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THE U.S.-TAIWAN COPYRIGHT AGREEMENT: COOPERATION OR COERCION?

Jean Lin†

Taiwan's¹ economic success has led to its international recognition as one of the four Newly Industrialized Countries ("NIC").² However, Taiwan has historically failed to comply with the international standards set forth in the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"),³ or even the much more lenient Universal Copyright Convention ("UCC").⁴ Along with its fame for economic success, Taiwan has earned a reputation for piracy⁵ of world intellectual property. Although Taiwan and the U.S. remain close trade partners, the problem of copyright infringement in Taiwan is a perennial cause of friction, as U.S. industries annually lose millions of dollars due to inadequate copyright protection in Taiwan.⁶

Ever since the U.S. listed curbing international piracy as one of the most important items in its trade agenda,⁷ it has vigorously pressured Taiwan to reform its copyright laws. In response to U.S.

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1. In accordance with U.S. government usage, this Comment uses the term "Taiwan" rather than "The Republic of China" whenever practical. See Taiwan Relations Act, 22 U.S.C. § 3314 (1988).

2. The other three NICs are Singapore, South Korea, and Hong Kong.

3. Berne Convention for the Protection of Literary and Artistic Works, Paris Additional Act, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The U.S. adopted the Berne Convention in 1988. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

4. Universal Copyright Convention, Sept. 6, 1952, 6 T.I.A.S. 3324, 216 U.N.T.S. 132 [hereinafter UCC, 1952 Text]; Universal Copyright Convention as revised at Paris, July 24, 1971, 25 T.I.A.S. 7868, 943 U.N.T.S. 178 [hereinafter UCC, 1971 Revision].

5. For the purposes of this Comment, "piracy" is "'the unauthorized taking of another person's intellectual property through substantial duplication or production of a substantially similar product of information for commercial purposes.'" GARY M. HOFFMAN & GEORGE T. MARCOU, ANNENBERG WASH. PROGRAM, CURBING INTERNATIONAL PIRACY OF INTELLECTUAL PROPERTY 8 (1989) (quoting the Annenberg Program panel).

6. *Id.* app. B at 30.

7. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 295 (1991).

trade sanctions, Taiwan has substantially amended its copyright laws. After years of negotiation, a copyright protection agreement between the U.S. and Taiwan was finalized in July 1989.⁸ The Agreement for the Protection of Copyright between the Coordination Council for North American Affairs and the American Institute in Taiwan (the "Agreement") incorporates the standards of both the Berne Convention and the UCC. The Agreement, however, does not grant a reasonable period of transition, and some of its provisions impose standards that are more stringent than international norms. While Taiwan's copyright infringement should not be condoned, the standards set by the Agreement are unreasonably strict in light of Taiwan's relatively recent embrace of modern copyright protection. As a result, the Agreement not only irreparably damages the image of the U.S. in Taiwan, but also adversely affects U.S. long-term economic interests.

This Comment explores the U.S.-Taiwan copyright relationship, pointing out the drawbacks of the U.S. approach and suggesting alternatives to the current U.S. stance. Part I of this Comment provides an overview of international norms of copyright protection. It reviews the history of U.S. international copyright policy and U.S. efforts to combat international intellectual property piracy. Part I also discusses the development of Taiwan's copyright law and the problem of infringement on U.S. copyrights in Taiwan, and provides possible explanations for Taiwan's noncompliance with international standards of copyright protection. It also discusses the U.S.-Taiwan copyright relationship and the legal setting of agreements between Taiwan and the U.S. Part II examines the Agreement against the backdrop of threats of U.S. trade sanctions against Taiwan, focusing on its debated provisions, and compares these provisions with the Berne Convention and the UCC. Part III discusses the implications of the Agreement, including problems of enforcement and adverse effects. It compares the U.S.-Taiwan copyright relationship to that between the U.S. and South Korea, and suggests that Taiwan deserves treatment similar to that South Korea currently receives. Finally, the Comment provides possible alternatives to the current U.S. stance on appropriate copyright protection in Taiwan.

I. BACKGROUND

A. AN OVERVIEW OF INTERNATIONAL COPYRIGHT LAW

1. *The Berne Convention*

The Berne Convention was the first international convention

8. In 1985 both sides first agreed to have a bilateral copyright agreement. The U.S. submitted its proposed copyright agreement to Taiwan in October 1987.

dealing with copyright.⁹ The principal objective of the Berne Convention is to achieve uniformity in the level of protection by bringing countries with lower levels of protection up to the standard of countries with higher levels.¹⁰ The Convention imposes the most rigorous copyright protection of any multilateral copyright treaty, and is administered by the World Intellectual Property Organization ("WIPO").¹¹ The term of protection is the life of the author plus fifty years after the author's death, and is applicable to both published and unpublished works.¹²

The Berne Convention sets out minimum rights in its substantive clauses, and embodies principles of national treatment, reciprocity, and automatic protection.¹³ Under the national treatment principle, a country must protect the works of foreign nationals on the same terms that it extends to works of its own nationals.¹⁴ The principle of automatic protection obligates member states to extend protection, free of formalities, to works originating in other member states or to works of authors who have habitual residence in member states.¹⁵ The copyright protection also extends to works of creators who are not nationals of a member state, but whose works are published first or simultaneously in a member state.¹⁶

The Berne Convention permits certain reservations with respect to translation rights, which allows ratifying countries more flexibility when reconciling the Berne Convention and their national

9. The Berne Convention was established in 1886 at a diplomatic conference by the Swiss Federal Council as a union of states for the protection of literary and artistic works, and it has endured for over a century. More and more countries have ratified it, reaching 77 by 1989. Since 1886, the Berne Convention has had two Additions and five Revisions. STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 101 (2d ed. 1989).

10. See generally *id.* chs. 3, 5.

11. See COPYRIGHT OFFICE, LIBRARY OF CONGRESS, CIRCULAR 93(A), *THE UNITED STATES JOINS THE BERNE UNION CONVENTION* (1989).

The original Berne Convention was intended to promote five objectives: (1) the development of copyright laws in favor of authors to bring about better worldwide copyright protection; (2) the removal over time of reciprocity as a basis for rights; (3) the elimination of discrimination in rights against foreign authors in all countries; (4) the reduction of formalities . . . required for the recognition and protection of copyright in foreign works; and, ultimately, (5) the promotion of uniform international legislation for the protection of literary and artistic works.

Id. at 5.

12. See Berne Convention, *supra* note 3, art. 7(1).

13. See Berne Convention, *supra* note 3; STEWART, *supra* note 9, at 99.

14. PAUL GOLDSTEIN, *COPYRIGHT—PRINCIPLES, LAW AND PRACTICE* § 16.2 (1989).

15. See Berne Convention, *supra* note 3, arts. 3, 5. This obligation of a member state does not extend, however, to works originating with its own nationals, whose rights are governed by domestic law. *Id.* art. 5(3).

16. *Id.* art. 3(1)(b). Publication within 30 days of first publication is deemed "simultaneous." *Id.*

laws.¹⁷ Finally, the Berne Convention has a system of compulsory license for translation rights in developing countries.¹⁸ Under this system, government authorities can issue nonexclusive compulsory licenses¹⁹ for limited purposes upon payment of a fee to a national of the contracting state.²⁰

2. *The Universal Copyright Convention*

Although the Berne Convention succeeded in establishing itself as the first international copyright convention, its effect was weakened by its emphasis on the quality of the rights it established over the quantity of nations enrolled as members.²¹ In the years after World War II, the United States and the Soviet Union, as well as many Asian and African states that were members of the United Nations, were not members of the Berne Convention.²² The absence of a universal convention that could attract states in varying stages of economic and cultural development prompted the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") to create the UCC in 1952.²³ While seeking to embrace states of all five continents, the UCC also aimed at attracting all countries without forcing Berne Convention members to lower their standard of protection.²⁴

Although it also embodies the principle of national treatment, the UCC provides a much lower and more flexible standard of protection than the Berne Convention. Unlike the fixed term of protection required in the Berne Convention, the UCC protects works (subject to various detailed qualifications and exceptions) for twenty-five years from the death of the author or from the date of

17. See *infra* notes 175-78 and accompanying text.

18. See *infra* notes 193-97 and accompanying text.

19. "Nonexclusive" in this context means that the issuance of a compulsory license and the circulation of copies of the licensed work does not bar competitors from the same developing country from obtaining additional licenses. See generally STEWART, *supra* note 9, at 175-77.

20. Berne Convention, *supra* note 3, app. art. II. See also *infra* notes 193-97 and accompanying text.

21. STEWART, *supra* note 9, at 146.

22. *Id.*

23. The UCC gets its inspiration from the aims of the United Nations. One of their articles of faith is that "if people know each other they will understand each other, and that there is no better means of knowing than through reading the books of other peoples, listening to their music, viewing their motion pictures and in general becoming acquainted with what their minds have created." *Id.* (quoting ARPAD BOGSCH, *THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION* 4 (3d rev. ed. 1972)). The UCC currently has 85 members. DEPARTMENT OF STATE, *TREATIES IN FORCE* 300-01 (1992).

24. Article XVII and the "Appendix Declaration" attached to it provide that no Berne country can denounce the Berne Convention and rely on the UCC in its copyright relations with Berne Union members. STEWART, *supra* note 9, at 146-47.

first publication.²⁵ In addition, the UCC is not retroactive. Thus, a contracting state is not obliged to protect works already within its public domain on the date the UCC becomes effective in that state. While the UCC obligates member states to certain minimum requirements, it generally demands only "adequate and effective" protection.²⁶ Moreover, unlike the Berne Convention, which forbids all formalities, the UCC allows one exception to the principle of automatic protection: the works must bear a copyright notice containing the symbol "©," the name of the copyright proprietor, and the year of first publication.²⁷ On the other hand, any contracting state can require formalities for the "acquisition and enjoyment of copyright" as long as the state confines these requirements to the works of its own nationals or works first published in its territory.²⁸ In addition, the UCC creates a system of compulsory licensing which is more generous than that of the Berne Convention. Unlike the Berne Convention, which limits the use of compulsory licenses to developing countries, the UCC permits compulsory licenses for both developed and developing countries.²⁹

B. U.S. INTERNATIONAL COPYRIGHT POLICY DEVELOPMENT

1. *The Early Stages of U.S. Policy*

From its first enactment of copyright laws in 1790 to its most recent copyright law revision in 1976, the U.S. pursued a policy of isolationism.³⁰ As a result, for most of its history, U.S. copyright laws were backward compared to those of leading European nations.³¹ Even as most of the leading European nations were concluding bilateral copyright agreements and joining the Berne Convention, the U.S. was still engaged in massive pirating of European works.³² In the first century of its history the U.S. neither

25. See UCC, 1971 Revision, *supra* note 4, art. IV(2).

26. *Id.* art. I.

27. See *id.* art. III; STEWART, *supra* note 9, at 153.

28. UCC, 1971 Revision, *supra* note 4, art. III(2); see also STEWART, *supra* note 9, at 153.

29. UCC, 1971 Revision, *supra* note 4, art. V; see *infra* notes 186-97 and accompanying text.

30. See *Oversight on International Copyrights: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. of the Judiciary, U.S. Senate, 98th Cong., 2d Sess. (1984)* (report of the U.S. Copyright Office) [hereinafter *Oversight on International Copyrights*].

31. Zechariah Chafee Jr., *Reflections on The Law of Copyright: II*, 45 COLUM. L. REV. 719, 734 (1945).

32. HSIUNG-LIN HSIAO, CHUNG MEI CHU TSO CH'UAN T'AN P'AN CHUAN CHI [U.S.-TAIWAN COPYRIGHT AGREEMENT NEGOTIATIONS] 247 (1988). Also, Secretary of Commerce C. William Verity, when testifying about the implication of early U.S. copyright policy, stated: "For most of our first century of nationhood, we were takers. We stole what others created. Nobody could match us in our disdain for the rights of foreign authors such as Dickens, Thackeray, or Gilbert and Sullivan . . ." See *The*

joined the Berne Convention nor made any bilateral arrangement for reciprocal copyright protection with a foreign country.³³ In fact, in the original copyright law of 1790³⁴ Congress explicitly denied protection to foreign authors.³⁵ The U.S. began shedding its reputation as a major copyright-pirating nation only within the last century.³⁶

The concerns over possible foreign economic or cultural domination and fears of higher costs for essential educational materials currently raised by many developing nations echo those heard from the U.S. a century ago.³⁷ According to a report submitted by the U.S. Copyright Office to Congress,

[v]irtually every present argument in support of the "social utility" of copyright piracy and of economic self-interest justifications for the non-recognition of foreign copyrights—"infant industry" protectionism, balance of payments deficits, possible abuse of monopoly power by foreign rightsholders . . . were uttered [by the United States] long before they were heard from . . . African and Asian countries.³⁸

The U.S. responded to external pressures to reform its isolationist copyright policy by adopting the Chace Act in 1891.³⁹ This act empowered the President to "proclaim" the works of foreign nationals eligible for U.S. copyright protection, provided that the foreign country reciprocated by giving U.S. works substantially the same protection given to works of its own citizens. The measure sought to mute international criticism of U.S. piracy as much as to protect the American copyright exports.⁴⁰ While the Chace Act arguably provided copyright protection under American law for foreign authors not residing in the U.S., the so-called "manufacturing

Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. 72 (1988).

33. *Oversight on International Copyrights*, *supra* note 30, at 29.

34. Act of May 31, 1790, ch. 15, 1 Stat. 124 (current version at 17 U.S.C. §§ 101-810 (1988 & Supp. III 1991)).

35. Congress explicitly rejected the policy of protecting the works of foreign authors, adding in Section 5 of the 1790 copyright law that

nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

Id. § 5.

36. Other nations that were guilty of copyright piracy are Japan and the former Soviet Union. From the Meiji Restoration until modern times, Japan massively copied Western civilization and won the name of "the translation country." HSIAO, *supra* note 32, at 200.

37. *Oversight on International Copyrights*, *supra* note 30, at 28.

38. *Id.* at 84.

39. Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106 (repealed 1933).

40. *Oversight on International Copyrights*, *supra* note 30, at 30-31.

clause"⁴¹ significantly decreased such protection.⁴² Under Section 4956 of the Act, copyright could be secured only by registration before publication and by depositing two copies of the work on or before the date it was published anywhere. Moreover, in the case of books and certain graphic works, the two copies had to have been manufactured in the U.S. In addition, the clause required that certain steps in the production or manufacturing of books and other printed materials be performed in the U.S. or Canada.⁴³ When a foreign manufacturer produced works that violated the clause, those works could not qualify for copyright protection.⁴⁴ The rigid requirements of the "manufacturing clause" made it difficult for foreigners to obtain copyright protection in the U.S.

Reluctance to protect foreign works delayed the U.S. adoption of the Berne Convention. The U.S. justified its actions by noting that adherence to the Berne Convention would require significant changes in U.S. copyright laws.⁴⁵ Significantly, because U.S. law denied jurisdiction to aliens seeking to protect their copyrights in domestic courts, the U.S. could not meet the terms of the Berne Convention.⁴⁶ Also, the registration required by the "manufacturing clause" stood as another impediment to U.S. adoption of the Berne Convention, because signatory states must extend full rights to a literary work without imposing any such formalities.⁴⁷

Other inconsistencies between U.S. copyright law and the Berne Convention included the U.S. failure to recognize "moral rights"⁴⁸ and to grant protection to architectural works. U.S. law

41. 17 U.S.C. § 601 (1982). The "manufacturing clause" expired on June 30, 1986. See Act of July 13, 1982, Pub. L. No. 97-215, 96 Stat. 178 (codified at 17 U.S.C. § 601 (1988)).

42. Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171 (1989). The requirement of domestic manufacture was eliminated by the 1909 revision of the U.S. copyright law for certain works published in languages other than English. This provision, however, provided little comfort to the closest cultural trading partner of the U.S., the United Kingdom. *Over-sight on International Copyrights*, *supra* note 30, at 43 n.37.

43. 17 U.S.C. § 601(a) (1988) ("[L]iterary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada"). See generally Hatch, *supra* note 42, at 174.

44. 17 U.S.C. § 601(d) (1988). While works imported in violation of the clause could technically qualify for "protection," the violation gave infringers a complete defense. *Id.*

45. Leaffer, *supra* note 7, at 293 n.95; see also Hatch, *supra* note 42, at 174.

46. Hatch, *supra* note 42, at 174.

47. See Berne Convention, *supra* note 3, art. 5(2); Hatch, *supra* note 42, at 175.

48. The recognition of "moral rights" was added to the Berne Convention in the Rome Conference in 1928. Article 6*bis* of the Berne Convention provides for the protection of an author's right to "claim authorship . . . and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, [the] work which would be prejudicial to his honor or reputation." It in essence gave authors a right to claim authority over their works and to object to excessive modification of

gave some users outright exemptions, and certain special interest groups received concessions in the form of compulsory licenses.⁴⁹ Even as late as 1983, the Registrar of Copyrights expressed the view that the U.S. was still a long way from accepting the entire range of international ideals embodied in the Berne Convention.⁵⁰

Even while resisting membership in the Berne Convention, the most widely accepted international copyright convention, the U.S. enjoyed its level of protection without offering reciprocal protection to Berne Convention members.⁵¹ It did this by using a provision which until 1914 extended protection automatically to works first published in any Berne Convention signatory nation. Although the 1914 additional Protocol to the Berne Convention allowed Berne members to restrict protection to works of nonmember nationals, the U.S. could consistently use the so-called "back door to Berne": a U.S. national could gain protection in all Berne Convention member countries simply by publishing her work in any member country at the same time she published the work in the U.S.⁵² Most notably Canada, with its proximity to U.S. publishing centers, served as a "back door" to protection under the Berne Convention through simultaneous first publications with the U.S.⁵³ Notwithstanding the bilateral copyright agreements between the U.S. and a number of Berne Convention members, this practice allowed the U.S. to use bilateral agreements to evade the Berne Convention's prohibitions of formalities.⁵⁴ Thus, while enjoying the benefits of the Berne Convention for U.S. copyright interests abroad, the U.S. accorded Berne members less copyright protection by imposing formalities as

their works independent of contractual rights. Hatch, *supra* note 42, at 175-76. In adhering to the Berne Convention, the United States, however, was not willing to change its existing copyright laws to fully comply with the moral rights provisions. The Berne Convention Implementation Act emphatically provides that the sum of existing U.S. legal principles (copyright "adaptation" rights, federal protection against "false designations," and common law doctrines of unfair competition, privacy, and defamation) fully complies with the Berne Convention moral rights provisions. Jon A. Baumgarten & Christopher A. Meyer, *Effects of U.S. Adherence to the Berne Convention*, 37 Pat. Trademark & Copyright J. (BNA) No. 921, at 464 (Mar. 9, 1989).

49. BARBARA RINGER, *United States of America*, in INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 480 (1983).

50. *Id.*

51. *Oversight on International Copyrights*, *supra* note 30, at 42.

52. PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 935 (1990).

53. *Oversight on International Copyrights*, *supra* note 30, at 42.

54. Article 5(2) of the Berne Convention embodies the principle of automatic protection, i.e., protection of rights is granted free of any formalities.

This automatic protection is independent of any protection the work may enjoy in its country of origin. The country of origin may subject the work to any formalities it chooses as a matter of domestic law, but outside the country of origin the author if he is a "Union author" is entitled to protection in any country of the Union without any formalities.

STEWART, *supra* note 9, at 118-19.

a precondition for protection of foreign works in U.S. markets.⁵⁵ As an alternative to the Berne Convention, the U.S. sought bilateral and multilateral agreements with other nations to protect intellectual property.⁵⁶

Realizing the need to improve copyright relations with foreign countries, the U.S. regarded the UCC as an attractive option, and therefore helped to create the new international copyright protection mechanism under UNESCO.⁵⁷ The UCC offered a compromise, granting the U.S. some benefits of uniform international copyright protection without disrupting the existing U.S. copyright scheme.⁵⁸ Congress ratified the UCC in 1955, finally committing the U.S. to a global copyright arrangement.⁵⁹ The UCC became the United States' main instrument for international copyright protection.⁶⁰

2. *International Piracy of U.S. Copyrighted Materials and U.S. Efforts to Combat Piracy*

As U.S. intellectual property became the target of worldwide piracy, resulting in the loss of millions of dollars due to copyright infringement in developing countries, the U.S. began seeking ways to combat copyright infringement.⁶¹ According to a 1987 study conducted by the U.S. International Trade Commission ("USITC"), the aggregate U.S. industry loss to piracy was estimated to be between \$43 billion and \$61 billion annually.⁶² These

55. *Oversight on International Copyrights*, *supra* note 30, at 42.

56. Hatch, *supra* note 42, at 175. These bilateral agreements included treaties with China in 1903, Japan in 1905, Hungary in 1912, and Siam in 1920. Multilateral treaties included the Pan American Conventions of 1902 and 1910. *Id.* at 175 n.31.

57. *Oversight on International Copyrights*, *supra* note 30, at 45-46; STEWART, *supra* note 9, at 146.

58. Hatch, *supra* note 42, at 176.

59. The U.S. sought to attain the following objectives by adopting the UCC:

- 1) to prepare a treaty based more firmly upon "national treatment" than upon detailed minimum rights, thereby reducing negotiating difficulties and permitting the widest acceptance of the new instrument;
- 2) to tailor the new convention to existing laws, principally our own, so as to permit prompt accession to the new treaty without having to amend drastically domestic copyright laws; and
- 3) to avoid prejudicing the integrity and future growth of the Berne Convention.

Oversight on International Copyrights, *supra* note 30, at 46.

60. With the significant exception of an agreement with the People's Republic of China, until recent years the U.S. has not initiated bilateral copyright relations with another state since the UCC came into force in 1955. See generally DEPARTMENT OF STATE, *supra* note 23.

61. Japan's current situation is analogous. Japan, for years guilty of intellectual property rights infringement, has come to feel the sting of Asia's technology pirates and is battling back, though not always successfully. Ronald Yates, *Winds Turn Against Product Pirates*, CHI. TRIB., Nov. 13, 1989, at C1.

62. U.S. INT'L TRADE COMM'N, PUB. NO. 2065, FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE 2-

losses constituted about five percent of the U.S. trade deficit.⁶³ One report estimated that 131,000 jobs were lost in 1982 due to foreign product counterfeiting.⁶⁴

Frustrated with international piracy losses, the U.S. felt a bilateral approach offered the best short-term solution to the piracy dilemma.⁶⁵ The bilateral approach involves the use of negotiations, backed by trade sanctions, with countries guilty of pirating U.S. intellectual property.⁶⁶ Through these negotiations the U.S. seeks to coerce problem countries into adopting adequate standards of protection.⁶⁷ The power to exert this carrot-and-stick policy arises under the Trade and Tariff Act of 1984, which requires the President to consider the protection a foreign nation affords to intellectual property when determining (1) that nation's eligibility for the Generalized System of Preferences ("GSP") program,⁶⁸ and (2) whether the nation's trade practices are "unjustifiable" or "unreasonable" for purposes of Section 301 of the Trade Act.⁶⁹

The strongest incentive for noncomplying countries to provide intellectual property protection lies in enhanced access to the U.S. market,⁷⁰ since in addition to the denial of GSP benefits, the U.S. imposes trade sanctions or import restrictions when bilateral negotiations are ineffective. These sanctions have been greatly strengthened by the Omnibus Trade and Competitiveness Act of 1988⁷¹ (the

4 (1988). The United States Trade Representative reached a similar conclusion. See U.S. TRADE REPRESENTATIVE, 1989 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 2-4 (1989). Commentators have questioned the USTR report's methodology and expressed concern that the ITC statistics are unsubstantiated estimates by companies with incentives to overstate piracy damages. See, e.g., HOFFMAN & MARCOU, *supra* note 5, at 9. The principal difficulty in calculating loss is that losses by enterprises in industrialized countries take the form of lost revenue opportunities. Thus, the calculation of such losses requires the assumption of unaffected revenues.

63. U.S. INT'L TRADE COMM'N, *supra* note 62, at 2-4.

64. See U.S. INT'L TRADE COMM'N, PUB. NO. 1479, EFFECT OF FOREIGN PRODUCT COUNTERFEITING ON U.S. INDUSTRY 4-13 (1984).

65. Leaffer, *supra* note 7, at 295.

66. *Id.*

67. *Id.*

68. 19 U.S.C. § 2462(c)(5) (1988). The GSP program provides for special tariff preferences for imports from designated developing countries. See *id.* §§ 2461-2465. (1988 & Supp. III 1991). In 1986, Taiwan's exports to the U.S. under the GSP program were \$3.7 billion. U.S. DEP'T OF COMMERCE, REPORT FT990, HIGHLIGHTS OF U.S. EXPORT AND IMPORT TRADE tbl. 8 (1986).

69. See 19 U.S.C.A. § 2411(e)(3)(C), (e)(4)(B) (West Supp. 1987). Before it was amended in 1988, Section 301 provided the President with the authority to seek the elimination of a nation's unjustifiable or unreasonable trade practices where such practices burden U.S. commerce, and authorized the restriction of imports from that nation if such practices were not eliminated. See *id.* §§ 2411-2416 (West 1980 & Supp. 1987). With the 1988 amendment Section 301 became an even more powerful threat to pirating countries, because the USTR gained the authority to oversee unreasonable trade practices.

70. Leaffer, *supra* note 7, at 295.

71. See 19 U.S.C. §§ 2242, 2411-2420 (1988).

“1988 Amendments”), which amended the Trade Act to mandate the protection of intellectual property rights as one of the priorities of U.S. trade policy. The 1988 Amendments provide a powerful tool for gaining worldwide protection of U.S. intellectual property by allowing the government to impose trade sanctions when it is dissatisfied with existing protection.⁷²

Moreover, the 1988 Amendments enhanced the role of the United States Trade Representative (“USTR”) in negotiating U.S. interests by giving the USTR discretion to initiate Section 301 investigations.⁷³ Under the Trade Act, the form of any retaliatory action is discretionary, but the Act requires that a tariff preference be granted or withheld.⁷⁴ Further, Section 301 requires the USTR annually to identify countries that deny protection of intellectual property rights,⁷⁵ “priority” countries that are the most egregious in pirating U.S. intellectual property,⁷⁶ and countries that fail to undertake or make progress in negotiations with the USTR.⁷⁷ By designating a country as a “priority” nation, the U.S. begins a process that leads ultimately to the imposition of sanctions if the country fails to make progress in combatting piracy.⁷⁸ In addition, Section 301 gives the USTR authority to enter into binding agreements with foreign countries.⁷⁹

The U.S. position regarding intellectual property protection differs fundamentally from that of the pirating countries. The U.S. holds that intellectual property is not an economic issue but rather a question of rights.⁸⁰ Consequently, the U.S. government has generally not considered intellectual property protection to be a matter for flexible negotiation. Although U.S. negotiators have thus provided reasons why negotiating nations should change their systems of intellectual property protection, and have threatened to withdraw GSP benefits or to take other retaliatory trade actions absent such changes, they have rarely offered any direct concessions.⁸¹

Pirating countries and most developing countries, on the other hand, perceive intellectual property less as a body of fundamental rights than as a subset of their general economic policies, to be man-

72. Leaffer, *supra* note 7, at 296.

73. See 19 U.S.C. § 2412(c) (1988).

74. Leaffer, *supra* note 7, at 296.

75. 19 U.S.C. § 2242(a)(1) (1988).

76. *Id.* § 2242(a)(2), (b)-(c).

77. Leaffer, *supra* note 7, at 296.

78. *Id.*

79. 19 U.S.C. § 2411(a), (b)(2), (c)(2)(C), (d)(3)(B)(i)(II), (d)(4)(B) (1988).

80. R. Michael Gadbaw & Timothy J. Richards, *Introduction to INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 2 (R. Michael Gadbaw & Timothy J. Richards eds., 1989) [hereinafter GLOBAL CONSENSUS].

81. *Id.* at 26.

aged for economic growth and industrial development.⁸² These countries weigh the benefits of piracy against the potential for intellectual property reform.⁸³ This utilitarian attitude reflects in part different cultural and philosophical traditions, and partially explains the resistance to U.S. efforts to secure improved intellectual property protection abroad.⁸⁴ Governments that oppose intellectual property protection thus view the U.S. stance as uncompromisingly harsh.

3. *U.S. Implementation of the Berne Convention*

While threats of trade sanctions offered one method of curbing growing piracy of U.S. copyrighted material, these efforts lacked both the stability and the enforcement efficiency of bilateral agreements. However, the United States' failure to join the Berne Convention sapped its credibility in bilateral negotiations with pirating countries, and made U.S. demands for Berne Convention level protection appear hypocritical.⁸⁵ Many countries resented the apparent double standard.⁸⁶ Ratification of the Berne Convention thus became necessary to strengthen the United States' bargaining position.⁸⁷

U.S. entry to the Berne Convention also gained impetus from the U.S. withdrawal from UNESCO, the organization that governs the UCC. Although withdrawal from UNESCO did not affect American rights or obligations under the UCC, the event had the unintended effect of reducing the UCC's utility in protecting U.S. copyright interests overseas.⁸⁸ Without a presence in the UNESCO Executive Board and General Conference, the U.S. could not urge the adoption of copyright programs beneficial to its interests.⁸⁹ Thus, the U.S. finally joined the Berne Convention in March 1989, more than a century after its inception.

C. TAIWAN COPYRIGHT LAW

1. *Chinese Cultural Attitudes Toward Copyright*

Taiwan's lack of protection of intellectual property has cultural

82. R. Michael Gadbow, *Intellectual Property and International Trade: Merger or Marriage of Convenience*, 22 VAND. J. TRANSNAT'L L. 223, 224 (1989).

83. Gadbow & Richards, *supra* note 80, at 18.

84. Gadbow, *supra* note 82, at 224-25.

85. When negotiating with India, for example, U.S. demands for Berne level protection of U.S. intellectual property were rejected because the U.S. itself did not adhere to the Berne standard. See generally HSIAO, *supra* note 32.

86. HOFFMAN & MARCOU, *supra* note 5, at 16.

87. Hatch, *supra* note 42, at 179 (quoting statement of Rep. Kastenmeier, 133 CONG. REC. H1294 (daily ed. Mar. 16, 1987)).

88. See generally *id.* at 177-78.

89. *Id.* at 178.

roots. The concept of literature as property is foreign to traditional Chinese thought, as knowledge was originally conceived as being in the public domain.⁹⁰ Not only was knowledge free, it was considered "a high scholarly calling to collect, organize, and propagate learning."⁹¹ The concept of knowledge as something that could be bought and sold was difficult to understand, and Chinese society took the neutral view that copying another's ideas is neither morally wrong nor a violation of a right.⁹² Not until the turn of the twentieth century did the Chinese language have a word for copyright, "*chu tsu ch'uan*," lifted directly from the Japanese legal code.⁹³

In 1928, China enacted its first copyright law.⁹⁴ This law had minimal effect, however, since literary property itself was so seldom recognized that few claims of violation were litigated.⁹⁵ The 1928 copyright law did not cover foreign works.⁹⁶ Under the law, when a professor needed copies of a foreign book for his students, he took his own copy to a local printer and had the desired number of copies made without any need to obtain permission from the author. Until only recently in Taiwan, book rental stores, often considered noble businesses as they extend learning to those who could not afford to buy books, were ubiquitous.

Against this cultural background, it is not surprising that even after Taiwan revised its copyright law in 1985 to require rental stores to secure copyright authorization for the books being rented, the law was neither followed nor enforced.⁹⁷ Thus, although Taiwan has more than sixty years of copyright law experience, it is only in the last decade that Taiwan's copyright law gained sufficient prominence to attract scholarly study.⁹⁸

90. DAVID KASER, *BOOK PIRATING IN TAIWAN* 17 (1969).

91. *Id.* Only one of Confucius's *Six Classics* was his own original work; the other five represent the compilation and republishing of ancient manuscripts. Yet, as stated by Kaser, "the glory of great scholarship redounded upon him equally for what he had preserved and transmitted as for what he had contributed of his own." *Id.*

92. Timothy J. Richards, *Taiwan*, in *GLOBAL CONSENSUS*, *supra* note 80, at 341, 341 (quoting Francis S.L. Wang, *The Struggle with Intellectual Property Rights Infringement—A Study of Cultural Assimilation and Legal Development in the Republic of China*, (presentation to the United States Trade Representative Trade Staff Policy Staff Committee GSP Review, June 24, 1985, at 1).

93. KASER, *supra* note 90, at A-18.

94. The first dynastic Chinese copyright law was enacted in 1910, near the end of the Ching dynasty. Hsiao, *supra* note 32, at 83.

95. KASER, *supra* note 90, at 19.

96. *Id.*

97. Hsiao, *supra* note 32, at 92.

98. *Id.* at 83. The Chinese copyright laws were amended in 1944, 1949, 1964, and 1985. See *COPYRIGHT LAW OF THE REPUBLIC OF CHINA* 1 (Industrial Development & Investment Center ed., 1987).

2. *Infringement of U.S. Copyrighted Materials in Taiwan*

Taiwan's cultural setting, with its lack of recognition for intellectual property, encouraged rampant pirating of foreign copyrighted works, particularly American materials. According to a USITC Report, Taiwan's piracy of U.S. intellectual property, including copyrights, patents, and trademarks, amounted to \$753 million in 1986.⁹⁹

The absence of an exclusive translation right in Taiwan has caused U.S. book publishers to suffer significant losses. In addition to publishing unauthorized translations, Taiwanese publishers duplicate U.S. editions of books, sell them cheaply, and sometimes even export the pirated works.¹⁰⁰ The Association of American Publishers ("AAP") estimated that over 450 titles of twenty-seven major U.S. publishers¹⁰¹ were pirated in Taiwan in 1983.¹⁰² Such figures lead some observers to label Taiwanese publishing activities as "theft."¹⁰³

Encyclopaedia Britannica's battle with a Taiwanese publisher, Tan Ching Book Company, provides an example of Taiwan's piracy problem.¹⁰⁴ In 1986, Encyclopaedia Britannica, through an arrangement with a mainland Chinese publishing house, produced the Concise Encyclopaedia Britannica ("CEB"), using simplified Chinese characters.¹⁰⁵ In 1987, Encyclopaedia Britannica entered into an agreement with a Taiwanese publisher, Chung Hwa Book Company, Ltd., to produce a Taiwanese edition of the CEB printed with the traditional Chinese characters used in Taiwan.¹⁰⁶ However, before Chung Hwa could complete the authorized version, another publisher, the Tan Ching Book Company, rushed out an unauthorized edition and sold it at a substantially lower price.¹⁰⁷ Tan Ching did nothing more to the original mainland edition except to change the text to traditional Chinese characters more suitable for Taiwanese readers¹⁰⁸ and to alter the Chinese history entries to re-

99. U.S. INT'L TRADE COMM'N, *supra* note 62, at 4-16.

100. *Oversight on International Copyrights*, *supra* note 30, at 134.

101. These titles include professional and college textbooks, reference works, and scientific, technical, and medical publication materials. *Id.* at 135.

102. *Id.* at 135 & n.198 (citing AAP's submissions to the Office of the Pacific Basin, International Trade Administration).

103. See, e.g., Grant G. Erickson, Note, *Intellectual Property Protection in Taiwan: "False Face Must Hide What False Heart Doth Know,"* 4 TRANSNAT'L LAW. 291 (1991).

104. David C. Rudd, *Britannica Battling Taiwan Book Pirate*, CHI. TRIB., June 4, 1989, § 7, at C1.

105. *Id.*

106. *Id.*

107. HOFFMAN & MARCOU, *supra* note 5, at 12.

108. *Id.*

flect the Taiwanese perspective.¹⁰⁹ Yet despite the criminal conviction of two Tan Ching principals in September 1989 and sporadic police raids since 1988, Tan Ching continued to sell the pirated version of the CEB. Further, Tan Ching ironically capitalized on its legal problems by enlisting its heightened publicity as a promotional tool.¹¹⁰

Taiwan's video parlors, which have severely injured U.S. motion picture companies, offer another example of piracy. Taiwan once featured more than 1000 miniature movie houses, locally called "MTVs." MTVs used ordinary video cassette machines to serve audiences as small as two or three people, offering privacy, service, and a large selection of movies.¹¹¹ Proprietors of these MTVs often showed pirated copies of movies.¹¹²

Taiwan's refusal to interpret its copyright law as affording an exclusive right of public performance for motion pictures greatly frustrated the U.S. motion picture industry.¹¹³ In February 1988, the Motion Picture Export Association of America filed a case on the "public performance"¹¹⁴ issue in Taipei to test the public performance standards of Taiwan's copyright protection.¹¹⁵ Interpreting Taiwan's copyright laws, the judge firmly ruled that the video

109. Rudd, *supra* note 104.

110. *Six Parties Comment on 17 Countries in Second Round Under Special 301 Provision*, 7 Int'l Trade Rep. (BNA) at 300 (Feb. 28, 1990). After receiving an unfavorable judgment, Tan Ching distributed fliers that advertised the low price of its version of the CEB: "To minimize our losses as a result of the unfavorable ruling . . . we will, beginning today, sell at a super low price our *Encyclopaedia Britannica*." HOFFMAN & MARCOU, *supra* note 5, at 12.

111. HOFFMAN & MARCOU, *supra* note 5, at 11.

112. *Id.*

113. *Id.* at 30.

114. Whether the showing of movies in the MTV parlors constitutes a "public performance" is the central issue of the MTV debate. Professor Hsiao argues that according to major civil law countries, such performance would not constitute "public performance," and thus there would be no copyright violation. In support of his position he cites Article 15, Section 3 of the German copyright law and Articles 2 and 22 of the Japanese copyright law, including a 1966 Japanese government notice and comment on the definition of "public performance." HSIAO, *supra* note 32, at 259-65. U.S. negotiators, however, insist that "public performance" covers performance in these video parlors. U.S. case law also reflects this interpretation. In deciding a case factually analogous to the Taiwanese MTV arrangement, the Third Circuit Court of Appeals held that the definition of "public performance" in section 101 of the U.S. copyright law covers performances of movies in video stores with booths equipped with video cassette recorders. *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154, 158 (3d Cir. 1984). The court reasoned that the relevant "public place" within the meaning of section 101 is the video store, not each individual booth within the store. *Id.* at 159. Simply because the cassettes can be viewed in private does not mitigate the essential fact that the stores are unquestionably open to the public. *Id.*; see also 17 U.S.C. § 101 (1988) (defining public performance as "to perform . . . at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered").

115. HOFFMAN & MARCOU, *supra* note 5, at 11.

parlor engaged in "illegal leasing" of both legitimate and counterfeit tapes. However, the judge's decision evaded the "public performance" issue. On appeal, the High Court issued a full order in January 1989 that also found that "public performance" was not at issue in the case.¹¹⁶ The "public performance" issue finally was addressed on appeal to the Taiwanese Supreme Court, which held that exhibition of tapes in MTV video parlors constitutes "public performance." As a result, the Taiwanese government adopted a strict regulation specifically designed to crack down on the illegal MTVs.¹¹⁷

3. *The United States-Taiwan Friendship, Commerce, and Navigation Treaties*

Before beginning a detailed discussion of the present U.S.-Taiwanese copyright relationship, it is worth mentioning the pre-1980 agreements between the U.S. and Taiwan. Prior to the Agreement in 1989, copyright relations between the U.S. and Taiwan were based upon provisions of two Friendship, Commerce, and Navigation Treaties ("FCN Treaties") signed by the Republic of China ("ROC") prior to the Communist takeover of mainland China.¹¹⁸ The copyright provisions of these treaties were unusual by international norms and obsolete long before the Agreement was concluded.¹¹⁹ In fact, neither Taiwan nor the U.S. strictly adhered to these copyright provisions.¹²⁰ The chief problem with the treaties was their exemption of translation rights: the ROC was not obligated to protect translation rights of U.S. works.¹²¹ However,

116. *Id.*

117. *ROC-U.S. Trade Consultations Being Held in Washington*, CENTRAL NEWS AGENCY, Mar. 23, 1990, available in LEXIS, Nexis Library, CENEWS File.

118. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, U.S.-China, 63 Stat. 1299; Treaty for the Extension of Commercial Relations, Oct. 8, 1903, U.S.-China, 33 Stat. 2208.

119. *Oversight on International Copyrights*, *supra* note 30, at 96 n.121. For arguments that support a reading that the FCN Treaties propose a solution to the problem of piracy of U.S. intellectual property in Taiwan, see Michael M. Hickman, Note, *Protecting Intellectual Property in Taiwan: Non-Recognized United States Corporations and Their Treaty Right of Access to Courts*, 60 WASH. L. REV. 117 (1984).

120. *Oversight on International Copyrights*, *supra* note 30, at 96 n.121.

121. *Id.* The 1903 bilateral agreement provided in part:

Whereas the Government of the United States undertakes to give the benefits of its right laws to the Citizens of any foreign State which gives to the citizens of the United States the benefits of copyright on an equal basis with its own citizens—

Therefore the Government of China, in order to secure such benefits in the United States for its subjects, now agrees to give full protection, in the same way and manner and subject to the same conditions upon which it agrees to protect trade-marks, to all citizens of the United States who are authors, designers or proprietors of any book, map, print or engraving especially prepared for the use and education of the Chinese people, or translation into Chinese of any book, in the exclusive right to print and

copyright negotiations between the U.S. and Taiwan led Taiwan in 1985 to issue administrative rulings granting U.S. copyright holders the same treatment received by domestic holders (so-called "national treatment").¹²² Thus, until 1985, Taiwan was theoretically at liberty to translate U.S. literary and artistic works without violating any U.S.-Taiwan bilateral agreement.

4. U.S. Retaliation

The U.S. retaliated against Taiwan and other pirating nations with trade sanctions. In 1989, it placed Taiwan on the "priority watch list."¹²³ After various negotiations, including the signing of a bilateral agreement in July 1989 and many concessions made by Taiwan to amend its copyright laws, the USTR downgraded Taiwan from the "priority watch list" to the "watch list."¹²⁴ Nevertheless, the threat of sanctions under Section 301 (commonly called "Super 301") continued to dominate U.S.-Taiwan trade talks, where discussions remained characterized by U.S. demands that Taiwan either revise its copyright laws or provide more effective enforcement of existing laws.¹²⁵

5. Taiwan's Efforts to Reform Copyright Protection

Even without the threat of Super 301, Taiwan's economic progress has generated internal pressure to harmonize its copyright system with its global trade and development policies. Perceiving its

sell such book, map[,] print, engraving or translation of the books, maps, etc., specified above, which may not be reprinted in the same form, no work shall be entitled to copyright privileges under this article. *It is understood that Chinese subjects shall be at liberty to make, print and sell original translations into Chinese of any works written or of maps compiled by a citizen of the United States.*

Id. (emphasis added).

122. HOFFMAN & MARCOU, *supra* note 5, at 12; *see also supra* notes 13-16 and accompanying text.

123. Other countries on the list included Brazil, the Republic of Korea, India, Saudi Arabia, Mexico, the People's Republic of China, and Thailand. *See generally USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property*, 6 Int'l Trade Rep. (BNA) 715-21 (May 31, 1989). The USTR also created a "watch list" which differs from the priority watch list in that it does not carry the threat of investigation or the possibility of trade retaliation. John Boatman, *Executive Briefing: U.S. Rewards Korea and Taiwan for Intellectual Property Moves*, E. ASIAN EXECUTIVE REP., Nov. 15, 1989, at 7.

124. Boatman, *supra* note 123.

125. The cycle of U.S. retaliation and Taiwanese accommodation reached a peak in May and June 1992, when for the first time the U.S. placed Taiwan on the list of Section 301 priority countries. Among the factors that led to this action were Taiwan's exports of pirated compact disks and software, piracy of video materials, and lax enforcement of existing copyright laws. Taiwan responded by negotiating a new bilateral Patent, Copyright and Trademark Agreement, finalized on June 5, 1992, which promised greater enforcement efforts. *U.S., Taiwan Reach Key Agreement on Patent, Trademarks, Copyrights*, 9 Int'l Trade Rep. (BNA) 1001 (1992).

future to be closely linked to the growing information economies of the West, Taiwan is weighing copyright policies in terms of how they may promote and attract industrial activity and local authorship in high technology, thereby serving as a crucial factor in its international commercial relations. Thus, although Taiwan has been a large-scale producer and supplier of pirated products, the Taiwanese government began to show a strong commitment to intellectual property protection during the 1980s.¹²⁶ The government's new position evolved as swiftly as Taiwan's development into a budding economic power.

As part of this evolution, Taiwan made a fundamental shift away from viewing copyrights merely as intrusive property rights asserted by foreigners against nationals.¹²⁷ Since 1985, Taiwan has instituted full intellectual property protection and has substantially overhauled its intellectual property laws,¹²⁸ including measures like doubling the penalties imposed on violators and creating a special court to expedite rulings on intellectual property infringement cases.¹²⁹ Additional major changes also reflect an emerging copyright maturity. In protecting authors' economic rights Taiwan now accommodates advancing technologies of distributing and exploiting their work, and provides minimum civil damages. Moreover, it expressly recognizes new media of creation like computer software as the subject matter of copyright, though only twenty other countries recognize computer software as intellectual property.¹³⁰ By 1987, new laws were in place in virtually all major areas of intellectual property.¹³¹ In addition, Taiwan amended its copyright laws pursuant to the 1989 Agreement, which gave U.S. works protection equivalent to protection under the Berne Convention.¹³² This latest change was so drastic that it raised cries for retrenchment within Taiwan.¹³³

The implementation of the new laws, however, lacked consistency, and piracy continued undeterred. This is understandable, however, since it would be unrealistic to expect complete change in so short a period of time, especially in light of the numerous government officials who came into office before the transitions in policy and legal structure and who are now responsible for administering

126. See HOFFMAN & MARCOU, *supra* note 5; Richards, *supra* note 92, at 342.

127. *Oversight on International Copyrights*, *supra* note 30, at 137.

128. Richards, *supra* note 92, at 34.

129. John Boatman, *Executive Briefing: Taiwan's Fall Agenda: Intellectual Property Rights*, E. ASIAN EXECUTIVE REP., Sept. 15, 1989, at 5; Richards, *supra* note 92, at 342.

130. Copyright Law arts. 4, 33 (1987) (Taiwan), translated in COPYRIGHT LAW OF THE REPUBLIC OF CHINA, *supra* note 98, at 4, 11; Richards, *supra* note 92.

131. Richards, *supra* note 92, at 349.

132. 7 Int'l Trade Rep. (BNA) 811, 811-12 (1990).

133. Richards, *supra* note 92, at 342.

the new laws.¹³⁴ Their inertia makes some continuation of past policies inevitable, particularly when combined with private sector resistance to the new laws.¹³⁵ Despite these problems, Taiwan's commitment to intellectual property protection remains firm. While the strongest motivation for change comes from U.S. economic pressure, two additional factors keep the new domestic intellectual property laws in place. First, the Taiwanese government is concerned that the country's international reputation for piracy inhibits its ability to export legitimate products.¹³⁶ Second, Taiwan realizes that protecting intellectual property serves the best interest of Taiwan's own economic development, as full intellectual property protection provides incentives for creativity and indigenous innovation. Furthermore, one of Taiwan's greatest fears—that intellectual property reform would result in a significant decline in exports—has not materialized.¹³⁷ Taiwan continues to maintain a high GNP growth rate.¹³⁸

Nevertheless, this receptivity to higher levels of protection should not be viewed as eagerness to enter into bilateral agreements that impose unreasonable terms of protection. If the U.S. exploits its economic power and Taiwan's dependence by dictating unrealistically high levels of protection without evaluating their feasibility and the adverse consequences, the U.S. will only stifle Taiwan's nascent commitment to intellectual property protection.

6. *Taiwan's International Status and the U.S.-Taiwan Relationship*

Unrecognized as a nation by much of the world, Taiwan has historically been barred from entering international organizations, including international intellectual property conventions. After the Communist takeover in 1949, the Nationalist Chinese government fled to Taiwan and claimed to be the sovereign of China. However, the ROC, under the leadership of Chiang Kai-Shek and later his son Chiang Ching-kuo, began to lose its appeal as the legitimate government of China; most nations of the world gradually withdrew recognition.¹³⁹ Although the Republic of China was one of the founding countries of the United Nations, its seat in the U.N. was taken by the Communist People's Republic of China ("PRC") in 1971.¹⁴⁰ Fewer than thirty countries, mostly small African and

134. *Id.* at 349.

135. *Id.*

136. *Id.* at 348.

137. *Id.* at 350.

138. *Id.*

139. FREDERIC S. PEARSON & J. MARTIN ROCHESTER, *INTERNATIONAL RELATIONS: THE GLOBAL CONDITION IN THE LATE TWENTIETH CENTURY* 344 (1984).

140. Harvey Feldman, *A New Kind of Relationship: Ten Years of the Taiwan Rela-*

Latin American countries, recognize Taiwan as a legitimate, independent political entity called "The Republic of China."¹⁴¹ The rest of the world officially regards Taiwan as a province of China and the PRC vigilantly guards against any suggestion that Taiwan should be recognized as an independent political entity. Although PRC-Taiwan relations have softened in recent years, it seems unlikely that the PRC will relent in its stance against "One China, One Taiwan." The absence of independent recognition bars Taiwan from joining any international body, and it has experienced painful expulsions from whatever international organizations it belonged to under the name of the Republic of China.¹⁴²

For these reasons, Taiwan cannot join either the Berne Convention or the UCC. Similarly, Taiwan's unrecognized status has until very recently thwarted its desire to join the GATT,¹⁴³ which the U.S. views as an attractive multilateral approach to the problem of infringement of U.S. intellectual property.¹⁴⁴ Thus, bilateral agreements with Taiwan provide the only avenue for restraining piracy there. More importantly for Taiwan, guarantees of reciprocity in bilateral agreements offer the only protection for Taiwanese intellectual property in other nations.

When the U.S. severed its diplomatic relations with the ROC and recognized the PRC as the sole legitimate government of China in 1979,¹⁴⁵ Congress enacted the Taiwan Relations Act ("TRA")¹⁴⁶ to preserve an unofficial relationship with Taiwan.

tions Act, in A UNIQUE RELATIONSHIP: THE UNITED STATES AND THE REPUBLIC OF CHINA UNDER THE TAIWAN RELATIONS ACT 25 (Ramon H. Myers ed., 1989) [hereinafter A UNIQUE RELATIONSHIP].

141. The list of these countries continues to shrink. In 1990, Saudi Arabia entered into diplomatic relations with the People's Republic of China, causing Taiwan to suspend diplomatic ties with Riyadh. *ASIAN WALL ST. J.*, July 23, 1990, at 1. In 1992, South Korea established diplomatic relations with the People's Republic and cut official ties with Taiwan. *Survey Taiwan*, *ECONOMIST*, Oct. 10, 1982, at 7.

142. For example, when Taiwan sought to participate in the Olympics under the Republic of China name, the People's Republic of China successfully blocked its admission. Taiwan entered the Olympics again only recently, and then under the name of "Chinese Taipei." *IOC Solves China Dispute*, *N.Y. TIMES*, Mar. 24, 1981, at B18.

143. Created in 1947, the GATT is both an international agreement embodying rules to govern international trade, and an institution charged with conducting trade negotiations and settling international trade disputes among nations. Despite opposition by the People's Republic of China, the GATT has agreed to consider Taiwan's application for membership under the name "Chinese Taipei," and notified Taiwan in October 1992 that it could participate in GATT activities as an observer pending the decision on its application for membership. Hungdah Chiu, *Taiwan's GATT Application: Working Party Formed*, *E. ASIAN EXECUTIVE REP.*, Dec. 15, 1992, at 8.

144. See, e.g., Leaffer, *supra* note 7.

145. David Cho, *The Republic of China and the Taiwan Relations Act*, in *A UNIQUE RELATIONSHIP*, *supra* note 140, at 140.

146. 22 U.S.C. § 3314 (1988). The term "Republic of China" was dropped, and the Act referred repeatedly to "the people on Taiwan," a phrase imposed by policy makers in the State Department intended to refer to the government of the ROC and its people

Under the Act, all treaties and agreements except defense treaties between the United States and Taiwan were to continue indefinitely unless specifically terminated.¹⁴⁷ The TRA also provided Taipei and Washington with an effective means for interacting. The dealings of the U.S. government with "the people on Taiwan" would be conducted through a nonprofit organization, the American Institute in Taiwan ("AIT"), which functions as an embassy and is specially authorized to enter into, carry out, and enforce agreements and arrangements with Taiwan. For its part, Taiwan set up a corresponding unofficial body, the Coordination Council for North American Affairs ("CCNAA").¹⁴⁸ The TRA, in effect, arranged a unique relationship: unofficial in name, but official in substance. That is, any agreement concluded by the AIT and the CCNAA is deemed a private agreement¹⁴⁹ but carries the practical force of an official treaty.¹⁵⁰

without offending the PRC. The phrase "people of Taiwan" (instead of "on Taiwan") was specifically rejected as implying that Taiwan was a separate state. Feldman, *supra* note 140, at 27-28.

147. Feldman, *supra* note 140, at 30.

148. The U.S. rejected the idea of any office with the name *China, Chinese, Republic of China, ROC* or even *Taiwan*. *Id.* at 33. As part of the initial pattern, all meetings between CCNAA and U.S. government officials had to take place either at AIT offices or in neutral territory, such as in restaurants. But since Taiwan became the fifth largest trading partner, the United States' trade, commercial, or even military relationships are too complex to be handled in this way. AIT officials simply could not eat so many meals, and their budget would not allow such frequent resort to restaurants. Now, CCNAA officials may call on their U.S. government counterparts in their offices so that the business of the two governments can be more efficiently accomplished. The only exceptions to this rule are the State Department and the Executive Office of the President. *Id.* at 37.

149. DEPARTMENT OF STATE, *supra* note 23, under China (Taiwan), lists only bilateral agreements concluded by the ROC prior to January 1, 1979.

150. The report of the Senate Foreign Relations Committee stated:

The bill [The TRA] submitted by the Administration takes no position on the status of Taiwan under international law, but does regard Taiwan as a country for purposes of U.S. *domestic* law. The bill assumes that any benefits to be conferred on Taiwan by statute may be conferred without regard to Taiwan's international legal identity.

LESTER L. WOLFF & DAVID L. SIMON, LEGISLATIVE HISTORY OF THE TAIWAN RELATIONS ACT 13 (1982).

In the context of considering the effect of the 1989 U.S.-Taiwan Copyright Agreement, Taiwanese commentators have expressed concern about receiving the reciprocal copyright protection of Taiwanese copyrights in the U.S., given the questionable constitutionality of the TRA (and thus the "private" agreements between the U.S. and Taiwan) according to the U.S. Constitution. However, a 1992 U.S. Circuit Court decision should dispel such fear. *New York Chinese TV Programs, Inc. v. U.E. Enters.*, 954 F.2d 847 (2d Cir. 1992). In that case, the Second Circuit emphatically upheld the constitutionality of the TRA, thereby confirming the validity of any bilateral agreements signed under the TRA.

In *New York Chinese TV Programs*, the alleged copyright infringement arose from the defendants' copying, distributing, renting, and selling of video cassette copies of Taiwanese soap operas. The plaintiff, the holder of an exclusive license to distribute video cassette copies of these programs in New York and New Jersey, brought an action

II. THE UNITED STATES-TAIWAN COPYRIGHT AGREEMENT

Not only was the absence of a clear copyright relationship between Taiwan and the U.S. a source of confusion and difficulty for U.S. copyright industries, but it also permitted Taiwanese bureaucratic delays, indecision, and sometimes outright opposition. To remedy this problem, the U.S. and Taiwan formally signed the Agreement in July 1989. Under this bilateral accord, U.S. works receive a level of protection that in some respects surpasses that of the Berne Convention.

While piracy in Taiwan demands urgent attention, the Agreement's extremely stringent standard of protection for U.S. copyright in a country inexperienced with copyright law is unreasonable. Like other U.S. bilateral trade agreements, the Agreement has provoked resentment and has been perceived as a species of colonialism.¹⁵¹ Despite the successful negotiation of the Agreement, such unbalanced bilateral agreements run counter to U.S. long-term interest in a healthy, stable trade environment. An ideal international system allocates equal rights and obligations among states, and would base trade on the principle of nondiscrimination. Negotiated under the U.S. threat of Super 301, however, the Agreement departed from this ideal and took on the nature of extreme, unilateral action.¹⁵²

based on section 104(b)(1) of the Copyright Act of 1978, 17 U.S.C. 104(b)(1) (1988), which accords copyright protection to nationals "of a foreign nation that is a party to a copyright treaty to which the United States is also party."

Using Professor Laurence Tribe of Harvard Law School as an expert witness, the defendant offered two arguments that the U.S. no longer has a copyright treaty with Taiwan. First, the defendant argued that because the TRA purported to require the U.S. to honor the obligations of the FCN Treaty, the TRA itself had to be a new "treaty" between the U.S. and Taiwan. However, the argument continued, the TRA was not made in accordance with Article II of the U.S. Constitution and hence could not be a valid "treaty." The defendants concluded that because the TRA is not a "treaty," it could not meet the requirement of section 104(b)(1) that there be a treaty. In their second argument, the defendants asserted that even if the TRA did not have to meet the "treaty" requirements of section 104(b)(1), the U.S. could not constitutionally continue to honor the FCN treaty because Taiwan was not a nation and hence a treaty (defined as a contract between nations) with Taiwan fell outside the treaty power.

In rejecting both of the defendants' arguments, the court held that the judiciary should refrain from determining whether a treaty has lapsed, and rather defer to the elected branches of government on treaty issues. 934 F.2d at 852. The court further held that Taiwan, though lacking diplomatic recognition, was still a "nation" for U.S. treaty purposes because it has "(1) a defined territory; (2) a permanent population; (3) a government; and (4) the ability to engage in relations with other nations." *Id.* at 853. Thus, by virtue of both Congress' enactment of the TRA and the Executive Branch's position that the FCN has remained in effect, the FCN remains a valid "treaty" for purposes of section 104(b)(1) of the Copyright Act of 1978. *Id.* at 852.

151. See generally Leaffer, *supra* note 7, at 297.

152. *Id.* For general arguments against bilateral agreements, see C. Michael Aho,

A. ELEMENTS OF THE LAW

The 1989 Agreement incorporates standards of both the UCC and the Berne Convention. It extends copyright protection for the lifetime of the author plus fifty years,¹⁵³ and protects not only citizens of the contracting parties but also persons who have their habitual residence in one of the contracting territories.¹⁵⁴ The Agreement extends protection retroactively for twenty years prior to 1985.¹⁵⁵ An application process for compulsory licenses,¹⁵⁶ which can be granted only for the purpose of teaching, scholarship, or research, will terminate in 2005.¹⁵⁷ In addition, the Agreement protects translation rights and ensures that enjoyment of all rights under the Agreement is free of formalities.¹⁵⁸ More notably, the Agreement allows the possibility of constant review by providing that the parties shall consult periodically to ensure that, "with the passage of time and changes in circumstances, the objectives of this Agreement may be effectively maintained."¹⁵⁹

B. POINTS OF DEBATE AND AREAS WHERE THE AGREEMENT EXCEEDS THE BERNE CONVENTION LEVEL OF PROTECTION

1. "Protected Person"

Whenever possible, the Agreement imposes a Berne Convention level of copyright protection, rather than the lower standard of the UCC. In addition to listing citizens or nationals of either territory¹⁶⁰ as "protected persons," Article 1(6) also protects copyright

More Bilateral Agreements Would Be a Blunder: What the President Should Do, 22 CORNELL INT'L L.J. 25 (1989).

153. The Agreement for the Protection of Copyright Between the Coordination Council for North American Affairs and the American Institute in Taiwan, July 14, 1989, U.S.-Taiwan, art. 5(1) [hereinafter *The Agreement*], reprinted in HSIAO, *supra* note 32, addendum at 1, 7. The Taiwanese Legislative Yuan ratified the Agreement on January 18, 1993, but made eight reservations. Taiwanese trade officials fear that these reservations, which include relaxed provisions for parallel importing, may provoke further U.S. retaliation. *Sino-US Copyright Pact Signed with Reservations*, CENTRAL NEWS AGENCY, Jan. 19, 1993, available in LEXIS, Nexis Library, CENEWS File.

154. The Agreement, *supra* note 153, art. 1(3), (6).

155. *Id.* art. 16(2).

156. In general, a compulsory license is a nonexclusive and nontransferable right granted by competent authority for a fee after a prescribed period has expired and after good faith efforts to secure a voluntary license from the copyright holder have failed. For example, when a publisher wishes to publish a translation of a particular foreign work, he can apply for a compulsory license to do so from a competent authority in his country, provided that his good faith efforts to contact or to obtain permission from the copyright holder have failed and that the relevant statutory period has elapsed. See *infra* notes 179-97 and accompanying text.

157. The Agreement, *supra* note 153, app. art. II(3).

158. *Id.* art. 4(2).

159. *Id.* art. 20(1).

160. Under art. 1(2) of the Agreement, "territory" describes the area under the ju-

owners "who have their habitual residence in one of the territories represented by either Party." This provision is modeled after Article 3(2) of the Berne Convention, in which authors who are not nationals of one of the member states but have their habitual residence in one of them are "assimilated to nationals of that country." Taiwan's copyright law, however, does not protect such authors.¹⁶¹ In fact, the UCC does not require such a high level of protection. Under Article II(3) of the UCC, whether foreign residents are protected is to be determined by domestic legislation.¹⁶² Thus, if the Agreement followed the UCC standard, Taiwan would not have to depart drastically from its existing copyright law.

Moreover, like the Berne Convention, the Agreement, in Article 3(3), protects works that have been published in either territory within thirty days of their first publication anywhere else,¹⁶³ a protection that is not required by the UCC. In combination, Article 1(6) (protected person) and Article 3(3) present a formidable barrier to Taiwan's access to foreign literary and artistic works, while the Agreement's bilateral nature deprives Taiwan of reciprocal protection in third countries. For example, if a Japanese citizen published a book in Japan and within thirty days published the same book in the U.S., Taiwan's translation of such book would violate the Agreement, even though Japan does not have a copyright agreement with Taiwan and can freely pirate Taiwanese books. Or if a Frenchman, who has his habitual residence in the U.S., published a book in France, Taiwan also could not translate such a book.¹⁶⁴ Since Taiwan has few bilateral copyright agreements with the rest of the world, the Agreement, in effect, requires that Taiwanese publishers investigate the author's background and the publishing history of the particular work before they can translate non-American works.

isdiction of the authority of either Party to this Agreement as the context may require. *Id.* art. 1(2).

161. See Copyright Law art. 17 (1987) (Taiwan), translated in COPYRIGHT LAW OF THE REPUBLIC OF CHINA, *supra* note 98, at 7.

162. Article 2(3) of the UCC provides that "[f]or the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State." See UCC, *supra* note 4, art. 2(3).

163. The Agreement, *supra* note 153, art. 3(3). The U.S. originally proposed that this time period be 90 days instead of 30 days. See American Inst. in Taiwan, Agreement for the Protection of Copyright Between the American Institute in Taiwan and the Coordination Council for North American Affairs art. 3(3) (1987) (U.S. proposal), reprinted in HSIAO, *supra* note 32, at 23, 26. The Berne Convention, however, in article 3(4) extends protection to non-Union work only if such work is published in a Union country within 30 days of its first publication in a non-Union country. See Berne Convention, *supra* note 3, art. 3(4).

164. HSIAO, *supra* note 32, at 3.

2. *Protected Period*

Article 5(1) of the Agreement, also mirroring the Berne Convention, provides that the term of protection shall be "no less than the life of the author and fifty years after his or her death."¹⁶⁵ Alternatively, protection extends to fifty years after the date of creation or first publication if the work was not authored by a natural person.¹⁶⁶ In contrast, the UCC determines the duration of protection for a work by the law of the contracting state, with the minimum set at life of the author plus twenty-five years.¹⁶⁷

Under the UCC standard, the longest protection period set by individual contracting states is the life of author plus fifty years after his death. For example, South Korea, which is not a member of the Berne Convention but is a member of the UCC, protects U.S. motion pictures and musical works for only twenty years.¹⁶⁸ Since Taiwan's copyright protection is only equivalent to the lifetime of the author, to demand that Taiwan grant such high protection requires Taiwan to depart drastically from its copyright laws.¹⁶⁹

3. *Retroactivity*

While the Agreement demands Berne level protection whenever possible, it exceeds Berne Convention standards in several respects, including its retroactive effect. Article 16 of the Agreement provides that "works created in the twenty years prior to 1985 shall be included as works protected under this Agreement in the territory represented by CCNAA."¹⁷⁰ The comparable provision in the Berne Convention concerning retroactive protection of copyrights provides that the Convention shall apply to all works that have not fallen into the public domain in the country of origin.¹⁷¹ Thus, when a country joins the Berne Convention, all its copyrighted works are protected against other treaty members as long as such works are not already in the public domain. The UCC, however, does not extend retroactive protection to copyright works of a con-

165. The Agreement, *supra* note 153, art. 5(1); Berne Convention, *supra* note 3, art. 7(1).

166. The Agreement, *supra* note 153, art. 5(2).

167. UCC, 1971 Revision, *supra* note 4, art. IV(1)-(2).

168. HSIAO, *supra* note 32, at 13; see Copyright Act ch. IV, § 5, art. 70 (as amended 1986) (S. Korea), translated in 1 LAWS OF THE REPUBLIC OF KOREA III-137, III-143-7 (Korean Legal Center ed., 4th ed. 1983).

169. See Copyright Law art. 8 (1987) (Taiwan), translated in COPYRIGHT LAW OF THE REPUBLIC OF CHINA, *supra* note 98, at 5. Instead of the term of lifetime plus fifty years as proposed by the U.S., Taiwan had originally proposed that the protection period be the lifetime of the author plus thirty years. This proposal, however, was rejected by the U.S. negotiators. Jiang-Bingliu, *T'ze Huei Tsai Tsang Ch'uan Tze Nan Ti*, FA HSUEH TS'UNG K'AN [CHINA LAW JOURNAL], Jan. 1989, at 60.

170. The Agreement, *supra* note 153, art. 16(1).

171. Berne Convention, *supra* note 3, art. 18(1).

tracting party and thus grants a lower level of protection. For example, when the former Soviet Union joined the UCC in May 1973, it protected only post-1973 literary and artistic works of other contracting parties.¹⁷²

The Berne Convention included two provisions that mitigate its terms for new members. First, an option for reservations softens the force of retroactive protection.¹⁷³ While the Agreement requires Berne Convention-level protection to U.S. copyright, it does not offer the Convention's countervailing option of reservations. Second, in conjunction with the possibility of reservation, the Berne Convention explicitly allows a country, upon acceding to the Convention, to have the option to terminate an author's exclusive copyright if that author does not publish a translation of his work in the language for which the protection is to be claimed within ten years of the first publication of his work.¹⁷⁴ This option to terminate an author's translation right makes the Berne Convention less rigid and more attractive to states considering entry to the Berne Convention. Japan, for example, benefitted greatly from such reservation of rights to translation.¹⁷⁵

The unreasonableness of the high level of protection demanded by the U.S. in the Agreement is evident when compared to other agreements between the U.S. and other developing countries similarly situated to Taiwan. For instance, as previously mentioned, while South Korea managed to avoid U.S. sanctions under Super 301 by joining the UCC in July 1987, thereby settling its copyright disputes with the U.S., Taiwan is barred from exercising that option through no fault of its own. Also, when South Korea amended its copyright laws in 1986 under U.S. pressure, it included provisions more favorable than those in the Taiwan Agreement. For example, under Article 3 of South Korea's new copyright law, foreign copyrights are protected according to treaties or conventions that South Korea has already entered; Article 3 specifically provides that the

172. HSIAO, *supra* note 32, at 26.

173. Berne Convention, *supra* note 3, art. 30(2)(a). The option for reservation was devised in 1896 under the Paris Additional Act to the Berne Convention when the European countries were at an earlier stage of their development, and was revived in only slightly modified form in 1971 to deal with similar needs of the developing countries. STEWART, *supra* note 9, at 100, 104; *see also* The Berne Convention, Paris Additional Act, May 4, 1896, art. V, 182 Consol. T.S. 441, 444 [hereinafter 1896 Paris Additional Act].

174. *See generally*, Berne Convention, *supra* note 3, art. 30(2)(b) (as amended in 1971) (option of temporarily substituting translation rights under the 1896 Paris Additional Act); 1896 Paris Additional Act, *supra* note 173, art. V (an author's translation rights may be terminated if not exercised within ten years of first publication).

175. HSIAO, *supra* note 32. By using the ten-year reservation, Japan massively translated European and American books. The wholesale import of Western culture contributed to Japan's success as an economic power today. *Id.*

protection shall not be applied retroactively.¹⁷⁶

Given that South Korea and Taiwan are both considered major pirating centers,¹⁷⁷ it seems unreasonable to demand that Taiwan accelerate its copyright protection more rapidly than South Korea. Not only is such a demand unfair, but it presents practical enforcement problems, especially regarding translation rights, since translated American works constitute a large portion of Taiwan's publishing industry.¹⁷⁸

4. *Compulsory Licenses*¹⁷⁹

Another area where the Agreement demands protection higher than both the UCC and the Berne Convention is the availability of compulsory licenses to the Taiwanese.¹⁸⁰ In general, a compulsory license is a nonexclusive, nontransferable right granted by a government authority¹⁸¹ for a fee after a prescribed period has expired and after good faith efforts to secure a voluntary license from the copyright holder have failed.¹⁸² The Agreement allows compulsory licenses in a much more restricted manner than the UCC. It allows compulsory licenses for translation rights if a work has not been published in Chinese or anywhere in the world except the Chinese mainland within one year of the first publication of the work.¹⁸³ However, the Agreement makes compulsory licenses available only until 2005.¹⁸⁴ Also, under the Agreement, compulsory licenses can be granted only for the purposes of teaching, scholarship, or research.¹⁸⁵ In contrast, the UCC permits application for compulsory licenses without setting a time limit.¹⁸⁶ Since the system of compul-

176. See Copyright Act ch. I, art. 3 (as amended 1986) (S. Korea), translated in 1 LAWS OF THE REPUBLIC OF KOREA, *supra* note 168, at III-138.

177. See generally Gadbar & Richards, *supra* note 80, at 12-13.

178. HSIAO, *supra* note 32, at 25.

179. Under the UCC and the Berne Convention, compulsory licenses are considered as exceptions to an author's exclusive rights. See generally STEWART, *supra* note 9, at 99-182.

180. HSIAO, *supra* note 32.

181. In the case of the U.S., the U.S. Copyright Office has the authority to issue compulsory licenses.

182. Oversight on International Copyrights, *supra* note 30, at 61-62.

183. The Agreement, *supra* note 153, app. art. II(1)(a), II(3).

184. *Id.* app. art. I(1).

185. *Id.* app. art. II(3). These terms, while not defined in the Agreement, have generally accepted meanings under the UCC and the Berne Convention. "Scholarship" covers instructional activities at all levels, including educational activities intended for all age levels and for the study of any subject. "Research" may be interpreted broadly in the educational sphere, but excludes industrial research institutes or industrial or commercial companies undertaking research for commercial purposes. See generally STEWART, *supra* note 9.

186. Under the UCC, the main characteristics of the compulsory licenses available in developing countries are: (1) they are nonexclusive; (2) they are nontransferable; (3) they can be granted only for educational purposes; (4) they can be granted only after the

sory licensing is available to both developing and developed countries, it is a permanent fixture of the UCC. The 1952 version of the UCC allowed member states to subject the translation right to a compulsory license seven years after a work's first publication under prescribed conditions.¹⁸⁷ In 1971, the UCC further liberalized the requirements for compulsory licenses under the translation right in response to demands from developing countries. Instead of seven years, the 1971 revision allows a developing country to impose a compulsory license for a work's translation in the country's language if no such translation has been published after three years from the work's first publication.¹⁸⁸ A developing country may also impose a compulsory license for translation from a language not generally used in any developed UCC country if no such translation has been published after one year from the work's first publication.¹⁸⁹ While a developing country faces fewer formalities and has a shorter waiting period before a compulsory license may be imposed,¹⁹⁰ its use of such license is limited to educational purposes.¹⁹¹

Moreover, the UCC does not limit the regime of compulsory licenses to developing countries. Under the UCC standard, even if Taiwan became a developed country by the year 2005, it could still use compulsory licenses. While the UCC imposes longer waiting periods on developed countries and demands more cumbersome application procedures, the option of compulsory licenses does not cease to exist altogether. In fact, for developed countries, the UCC *expands* the scope of compulsory licenses beyond educational purposes, and permits copies of translated works to be exported.¹⁹²

The Agreement follows the Berne Convention by allowing compulsory licenses only in developing countries.¹⁹³ However, the

prescribed periods have expired and the prescribed procedures have been followed; (5) the competent authority can issue a compulsory license only against payment of equitable remuneration; and (6) exporting copies made under a compulsory license is generally forbidden. UCC, 1971 Revision, *supra* note 4, art. Vbis, Vter, Vquater; see also STEWART, *supra* note 9, at 171-82.

187. UCC, 1952 Text, *supra* note 4, art. V(2).

188. UCC, 1971 Revision, *supra* note 4, art. Vter.

189. See *id.* See generally GOLDSTEIN, *supra* note 14, § 16.6. A developing country may use the option of compulsory licenses under translation rights if it notifies UNESCO of its intention to do so, and such notification is effective for ten-year periods, renewable until the state concerned is no longer regarded as a developing country. UCC, 1971 Revision, *supra* note 4, art. Vbis (1)-(3).

190. See generally STEWART, *supra* note 9.

191. UCC, 1971 Revision, *supra* note 4, art. Vbis (3). The limitation to "teaching, scholarship or research" is identical to the Agreement's terms for the use of compulsory licenses. *Id.*

192. *Id.* art. V(3)(e).

193. Berne Convention, *supra* note 3, app. art. II. This article sets out a complete set of rules for developing countries which in all material respects is identical with that of the UCC.

Agreement and the Berne Convention differ sharply in their method of evaluating a country's development status. The Berne Convention provides a flexible and objective standard to determine a country's cultural and economic stage of development.¹⁹⁴ The Agreement, on the other hand, by curtailing compulsory licenses for Taiwan in 2005, in effect decrees that in 2005 Taiwan will be considered a developed nation and no longer need the benefit of compulsory licenses. This scheme is overly rigid, since even if Taiwan's cultural situation does not reach the level of developed countries, Taiwan still loses the right to compulsory licenses. It would then be vulnerable to American copyright holders' monopolistic control while still unable to satisfy its needs for published information with domestic output. A more reasonable approach would link the revocation of compulsory licenses to Taiwan's becoming a "developed country" by flexible, objective criteria and not a mandatory cutoff date.

The Agreement also goes beyond the Berne Convention by failing to offer the option for reservation provided in Article 30(2)(b) of the Convention. As mentioned above, this reservation on translation rights permits a work originating in a member country to be translated in another member country if, within ten years of the work's first publication, the author has not published in a Berne Convention country "a translation in the language for which the protection is to be claimed."¹⁹⁵

The Berne Convention also provides, and the Agreement omits, compulsory licenses authorizing reproduction. Under the Berne Convention¹⁹⁶ if, after a stated period of time from a work's first publication, the work has not been distributed either to the general public or in connection with systematic educational activities of the developing country "at a price reasonably related to that normally charged in the country for comparable works," that country may issue a compulsory license authorizing reproduction.¹⁹⁷ Therefore, the absence of mitigating options of reservation on translation rights and compulsory licenses for reproduction, combined with curtailment of the entire compulsory license process at a set date, make the Agreement more restrictive than the world's strictest international system of copyright protection and an unreasonable copyright regime for Taiwan.

194. See generally UCC, 1971 Revision, *supra* note 4, art. *Vbis.*; Berne Convention, *supra* note 3, app.

195. 1896 Paris Additional Act, *supra* note 173, art. V.

196. The UCC also has similar rules for compulsory licenses authorizing reproduction. See UCC, 1971 Revision, *supra* note 4, art. *Vquater* 1(a).

197. Berne Convention, *supra* note 3, app. art. III(2)(a).

III. IMPLICATIONS OF THE U.S.-TAIWAN COPYRIGHT AGREEMENT

A. PROBLEMS

1. *Practical Enforcement*

The high standard of copyright protection mandated by the Agreement will necessarily create enforcement difficulties. It is often said that U.S. piracy losses in Taiwan largely result from the difficulty of bringing effective enforcement actions against Taiwanese pirates. Indeed, Taiwan is notorious for failing to punish its infringers.¹⁹⁸ However, demanding a drastic departure from Taiwan's current copyright laws and imposing a system of protection more stringent than international norms only compounds the problem of copyright protection in Taiwan.

While it is true that Taiwan, like other developing countries, approaches intellectual property protection not as a question of rights but as an economic issue, the costs and benefits resulting from potential U.S. trade retaliation do not translate into simple market incentives for change in Taiwan. In theory, the U.S. may find it attractive to impose high costs on Taiwan for failing to protect copyright. In practice, however, increased economic pressure cannot coerce the radical changes necessary to enforce the Agreement's high standards, because the U.S. plays a dual role as both Taiwan's largest trading partner and its most important cultural influence. Restricting the availability of copyrighted material from America imposes enormous costs on Taiwan's economic and cultural development. This cost of compliance with the Agreement poses a countervailing force even to the high costs of direct economic sanctions the U.S. might exert if Taiwan fails to enforce the Agreement.¹⁹⁹ In addition to the possible adverse effect on Taiwan's cultural and educational development,²⁰⁰ even if the government acts vigorously to protect U.S. copyright interests, public resistance and deeply rooted cultural attitudes against recognition of intellectual property as "property" will likely impede governmental efforts. Added friction between the U.S. and Taiwan due to

198. *USTR Identification of Priority Practices and Countries Under Super 301 and Special 301 Provisions of the Omnibus Trade and Competitiveness Act of 1988: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 74 (1989) (statement of Eric H. Smith, Gen. Counsel, Int'l. Intellectual Property Alliance).

199. HSIAO, *supra* note 32, at 228.

200. According to a report concluded in 1989, students are major users of unauthorized copies of books and software in the several countries studied, including Taiwan. Governments of these countries commonly argue that improved intellectual property protection would probably increase the cost of education for members of this low-income group and threaten their ability to obtain an education. See Gadbow & Richards, *supra* note 80, at 15.

such ineffective enforcement could then occur, probably accompanied by more U.S. threats of economic sanctions.

2. *Resentment*

Taiwan views the U.S. as a bully because of its coercive use of Super 301 and because it appears hypocritical. When the Agreement was proposed by the U.S. in 1987, the U.S. was itself only a member of the UCC. It became a member of the Berne Convention only four months prior to the actual conclusion of the 1989 Agreement, 102 years after the creation of the Berne Convention. Yet it now requires this same high standard of Taiwan, and, because of a superior trade position, is able to extract it. Until recently the U.S. justified its refusal to join the Berne Convention by claiming that its copyright laws were incompatible with the Berne Convention, and that adherence to the Berne Convention would require significant policy changes.²⁰¹ The argument lacked merit because the Convention was created for the exact purpose of removing inconsistencies and providing a more uniform international standard of protection. Now the U.S. invokes a double standard by finding this same argument unpersuasive when voiced by Taiwan.

Behind the idealistic proclamation that by ratifying the Berne Convention "the U.S. announced its choice to advance the progress of literature and the arts internationally by providing substantial copyright protection to authors and artists of all nations"²⁰² lies an utilitarian calculation of cost and benefits. At this point in its development, the U.S. has everything to gain and very little to lose from joining the Berne Convention. At a minimum, it can marginally reduce the trade deficit, as U.S. industry losses due to international piracy of U.S. intellectual property (including copyrights, patents, and trademarks) constitute five percent of the trade deficit.²⁰³

U.S. threats of trade sanctions provoke resentment not only because they give the U.S. unequal bargaining power, but because the U.S. has not always fulfilled its part of the bargain, even when a country has knuckled under to threats. For example, after Singapore extensively amended its copyright laws in response to U.S. threats to withdraw GSP benefits, the U.S. withdrew Singapore's GSP benefits anyway, citing "different policy reasons."²⁰⁴

201. Leaffer, *supra* note 7, at 293 n.95.

202. Hatch, *supra* note 42, at 195.

203. See Foreign Protection of Intellectual Property Rights, *supra* note 62; *supra* note 62.

204. HSIAO, *supra* note 32, at 229; see also Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT'L L., 285, 304 n.60 (1989).

B. ALTERNATIVES

A lower standard of protection than the Agreement currently provides would actually serve the best interests of the U.S. Not only would a lower standard reduce resentment and practical problems of enforcement, it would also contribute to long-term interests in a healthy, stable trade environment. Because of Taiwan's unique international status, U.S.-Taiwan trade must be managed through bilateral agreements. Yet such agreements are troublesome because they tend to fragment the world trading system and can create resentment, particularly among Third World countries who view imposed bilateral agreements as a species of colonialism.²⁰⁵ Dealing in a reasonable manner with Taiwan, with provisions modeled on the multinational standards that apply to similarly situated states, will mitigate the inherent problems of bilateralism. As it currently stands, the Agreement imposed on Taiwan by the U.S. smacks of colonialism. For example, the Agreement's provision for possible periodic review allows the U.S. to intrude into Taiwan's internal affairs.²⁰⁶ Although fairness may not be the motivation behind U.S. policies, negotiating even-handedly will nevertheless add credibility and legitimacy to the U.S. position.

One feasible alternative that the U.S. should adopt is the use of a protection standard similar to that of the UCC. The UCC's lower standard can be implemented and enforced more easily, thereby according actual protection to U.S. copyright. It can also reduce the tensions between the U.S. and Taiwan, creating a better relationship between the U.S. and its fifth largest trade partner. Beyond the United States' own historical preference of the UCC over the Berne Convention, the U.S. copyright relationship with South Korea, a country similarly situated to Taiwan, gives evidence to the viability of using the UCC as a standard.²⁰⁷ As part of the settlement of a Super 301 case, South Korea joined the UCC in 1987. Unfortu-

205. Leaffer, *supra* note 7, at 119.

206. Article 4(2) of The Agreement provides that the parties shall consult periodically to ensure that, "with the passage of time and changes in circumstance, the objectives of this Agreement may be effectively maintained." Although this provision is termed on mutual grounds as the rest of the Agreement, it is obvious that it is the U.S. that will be constantly reviewing of Taiwan's copyright laws. The Agreement, *supra* note 153, art. 4(2).

207. The Republic of Korea (South Korea), as one of the NICs, is also a recognized center of piracy. In 1986 and 1987, it enacted a series of revisions to its intellectual property regime, which was achieved almost exclusively because of U.S. trade leverage. The dramatic reform met with strong opposition, as many people questioned the wisdom of adopting an advanced system of intellectual property protection given South Korea's stage of economic development. The predominant opinion within the South Korean government is that without the Section 301 case, laws more appropriate to South Korea's level of economic development would have been enacted, and there would have been much less anti-American sentiment. See generally R. Michael Gadbow, *Republic of Korea*, in GLOBAL CONSENSUS, *supra* note 80, at 272-86.

nately, due to its lack of international recognition, Taiwan cannot join the UCC. Taiwan should not suffer further punishment through harsh copyright laws.

At a minimum, U.S. negotiators should adopt a more reasonable stance because, without changing international institutional arrangements, bilateral agreements induced by economic threats will only ease the problem in the short term. In fact, the U.S. Copyright Office's 1984 recommendation still remains true today: "the possible success of [the U.S.-Taiwan copyright dialogue] will be enhanced if the United States government and publishers transcend their inclination to pressure in generally 'threatening' ways and, instead, embrace a program of close cooperation" ²⁰⁸

IV. CONCLUSION

The problem of piracy of U.S. copyrights in Taiwan has been one of the focal points of U.S.-Taiwan trade talks, since the U.S. considers copyright-related economic losses by its industries an urgent problem demanding an immediate solution. While curtailing piracy may benefit Taiwan in the long run by stimulating its domestic creation of intellectual property,²⁰⁹ the Agreement's protection scheme is unreasonably restrictive. Not only does its system of protection surpass international norms, it also requires a drastic departure from Taiwan's current copyright laws. By denying a period of gradual transition, the Agreement places unreasonable restrictions on Taiwan and will face problems of enforcement. While Taiwan's piracy should not be condoned, the U.S. consider its own experience with international norms of copyright protection before hastily utilizing the powerful Super 301 to demand immediate compliance. Even if the U.S. can obtain the immediate result it hopes from the Agreement, such an agreement, bilateral in name but unilateral in substance, runs counter to U.S. long-term interests in a healthy, stable trade environment. It will only strengthen the belief held by those countries threatened by U.S. economic sanctions that the U.S. uses its economic power to extract unfair agreements.

208. *Oversight on International Copyrights*, *supra* note 30, at 138.

209. It has been argued that "free riding" of intellectual property development stifles creativity and hinders the pirating country's own development of literary, musical, and artistic cultures, all necessary foundations for further economic development. Janet H. Maclaughlin et al., *The Economic Significance of Piracy*, in GLOBAL CONSENSUS, *supra* note 80, at 105-06.