. See note, *supra*.

64. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 763, 776, 783-4, 789-90, 793, 802, 821, 823, 831, 833, 835, 836, 841, 843 (2005).

In developed countries, pirated recording sales are probably only a tiny portion of online piracy figures, as nearly everyone in these countries has Internet access and downloading music files is simpler and faster than downloading movies. Thus Spain, viewed by the IFPI as "Europe's most serious piracy problem country where rampant street CD piracy has shrunk the legitimate market by one third in the last three years,"⁶⁵ actually shows a per capita pirated recording sales value no higher than that of the UK. Another industry group, however, the Entertainment Software Association, "reports that Spain, along with Italy and France, is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. In addition, the ISPs in Spain are generally non-responsive to the notices of infringement sent to them by the ESA."⁶⁶ And despite the near-universal availability of Internet access in the U.S., per capita sales of pirated music recordings are actually higher in the U.S. than in 11 of the 21 other countries and territories listed here, including China, India, Korea, and Thailand, and comparable to rates in Hong Kong, Japan and Taiwan.⁶⁷

IX. Why Does the Perception Gap Matter, and What Can Be Done to Correct It?

IP owners, more intent on watching the money than on gaining viewers, readers, or votes with scare stories, are more inclined to concentrate efforts on developed countries such as Canada, where half of the world's pirated movie recordings may originate.⁶⁸ Unfortunately, distortions of public perception and extrinsic political concerns may ultimately distort U.S. trade law and policy in ways that can be harmful to U.S. IP owners' interests.

The gap between the perception and reality of international IP policy matters because it affects U.S. policy. Incorrect understanding of the problem may influence trade laws and foreign relations, and law enforcement resources may be misallocated. And if the U.S. fails to appreciate the efforts already made by developing countries to address

65. IFPI, *One in Three Music Discs Is Illegal but Fight Back Starts to Show Results* (June 23, 2005), http://www.ifpi.org.uk/content/section_news/20050623.html.

66. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2007 SPECIAL 301 REPORT: SPAIN 435, <http://www.iipa.com/rbc/2007/2007SPEC301SPAIN.pdf>.

67. The IFPI report lists more countries than the twenty-two included in the L.E.K. Report; the table here includes, for comparison, only the countries and territories in the L.E.K. Report.

68. See, e.g., Vito Pilioci, *Hollywood Blames Canada for Half of Movie Piracy*, CANADA.COM., Jan. 24, 2007, <http://www.canada.com/topics/technology/story.html?id=f8ae08f5-b82d-4e87-97b9-67ff7097638f&k=65095>.

IP piracy issues, those countries may have little incentive to continue those enforcement efforts.

To a certain extent, the problem may correct itself: Some countries, like China, may find that they have a strong stake not only in enforcing IP laws but in being seen to do so. The current overall piracy rate (as a percentage of total domestic sales) in China is high, but total pirate sales are falling and should continue to fall, while licensed sales continue to increase. This attacks the piracy percentage problem from both ends at once. While there will be some lag, public perception should improve as China's piracy percentage falls. However, even with low per capita piracy rates, China's total piracy level will remain high, because it is the world's most populous country. In addition, the effect of increased IP protection in China will be to move the problems of real and perceived piracy to other countries, like Vietnam and Ukraine. The problem will remain unless and until responsible commentators restructure the discourse to reflect reality, reason and accuracy rather than media scare-mongering or political vote-chasing.

