Drawing a Distinction Between Bootleg and Counterfeit Recordings and Implementing a Market Solution Towards Combating Music Piracy in Europe

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Drawing a Distinction Between Bootleg and Counterfeit Recordings and Implementing a Market Solution Towards Combating Music Piracy in Europe*

“Piracy of sound recordings is the single biggest threat to the economic and cultural health of the music industry in Europe.”—International Federation of the Phonographic Industry (hereinafter “IFPI”) spokesman, Adrian Strain.¹

“I want [music pirates] to think about jail sentences, confiscation of assets and of expensive and lengthy litigation.”—IFPI head of enforcement, Iain Grant.²

I. Introduction

Europe is home to the world’s largest retail market for music recordings.³ Europe has displaced the United States as the world’s major music market in the last ten years.⁴ With 13.4 billion U.S. dollars in sales, Europe commands 34% of the global market, compared with 33% for the United States.⁵ To put it in perspective, these numbers place the European music industry ahead of the European Union’s steel industry.⁶

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* An earlier version of this comment received First Prize in the 1998 ASCAP Nathan Burkan Memorial Competition at the Dickinson School of Law. An abbreviated version also placed in the National Semi-Finals of the First Annual Entertainment Law Initiative Scholarship Competition, sponsored by the National Academy of Recording Arts and Sciences.


4. See Cunningham, supra note 1, at 3.

5. See id.

6. See id. In terms of revenues, Europe’s music industry is three times larger than the European film industry, and more than twice as large as the European video industry. See Shada Islam, Europe’s Music Industry Fetes Success but Worries About Future, DEUTSCHE PRESSE AGENTUR, July 10, 1998, available in
Income from the music industry is earned from several sources. In most instances, album sales are the largest source of income to publishers and writers. Record companies pay their artists royalties on each album sold. After album sales, the largest sources of income are public performances, synchronization rights, and printed editions of sheet music, respectively.

Pirated sales of musical recordings cost the music industry five billion dollars in 1997. This amount represents nearly 15% of worldwide legitimate sales, which have been valued at forty billion dollars. Therefore, it should come as no surprise that the problem of piracy is a major concern to the music industry.

This Comment will discuss the current state of music piracy in Europe. Part II will describe exactly what piracy is, and will discuss the current problems with piracy in Italy, Bulgaria, and England. Part III will survey existing international copyright protection. Part IV will address enforcement, dealing with what has worked and what has not. Part V argues that a distinction should be drawn between bootlegging and counterfeiting. Bootlegs are not as damaging to artists and the music industry as counterfeits are. Finally, Part VI argues that the music industry should concentrate more on a market-based solution towards combating piracy. The release of more live performances, the use of anti-piracy holograms, and lowering the prices of compact discs (hereinafter “CDs”) will ultimately be a more effective way of reducing the share of the market dominated by pirated recordings.

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8. Id.
9. Synchronization rights are the rights to use a song in a motion picture, television show, or commercial. See Selsky, supra note 7, at 294-295.
10. See id.
II. Background

A. What is Piracy?

The term "piracy" refers to the illegal duplication and distribution of sound recordings. This term is often used imprecisely, and is used interchangeably with the term "bootleg" recording. For purposes of this comment, precise usage of the terms are necessary, as they have different meanings. Piracy is a broad term that takes three specific forms: 1) counterfeits, 2) bootlegs, and 3) compilations. A counterfeit is a copy of a legitimate release. Not only is the music duplicated, but in addition the artwork and packaging of the CD are duplicated as well. Bootlegs refer to unofficial recordings of a live performance. Bootlegs are sometimes taped from either radio or television, but are more commonly taped when a concert-goer smuggles a recorder into a concert. Compilations are unauthorized collections of previously released material. They do not necessarily duplicate the cover design of official releases or the playing order of the tracks on the album. Of the three types of pirated sound recordings, counterfeits pose the biggest problem to the music industry.

B. Who Gets Hurt by Piracy?

In terms of dollars lost to piracy, the music industry's recording companies are hurt the most. However, they are not the only victims. The musical artists themselves are also greatly

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14. Id.
16. See FAQ, supra note 12.
18. See id. at 614-615.
19. See id. at 621.
20. See id.
21. See id. at 620.
affected by piracy in that they lose royalties they would have received had a legitimate recording been purchased.\textsuperscript{23} It is not uncommon for popular artists to lose in excess of 10\% of their income because of piracy.\textsuperscript{24} Consumers are also hurt by piracy, as the prices of legitimate recordings are driven up because of the financial loss incurred by record companies.\textsuperscript{25} Lastly, piracy causes European governments lose large amounts of Value Added Tax, income tax, and company taxes.\textsuperscript{26}

C. \textit{How Piracy Operates}

Piracy of CDs has greatly intensified in the last several years as a result of the availability of cheaper CD production equipment.\textsuperscript{27} In 1996, the quantity of seized pirated CDs outnumbered the number of seized pirated cassettes for the first time.\textsuperscript{28} Today, it costs approximately $800,000 to produce a factory capable of manufacturing three to four million pirated CDs a year.\textsuperscript{29} In 1996 it cost twice that amount.\textsuperscript{30} These factories feature high quality equipment, including professional consoles for the production of master tapes and a print room for inlay production.\textsuperscript{31} Illegal factories are not the only source of pirated works since legitimate production facilities sometimes sell unauthorized recordings "on the side."\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{23} See Margo Lanford, Countering Bootlegs Demands Vigilance, \textit{BILLBOARD} MAG., Nov. 5, 1994.
\item \textsuperscript{24} See Cunningham, \textit{supra} note 1, at 3. For example, the British pop group "The Spice Girls" are said to be losing 13\% of their income because of pirate CDs. \textit{Id.}
\item \textsuperscript{25} See FAQ, \textit{supra} note 13.
\item \textsuperscript{26} See James Meikle, \textit{CD and Cassette Pirates ‘Skim Off’ Pounds 3 Billion a Year}, \textit{THE GUARDIAN} (London), Sept. 19, 1997, at 7, \textit{available in LEXIS}, News Library. The sales tax on CDs in the U.S. is between two and seven percent, while rates of Value Added Tax (VAT) in Europe go up to as high as twenty-five percent. See Emmet Oliver, \textit{Music Group Warns EU Over High VAT Rates on Recordings}, \textit{THE IRISH TIMES}, Oct. 17, 1996, at 16, \textit{available in LEXIS}, News Library.
\item \textsuperscript{27} See Alice Rawsthorn, \textit{Music Piracy Crackdown Planned}, \textit{FIN. TIMES} (London), Apr. 15, 1997, at 7, \textit{available in LEXIS}, News Library.
\item \textsuperscript{29} See Rawsthorn, \textit{supra} note 12, at 6.
\item \textsuperscript{30} See id.
\item \textsuperscript{32} See Rawsthorn, \textit{supra} note 12, at 6.
\end{itemize}
As piracy is becoming more high-tech, it is frequently being dominated by organized criminal entities. These groups find piracy to be an ideal way to launder dirty money. Intercepted shipments of pirated CDs have been discovered alongside drugs, weapons, and counterfeit cash at European borders. As a further sign of the degree of organization, pirates are using "talent scouts." These scouts are sent to music festival where they report back with information on up-and-coming artists. As a result, pirates are able to copy only the most successful discs, and do not need to spend any money on promotional activity since they "take a free ride on record companies' promotional spending."

Most pirated works are sold by street vendors, who are able to compete with the mainstream music stores by selling their recordings at a much reduced rate. However, as counterfeit CDs become harder to distinguish from the genuine CDs, they are increasingly being sold in mainstream music stores.

Certain countries in Europe are plagued more by piracy than other countries. This comment will next turn to examine Italy and Bulgaria, two countries in which piracy runs rampant, as well as look at Britain, one country that is turning the tide against piracy.

D. The State of Piracy in Europe

1. Italy—Italy currently holds the dishonor of being home to the worst pirate industry in Europe, and the world's fifth largest music black market for music. With forty-four percent of the nearly 47 million pirate recordings in the European Union (hereinafter "EU") coming out of Italy, the country accounts for

33. See Stuart Millar, Copyright Theft Cost Billions: Alarm as Music Piracy Reaches Record Level, THE GUARDIAN (London), Mar. 8, 1997, at 3, available in LEXIS, News Library. The Chinese Triads and the Russian, Bulgarian, and Italian Mafias are the main organized crime groups behind the illegal production of CDs. See Ayres, supra note 2.
34. See Margaret Rigillo, 'CD King' Arrested as Italy gets Tough on Fakers, The Herald (Glasgow), May 26, 1997, at 8, available in LEXIS, News Library.
35. See Millar, supra note 33, at 3.
36. See Rigillo, supra note 34, at 8.
37. See id.
38. See Cunningham, supra note 1, at 3.
40. See Cunningham, supra note 1, at 3.
nearly one half of all illegal recordings sold in the EU.\textsuperscript{42} Approximately one out of every three recordings sold in Italy is a pirated work.\textsuperscript{43}

For the past several years, piracy has become an incredible growth industry in Italy, as pirate sales tripled in value to $142 million between 1991 and 1994.\textsuperscript{44} The problem is particularly pressing to the Italian music industry because it invests great amounts of money in developing new talent.\textsuperscript{45} The Italian music industry invests approximately 15\% of its annual turnover in developing new talent, which is about five percent more than the Italian pharmaceutical industry invests in research.\textsuperscript{46} The Mafia is believed to be a large force behind the piracy problem in Italy, according to Italy's anti-piracy unit, the Federation Against Music Piracy.\textsuperscript{47}

2. \textit{Bulgaria}\textemdash Bulgaria is unique, because its government is fully aware of the activity of plants manufacturing pirated CDs, according to the European music recording industry.\textsuperscript{48} Furthermore, industry representatives claim that the Bulgarian government may even be actively involved in music piracy.\textsuperscript{49} Michael Kunstmann, a German who runs Virgin Records in Bulgaria, is evidence of this claim.\textsuperscript{50} Virgin Records is the only legitimate distribution of Western music in Bulgaria.\textsuperscript{51} In the summer of 1996, Kunstmann went on Bulgarian television and named a former Bulgarian prime minister, ex-generals and ex-prosecutors as being at the top of the Bulgarian piracy web.\textsuperscript{52} Seven days later, Kunstmann was

\begin{itemize}
\item \textsuperscript{42} See \textit{Record Majors Fight Italian Record "Pirates"}, \textsc{The Reuter Eur. Community Rep.}, Jan. 9, 1996, available in LEXIS, News Library.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} See Rigillo, \textit{supra} note 34, at 8.
\item \textsuperscript{46} See id.
\item \textsuperscript{47} See Sadler, \textit{supra} note 41. The Federation Against Music Piracy began operations in early 1996. \textit{See Record Majors Fight Italian Record "Pirates"}, \textit{supra} note 41. The Italian music industry invested one million dollars in creating this new anti-piracy organization. \textit{See id.}
\item \textsuperscript{48} See Millar, \textit{supra} note 33, at 3.
\item \textsuperscript{49} See id.
\item \textsuperscript{50} See Charis Gresser, \textit{Pick of the Pops with CD Pirates}, \textsc{The Daily Telegraph}, Mar. 15, 1997, at 6, available in LEXIS, News Library.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\end{itemize}
attacked and severely beaten. He then fled the country after being told that his life was in further danger.

Further evidence of the government involvement in piracy is demonstrated through Bulgaria's pirating plants. Seven plants in Bulgaria are producing more than four million pirated CDs a month. One plant alone is capable of generating revenues of between $40 million and $60 million a year. The plants are equipped with modern technology and are guarded by security personnel. Additional evidence of government involvement is that some of these plants are housed in old state factories. Rupert Perry, head of EMI music, states that the most compelling evidence of a government dominated piracy web in Bulgaria is the fact that the government has done nothing about the problem.

Bulgaria did introduce a new copyright law in 1993 and tougher criminal sanctions in 1995. However, the current state of piracy in Bulgaria exists because of non-enforcement of the laws. Therefore, the International Federation of the Phonographic Industry is calling for the EU to block Bulgaria's admission to the World Trade Organization until Bulgaria improves its policing efforts.

3. Britain—Britain is one country that has taken its policing efforts against piracy seriously. Figures from 1995 regarding

53. Id. This is not the only incident where someone has been attacked after speaking out against music piracy. See IFPI Offers US$10,000 Reward for Piracy Information, ONE TO ONE, Sep. 1998, at 20, available in LEXIS, News Library. Sorin Golea, the Sony licensee in Romania, was beaten and threatened with a gun after he filed a complaint with the Romanian Copyright Office about the sale of pirated copies of the 1998 World Cup album. Id.
54. See Gresser, supra note 50, at 6.
55. See id.
56. See id.
57. See id.
58. See Gresser, supra note 50, at 6.
59. See id.
60. See id.
62. Id.
63. Id. Even though Bulgaria is not a member of the EU, Bulgaria's long border with Greece (a EU country) gives it easy access to the EU's open markets. See Jeff Clark-Meads, Greek Officials Receptive to Helping Curb Bulgarian Piracy, BILLBOARD MAG., Nov. 29, 1997.
piracy in Britain show that the volume of pirated recordings in the country fell 40%.

In 1996, the total percentage of Britain's market attributable to pirated recordings was only one percent. This decrease in piracy is attributable in part to the growing awareness among Britain's political parties of the music industry's importance to the country. The music industry's importance is demonstrated by the fact that it is one of the United Kingdom's most successful export sectors. Retail record sales in the United Kingdom were over one billion pounds in 1995, which was 11% higher than the previous year. In addition, exports rose by 25% in 1995, led by the success of popular British acts such as Oasis and The Spice Girls. Political parties are also placing emphasis on the music industry as a means of appealing to young voters.

Despite its recent success against piracy, Britain is not immune from the problem. Piracy costs the British music industry approximately 25 million pounds per year. The Beatles are the most pirated artist in the United Kingdom, with over 180 pirated titles. Close behind are Prince, Bob Dylan, and the Rolling Stones. Still, a police raid on a pirate factory in Britain appears to show that piracy is relatively under control in the country. Despite seizing over 17,000 pirated CDs, authorities

65. Id.
66. See Record Dutch Pirate Catch; Netherlands: A Shipment of 96,000 Illegal CDs were Confiscated by Custom Officials at Schiphol Airport, MUSIC & MEDIA, Apr. 5, 1997, at 24, available in LEXIS, News Library.
68. See Alice Rawsthorn, Smith Moves in to Stamp Out Music Piracy, FIN. TIMES (London), Nov. 14, 1997, at 8, available in LEXIS, News Library. United Kingdom artists are responsible for 18% of music sales around the world. See Wai-Sum Leong and Peter Koenig, Creative Industries: Music: The Fight to Stay Top of the Pops, THE INDEP., Feb. 15, 1998, available in LEXIS, News Library. In Britain alone, the music industry generates full time employment of 115,000 musicians, roadies, and engineers, and part time employment of 45,000. Id.
69. See Rawsthorn, supra note 67, at 8.
70. See id.
71. See id.
73. Id.
74. Id.
75. Id.
76. Id.
were content to only fine the owner 5,000 pounds and let him escape without a prison sentence.\textsuperscript{77}

III. Existing International Copyright Protection

The term “copyright” refers to an “intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a limited period of time, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.”\textsuperscript{78} Copyright attempts to give authors an incentive to create by giving them a limited economic monopoly over their creations.\textsuperscript{79} It distinguishes between reproduction for public use, which can only be done with the right holder’s permission, and private use.\textsuperscript{80} Today in the EU copyright largely remains the domain of a member state’s domestic law.\textsuperscript{81} However, all member states have ratified the Convention for Protection of Literary and Artistic Works\textsuperscript{82} (hereinafter the “Berne Convention”), the first multilateral treaty for international copyright law.\textsuperscript{83}

A. The Berne Convention

Adopted in 1886, the Berne Convention requires its signatory countries to give certain minimum copyright protections to the authors of other signatory countries.\textsuperscript{84} Prior to the Berne Convention, countries allowed their citizens to use foreign works as they wished, and only granted copyright protection to their own

\begin{itemize}
\item \textsuperscript{77} See Holden, \textit{supra} note 72.
\item \textsuperscript{78} \textit{Black's Law Dictionary} 304 (6th ed. 1990).
\item \textsuperscript{81} Treaty Establishing The European Economic Community, Mar. 25, 1957, 28 U.N.T.S. 11, art. 222. Article 222 provides that “The Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.” \textit{Id}. See also Case 144/81, Keurkoop v. Nancy Kean Gifts, 1982 E.C.R. 2853, 2872 (stating that the EEC Treaty leaves copyright protection to the domestic law of the Member States, absent harmonizing legislation).
\item \textsuperscript{82} U.N.T.S. No. 11850, vol. 828, at 221-293.
\item \textsuperscript{84} \textit{Id}. at 586.
\end{itemize}
The Berne Convention granted a minimum term of protection for authors that lasts for 50 years after the author's death. However, the Convention allows signatory countries to exceed this minimum term of protection. The European Union has since introduced the Directive on Harmonizing the Term of Protection of Copyright and Certain Related Rights, which extends the copyright term applicable in all EU Member States to seventy years after the death of the author.

The Berne Convention prohibits formalities for copyright protection. This is the reason why the United States resisted joining the pact for over 100 years. This prohibition of formalities can be better understood by examining what was required under U.S. law for a work to be granted copyright protection. Previously, under U.S. copyright law, it was necessary to mark and register works properly in order to protect them. This proper marking and registration was accomplished by marking the work to be protected with a "(c)" symbol, the word "Copyright," or the abbreviation "Copr." In addition, the work had to be marked with the year the work was first published together with the name of the party claiming the copyright protection. Failure to mark a work properly placed it into the public domain.

The Berne Convention, on the other hand, takes the opposite approach. Under the Berne Convention, any work which is capable of being protected by copyright is presumed to be protected by copyright law. Article 2 of the Berne Convention states that musical compositions are a type of literary and artistic work that is so protected. As a result, the only way for works to enter the public domain is for them to be dedicated through an

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86. See Brownlee, supra note 83, at 589.
87. See id.
90. Id.
91. Id.
92. Id.
93. Id.
94. See Lewis et al., supra note 89, at 2526.
95. Berne Convention, art. 2(1), 828 U.N.T.S.
IV. Successes and Failures in the Battle Against Piracy

There have been success stories in the music industry's battle against piracy, as well as some problem areas. For the most part, relying on legal remedies has not proven to be effective. A key reason is that there are weak copyright laws in place; however, even when strong laws do exist, countries have not committed their resources towards enforcement. Where the industry has had success against piracy it is where it has implemented technological solutions. This Comment will next address the enforcement problems associated with music piracy.

A. Berne Convention's Lack of Enforcement

Despite the Berne Convention's automatic grant of copyright on musical compositions, it has not slowed down the growth of music piracy. The chief reason for this occurrence is that the Berne Convention contains no enforcement mechanisms for intellectual property rights. Rather, because it only provides minimum rights, the Berne Convention can not be effective if its signatory countries inadequately enforce their copyright laws.

B. Failing to Enforce Existing Copyright Laws

What reasons might a country have for not more adequately enforcing its copyright laws? One reason is that developing countries, such as those in Eastern Europe, never perceived the need for strong copyright protection to provide an incentive for creativity. Developing countries needed access to these intellectual products for their economic development. This need created a lackadaisical attitude towards enforcement of copyright laws and produced an ideal location for piracy to surface. Dorothy Sherman, president of GrayZone, explained that as a

96. See Lewis et al., supra note 89. at 2526.
97. See Tai, supra note 85. at 170.
98. See id.
100. Id.
101. Id.
102. GrayZone is a private U.S. based company that specializes in tracking pirated recordings for the music industry. For example, GrayZone has helped
result of the turmoil in countries such as Russia and the Czech Republic, financial resources are too limited to battle piracy at this time. After all, "if people can barely scrape out a living due to an unstable economy, they can't be expected to deal with amending [and enforcing] copyright laws."104

C. Civil vs. Criminal Enforcement

Most enforcement of copyright law regarding pirated recordings is criminal rather than civil.105 There are several reasons behind this. First, criminal enforcement is cheaper for the music companies.106 While the recording companies pay attorney's fees for some investigation, the police and prosecutors do not have to be compensated.107 A second reason is that criminal actions present less of a risk of counterclaims.108

However, when enforcement does take place, it has proven to be painfully slow.109 The International Federation of the Phonographic Industry brought five cases for prosecution in 1994;110 judgments are not expected in these cases until 1999.111 Even if large monetary damages are eventually awarded, it does not stop the problem of piracy in the immediate future.

One form of immediate civil relief is the so called "Anton Pillar" action.112 This remedy consists of an ex parte order obtained from a judge that allows music companies to seize pirated goods with no notice given to the pirates.113 The downside to an

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103. Electronic Interview with Dorothy Sherman, President, GrayZone, Inc. (Dec. 1, 1997).
104. Id.
106. Id.
107. Id.
108. Id.
110. See id.
111. See Heim & Goeckner, supra note 103, at 267.
112. See id.
113. See id.
Anton Pillar action is that the order must be executed properly with no room for error, otherwise the petitioner risks exposure to a costly lawsuit.\textsuperscript{114}

While these Anton Pillar actions can be a powerful weapon in the battle against piracy, they are available only to the extent that individual countries provide for them. Copyright laws vary greatly from country to country in Europe.\textsuperscript{115} Powerful lobbying groups have emerged whose aim is to get these countries lagging in the war against piracy to treat music piracy more seriously. At the forefront of these groups is the International Federation of the Phonographic Industry.\textsuperscript{116}

D. \textit{IFPI}

IFPI represents more than 1,200 producers and distributors of sound recordings worldwide.\textsuperscript{117} Currently, the organization is lobbying for tougher criminal penalties for pirate operators.\textsuperscript{118} In addition, IFPI is calling for sanctions against EU firms who sell CD manufacturing equipment to the pirate operators.\textsuperscript{119} With regard to Bulgaria, a country not in the EU, IFPI has urged the EU to block that country's admission to the World Trade Organization unless it agrees to crack down on music pirates.\textsuperscript{120} IFPI is also involved with developing other tools to combat piracy, such as high tech solutions and educational measures.

1. \textit{Development of New Technologies}—IFPI has been in the forefront of developing both hidden and invisible identifiers for

\begin{itemize}
\item \textsuperscript{114} See Sherman, \textit{supra} note 103.
\item \textsuperscript{115} See id.
\item \textsuperscript{116} The International Federation of the Phonographic Industry (IFPI) is also concerned with private copying; surveys show at least 90% of blank tapes in Europe are used for private copying of recorded music, a significantly higher percentage than that of the United States. \textit{See EU Urged to Act Aggressively Against Import of Counterfeits}, 6 No. 7 J. PROPRIETARY RTS. 37, July 1994. For a more thorough discussion of the problem of private music and video copying in Europe, See Gillian Davies & Michael E. Hung, \textit{Music and Video Private Copying: An International Survey of the Problem and the Law}, (1993).
\item \textsuperscript{118} See Music Industry Urges Italy to Clamp Down on Piracy, \textit{supra} note 39.
\item \textsuperscript{119} See Music Industry: Record Companies Call for EU Anti-Piracy Policy, \textit{supra} note 3.
\item \textsuperscript{120} See E.U. Music Industry Calls for Tougher Action Against “Pirates”, \textit{supra} note 61.
\end{itemize}
legitimate CDs. One innovative solution is the use of holograms.\textsuperscript{121} Production of holograms on legitimate CDs makes it easier for authorities and record retailers to determine whether a product is legitimate; the current cost of producing a hologram is too high for pirates.\textsuperscript{122} The use of holograms has already produced dramatic drops in piracy in some countries. Since anti-piracy holograms were introduced in Poland in 1993, the percentage of counterfeit albums sold has decreased from approximately 90 to 22%.\textsuperscript{123} Holograms have also proven effective in Hungary, helping to reduce the pirated share of the market from 60 to around 20%.\textsuperscript{124}

Another technological breakthrough has been the implementation of the Source Identification Code (SID).\textsuperscript{125} SID is a code attached to each CD that allows it to be traced back to its factory of origin.\textsuperscript{126} This technology is being used in 255 of the 350 known CD factories throughout the world.\textsuperscript{127} More popular CDs are manufactured by different plants and have different SID codes.\textsuperscript{128} This means that in order to beat the system, pirates must change each mold to ensure that the copied CDs have the right code as well.\textsuperscript{129} Doing so would be expensive and time consuming, since each mold costs $80,000.\textsuperscript{130}

2. \textit{Promoting Awareness Among the Public}—Lastly, IFPI is seeking to promote awareness among consumers on the damage piracy has inflicted on the music industry.\textsuperscript{131} This campaign has already gotten underway in Italy, one of the worst pirate nations in Europe.\textsuperscript{132} The Italian record industry sponsored Federation Against Music Piracy has instituted public awareness campaigns

\textsuperscript{122.} \textit{Id.}
\textsuperscript{123.} \textit{Id.}
\textsuperscript{124.} \textit{Id.}
\textsuperscript{126.} \textit{Id.}
\textsuperscript{127.} \textit{Id.}
\textsuperscript{129.} \textit{Id.}
\textsuperscript{130.} \textit{Id.}
\textsuperscript{131.} See Music Industry Urges Italy to Clamp Down on Piracy, supra note 39.
\textsuperscript{132.} See MTV Launches Anti-Piracy Ad, MUSIC & MEDIA, Nov. 9, 1996, available in LEXIS, News Library.
such as their “Three Days Against Piracy” campaign. In addition, advertisements are being broadcast on nationwide television and shown at cinemas throughout Italy. The advertisements have been commissioned by Italy’s anti-piracy organization, and are being produced by MTV. The effectiveness of such a campaign has not yet been seen.

V. A Distinction Between Bootlegging and Counterfeits

This comment argues that the music industry should draw a distinction between bootleg and counterfeit recordings in its fight against piracy. This comment will address the arguments as to whether there is harm caused by bootlegs.

A. The Privacy Rights of the Artists

The main argument presented for the harm caused by bootlegs is that such recordings damage the artist’s privacy rights. For example, an artist who comes across one of his or her bootlegged performances might feel as though it does not accurately reflect his or her talents and should not be heard or seen. There are two reasons behind this: the poor quality of the recording and the poor quality of the performance.

An artist might not want a bootleg recording to be released because he or she gave a bad performance on a specific occasion. If this is the justification behind the argument that bootlegs harm artists, it ignores the fact that anyone who attended the sub-par performance is free to tell anyone who was not present about it. Such “word of mouth” reviews are common among up and coming touring artists. Among more popular artists, reviews of concert performances are frequently published in newspapers and magazines.

The second reason why an artist might not want someone to listen to, or view, a bootleg is that the quality of the recording might be poor compared to the performance itself. For exam-

134. Id.
135. Id.
137. See id. at 64.
ple, the musician David Bowie bought a bootleg video of his own show and was so disturbed at the quality that he made an official complaint to his record company and the salesman was arrested. A spokesman for Bowie explained that on the video the stage was blocked by peoples’ heads and the sound was terrible, making it “a horrible misrepresentation of [Bowie’s] show.” The spokesman also stated that “[l]ike all artists, [Bowie] secretly quite enjoys listening to unauthorized recordings of his shows, but on this occasion he was concerned about his fans being ripped off.”

B. The Financial Interests of the Artists

The economic importance of the performing artist’s exclusive right to authorize the reproduction and distribution of his performances also comes into play when analyzing the harm caused by bootlegging. The Court of Justice of the European Communities addressed this in the case of Phil Collins v. Imtrat Handelsgesellschaft. There, the court stated that the release of unauthorized recordings (it did not distinguish between bootlegs and counterfeits) damages the artist in two ways.

First, the court reasoned that the artist earns no royalties through the release of the pirated recordings. In the case of counterfeit recordings, where a consumer purchases an identical counterfeit album instead of the legitimate release, the fact that the the artist suffers from the loss of royalties is undoubtedly true. But when a consumer purchases a bootleg recording (i.e. a recording of a live performance) the artist does not suffer from lost royalties because the consumer is purchasing a product that the artist has not released. The court elaborated on why the artist is damaged from loss of royalties, stating that the sale of pirated recordings reduces the demand for an artist’s authorized recordings, “since the

139. Id.
140. Id.
141. Id. Bowie is one of many artists who has gone on the record about the enjoyment of bootleg recordings. David Turin (a collaborator with musician Perry Farrell) has stated that bootlegs are “the best thing in the world . . . . If people care enough about the music to [bootleg] it, I’m flattered.” See Alan Saracevic, A Wrench in the Music Machine; On-line Migration is Changing the Face of the Recording Industry, THE S. F. EXAMINER, Dec. 20, 1998, at B-1.
143. Id.
144. Id.
spending power of even the most avid record collector is finite.\textsuperscript{145} However, this assumes that consumers are just as likely to purchase a bootleg recording as they are a legitimate "studio" album. The opposite is more likely the safer assumption; collectors and especially the average consumers are more likely to purchase the legitimate releases first. Only afterwards, when a collection is complete (or in the case of an artist still producing music, when the collection is complete for the time being), is a consumer likely to purchase bootleg recordings.

The second reason the court gave for why unauthorized recordings damage the financial interests of an artist is closely tied to the privacy interests of the artist as mentioned above. This interest is one dealing with the artist's concern for his or her reputation.\textsuperscript{146} The court stated that because the artists have no power to control the quality of the unauthorized recording, their reputation may be adversely effected if the quality of the recording is technically inferior.\textsuperscript{147} While this is sound reasoning, the court should have sought to distinguish between the consequences a low quality counterfeit recording would have on the artist's reputation as compared to the consequences a low quality bootleg would produce.

It is settled that bootlegs are primarily purchased by serious collectors as opposed to average consumers.\textsuperscript{148} Therefore, the serious collector is arguably more likely to recognize that the lower quality of the bootleg is by no means the fault of the artist. The serious collector is more apt to understand that factors such as crowd noise, the acoustics of the recording environment, and the quality of recording equipment used come into play when recordings of live performances are produced. However, if the quality of a counterfeit is poor, such a recording would be much more likely to damage the reputation of an artist because the factors that go into producing a poor sounding bootleg are absent.

C. \textit{The Benefits of Bootlegs}

One of the most significant contributions of bootlegs is that they preserve recordings of performances that would not otherwise

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Phil Collins, supra note 142.
\textsuperscript{148} See Schwartz, supra note 15, at 614.
have been kept. A prime example is the ten disk set, “New York Philharmonic: The Historic Broadcasts 1923 to 1987”. This set of live recordings features some of this century’s greatest conductors performing works that were never recorded commercially. However, if it were not for bootleggers who recorded this material from radio, much of this set would not exist. Until the New York Philharmonic established its own archives in the 1960s, it did not save its broadcasts.

In addition, other benefits of bootlegs are that they help to shine light on the creative process, as well as capture a spontaneous electricity that studio recordings often lack. For example, musicians frequently perform songs live using different arrangements and instrumentation than what was used on their albums. Taken to the utmost, some artists approach live performances as a kind of spontaneous composition, reaching out and taking chances even in songs performed nightly.

A problem arises when record labels and their artists decide to release live material themselves. Opponents of bootlegs argue that the record labels and artists are hurt financially when they plan to release live material, only to find that the market has been saturated with inferior quality bootlegs. However, this is by no means a certainty; since bootlegs are primarily purchased by the avid collector, they would likely be happy to buy this material from legitimate sources since the quality of the recording would be higher when produced by the record companies.

VI. Market Based Solutions Towards Combating Piracy

Uniformity in world copyright laws does not seem to be coming anytime in the near future. Therefore, in the immediate term the music industry can take steps towards combating piracy by giving the public what it wants. While this comment has suggested that bootlegging is not very damaging, if the music industry still

149. See Allan Kozinn, Critic’s Notebook; Bootlegging as a Public Service: No, this Isn’t a Joke, N.Y. TIMES, Oct. 8, 1997, at E2.
150. Id.
151. Id.
152. Id.
153. Id.
154. See, Stevie Ray Vaughan and Double Trouble, Live at the el Mocambo (Sony Music Entertainment 1991). Musician Jimi Vaughan, in describing his late brother Stevie Ray Vaughan’s performances, stated, “He never played it the same way once, much less twice.” Id.
155. See Sherman, supra note 103.
desires to clamp down on bootlegs it can do so by releasing more live recordings. With respect to counterfeits, the music industry should seek to bring down the prices of CDs to lure the public away from buying the cheaper counterfeits, in addition to implementing technological solutions.

A. A Market Based Solution Towards Bootlegs

The music industry is beginning to realize that there is a large demand for bootlegs. The music industry has released legitimate bootlegs of artists who have been the subjects of unauthorized bootlegs, to great success. For example, the six disc Beatles "Anthology" was composed of many tracks that had previously been available only as unauthorized bootlegs. In addition, last year saw the release of the critically acclaimed two disc set, "The Jimi Hendrix Experience: BBC Sessions." The release of this high quality set is expected to eliminate the demand for the bootlegged versions. Obviously, choosing to combat bootleg recordings in this fashion will only be feasible with very popular artists. Therefore, with regard to less popular artists, the music industry can choose to release only a limited number of bootlegs—to members of a fanclub, for example.

B. A Market Based Solution Towards Counterfeits

The entertainment industry has already shown that market solutions have proven effective in the area of home video piracy. Because the industry was successful in obtaining effective legal means for preventing home video piracy in the U.S., the

156. See Kozinn, supra note 149.
157. See id.
158. See id.
160. See Andy Aledort, BBC King, GUITAR WORLD, June, 1998, at 87.
161. To satisfy fans craving new material, the Scottish rock band "Big Country" have released an EP of demo songs on their own web site. See Big Country, In the Scud (Track Records, 1998), available at <http://www.bigcountry.co.uk>. In describing the EP, the band's frontman, Stuart Adamson, stated that the "songs in this format are not what a group would normally have you hear. They are our aural sketchpad, the first outlines of what eventually will become a fully fledged album. [But] [w]ith the interest shown on the web site for demo material, we decided to let [it] be heard." Id. The band is also selling bootlegs of their concert performances on the web site. See <http://www.bigcountry.co.uk/scripts-merchandise>.
162. See Burr, supra note 79, at 256-257.
industry decreased the price of an original videotape 75%, from $79.95 to $19.95 or less. The market demonstrated that lower sales prices could compete with the time and money needed to rent a movie, purchase a blank tape, and record the movie. Furthermore, by lowering the prices of videos, the entertainment industry subsequently sold more videotapes and generated more revenue than it did with higher priced tapes.

Counterfeit recordings presently cost up to 50% less than legitimate releases, making them enticing to consumers. As one would expect, the music industry denies that high CD prices might encourage consumers to turn to pirated recordings. Ruddi Gassner, president and chief executive of BMG International, a division of the music company BMG, has stated that the industry can not fight a price battle with these large differences, but should instead try to educate consumers as to the illegal origins behind counterfeit recordings. This comment does not suggest that the music industry should reduce the prices of recordings as dramatically as the entertainment industry did with videos, only that a moderate decrease in prices might go a long way in luring consumers in some of the more piracy plagued European countries towards buying legitimate recordings. Mere education alone will not likely prove as effective as the industry is hoping for if the prices of legitimate recordings are greater than counterfeits and while the quality of counterfeits is improving. It is not widely known that the cost to manufacture, produce, and advertise a recording in the CD format is practically the same as a recording in the much lower priced cassette format. Perhaps the music industry should not be so quick to suggest it can not fight a price battle with the counterfeiters.

163. See id.
164. See id.
165. See id.
166. See Sullivan, supra note 125, at 23.
167. See Andrew Hill, Piracy on the High Cs—Italy is a Significant Source of Illegal Recordings in Europe, but the Music Industry is Planning to Fight Back, Fin. Times (London), Mar. 19, 1996, at 8, available in LEXIS, News Library.
168. See id.
169. See Josh Mankiewicz, Profile: Record Profits; Record Companies are Charging High Prices for CDs but the American Public Keeps Paying the High Price, Dateline NBC, Aug. 11, 1996, available in 1996 WL 6704451.
170. In the U.S., the Federal Trade Commission has begun a preliminary probe in mid 1997 into possible CD price-fixing that is expected to escalate into a formal investigation. See Jayne O'Donnel & David Lieberman, Is the Fix in on CD Prices? Pricing Probe could Play out in Full Investigation, USA Today, Aug. 12, 1997, at 01B. In addition, class action suits by consumers in the U.S. are being
VII. Conclusion

Music piracy has become a significant problem in Europe, the world’s largest global market for musical recordings. While many countries have music piracy relatively under control, the few problem countries such as Italy, Bulgaria, and others in Eastern Europe make piracy a concern for all of Europe.

Music piracy has moved beyond the small scale home operations that copied cassette tapes into a large industry dominated by organized crime that now copies compact discs. The music industry, dominated by the “Big Five” record companies, is hurt the most by piracy. Artists are also hurt because they do not receive royalties when consumers purchase counterfeit recordings. However, while the music industry argues that consumers are also a victim of music piracy, this argument is losing strength as the sound quality of pirated works continues to improve.

Piracy has grown and remained a problem in Europe for two reasons: weak copyright legislation and weak enforcement. Both strong legislation and enforcement are needed to curtail music piracy. A common situation is that a country will have strong copyright legislation in place only to inadequately enforce its laws. Two reasons behind this nonexistent enforcement is that the country does not treat piracy seriously and the country simply does not have enough resources to battle piracy.

The International Federation of the Phonographic Industry (IFPI) is a lobbying group whose aim is to get countries to treat music piracy more seriously. While IFPI has had success in getting stricter copyright laws on the books in some of the developing countries in Europe, it can not provide the resources needed for enforcement of the laws. Therefore, IFPI has also been at the forefront of implementing technological solutions towards combating piracy, such as anti-piracy holograms and the Source Identification Code. In countries where these high-tech tools have been used, there have been dramatic reductions in piracy. In addition,

commenced, alleging that the major music companies are conspiring to set CD prices artificially high. See David Segal, A Class Action Fight? That’s Music to his Ears; Big CD Makers are Michael Hausfeld’s Latest Corporate Foes, THE WASH. POST, Oct. 14, 1996, at H09. In July, 1997, the U.S. Court of Appeals for the Ninth Circuit reversed an earlier district court’s decision to dismiss a case alleging price-fixing brought against the major music labels. See CD Price-Fixing Case Reinstated by Federal Court of Appeals, BUSINESS WIRE, July 10, 1997, available in LEXIS, News Library.
IFPI is seeking to educate consumers about the illegal origins behind pirated recordings and the damage they cause. However, as long as the price of legitimate recordings so much greater than pirated works (currently authorized recordings cost as much as two times what unauthorized recordings cost), it is unlikely that educational measures will prove to be much of a deterrent.

Further compounding the piracy problem is that a critical distinction between bootleg recordings and counterfeit recordings is often lost. All pirated works are often viewed as being equally damaging to the music companies and the artists. However, because bootlegs are most often collected by serious collectors, it is by no means clear that bootlegs do cause any harm to the music industry. In fact, by preserving performances that would oftentimes otherwise be lost, bootlegs can often be beneficial to the music industry.

The law is slow to respond to technological change. While one day all of the nations in Europe might have the resources and legal foundations in place to combat music piracy, that day appears to be a long time away while Eastern and Central Europe are still developing economically. Therefore the music industry should take steps to help itself now by implementing technological and market based solutions in the war against music piracy.

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