



1-1-1991

## Intellectual Property Protection in Taiwan; "False Face Must Hide What False Heart Doth Know"

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# Intellectual Property Protection In Taiwan; *“False Face Must Hide What False Heart Doth Know.”*

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## I. INTRODUCTION

Taiwan purports to provide adequate protection for intellectual property, while in reality the Taiwanese government has no desire to conform to effective international standards of protection.<sup>1</sup> Shakespeare's *Macbeth* uttered a phrase that has become synonymous with similar types of deception: "False face must hide what false heart doth know." Taiwan, masked in false face, has made and continues to make, grand promises of increased enforcement and improvement of intellectual property laws. Despite these assurances, Taiwan's intentions and philosophies run counter

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1. The intellectual properties of concern in this comment are copyrights, patents, trademarks, trade secrets, and semiconductor mask works.

**Copyright** - A copyright is a form of protection provided to authors of original works of authorship including literary, dramatic, musical, artistic, and certain other intellectual works. Copyright protects the work regardless of the form in which it exists.

**Patent** - A patent is a grant conferring the right to exclude others from making, using or selling the invention. Patents may be granted for new and useful products and processes for the manufacture of new or existing products, as well as methods of use of new or existing products.

**Trademark** - A trademark is a word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.

**Trade Secret** - A trade secret is information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known, and not being readily ascertained by proper means, by other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

**Semiconductor Mask Works Protection** - Semiconductor mask works protection consists of protection for original mask works fixed in a semiconductor chip product by, or under the authority of the owner of the mask work, which have been registered or commercially exploited anywhere in the world. The owner has the right to directly, or authorize another to: Reproduce the mask work by optical, electronic, or other means, import or distribute a semiconductor chip product in which the mask work is embodied, and induce or knowingly cause another person to take either of these actions.

**Semiconductor Chip Product** - The final or intermediate form of any product, having two or more layers of metallic, insulating, or semiconductor material, deposited or otherwise placed on, or etched away, or otherwise removed from, a piece of semiconductor material in accordance with a predetermined pattern, and intended to perform electronic circuitry functions.

**Mask Work** - A series of related images, however fixed or encoded, having or representing the predetermined three dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor chip product, and in which series the relation of the images to one another is that each image has the pattern of the surface of one form of the semiconductor chip product.

*Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC, Pub. 2065, Inv. No. 332-245, 16-22 (Feb. 1988).

to international principles, and piracy of intellectual property in Taiwan continues to flourish. Intellectual property theft<sup>2</sup> is an unacceptable occurrence in the eyes of the international community.<sup>3</sup> This is evidenced by the number and variety of international conventions, organizations, and agreements in existence to protect intellectual property rights: The Berne Convention for the Protection of Literary and Artistic Works,<sup>4</sup> the Universal Copyright Convention (UCC),<sup>5</sup> the Paris Convention for the Protection of Industrial Property,<sup>6</sup> and the World Intellectual Property Organization (WIPO).<sup>7</sup> There is also a movement in the

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2. *Protecting Intellectual Property in Asia-Pacific* OYEZ LONGMAN INTELLIGENCE REPORTS 1 (J. Connors ed. 1984) (A report summarizing the principle features of the intellectual property laws of various countries in Asia-Pacific). Intellectual property owners tend to disfavor the term "piracy" and argue that a more accurate, and less romantic term is "theft." *Id.*

3. A common set of concerns that transcends national borders is what brings about the promulgation of international agreements. F. PEARSON & J. ROCHESTER, *INTERNATIONAL RELATIONS, THE GLOBAL CONDITION IN THE LATE TWENTIETH CENTURY* 325 (1984).

4. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (existing as one of the oldest and most prominent treaties protecting copyrights) [hereinafter Berne Convention]. See generally P. GOLDMAN, E. KITCH & H. PERLMAN, *SELECTED STATUTES AND INTERNATIONAL AGREEMENTS ON UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT* 298-333 (1989) (containing the 1971 Paris Text of the convention).

On March 1, 1989, the United States became a member of the Berne Convention. On the same day, amendments to the U.S. Copyright Law simultaneously went into effect to bring the U.S. law into conformity with the Berne Convention requirements. See U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS PUBLICATION, *THE UNITED STATES JOINS THE BERNE CONVENTION* (Feb. 1989). See generally 17 U.S.C.A. §§ 101, 104, 109(b), (c), (d), 110(10), 111(a)(3)-(5), (d), (f), 112(a)(2), 115(c)(3)-(5), 116(a), (e), 116A, 117, 119, 201(e), 205(d), (e), 301(e), 401(a), (b), (d), 402(a), (b), (d), 403, 404, 405(a), (b), 406, 407(a), 408(a), (c)(2), 411, 501(b), (e), 504(c), 506(a), 601(a), 602(a), 702, 708(a), (c), 801(a), (b)(2)&(3), 803, 804(a), (d) (West 1990) (constituting the fairly pervasive amendments to the U.S. Copyright Act enacted in order to enable U.S. joining of the Berne Convention).

5. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 6 T.I.A.S. 3324, 216 U.N.T.S. 132 [hereinafter UCC]. See generally GOLDMAN, KITCH & PERLMAN at 280-97 (containing the Paris text of 1974).

6. Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Stockholm on July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305 [hereinafter Paris Convention] (recognizing the standards of patentability). See generally GOLDMAN, KITCH & PERLMAN at 334-48.

7. Convention Establishing World Intellectual Property Organization, July 19, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3.

General Agreement on Tariffs and Trade (GATT) for intellectual property protection requirements.<sup>8</sup>

The purpose of this comment is to propose what governments as well as corporations and individuals can do to convince Taiwan to abandon its deceptive practices and to conform to international standards of intellectual property protection. The second part of this comment discusses the extent and background of the problem of intellectual property theft. Part III surveys international standards for protection of intellectual property; their origins, and their current state in the form of the Berne, Universal Copyright, and Paris Conventions.

Part IV examines Taiwan's intellectual property laws and compares them to the international standards. The general weaknesses in Taiwan's intellectual property laws are also surveyed. In part five, this comment addresses the problems in effectuating the protection of intellectual property focusing on weak law enforcement, judicial and administrative biases, and general public and governmental influences.

The sixth part discusses why Taiwan has chosen not to follow international intellectual property protection standards and why Taiwan stands as an aberration of those standards. This comment considers, in Part VII, why Taiwan should have to conform to international standards, and whether the international community has a right to expect and demand Taiwan's compliance with international standards.

After considering possible answers to these questions, the comment proceeds to explore avenues for obtaining compliance with international standards from Taiwan. The eighth part examines mechanisms governments with trade agreements with Taiwan can employ to influence observance of international intellectual property protection standards. The United States is used as a case study to show what governments should and should not do to

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8. See General Agreement On Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A 3, A 7, T.I.A.S. No. 1700, 55 U.N.T.S. 187. See also 5 Int'l Trade Rep. (BNA) No. 28, at 1012 (July 13, 1988). Both the United States and the European Community have offered proposals for protection of intellectual property which are being discussed in the ongoing Uruguay rounds of the GATT negotiations. *Id.*

convince Taiwan of the need to observe accepted levels of intellectual property protection. Finally, Part IX explores ways in which those that have problems with intellectual property theft in Taiwan can protect their interests. Additionally, this part considers ways in which the industries relying on protection of intellectual property may aid in making Taiwan aware of the need for conformity with international standards.

## II. BACKGROUND AND EXTENT OF THE INTELLECTUAL PROPERTY THEFT PROBLEM

### *A. Extent of Intellectual Property Theft Problem*

United States concerns over international intellectual property protection inadequacies led the United States International Trade Commission (USITC) to conduct a comprehensive study on intellectual property theft and its effect on U.S. industry and trade.<sup>9</sup> The USITC study concluded that in 1986 U.S. industry losses attributable to inadequate intellectual property protection amounted to 23.8 billion dollars.<sup>10</sup> It further determined that worldwide sales of pirated products in that year totalled 60 billion dollars.<sup>11</sup> Current studies estimate that losses to U.S. industry attributable to intellectual property theft in 1990 amounted to 60 billion dollars,<sup>12</sup> an increase of 152.1 percent in only four years.<sup>13</sup>

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9. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 1-3 (Feb. 1988). The study was initiated on March 12, 1987 at the direction of President Reagan. The USITC instituted investigation No. 332-245. The data was developed through the use of a questionnaire sent to 736 U.S. companies including all of the Fortune 500, appropriate members of the American Business Conference, and smaller firms that are known to depend on intellectual property protection. The data is therefore an estimate and the losses to U.S. industry as a whole may be much larger. *See generally id.*

10. *Id.* at 5.

11. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 2 (1988).

12. N.Y. Times, Nov. 29, 1990, § D, at 6, col. 4.

13. *See id.*; Chicago Tribune, Nov. 12, 1989, Bus. Sec., at 1, Zone C.; Chicago Tribune, Nov. 13, 1989, Bus. Sec., at 1, Zone C (calculating estimates contained in these sources). This increase is attributable to increased quantities of piracy occurring internationally, but more significantly to the shift in intellectual property theft to piracy of high tech property. Some is naturally due to general inflation. However, neither a shift to high tech, or a claim of inflation is an excuse for such an



The USITC study attributed Taiwan<sup>14</sup> with the greatest amount of piracy occurring in any one country at an estimated loss to U.S. industry of 753 million dollars in 1986.<sup>15</sup> In the 1990s, Taiwan continues to be a bastion of intellectual property pirates, and one of the foremost contributors to economic loss due to intellectual property theft.<sup>16</sup>

During the period 1986 to 1990, U.S. industry<sup>17</sup> expected intellectual property protection improvements in Taiwan.<sup>18</sup> They harbored these expectations for change based on promises made by Taiwan. These promises were made in response to U.S. government efforts to convince Taiwan to institute such improvements.<sup>19</sup> Unfortunately, the changes that were hoped for have not been realized. According to the U.S. Department of Commerce, International Trade Administration, no significant change in Taiwan's intellectual property laws has occurred since 1986.<sup>20</sup>

There has been a change in the nature of the piracy in Taiwan.<sup>21</sup> The thieves have shifted their emphasis and now concentrate on higher-profit high technology. Taiwanese intellectual property pirates have begun to illegally duplicate such products as medical equipment, microchips, computer software, and electronics.<sup>22</sup> For example, Nintendo of America, Inc. discovered that its games were being copied, smuggled through customs, and

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extreme rise in losses. See Chicago Tribune, Nov. 12, 1989, Bus. Sec., at 1, Zone C; Chicago Tribune, Nov. 13, 1989, Bus. Sec., at 1, Zone C.

14. See Taiwan Relations Act, 22 U.S.C. § 3314 (1988). This comment will follow the practice of the U.S. Government and use "Taiwan" in place of "Republic of China" whenever possible.

15. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 11 (Feb. 1988).

16. N.Y. Times, Nov. 29, 1990, § D, at 1, col. 4.

17. See generally *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 1-3 (Feb. 1988).

18. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 322-245, 84 (Feb. 1988); See generally 4 Int'l Trade Rep. (BNA) No. 16, at 541 (Apr. 22, 1987); 2 Int'l Trade Rep. (BNA) No. 45, at 1452 (Nov. 13, 1985).

19. *Id.*

20. Telephone conversation with the Department of Commerce (Nov. 30, 1990). Based on conversations with the East-Asia desk of the Department of Commerce, the 1986 information remains accurate and there have been no noteworthy changes since 1986. *Id.*

21. Quinn, *Taiwan's Copyright Pirates Sail into the Space Age*, Reuters, May 4, 1990, BC Cycle.

22. *Id.*

sold in the United States.<sup>23</sup> A Nintendo spokesperson stated that the counterfeit game cartridges and adapters were being manufactured in Taiwan.<sup>24</sup>

Nintendo is not alone in its battle with Taiwan's intellectual property thieves. The computer software industry is also under siege. The Business Software Alliance is the division of the Software Publisher's Alliance responsible for anti-piracy efforts. The Business Software Alliance represents some of the leading personal computer software companies.<sup>25</sup> The Alliance has stated that software piracy in Taiwan is "some of the worst in the world."<sup>26</sup> In response, the Business Software Alliance is focusing the majority of its efforts on fighting computer software theft in Taiwan.<sup>27</sup>

*B. Philosophical Differences: One Source of Taiwan's Piracy Problem*

One reason asserted for Taiwan's disregard of intellectual property rights is the difference between Chinese and Western philosophies on property. The Western world views protection of intellectual property as essential to promoting creativity and development of new ideas and technologies.<sup>28</sup> When adequate protection for intellectual property is not insured, the incentive to create new works, technologies and inventions is significantly diminished.<sup>29</sup> Creativity and development of new ideas are the

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23. Weekly Home Furnishings Newspaper, Apr. 23, 1990, at 1. These concerns were voiced by Howard Lincoln, senior vice-president of Nintendo of America, Inc.

24. *Id.*

25. Business Software Alliance Release (Oct. 18, 1990) (available on file at *The Transnational Lawyer*). Companies represented include: Aldus, Ashton-Tate, Autodesk, Digital Research, Lotus Development, Microsoft, WordPerfect, and XTree.

26. Phone interview with representative of the Business Software Alliance (Nov. 30, 1990).

27. *Id.* (indicating that all information from our conversation was to be attributed to the Business Software Alliance).

28. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 1-3 (1988).

29. *Id.* at 3.

foremost factor in determining the success both of businesses and nations.<sup>30</sup>

Confucian philosophy, however, views duplication and imitation of ideas, art, and learning as a manifestation of honor and respect.<sup>31</sup> This concept has also permeated Chinese political thought.<sup>32</sup> This infiltration is not unexpected; Confucius was as much a political theorist as he was a philosopher on life. The Nationalist Government in Taiwan has viewed imitation as a necessary element of the economic growth and development of the country.<sup>33</sup> This view is entirely antithetical to that expressed through western intellectual property protection theories.

### *1. A Perceived Change in Philosophy*

Despite millenia of adherence to Confucian philosophy by the governments of China, many writers,<sup>34</sup> U.S. government representatives,<sup>35</sup> and journalists assert that the government of Taiwan's belief, that copying is healthy for an economy, has changed.<sup>36</sup> They argue that Taiwan's government is now in accord with the general international beliefs in the necessity of protecting intellectual property. These opinions are based on the Taiwanese government's promises to institute improvements in their intellectual property laws.<sup>37</sup>

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30. *Id.* at 1.

31. Chicago Tribune, Nov. 12, 1989, Bus. Sec., at 1, Zone C.

32. Principles of Confucianism still underlie Chinese politics. This fact should not be a surprise. "Confucianism began as a means of bringing social order out of the chaos of a period of warring states. It has been a philosophy of status and consequently a ready tool for autocracy and bureaucracy whenever they flourish." J. FAIRBANK, *THE UNITED STATES AND CHINA* 54-55 (4th ed. 1983).

33. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 348 (1988). (citing the source of this statement as "an unattributed document entitled 'Intellectual Property Rights Protection, A Republic of China Perspective.'")

34. *Id.* at 349-50.

35. Broadcasting Corporation of China, *Out of the Trade Doghouse*, AQI Central News Agency, Nov. 4, 1989.

36. Chicago Tribune, Nov. 13, 1989, Bus. Sec., at 1, Zone C.

37. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 349-50 (1988); Broadcasting Corporation of China, *Out of the Trade Doghouse*, AQI Central News Agency, Nov. 4, 1989; Chicago Tribune, Nov. 13, 1989, Bus. Sec., at 1, Zone C.

2. *The Falsehood of the Perceived Change*

Changes in attitude, like the improvement in the amount of piracy occurring in Taiwan hoped for by the respondents to the USITC study, have not occurred. Taiwan has enacted amendments to its intellectual property laws,<sup>38</sup> and a new draft copyright law is now under consideration by the Executive *Yuan*.<sup>39</sup> These changes, however, are only facades of improvement. Taiwan has merely responded to U.S. threats that it will impose trade sanctions against Taiwan if improvements in intellectual property protection do not occur.<sup>40</sup> Those changes that *do* occur are not derived from a fundamental change in Taiwan's philosophy regarding intellectual property, but solely out of fear of U.S. trade sanctions.

The Confucian belief that imitation and duplication is acceptable and even a desirable occurrence, continues to influence the policies and procedures of the government of Taiwan. The theory is that copying provides the economic base on which the nation can develop.<sup>41</sup> As a result of recent economic reversals, the vice minister for economic affairs of Taiwan stated that Taiwan must develop its own domestic market.<sup>42</sup> This type of domestic development is the ostensible justification for imitation and duplication regardless of intellectual property rights.

Due to these recent downturns in the Taiwanese economy, there is a very real threat that Taiwan will remove its "false face" of concern, and its underlying disregard for intellectual property

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38. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 349 (1988).

39. Telephone conversation with Laura Anderson, Assistant United States Trade Representative, who has been handling the trade negotiations with Taiwan (Nov. 29, 1990). The Executive *Yuan* is the executive branch of the Taiwanese government. In the Taiwanese government however, the Executive *Yuan* proposes legislation to the Legislative *Yuan*. Thus, unlike the U.S. form of government where legislation passes from the legislature to the executive, in Taiwan legislation passes from the executive branch to the legislative. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 351-52 (1988).

40. *NETWORK WORLD*, May 7, 1990.

41. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 349 (1988). Those officials responsible for administering intellectual property laws in Taiwan have remained in position, as such continuity of philosophy is inevitable. *Id.*

42. *Financial Times*, Oct. 10, 1990, at 38.

protection will re-emerge as a dominant policy.<sup>43</sup> Until Taiwan understands the importance of protecting intellectual property and conforms to international standards, there will be no effective protection of intellectual property in Taiwan.

### III. INTERNATIONAL INTELLECTUAL PROPERTY PROTECTION STANDARDS

International unions for intellectual property protection, like all multilateral conventions and international organizations, are formed to manage an acknowledged increasing international interdependence.<sup>44</sup> Today, the openness of the world market, and the constantly developing international economic interdependence, urge the congruity of national intellectual property systems.<sup>45</sup> The strong international belief in intellectual property rights is considered by scholars to be an extension of western beliefs in more traditional forms of property.

As analyzed by Locke, Hegel, and Proudhon, *all* forms of property are rights derived from individual labor, or as part of individual personality.<sup>46</sup> A person's inventions and ideas are born

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43. R. GADBAY & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 350 n.9 (1988). One of the greatest fears of the senior Taiwanese government officials is that increased intellectual property protection will have a negative impact on the economy in Taiwan. *Id.*

On September 10, 1990, the Asian Wall Street Journal reported closing of banks and avoidance of expansion into Taiwan by East-Asian banks due to a significantly suffering Taiwanese economy. Exports from Taiwan have slowed, the Taiwanese Stock Market has undergone recent sharp downturns and the property market has slumped. The Directorate General for Budget Accounting and Statistics in Taiwan reduced its projection for 1990 economic growth from 7.2% to 5.2%, the lowest growth level since 1982. Bankers have also added concerns, borrowing is down, delinquent loans are on the rise. Approximately three billion New Taiwan dollars (109.9 million U.S.) in loans are overdue and bankers expect the worst is yet to come. Asian Wall St. J. Sept. 10, 1990, at 24.

On October 10, 1990, the Financial Times recounted the first contractions in Taiwanese exports since the early 1980s. This they attribute to a loss of competitiveness. Financial Times, Oct. 10, 1990, at 38.

44. Comment, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467 (1987).

45. D. Chisum, *Intellectual Property Protection in the Next Decade: Developing Approaches to New Technologies*, presented at the Annual Fall Meeting of the ABA Section of International Law & Practice, Dec. 7, 1990.

46. See generally Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (analyzing the various philosophies from which intellectual property is derived).

out of no other source than an individual's imagination. They are derivatives of one's own labor and personality, and therefore undeniably "property." The international agreements which have been formed to protect this unique area of property rights are the Paris Convention, the Universal Copyright Convention, and the Berne Convention.

*A. The Berne Convention for the Protection of Literary and Artistic Works*

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) is the oldest multilateral copyright treaty in existence.<sup>47</sup> The original Convention entered into force on December 5, 1887.<sup>48</sup> As of February 1989, there were eighty-one contracting parties to the Berne Convention.<sup>49</sup> The Berne Convention has the most rigorous copyright protection of any international intellectual property treaty,<sup>50</sup> and is effectively administered by the World Intellectual Property Organization (WIPO).<sup>51</sup>

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47. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221. See COPYRIGHT OFFICE, LIBRARY OF CONGRESS, THE UNITED STATES JOINS THE BERNE CONVENTION (Feb. 1989).

48. See Berne Convention, *supra* note 47.

The original Berne Convention was entered into to promote five basic ends: (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 recognition and protection of copyright in foreign works, and eventually, (5) the promotion of international legislation for the prosecution of literary and artistic works.

COPYRIGHT OFFICE, LIBRARY OF CONGRESS, THE UNITED STATES JOINS THE BERNE CONVENTION (Feb. 1989).

49. H. HENN, SUMMARY OF THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988, COPYRIGHT LAW: A PRACTITIONER'S GUIDE 43-49 (Supp. 1989). The United States did not join the Berne Convention until February 1989.

50. See Berne Convention, *supra* note 47. See COPYRIGHT OFFICE, LIBRARY OF CONGRESS, THE UNITED STATES JOINS THE BERNE CONVENTION (Feb. 1989).

51. Convention Establishing World Intellectual Property Organization, July 19, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3. See Leich, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 83 AM. J. INT'L. L. 63, 64 (1989).

Protection under the convention extends, without formalities, to the works of creators who are nationals of one of the union member countries,<sup>52</sup> or have habitual residence in one of the countries of the union.<sup>53</sup> The copyright protection extends to published and unpublished works. Protection is also granted to works of creators who are not nationals of one of the countries of the union, but whose works are published first or simultaneously in a union member state.<sup>54</sup> Translations, adaptations, or other alterations of a work must be protected as originals without prejudice to the copyright of the original work.<sup>55</sup> The term of protection granted by the convention is the life of the creator plus fifty years after his or her death.<sup>56</sup> While the Berne Convention is the oldest and most important international copyright treaty offering the highest level of intellectual property protection of any treaty,<sup>57</sup> it is not the only multinational copyright convention. Its stringent requirements caused some countries to avoid membership and thus form another copyright convention.

#### *B. The Universal Copyright Convention*

The Universal Copyright Convention (UCC) was signed in 1952 under the authority of the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>58</sup> The need for another copyright agreement arose when the United States felt that it could not conform to the required lack of formalities of the Berne Convention.<sup>59</sup> This multilateral treaty<sup>60</sup> does not alter the

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52. See Berne Convention, *supra* note 47, at art. 3, § (1)(a).

53. See *id.* at art. 3, § (2).

54. See *id.* at art. 3, § (1)(b).

55. See *id.* at art. 2, § (3).

56. See *id.* at art. 7, § (1).

57. See Leich, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 83 AM. J. INT'L L. 63, 64-65 (1989).

58. UCC, Sept. 6, 1952, 6 U.S.T. 2731, 6 T.I.A.S. 3324, 216 U.N.T.S. 132. See A. LATMAN, R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE EIGHTIES CASES AND MATERIALS* 8 (2d ed. 1985) (discussing UNESCO as the United Nations organization that oversees the UCC).

59. *Id.*

obligations of the Berne Convention adherents. When first promulgated, however, it offered a new route for international protection of intellectual property.<sup>61</sup> It allowed for protection of a work if first published in a member state of the UCC, regardless of the nationality of the author.<sup>62</sup> Under the terms of the UCC, each contracting state agrees to provide adequate and effective protection for copyright proprietors,<sup>63</sup> as well as protection specifically granted by the UCC.<sup>64</sup> The signatories agree to provide the same protection to nationals of other contracting parties as they would to their own citizens.<sup>65</sup> The protection specifically granted by the UCC is restricted to certain minimum requirements. Article III dictates that if the domestic copyright law of a contracting party requires compliance with certain formalities, those formalities will be satisfied with respect to the works of nationals

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60. Membership in the UNIVERSAL COPYRIGHT CONVENTION (hereinafter UCC) as of January 1983 included: Algeria, Andorra, Argentina, Australia, Austria, Bahamas, Bangladesh, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Democratic Kampuchea, Denmark, Ecuador, El Salvador, Fiji, Finland, France, Germany, Ghana, Greece, Guinea, Guatemala, Haiti, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Kenya, Laos, Lebanon, Liberia, Liechtenstein, Luxembourg, Malawi, Malta, Mauritius, Mexico, Monaco, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sweden, Switzerland, Tunisia, United Kingdom, United States, Union of the Soviet Socialist Republic, Venezuela, Yugoslavia, and Zambia. See S. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 172-73 (1983).

61. A. LATMAN, R. GORMAN & J. GINSBURG, COPYRIGHT FOR THE EIGHTIES CASES AND MATERIALS 9 (2d ed. 1985). The purpose of the UCC, as stated in the Paris text is:

The Contracting States

Moved by the desire to ensure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,

Persuaded that a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding. . .

Have agreed as follows: . . .

UCC, *supra* note 58, at Preamble.

62. Leich, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 83 AM. J. INT'L L. 63, 65 (1989).

63. See UCC, *supra* note 58, at art. I (Paris Text 1974).

64. See *id.* at art. II, § 1.

65. *Id.*



of all other contracting parties published outside the contracting nation's territories. This protection must be guaranteed by the members so long as the publication bears the copyright symbol (©).<sup>66</sup> The Convention also demands that there be a means of protecting the unpublished works of nationals of other contracting nations without the requirement of formalities.<sup>67</sup>

The minimum duration of the copyright of any signatory must be the life of the author plus twenty-five years after the author's death. If the contracting nation does not base its domestic copyright law on the life of the author, the minimum requirement is twenty-five years from the date of first publication or registration.<sup>68</sup> The rights enumerated in the convention include exclusive rights of the author to license reproduction by any means, public performances and broadcasts,<sup>69</sup> and to publish, and authorize the publication of, translations of works protected by the convention.<sup>70</sup>

The Berne Convention and the UCC are powerful instruments of all who desire to insure the protection of authors' rights throughout the world. Copyright is not the only type of intellectual property covered by an international agreement. Patents and trademarks are protected by The Paris Convention for the Protection of Industrial Property.

### *C. The Paris Convention for the Protection of Industrial Property*

The Paris Convention for the Protection of Industrial Property was established March 20, 1883.<sup>71</sup> Industrial property includes patents, utility models, industrial designs, trademarks, service

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66. See generally *id.* at art. III, § 1 (stating that the name of the copyright proprietor and the year of first publication is required to give reasonable notice of the claim of copyright).

67. See *id.* at art. III, § 4.

68. See UCC, *supra* note 58, at art. IV, § 2(a) & (b).

69. See *id.* at art. IVbis, § 1.

70. See *id.* at art. V, § 1. See generally *id.* at art. V, § 2, §§ (a)-(f) (listing certain enumerated exceptions to the translation right.)

71. Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Stockholm on July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305 [hereinafter Paris Convention]. See P. GOLDSTEIN, E. KITCH & H. PERLMAN, SELECTED STATUTES AND INTERNATIONAL AGREEMENTS ON UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT 334 (1989).

marks, and trade names. The convention requires indications of source or appellations of origin and the repression of unfair competition.<sup>72</sup>

The Paris Union (the Union) provides that the nationals of all union members will be protected by the laws of the individual member states.<sup>73</sup> However, the member states cannot maintain a domicile requirement.<sup>74</sup> The legal remedies against infringement provided by the laws of the member states extend to the nationals of the other members of the Union.<sup>75</sup>

Under the Union, any person that has filed an application for a patent, or for the registration of a trademark in one of the countries of the Union, has a right of priority in the other countries of the Union for purposes of filing in one of those countries.<sup>76</sup> This priority remains in force twelve months for patents and six months for trademarks.<sup>77</sup>

#### *D. Continuing Revision of the International Intellectual Property Agreements*

All of the international unions have undergone continuous updating and improvement. The Berne Convention has undergone six revisions since its completion in 1896 and was most recently revised in Paris in 1971.<sup>78</sup> The UCC's most recent improvements were made in Paris in 1974.<sup>79</sup> Like Berne, the Paris Convention has been revised six times since its initial organization in 1883, most recently in Stockholm in 1967.<sup>80</sup> New meetings for revision of all three agreements are currently under consideration to account

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72. See Paris Convention, *supra* note 71, at art. 1, § 2.

73. See *id.* at art. 2, § (1).

74. See *id.* at art. 2, § (2).

75. See *id.* at art. 2, § (1).

76. See *id.* at art. 4, § A(1).

77. See Paris Convention, *supra* note 71, at art. 4, § C(1).

78. Leich, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 83 AM. J. INT'L L. 63, 64 (1989).

79. P. GOLDSTEIN, E. KITCH & H. PERLMAN, *SELECTED STATUTES AND INTERNATIONAL AGREEMENTS ON UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT* 280 (1989).

80. *Id.* at 334.

for modern advances in technology. The degree of specificity in the agreements,<sup>81</sup> and their ongoing revisions,<sup>82</sup> evidence a continuing international concern for intellectual property protection.

### *E. The GATT Proposals for Protection of Intellectual Property*

As a means of furthering international protection, the European Community (EC), Japan, and the United States have brought proposals for intellectual property protection under the direction of the GATT to the GATT negotiations.<sup>83</sup> The GATT delegates in Geneva consider these proposals significant in that they advocate tough GATT rules to strengthen worldwide protection of intellectual property rights.<sup>84</sup> Although developing countries resist the use of GATT for promotion of intellectual property protection,<sup>85</sup> all of the countries involved in the agreement apparently recognize the importance of expanded international intellectual property protection.<sup>86</sup>

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81. See generally Berne Convention, *supra* note 47; UCC, *supra* note 58; Paris Convention, *supra* note 71 (each agreement is specific as to minimum requirements for intellectual property protection).

82. The latest revision of the Berne Convention occurred in Paris in 1971. The UCC was last revised in Paris in 1974, and the Paris Convention was revised in 1900, 1911, 1925, 1934, 1958, and most recently in 1967. All of these revisions have been in response to new developments which impacted intellectual property protection and specific concerns of member states. A. LATMAN, R. GORMAN & J. GINSBURG, COPYRIGHT IN THE EIGHTIES 297 (2d ed. 1985).

83. Under the EC's proposal to the GATT, all GATT members would adhere to the WIPO administered Paris Convention and the Berne Convention. They also included specific intellectual property protection standards including: A validity period of twenty years from the date of application for all patents; trademark registration could be renewed indefinitely and cancelled only after an uninterrupted period of at least five years of non-use; computer programs would be protected under exclusive rights of reproduction, adaptation, and translation for at least twenty-five years; semiconductor mask works would be protected under exclusive rights; models and designs would be protected for a minimum of ten years, and sound recordings would be exclusively protected for a period of at least twenty years after its performance or broadcast. 5 Int'l Trade Rep. (BNA) No. 28, at 1012 (July 13, 1988).

84. *Id.*

85. 7 Int'l Trade Rep. (BNA) No. 11, at 373 (Mar. 14, 1990). The developing countries are not arguing over whether there needs to be continuing work in the area of intellectual property protection, they argue only that WIPO is the forum for such issues. *Id.*

86. *Id.*

*F. Movement for Protection of Semiconductor Mask Works*

With modern technology advancing more quickly than society itself, industrial property, trademarks, and artistic works are not the only areas of intellectual property in need of protection. As new technology develops, new areas of intellectual property emerge. Semiconductors are one new area of property now requiring protection.

Semiconductors are the central part of the modern technological revolution and are essential to today's military intelligence, communications, and weaponry.<sup>87</sup> Semiconductors are critical to the electronics and computer industries. Electronics, a quarter trillion dollar industry annually in the U.S., is larger than the automobile, steel, and aerospace industries combined.<sup>88</sup> Because of their unique nature,<sup>89</sup> semiconductors can be easily and inexpensively pirated. Because they can cost millions of dollars in initial research and development, pirating of semiconductors can deprive a country of substantial profits.<sup>90</sup>

The Goldman Sachs investment house issued a distressing newsletter in late 1990 concluding that intellectual property protection for semiconductors must be improved internationally for growth of the industry to continue.<sup>91</sup> The newsletter also indicated that systematic efforts are needed to broaden the scope of protection offered by a patent. The newsletter pointed out that the economic and technological realities of the industry as well as the cost of research and development, plants, equipment, and the short life of the chip with the current rate of technological advancement,

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87. Hatano, *Intellectual Property Protection in the Next Decade: History and Outlook in Semiconductors*, presented at the Annual Fall Meeting of the ABA Section of International Law & Practice, Dec. 7, 1990.

88. *Id.*

89. See *supra* note 1 (The definitions of semiconductors and mask works gives some idea of the complexity and unusual nature of this form of intellectual property.).

90. Hatano, *Intellectual Property Protection in the Next Decade: History and Outlook in Semiconductors*, presented at the Annual Fall Meeting of the ABA Section on International Law & Practice, Dec. 7, 1990. Semiconductors can be copied by peeling off the layers of a chip and taking a picture of each layer. This is called producing a "mold" chip. *Id.*

91. *Id.*

demand expansion of intellectual property protection to accommodate their uniqueness.<sup>92</sup> The idea behind expansion of intellectual property rights is to create an environment where the industry can financially sustain itself. Even without the losses attributed to mask piracy, the semiconductor industry has difficulty making it economically feasible to continue development and production of semiconductor masks. Without mask work protection, the prophecy of the diminution of the semiconductor industry to near non-existence will become a reality.<sup>93</sup>

Today, twenty countries have semiconductor chip protection laws in place.<sup>94</sup> The international community recognizes the need for an international agreement, and a WIPO treaty on the subject was drafted in 1989.<sup>95</sup> Unfortunately, the developing countries amended the treaty to the point of ineffectiveness due to fear of lost technology transfers to the newly developing countries. As a result of those amendments, both the governments of the U.S and Japan refused to support the treaty. The semiconductor industries of the U.S., Japan, and the European Community also rejected the treaty as ineffective.<sup>96</sup> Despite its failures, the importance of this initial semiconductor mask protection treaty cannot be underestimated for its effect in promoting international realization of the need to protect this new, unique, and rapidly developing area of intellectual property.

The GATT negotiators also are considering semiconductor protection proposals. Unfortunately, the GATT mask work proposals face the same difficulties as other intellectual property protection proposals in the GATT.<sup>97</sup> These mask work protection

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92. *Id.*

93. *Id.*

94. *Id.* These countries include: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, United Kingdom, and the United States. *Id.*

95. See Hatano, *Intellectual Property Protection in the Next Decade: History and Outlook in Semiconductors*, presented at the Annual Fall Meeting of the ABA Section on International Law & Practice, Dec. 7, 1990.

96. *Id.*

97. *Id.* See *supra* note 85 (explaining developing states' objections to use of the GATT for intellectual property protection).

proposals could easily suffer the same fate as the WIPO treaty if care is not used in the implementation of mask work protection standards.

Many of the chip protection laws in the world closely follow those of the United States. Under the U.S. law, mask works are protected for ten years after registration of the masks. Exceptions from prosecution are provided for innocent infringements and for reverse engineering.<sup>98</sup> Recognizing the necessity of international protection for intellectual property in today's global market, the U.S. Semiconductor Chip Protection Act includes § 914. Under § 914, foreign nationals are granted protection in the U.S. if the U.S. Commerce Department determines that the foreign country is making a good faith effort to protect U.S. chips.<sup>99</sup>

Against this background of international intellectual property standards, Taiwan's intellectual property laws may be scrutinized. In order to determine the inadequacies of Taiwan's laws, comparisons among the international agreements and Taiwan's laws must be made. Only then can an adequate determination be made as to where Taiwan must improve its intellectual property laws.

#### IV. TAIWAN'S INTELLECTUAL PROPERTY PROTECTION LAWS AND HOW THEY COMPARE TO INTERNATIONAL STANDARDS

Taiwan is a country governed by civil law. Its legal standards are not judicially made; there is little or no judicial interpretation of the law. Rather, the entire source of the law is comprehensive legal codes, and courts merely apply the codes to the facts in a given case.<sup>100</sup> Because the codes are the entirety of the law, legitimate analysis may take place by examining the codes on their face. Unlike the Western legal systems, judicial interpretation does

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98. Hatano, *Intellectual Property Protection in the Next Decade: History and Outlook in Semiconductors*, presented at the Annual Fall Meeting of the ABA Section on International Law & Practice, Dec. 7, 1990.

99. *Id.*

100. See Hickman, *Protecting Intellectual Property in Taiwan -- Non-Recognized United States Corporations and their Treaty Right of Access to Courts*, 60 WASH L. REV. 117, 119 (1984).

not affect application of the codes; including those regulating copyright, patent, and trademark.

*A. Copyright*

Article 17 of Taiwan's copyright statute provides that a foreign national may be eligible for copyright registration if the work was first published in Taiwan, or the foreigner's country of citizenship will, by law or custom, afford reciprocity to Taiwanese nationals.<sup>101</sup> The significant difference in Article 17 and the international standards of both the Berne Convention and the UCC, is the requirement of publication and registration of the work in Taiwan before protection is provided.<sup>102</sup> The protection under the Berne Convention and the UCC is automatic to the nationals of the member states.

*1. Publication or Reciprocity Requirement of Taiwan's Copyright Law*

The holder of a copyright in Taiwan, which is registered pursuant to the criteria of publication or a reciprocal agreement, is entitled to the rights under Taiwanese copyright law, provided that the entitlement does not include rights to translation of the works.<sup>103</sup> Conversely, the Berne Convention provides that it is the option of the individual member countries whether to require that the work be in material form to receive protection. Both the Berne Convention and the UCC explicitly include translation rights in the copyright of the author.<sup>104</sup>

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101. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 160 (Feb. 1988).

102. See Berne Convention, *supra* note 47, at art. 3, § (1)(a). See also UCC, *supra* note 58, at art. II, § 2.

103. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 161 (Feb. 1988).

104. See Berne Convention, *supra* note 47, at art. 2, § (3). See also UCC, *supra* note 58, at art. V, § 1.

## 2. *Term of Protection Under Taiwan's Copyright Law*

In general, copyright protection in Taiwan extends for the author's life.<sup>105</sup> However, the term of the copyright is assured for a shorter period of time than the life of the author in many cases. Copyright protection of compilations, motion pictures, sound recordings, video tapes, photographs, or computer programs is for a maximum term of thirty years.<sup>106</sup> The Berne Convention and the UCC, on the other hand, provide for significantly longer periods of protection than Taiwan's laws permit. Under the Berne convention and the EC proposal to the GATT, the term of the copyright is the life of the author and fifty years after the author's death.<sup>107</sup> In the case of motion pictures, the term of the copyright is fifty years from the release date.<sup>108</sup> Under the UCC, although the duration of the copyright is determined by domestic law of the member states, the term may not be less than the life of the author, plus twenty-five years after the author's death.<sup>109</sup>

## 3. *Conclusions on Taiwan's Copyright Law*

The above comparisons demonstrate that the copyright law of Taiwan fails to meet international standards of adequate copyright protection as laid out in the international copyright agreements. Areas of Taiwan's copyright law which fall short of international standards include: the eligibility requirements, the amount of rights covered by the law, and the term of the copyright.

### *B. Patents*

The *Patent Law of the Republic of China*, as followed by Taiwan, grants patents on application and examination thereof, by

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105. See generally COPYRIGHT LAW OF THE REPUBLIC OF CHINA at art. 8.

106. See generally *id.* at arts. 12 & 13.

107. See Berne Convention, *supra* note 47, at art. 7, § (1).

108. See *id.* at art. 7, § (2).

109. See UCC, *supra* note 58, at art. IV, §§ 1 & 2.



the Patent Office of the Ministry of Economic Affairs.<sup>110</sup> Patents expire fifteen years from the date of the publication and do not extend beyond eighteen years after the date of application.<sup>111</sup> While this is not an abnormally short period of time for the life of a patent,<sup>112</sup> the proposal of the EC to the GATT indicates a desire for a longer term.<sup>113</sup>

### *1. What is Patentable Under Taiwan's Patent Law*

An invention is patentable under Taiwan's law if it is new and has industrial utilization value.<sup>114</sup> There are numerous exceptions to what may be patented under Taiwan's law, including chemicals, drinks, foods, and medicines. Similarly, the Paris Convention does not specify what it may or may not be possible to patent. The Convention only provides minimum standards and then simply extends protection of the various members states domestic laws to the nationals of the other members of the Union.<sup>115</sup>

### *2. Taiwan's "Working" Requirement*

The greatest discrepancy between the patent law of Taiwan and international standards rests in revocability and working requirements. Under the law in Taiwan, failure to work a patent within two years after issuance may result in revocation of the patent.<sup>116</sup> Working consists strictly of production of the patented item in Taiwan. Manufacturing abroad and importing into Taiwan does not constitute working for purposes of Taiwan's patent

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110. See PATENT LAW OF THE REPUBLIC OF CHINA at art. 10.

111. See *id.* at art. 6.

112. See generally Patent Act, 35 U.S.C. § 154 (1988) (granting patents for a term of seventeen years).

113. See generally 5 Int'l Trade Rep. (BNA) No. 28, at 1012 (July 13, 1988) (the term sought is a minimum of twenty years).

114. See PATENT LAW OF THE REPUBLIC OF CHINA at art. 1.

115. See Paris Convention, *supra* note 71, at art. 2.

116. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Trade*, USITC Pub. 2065, Inv. No. 332-245, 175 (Feb. 1988).

law.<sup>117</sup> A patent will be subject to compulsory licensing<sup>118</sup> in Taiwan if it is not adequately worked within three years of the grant of the patent. Notwithstanding adequate working, a compulsory license may still be required of the patent holder to permit market demand to be met.<sup>119</sup> In exact opposition, the Paris Convention specifically prohibits forfeiture of the patent unless a compulsory license would be insufficient to prevent abuses.<sup>120</sup> Even after that determination is made, proceedings for forfeiture or revocation cannot be instituted before the expiration of two years from the grant of the first compulsory license.<sup>121</sup>

As noted, Taiwan's patent law calls for revocation before it allows for compulsory licensing. This standard is in direct conflict with the Paris Convention's desire to avoid forfeitures and revocations of patents by allowing for forfeiture only after compulsory licensing has failed to eliminate the abuse of the patent. Additionally, Taiwan's licensing regulations provide a loophole which may be used at any time to avoid compliance with a patent by allowing for compulsory licensing to meet market demands.

### *3. General Conclusion on Patents*

The Paris Convention provides almost strictly for compulsory licensing in cases of abuse of the patent,<sup>122</sup> while Taiwan calls for revocation even at whim.<sup>123</sup> This is the area in which the patent law of Taiwan is at the greatest odds with international

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117. See PATENT LAW OF THE REPUBLIC OF CHINA at arts. 67-69. See also 7 Int'l Trade Rep. (BNA) No. 23, at 811 (June 6, 1990).

118. License of a patent is a written authority granted by the owner of a patent to another person empowering the latter to make or use the patented article for a limited period of time . . . BLACK'S LAW DICTIONARY 829 (5th ed. 1979). Compulsory is "involuntary; forced; coerced by legal process or by force of statute." BLACK'S LAW DICTIONARY 260 (5th ed. 1979); Compulsory licensing then is a forced license granted by a government, under statute, against the owner of the patent.

119. See PATENT LAW OF THE REPUBLIC OF CHINA at arts. 67-69.

120. See Paris Convention, *supra* note 71, at art. 5, § (3).

121. *Id.*

122. *Id.*

123. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 175 (Feb. 1988).

standards of acceptability in protection of new inventions. Industries affected by patent violations, such as Texas Instruments, criticize Taiwan's patent system as characterized by long delays, arbitrary denials, and unduly restrictive interpretation of patent applications.<sup>124</sup> Even when the patents are issued, the protections under the law are too narrow to be considered adequate.<sup>125</sup>

Unfortunately, Taiwan's copyright and patent laws fail, quite dramatically, to meet international standards. Comparatively speaking, their trademark law fares significantly better.

### *C. Trademarks*

#### *1. General Points of Taiwan's Trademark Law*

The trademark law in Taiwan provides coverage for any word, drawing, symbol or combination thereof. The duration of the exclusivity of the trademark is ten years from the date of registration and may be extended indefinitely for additional ten year terms. The trademark may be canceled if it has not been put to use for two years after registration. The law provides for criminal and civil penalties for violation of a trademark, but the owner of the trademark must make a prima facie case that the trademark has been violated before the police will conduct a raid or the courts will consider a case.<sup>126</sup>

#### *2. Comparison to International Standards*

To Taiwan's credit, their trademark law conforms quite well to international standards with two important exceptions, the first being that there is no protection for "well known" marks that are not "well known" in Taiwan. This makes it possible for Taiwanese companies to copy trademarks that are known elsewhere

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124. 7 Int'l Trade Rep. 300 (Feb. 28, 1990).

125. *Id.*

126. R. GADBAW AND T. RICHARDS, INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 367-69 (1988).

in the world and export goods under that mark.<sup>127</sup> The Paris Convention grants *ex officio* power in union countries to prohibit the use of a trademark that is well known in the country of its registration.<sup>128</sup> The Paris Convention also grants a minimum period of five years from the date of registration for the cancellation of a well known mark, and indefinite time to cancel the registration of a well known mark that was registered in bad faith.<sup>129</sup>

The second exception to conformity with internationally accepted standards of trademark protection is the presumption under the Taiwanese law that there has been no violation of a trademark unless the legitimate owner of the trademark presents a *prima facie* case that there has been a violation. This placement of the burden of proof effectively eliminates any independent government enforcement of the trademark law. Under such a standard, no action may be taken by the government until the true owner of the trademark discovers the violation, conducts an independent investigation and gathers sufficient evidence without the aid of enforcement agencies, to construct a *prima facie* case of violation. This flies in the face of the purpose of international intellectual property agreements such as the Paris Convention which has as its purpose creation of a union for protection of the holders of intellectual property rights.<sup>130</sup> With such a burden of proof, there is effective protection of the trademark violators until the owner of the trademark discovers the illegal use of the mark and is able to accumulate the evidence necessary to construct a *prima facie* case.

The copyright, patent, and trademark laws have significant flaws. There is, however, a code section addressing the issue. The same cannot be said about the last two areas of intellectual property to be addressed, trade secrets and semiconductor mask works.

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127. *Id.* at 374.

128. Paris Convention, *supra* note 71, at art. 6*bis*, § (1).

129. *Id.* at art. 6*bis*, §§ (2)&(3).

130. *Id.* at art. 1, § (1).

*D. Trade Secrets and Semiconductor Mask Work Protection*

Taiwan has no trade secret law. Implementation of the draft Fair Trade Law making it illegal to improperly acquire or sell trade secrets, is unlikely.<sup>131</sup>

There is no protection for designs of semiconductor chips in Taiwan.<sup>132</sup> This dearth in protection is significant due to the shifting focus of pirates to higher technological devices which involve the use of semiconductor chips.<sup>133</sup> Indeed, Taiwan is currently under scrutiny by the International Trade Commission and Texas Instruments for production and exportation of pirated semiconductor chips.<sup>134</sup>

In addition to areas of inconsistency with international standards, Taiwan's intellectual property laws have other significant flaws. These defects cause a great deal of apprehension in industries which are affected by violations of intellectual property rights.

*E. General Deficiencies In Taiwan's Laws*

*1. Formality Requirements*

One of the foremost criticisms of Taiwan's laws is the burdensome procedural formalities involved in obtaining any form of protection for intellectual property.<sup>135</sup> To those individuals and businesses seeking intellectual property protection, the bureaucratic process is a considerable hindrance.

Texas Instruments has complained that the patent system in Taiwan is replete with lengthy delays, arbitrary denials, and unduly

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131. R. GADBAW & T. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 374-75 (1988).

132. *Id.* at 375.

133. See generally Quinn, *Taiwan's Copyright Pirates Sail into the Space Age*, Reuters, May 4, 1990, BC Cycle.

134. *ITC to Probe TI Patent Violation Case*, Jiji Press Ticker Service, (Aug. 8, 1990).

135. *Foreign Protection of Intellectual Property Rights and the Effect on Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 42 (Feb. 1988).

restrictive interpretation of patent applications.<sup>136</sup> Under Taiwan's copyright law, certain types of works must not only go through the registration process, but they must receive the approval of other government agencies before they can be registered.<sup>137</sup> In addition to the difficulty in fulfilling all of the necessary procedures to obtain protection, once the protection is granted, the legal remedies available when rights are violated are wholly insufficient.

## *2. Inadequacy of Remedies*

Great concern lies in the area of obtaining a legal remedy under the Taiwanese laws. In many cases the remedies allotted are seen as inadequate.<sup>138</sup> The industries that have suffered from violations in Taiwan indicate that there is no preliminary or injunctive relief, that there is a lack of seizure and impoundment remedies, and perhaps most damaging is a lack of compulsory process and discovery.

Lack of process and discovery effectively blocks the obtaining of the evidence necessary to present the required prima facie case against the intellectual property thieves. Without the necessary evidence to establish a prima facie case, the legal system cannot be entered. The required level of proof for entrance to the judicial system, coupled with the lack of a legal means of obtaining adequate evidence to meet the requisite level of proof acts as a block to apprehension and prosecution of intellectual property pirates.

The general belief is that both the civil and criminal penalties for intellectual property violations are inadequate.<sup>139</sup> The laws are often cryptic leaving a great deal of discretion to the judges and prosecutors in their application, but not for interpretation.<sup>140</sup>

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136. 7 Int'l Trade Rep. (BNA) No. 9, at 300 (Feb. 28, 1990).

137. See COPYRIGHT LAW OF THE REPUBLIC OF CHINA at art. 6, § (2).

138. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 43-49 (Feb. 1988).

139. *Id.* at 43.

140. Daily Telegraph, May 21, 1990, at 32.

There are profound defects in Taiwan's intellectual property laws both from a business standpoint as well as that of international expectations on protection of intellectual property. In addition to the structural weaknesses in the laws, problems with protection of intellectual property in Taiwan also exist outside the text of the laws themselves. These additional problems also bear consideration.

V. PROBLEMS IN PROTECTING INTELLECTUAL  
PROPERTY IN TAIWAN OTHER THAN DEFECTS  
IN THE LAWS THEMSELVES

*A. Enforcement*

Even if Taiwan's intellectual property laws were a mirror reflection of the international conventions, without adequate enforcement laws can be nothing more than paper tigers. Enforcement in Taiwan is weak enough that not only could the laws be called paper tigers, they could be called declawed, toothless, and tamed.

Encyclopedia Britannica licensed a Taiwan firm, in 1987, to publish a Chinese language version of its ten volume encyclopedia. Before the first volume was issued, another publisher released a pirated edition.<sup>141</sup> Encyclopedia Britannica filed suit at that time. Despite the initiation of the action, to date the pirating company continues to sell the pirated version of the encyclopedia in Taiwan.<sup>142</sup> As a consequence of its dealings with Taiwan on this issue, the Encyclopedia Britannica Company stated early in 1990 that enforcement of Taiwan's intellectual property laws is "woefully deficient . . . Having adequate intellectual property laws in the statutes of a nation are really of no significant value without

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141. Financial Times, Business Law Brief (July 1989). As an example of the comfort which the pirates in Taiwan feel in their thievery, the Tan Ching Book Company which published the pirated version of the encyclopedia had the temerity to circulate advertisements warning buyers to "watch out for the fakes that have lately appeared in the market." San Francisco Chron., Feb. 12, 1990, at A1.

142. 7 Int'l Trade Rep. (BNA) No. 9, at 300 (Feb. 28, 1990).

adequate and effective enforcement of those laws.”<sup>143</sup> Encyclopedia Britannica is not alone in that view.

Eric Smith, general counsel of the International Intellectual Property Alliance (IIPA), in 1990 portrayed enforcement efforts in Taiwan as “mixed at best.”<sup>144</sup> The USITC study in 1988 of industries affected by theft of intellectual property, found enforcement to be unreasonably slow for copyright, patent and trademark violations.<sup>145</sup> Texas Instruments, in commenting on this point, stated that “[i]ntellectual property rights must be enforceable swiftly and at minimal expense” in order to be effective.<sup>146</sup>

Specific cases of poor enforcement are legion. Recent examples include the unexpectedly poor enforcement of a 1989 agreement between the U.S. and Taiwan to regulate the showing of pirated films in “video parlors” in Taiwan.<sup>147</sup>

At the peak of the “video parlor” fad, the American Movie Industry determined that it was losing as much as fifty million dollars a year in royalties due to the showing of pirated videos in these “parlors.”<sup>148</sup> In 1989 there were some 1,200 parlors showing foreign films without paying the license fees.<sup>149</sup> In mid-1990, approximately 1,000 parlors were still operating and showing these pirated films despite the signing of an agreement in 1989 to regulate the showing of the pirated films.<sup>150</sup>

Software cloning has boomed in Taiwan due to poor laws and equally wanting enforcement.<sup>151</sup> In raids in early 1990 by an American software company, Ashton-Tate Corporation, Richard Neff, deputy general counsel for international legal affairs at Ashton-Tate reported that:

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143. *Id.*

144. 7 Int'l Trade Rep. (BNA) No. 23, at 811 (June 6, 1990).

145. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 44-50, (Feb. 1988).

146. 7 Int'l Trade Rep. (BNA) No. 9, at 300 (Feb. 28, 1990).

147. Daily Telegraph, May 21, 1990, at 32.

148. L.A. Times, Jan. 8, 1990, Part D, at 3, col. 1.

149. *Id.*

150. Daily Telegraph, May 21, 1990, at 32.

151. Burton, *Software Piracy: A Multibillion-Dollar Industry Curse*, Investor's Daily, Apr. 17, 1990, at 29.



. . .the cooperation of the police was disappointing and in some instances obstructionist. . . . The officers sided with the defendants when they couldn't find keys to locked rooms, or didn't want searches of a computer's hard disk on the grounds that it was hardware rather than software. . . . We had evidence that the hard disks were being dumped. It was just hopeless.<sup>152</sup>

Ashton-Tate is not the only victim of intellectual property theft which has noted the biases of enforcement officials in Taiwan. The Business Software Alliance, of which Ashton-Tate is a part, indicates that before it started raids, eighty-six percent of the software in Taiwan was pirated. The Alliance has stated that it will be fortunate if it can reduce pirating to seventy-five percent.<sup>153</sup>

Cloned software is the rule in Taiwan rather than the exception.<sup>154</sup> Dozens of stores sell pirated software at prices sometimes one-tenth that of the standard retail cost.<sup>155</sup> To solve this problem, enforcement is essential. Pirates take the stance that, "unless all pirate stores are shut down, no one will buy original software. . . ."<sup>156</sup> Studies have also found that enforcement officials discriminate against foreigners.<sup>157</sup> Enforcement officials are not the only ones perceived as biased.

## *B. Biased Courts and Administrative Bodies*

### *1. Biased Court Decisions*

The USITC study reported that industries that rely on intellectual property are of the opinion that the court decisions in

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152. Chicago Tribune, June 18, 1990, Bus. Sec., at 7, Zone N.

153. *Id.*

154. Chicago Tribune, Nov. 12, 1989, Bus. Sec., at 1, Zone C.

155. *Id.*

156. *Id.* Percy Shieh, a partner in a shop that sells strictly pirated software stated that his store had tried to sell original software and was unable to sell any of the products because of the high price as compared to the seller of the pirated goods a few stores away. *Id.*

157. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, USITC Pub. 2065, Inv. No. 332-245, 44-50, (Feb. 1988).

Taiwan are biased and political.<sup>158</sup> In 1990, the IIPA found that industries depending on intellectual property protection feel Taiwan's courts have remained unchanged.<sup>159</sup> The biased court decisions are made possible by the structure of the Taiwanese court system which has no doctrine of stare decisis. The judges are, therefore, given absolute discretion in applying the law.<sup>160</sup>

The biases of the courts become transparent in their decisions. One investigator for a firm specializing in finding intellectual property violators states "[w]e have been screaming at the courts [in Taiwan] for years, but it doesn't seem to do any good. We do the surveillance, do the raid, get the evidence -- and then the court will throw the case out, it's very frustrating."<sup>161</sup> Encyclopedia Britannica's current situation is perhaps the best evidence of this bias. After the pirated version of their encyclopedia was discovered and the publisher of the stolen version was determined, Britannica filed suit in Taiwan. The judge ruled that Encyclopedia Britannica, Inc. of the U.S. had no case for sale of pirated copies of the encyclopedia. The court held that U.S. publishers do not have the benefit of Taiwan copyright law because all U.S. trade agreements were broken when the U.S. dissolved diplomatic relations with Taiwan in 1978.<sup>162</sup> The case is still pending before the Taiwan Supreme Court.<sup>163</sup>

Even when the courts do rule in favor of the plaintiffs, the pirates are often allowed to avoid serving jail time by paying a

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158. *Id.*

159. 7 Int'l Trade Rep. (BNA) No. 23, at 811 (June 6, 1990).

160. Hickman, *Protecting Intellectual Property in Taiwan -- Non-Recognized United States Corporations and their Treaty Right of Access to Courts*, 60 WASH. L. REV. 117, 120-21 (1984). Judicial decisions in Taiwan are brief statements of the law followed by an equally brief application of the facts to the law. Lawyers and judges in Taiwan are not usually sensitive to factual considerations. Taiwan's legal system, including schooling, focuses on the broad theoretical aspects of the law. Only the panel decisions of the Judicial Yuan in interpreting the law, and the decisions of the Supreme Court, which the court expressly selects as such, are binding precedent. *See generally id.* (giving an excellent exegesis on Taiwan's judicial system).

161. Quinn, *Taiwan's Copyright Pirates Sail into the Space Age*, REUTERS, May 4, 1990, BC Cycle. The firm referred to is Orient Commercial Enterprises which has had extensive experience with the process of prosecuting pirates in Taiwan. *Id.*

162. Financial Times, Business Law Brief, (July 1989).

163. Telephone interview with the legal counsel for Encyclopedia Britannica, Inc., U.S.A. (Nov. 28, 1990).

nominal fee per day for the length of the sentence.<sup>164</sup> In addition to the impact that public opinion has on the determinations of the judiciary, the judges often see the situation as the overpowering international corporation crushing the small local businessman.<sup>165</sup> The judiciary in Taiwan is not the only element of the intellectual property enforcement mechanism that is prejudiced against non-Taiwanese petitioners.

## *2. Biased Administrative Agencies*

The administrative agencies that are established under Taiwan's intellectual property laws are also partial toward Taiwanese nationals. Johannes von Schilcher, executive director of the International Anti-Counterfeiting Coalition, commented that Taiwan's National Bureau of Standards has been erratic in ruling on issues of descriptiveness and distinctiveness of trademarks. Von Schilcher opined that the Bureau's decisions exhibit "an obvious bias in favor of Taiwanese nationals."<sup>166</sup> The biases of the courts and administrative agencies in Taiwan are merely symptomatic of the much more expansive obstacle of public and governmental opinion.

## *C. Negative Public and Governmental Opinion*

When there is no public and governmental support of a law, there will never be compliance with the law's precepts.<sup>167</sup> Unfortunately, this lack of support rises to the level of belligerence toward intellectual property protection laws and makes institution of new laws a mockery. New laws are of no value if neither the government, nor the populace have any intention of conforming with the requirements of the legislation.

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164. Daily Telegraph, May 21, 1990, at 32.

165. Chicago Tribune, June 18, 1990, Bus. Sec., at 7, Zone N.

166. 7 Int'l Trade Rep. (BNA) No. 23, at 811 (June 6, 1990).

167. See generally Franck, *Legitimacy in the International System*, 82 AM. J. INT'L. L. 705 (1988) (discussing the necessity that, in order for the law to be effective, the people subject to a law must believe that a law has legitimacy).

*1. Lack of Public Appreciation of the Need for Intellectual Property Protection in Taiwan*

The people of Taiwan do not understand the problems associated with the theft of intellectual property. One Taiwan University student's sentiments are typical of the general lack of understanding of the determination of the U.S. in trying to put pirates out of business. He stated; "It seems selfish. . . . Don't American companies earn enough money already? Why are they so angry about people who are just trying to earn a living?"<sup>168</sup> The majority of the Taiwanese people are of the same opinion.<sup>169</sup> These social attitudes are a significant factor in the lack of intellectual property protection in Taiwan. Demands for increased intellectual property protection are attacked by the media in Taiwan as proof of U.S. interference in the internal workings of Taiwan's government.<sup>170</sup>

A 1988 study indicates that violators of intellectual property rights exercise a strong political impact on the direction that protection of intellectual property takes.<sup>171</sup> The violators also wield moderate net private sector pressure on the government to reduce intellectual property protection.<sup>172</sup> The validity of this study can be seen in the lack of support for intellectual property protection within the government of Taiwan. The attitude decrying perceived U.S. interference and general disfavor for improving intellectual property protection held by the general populace in Taiwan extends to the government as well.

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168. Chicago Tribune, Nov. 12, 1989, Bus. Sec., at 1, Zone C.

169. *Id.*

170. *Id.*

171. R. GADBAW & T. RICHARDS, INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 343 (1988).

172. *Id.*

*2. Lack of Governmental Support for Improved Intellectual Property Protection in Taiwan*

In November 1989, the deputy chairman of the Council for Economic Planning and Development stated that Taiwan had gone far beyond what it should have to, in protecting intellectual property rights.<sup>173</sup> Officials of the Interior Ministry of Taiwan told reporters that the revisions in Taiwan's copyright law were made "under duress" from the U.S. Government.<sup>174</sup> Statements such as these do not indicate a true interest in improved intellectual property protection within the government in Taiwan.<sup>175</sup> Rather, there is considerable doubt as to whether the commitments of the government of Taiwan will translate into new intellectual property laws. Additionally, the result of negotiations with the U.S. clearly indicates a complete lack of desire to improve protection of intellectual property rights other than for the single purpose of avoiding trade sanctions. It is here that the false heart of Taiwan can be seen regarding protection of intellectual property.

*3. Effect of Public and Governmental Opinion on the Judiciary in Taiwan*

The combination of negative public and governmental opinion is likely to have an impact on the judiciary in Taiwan as well as the other branches of the Taiwanese government. The reason for such impact is that the governmental entities of Taiwan value societal norms more highly than individual equities.<sup>176</sup>

Thus far, this comment has indicated that the textual requirements of Taiwan's intellectual property laws are considerably lacking. Additionally, it has been established that due

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173. Broadcasting Corporation of China in Taipei, Nov. 4, 1990. The Council for Economic Planning and Development is the agency which administers the patent and trademark laws in Taiwan. *Id.*

174. Chicago Tribune, Nov. 13, 1989, Bus. Sec., at 1, Zone C. The Interior Ministry of Taiwan administers Taiwan's copyright law. *Id.*

175. See *supra* notes 39 and 41.

176. Hickman, *Protecting Intellectual Property in Taiwan -- Non-Recognized United States Corporations and their Treaty Right of Access to Courts*, 60 WASH. L. REV. 117, 120-21 (1984).

to biases and lack of enforcement, these laws are not much more than passable Chinese calligraphy on a page. What is the catalyst that causes these attitudes and drives Taiwan so far from the international norm?

## VI. WHY DOES TAIWAN DEVIATE SO FAR FROM INTERNATIONAL NORMS?

### *A. Lack of International Recognition*

One possible reason for the antagonism in Taiwan is lack of international recognition. Taiwan lost its seat in the United Nations due to the mounting challenge to Taiwan's political status brought on by the People's Republic of China in October 1971. This resulted in the loss of Taiwan's diplomatic status as a nation recognized by the majority of the countries of the world.<sup>177</sup> As a result, Taiwan cannot belong to the Berne Convention, the UCC, or the Paris Convention because these organizations are administered by U.N. agencies.<sup>178</sup>

The United States officially recognized the People's Republic of China in 1979, cutting off diplomatic ties with Taiwan.<sup>179</sup> As recently as September 1990, Saudi Arabia announced its intention to sever diplomatic relations with Taiwan and normalize relations with Mainland China.<sup>180</sup> Such limited recognition frees Taiwan from having to answer to any type of international tribunal. Even if Taiwan wanted to join an international body, the chances of it being able to do so are slim.

Taiwan is currently seeking to enter GATT.<sup>181</sup> Certainly, from a trade standpoint, Taiwan should be involved in that agreement. Taiwan is currently the thirteenth largest trading entity in the world,<sup>182</sup> a substantial achievement for an island 150 miles wide

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177. J. CHENG, *DOING BUSINESS IN TAIWAN* 77 (1986).

178. *Id.*

179. J. SPENCE, *THE SEARCH FOR MODERN CHINA* 667 (1990).

180. *Asian Wall St. J.*, July 23, 1990, at 19.

181. *See* Central News Agency, Dec. 19, 1989.

182. Central News Agency, Mar. 6, 1990.

and 200 miles long. Nevertheless, China has taken early action to block Taiwan's entry into GATT,<sup>183</sup> and the reluctance of most of the member countries to risk offending China means that Taiwan will most likely fail in its bid for membership.<sup>184</sup> It is not surprising that, with such political hostility (or at a minimum ambivalence) directed against Taiwan, that its government and people do not have a great deal of resolve for adherence to international standards.

*B. Lack of Understanding of the Concept of Intellectual Property*

In addition to the apparent apathy toward international intellectual property concerns, it is also suggested that there is no concept of intellectual property in Chinese tradition and therefore lawyers, judges, and even government officials in Taiwan do not understand the concept.<sup>185</sup> It is argued that those seeking improved protection should be patient and let the Taiwanese develop and understand that they are still in a state of development.<sup>186</sup> This theory has one significant flaw. Intellectual property law in Taiwan has not just come into existence within the last few decades. Taiwan's patent law was first promulgated in 1944.<sup>187</sup> Trademark regulation was first initiated in 1931,<sup>188</sup> and a copyright law was first enacted in 1928.<sup>189</sup> While these laws do not have the century of history that the Berne Convention does, or the two hundred year old allowance for intellectual property protection of the U.S. Constitution,<sup>190</sup> there has been time for, at a minimum, the legal community of Taiwan to become accustomed to the concept.

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183. 7 Int'l Trade Rep. (BNA) No. 4, at 112 (Jan. 24, 1990).

184. Financial Times, Oct. 10, 1990, at 38.

185. Reuters, May 4, 1990, BC Cycle.

186. Pagell, *International Information Copyright Issues: A Personal View*, 13 DATABASE 5 (1990).

187. J. CHENG, *DOING BUSINESS IN TAIWAN* 77 (1986).

188. *Id.* at 97.

189. *Id.* at 117.

190. U.S. CONST. art. I, § 8 (enumerating Congress' power to grant patents and copyrights).

Taiwan has no real desire to protect intellectual property rights. Why then should they have to conform to international standards? What right does the world have to expect Taiwan's compliance with those standards?

VII. WHY SHOULD TAIWAN HAVE TO COMPLY WITH  
INTERNATIONAL STANDARDS, AND WHAT RIGHT  
DOES THE WORLD HAVE TO ATTEMPT TO  
FORCE TAIWAN'S COMPLIANCE?

*A. Does the International Community Have a Right to Expect  
Taiwan to Conform to International Intellectual Property  
Protection Standards?*

To answer this question it is necessary to understand what criterion determines when an entity should be expected to submit to international law. Subjects of international law are those entities capable of possessing international rights and duties.<sup>191</sup> It is by virtue of their sovereign status that states are entitled to those rights and duties.<sup>192</sup> International laws are therefore concerned with the reciprocal rights and duties of states.<sup>193</sup>

*1. Theories of Statehood*

Whether an entity is, or should be treated as a state has given rise to two theories or standards for determining statehood. The first is that recognition by other states is what confers international personality on an entity purporting to be a state. In other words, it is the act of recognition by other nations that determines whether an entity is a state, and confers the rights, and imposes the obligations of international law on a nation.<sup>194</sup>

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191. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 228 (2d ed. 1987).

192. M. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 123 (1988).

193. *Id.* at 121.

194. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 231 (2d ed. 1987).



The opposing position is that the state is defined by the facts and whether those facts meet the criteria of statehood as laid out in international law.<sup>195</sup> International law only provides crude criterion by which to determine whether an entity should be regarded as a state. That model states that the entity must (1) possess a defined territory; (2) have a politically organized society and effective government; and (3) be able and willing to assume the obligations of an independent state under international law.<sup>196</sup> Under this theory, however, existence as an international "person" with the rights and obligations of a state is derived from the extent of its international recognition.<sup>197</sup>

Essentially then, under either theory, it is recognition that gives a state its legitimacy and thereby its rights and obligations under international law. How then does Taiwan fit into these standards for measuring the "statehood" of an entity?

## *2. Application of These Theories of Statehood to Taiwan*

Immediately following the victory of the communist revolution, Chiang Kai-Shek fled with the Nationalist Chinese Government to Taiwan. At that time, Taiwan was recognized as the legitimate government of China. The Nationalists were one of the four nations which met at Dumbarton Oaks in 1944 to discuss the basic configuration of the United Nations.<sup>198</sup> As one of the founding nations, China, under the Nationalists, held one of the permanent seats in the U.N. Security Council. After the victory of the Communists in the revolution in China, the willingness to recognize the Nationalists as the official government of China began to erode. The Soviet boycott of the Security Council, resulting in the vote to use U.N. forces in Korea, was in protest of the occupation of the Chinese seat by Taiwan rather than the

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195. *Id.*

196. N. PADEFORD & G. LINCOLN, *THE DYNAMICS OF INTERNATIONAL POLITICS* 480 (1964).

197. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 231 (2d ed. 1987).

198. M. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 145 (1988).

Communist Chinese.<sup>199</sup> In 1971, the Republic of China was removed from the United Nations, and the People's Republic of China took the Chinese seat in the both the Security Council and the General Assembly.<sup>200</sup> Taiwan was officially viewed by the U.N. as a province of China, and therefore was not permitted independent recognition in any international body.

Taiwan's legitimacy as a political entity was fading. In January of 1979, the United States officially recognized the People's Republic of China<sup>201</sup> as the sole legal government of China and acknowledged the Chinese position that there is but one China and Taiwan is part of that China.<sup>202</sup>

Taiwan's international recognition as a legitimate political entity has dissolved to the point of near non-existence. In 1990, the last of the major countries of the world that still recognized Taiwan, Saudi Arabia officially withdrew its recognition of Taiwan.<sup>203</sup> This leaves only twenty-seven small African and Latin American countries still recognizing Taiwan.

Despite the fact that Taiwan meets the criteria of a state as defined by international law, the international community refuses to recognize it as such. Taiwan possesses a defined territory, an organized society and an effective government. Furthermore, Taiwan's desire to join the GATT evidences a willingness to assume the obligations of an independent state. It must be noted, however, that despite this conformity with standard international criterion there are two significant obstacles to international recognition. The first is that Taiwan refuses to accept any standard of recognition other than that they are "China." The second is that the People's Republic of China refuses to accept any suggestion by the world that Taiwan should be recognized as an independent entity. Even if the government in Taiwan would concede that the entirety of their nation consisted only of the island of Taiwan, the

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199. F. PEARSON & J. ROCHESTER, *INTERNATIONAL RELATIONS: THE GLOBAL CONDITION IN THE LATE TWENTIETH CENTURY* 344 (1984).

200. *Id.* at 335.

201. *Id.* at 125.

202. 19 *INTERNATIONAL LEGAL MATERIALS* 1491 (1980).

203. *Asian Wall St. J.*, July 23, 1990, at 19.

People's Republic of China (PRC) would still claim that Taiwan is merely a province of their nation. To the PRC, it would be similar to the nations of the world recognizing California as an independent nation while the United States still officially considered it a state of the Union.

Under the two theories of statehood, it is recognition that places international rights and obligations. Taiwan is not seen as a legitimate political entity by the vast majority of the world. Technically Taiwan has no international rights and, therefore, no international obligations. Taiwan's position as a political "non-entity" creates a situation where one of the largest traders in the global market is not subject to any international tribunal, and is not legitimately subject to scrutiny by the international community.

How then can the world expect the government in Taiwan to conform to the expectations of that community in any form; especially in an area of expectations that they have no real interest in themselves, like intellectual property protection? It would be a supreme act of arrogance for the international community to expect Taiwan to conform with *any* "international standard" since the world refuses to give them legitimacy. How can anyone expect Taiwan to conform to these internationally accepted standards?

#### *B. Why Taiwan Should Have to Conform to International Standards*

Due to the minimal level of Taiwan's international recognition, and despite its strength in the international trade arena, nations of the world have managed to negotiate with Taiwan bilaterally on trade issues without officially recognizing the government of Taiwan and without upsetting the government of the PRC. As an example, cultural, commercial, and other unofficial agreements between the U.S. and Taiwan are administered on a nongovernmental basis by the American Institute on Taiwan (AIT), a nonprofit corporation.<sup>204</sup> Independent nations and corporations dealing with Taiwan have a legitimate concern that goods

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204. 19 INTERNATIONAL LEGAL MATERIALS 1491 (1980).

deserving of intellectual property protection cannot be imported into Taiwan without significant risk of having the item pirated. Even the AIT admits in their publication on doing business in Taiwan that there is a significant danger that ideas and designs will be stolen.<sup>205</sup>

It is in bilateral trade negotiations and corporate/national trade agreements that the point must be made to Taiwan that real improvements must be made in protection of intellectual property. Taiwan must understand that as significant participants in the international market it has certain obligations that are derived from the right to participate in that market. That bilateral trade interaction with Taiwan gives other countries in the world, along with any trading corporations, the right to expect protection for their intellectual property in Taiwan.

#### VIII. HOW GOVERNMENTS CAN OBTAIN TAIWAN'S COMPLIANCE WITH INTERNATIONAL STANDARDS OF INTELLECTUAL PROPERTY PROTECTION

Those nations trading with Taiwan on a significant level wield the greatest power over the government in Taiwan. Taiwan is entirely dependant on trade, specifically export, for its economic survival. It is use of this power that may cause the Taiwanese to conform to acceptable standards of intellectual property protection. For purposes of illustration, the United States will be used as a case study, as the U.S. is Taiwan's largest trading partner.<sup>206</sup> There are two significant actions that nations with trade agreements with Taiwan can take to obtain acquiescence to international protection standards.

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205. R. GRIFFITHS & AMERICAN INSTITUTE IN TAIWAN, KUAN-HSI: THE KEY TO AMERICAN BUSINESS SUCCESS IN TAIWAN 28 (1989).

206. Reuters, Feb. 12, 1991, BC Cycle. See Reuter Library Report, BC Cycle, Mar. 15, 1991; N.Y. Times Nov. 9, 1990, § D, at 10, col. 1; 7 Cincinnati Bus. Courier, May 21, 1990, at § 1, 1.

*A. Strict Use of Trade Sanctions*

Nations can enforce international protection standards by instituting strict trade sanctions against Taiwan. In the United States, under the "Super 301" provision of the U.S. Omnibus Trade and Competitiveness Act of 1988,<sup>207</sup> the USTR is required to identify by May 30 of each year those countries it finds to be "priority countries." These priority countries are defined as those trading partners of the United States maintaining significant trade barriers against the U.S.<sup>208</sup> The "Super 301" provision is the most powerful trade remedy available under U.S. law.<sup>209</sup> One of the barriers to trade which is considered by the USTR is the adequacy of intellectual property protection of the trading partner.

Based on the inadequacy of Taiwan's intellectual property protection, the country was placed on the "Priority Watch List" in May of 1989 for U.S. monitoring of their intellectual property rights protection.<sup>210</sup> Taiwan only avoided full 301 sanctions by sending top officials to Washington to lobby for avoidance of the trade sanctions.<sup>211</sup> As a result of that act by the USTR, bilateral negotiations between the U.S. and Taiwan took place in June and July of 1989. During the course of those talks, Taiwan promised to set up protection for intellectual property

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207. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 301, 102 Stat. 1107, 1164 (1988). See generally Palmetier, *Section 310: The Privatization of Retaliation*, 3 TRANSNAT'L LAW. 101 (1990) (discussing the development and intricacies of use of § 301); Wilson, *A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries*, 1 TRANSNAT'L LAW. 421, 423-34 (1988) (discussing use of Super 301 to promote improved intellectual property protection).

208. 6 Int'l Trade Rep. (BNA) No. 14, at 412 (Apr. 5, 1989).

209. *Id.* The "Super 301 Provision" is actually section 310 of the 1988 Omnibus Trade and Competitiveness Act. *Id.* See Palmetier, *Section 310: The Privatization of Retaliation*, 3 TRANSNAT'L LAW. 101 (1990). See also Wilson, *A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries*, 1 TRANSNAT'L LAW. 421, 423-34 (1988) (discussing use of Super 301 to promote improved intellectual property protection).

210. Central News Agency, Sept. 28, 1989. Under the Priority Watch for intellectual property violations, if the countries listed are judged as failing to take steps in cracking down on violations, the USTR will initiate negotiations with the countries and determine whether to impose trade retaliations. *Id.*

211. Reuters, Apr. 18, 1990, BC Cycle.

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rights.<sup>212</sup> U.S. and Taiwan officials began to map out an agreement to enforce protection of copyrighted U.S. works and patents.<sup>213</sup>

Taiwan was to prepare amendments to its copyright laws, pursuant to the July 1989 agreement, that would give U.S. works the same level of protection provided in the Berne Convention.<sup>214</sup> The deadline for completion of the copyright amendments was June 1990. At that time, the proposed changes to the patent and trademark laws were to be in the planning stages.<sup>215</sup> Taiwan's efforts were reviewed in September 1989.<sup>216</sup> In November, the USTR downgraded Taiwan from the "Priority Watch List" to the "Watch List."<sup>217</sup> The USTR said Taiwan was downgraded because of better enforcement of existing laws and the July copyright accord.<sup>218</sup>

Yet, in January of 1990, there was actually a reduction in copyright protection<sup>219</sup> while copyright infringement increased.<sup>220</sup> The USTR was concerned about the lax enforcement of the intellectual property rights agreements.<sup>221</sup> An assistant USTR spokesperson, expressed her frustration by stating that "Taiwan may be placing itself at a disadvantage" in Washington's next trade review, referring to the 301 sanctions.<sup>222</sup> Under that threat of retaliation, Taiwan reversed course once again and promised to increase its protection of intellectual property rights.<sup>223</sup> After further negotiations in March the U.S. and Taiwan failed to reach a compromise on the U.S. demands for intellectual

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212. Central News Agency, Sept. 28, 1989.

213. Asian Wall St. J., June 26, 1989, at 22.

214. 7 Int'l Trade Rep. (BNA) No. 23, at 811 (June 6, 1990).

215. 6 Int'l Trade Rep. (BNA) No. 27, at 878 (July 5, 1989).

216. Central News Agency, Sept. 28, 1989.

217. 11 E. ASIAN EXECUTIVE REP. 7 (1989). The difference between the Priority List, and the Regular List, is that the Regular List does not carry the threat of investigation or the possibility of trade retaliation. *Id.*

218. *Id.*

219. ECONOMIST, Jan. 13, 1990 at 68.

220. 12 INT'L LAW. NEWSL. 19 (Jan./Feb. 1990).

221. ECONOMIST, Jan. 13, 1990 at 68.

222. *Id.* The spokesperson was Assistant USTR Sandra Kristoff, who had been the U.S. negotiator with Taiwan. *Id.*

223. Financial Times, Feb. 26, 1990, at § I, 17.

property protection.<sup>224</sup> Taiwan newspapers reported that Taiwan would be placed on the 301 list leading to retaliatory trade sanctions.<sup>225</sup> Taiwan then made a last appeal, claiming a need to explain its situation, and promising to make more intellectual property law reforms.<sup>226</sup>

These last appeals succeeded, and the USTR decided not to move any countries up to actual 301 sanctions or even to the Priority Watch List. The USTR determined that Taiwan should remain on the Watch List and not be upgraded to the Priority Watch List simply because there was recognized improvement of intellectual property protection in Taiwan.<sup>227</sup> The claim that there was improvement in Taiwan, following on the heels of the impasse in the March negotiations, left many in the industries dependent on intellectual property confused.<sup>228</sup> According to the USTR's statement, the improvements included measures to bring Taiwan's copyright law up to international standards.<sup>229</sup> Taiwan's Vice Economic Minister voiced little surprise at avoidance of the upgrade because, "[Taiwan] made last ditch concessions."<sup>230</sup>

U.S. copyright industries were highly critical of the decision not to upgrade. The industry charged that not having moved any countries to the Priority Watch List sent entirely the wrong message. Some authorities on intellectual property in the United States believed that the U.S. needed an aggressive stance on intellectual property protection, and that by not placing any countries on the Priority Watch List the totally erroneous impression that there were not any real problems in the area of

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224. N.Y. Times, Apr. 19, 1990, § D, at 24, col. 5.

225. *Id.*

226. Reuter Library Report, Apr. 18, 1990, BC Cycle.

227. Central News Agency, Apr. 28, 1990.

228. See *Special 301: Washington Aims at GATT for Intellectual Property Protection*, Bus. Asia, June 11, 1990. See also Wilson, *A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries*, 1 TRANSNAT'L LAW. 421 (1988); Palmetier, *Section 310: The Privatization of Retaliation*, 3 TRANSNAT'L LAW. 101 (1990).

229. Central News Agency, Apr. 28, 1990.

230. Reuter Business Rep., Apr. 30, 1990, BC Cycle.

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intellectual property theft was conveyed.<sup>231</sup> The copyright industry argued that such complete lack of action threatened the credibility of the U.S. trade policy.<sup>232</sup> U.S. manufacturing firm representatives stated that “[i]f you have an egregious offender and you don’t take any action, the credibility of the 301 process will be undermined.”<sup>233</sup> The general counsel of the International Intellectual Property Alliance stated that Taiwan should have been at least elevated to the Priority Watch List after its neglect in implementing the improvements agreed upon in 1989. “Enforcement in the copyright area has fallen off since Taiwan pledged to improve its laws. . .”<sup>234</sup>

In September 1990, the U.S. again met in bilateral negotiation with Taiwanese officials to discuss unacceptable points in the draft copyright law, and to discover why the draft copyright law, had not been instituted.<sup>235</sup> Carla Hills, the United States Trade Representative, had noted that Taiwan had committed to improve levels of intellectual property protection but she said that it was unclear whether their commitments would translate into new laws.<sup>236</sup>

In the summer of 1990, the USTR ceased emphasizing section 310 of the 1988 Omnibus and Trade Competitiveness Act, and shifted its emphasis to the creation of intellectual property protection under the GATT. The USTR claimed that all countries would be eligible for priority status and therefore the multilateral framework of the GATT was the more important option.<sup>237</sup> Many

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231. *Special 301: Washington Aims at GATT for Intellectual Property Protection*, Bus. Asia, June 11, 1990. The claim was made by James Bikoff, a lawyer specializing in intellectual property protection. *Id.*

232. 7 Int’l Trade Rep. (BNA) No. 18, at 616 (May 2, 1990).

233. *Special 301: Washington Aims at GATT for Intellectual Property Protection*, Bus. Asia, June 11, 1990. See also Wilson, *A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries*, 1 TRANSNAT’L LAW. 421 (1988); Palmetier, *Section 310: The Privatization of Retaliation*, 3 TRANSNAT’L LAW. 101 (1990).

234. 7 Int’l Trade Rep. (BNA) No. 18, at 616 (May 2, 1990).

235. Telephone interview with Laura Anderson, assistant United States Trade Representative who handled the U.S./Taiwan intellectual property protection negotiations which took place Sept. 25-27, 1990 (Nov. 30, 1990).

236. Central News Agency, Sept. 25, 1990.

237. *Special 301: Washington Aims at GATT for Intellectual Property Protection*, Bus. Asia, June 11, 1990.



believed that putting all of the United States intellectual property protection reliance in the GATT proposal was a significant mistake.<sup>238</sup> Certainly as it pertains to Taiwan, such a shift in emphasis is a grave error due to Taiwan's absence from that agreement, and that it is the threat of 301 sanctions that have prompted the few concessions from Taiwan that there have been.

Taiwan understands the USTR's hesitance to use sanctions all too well.<sup>239</sup> In the case of Taiwan, where the U.S. accounts for two-fifths of Taiwan's exports,<sup>240</sup> the U.S. market would be a powerful weapon if used against Taiwan. The fluctuation in protection in Taiwan is based on the time of year and relative nearness of the Super 301 determinations. This is an indication that Taiwan is putting on its feigned concern for intellectual property protection to hide its false heart in its continuing attempts to avoid significant trade sanctions.

#### *B. Advocate Inclusion of Taiwan in the GATT*

Another option for governments and trading partners concerned with protection of intellectual property is to push for inclusion of Taiwan in the GATT. This could help alleviate some of Taiwan's aversion for international conformity. Taiwan's membership in the GATT would also give the rest of the world a forum into which they could bring actions against Taiwan should Taiwan fail to improve protection for intellectual property rights. Inclusion of Taiwan in the GATT would give those affected by Taiwan's implicit promotion of intellectual property theft a means of stripping away the mask and laying bare Taiwan's fraudulent heart.

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238. *Id.*

239. Financial Times, Feb. 26, 1990, at § I, 17. Carla Hills stated that she was ready to use the U.S. market as a weapon. She said "...[s]ometimes you have to take the unhappy solution to ultimately achieve your aim. I hope my trading partners understand. That's not my preferred course of action." *Id.* Considering the continuing intransigence of Taiwan on the intellectual property issue, the U.S. nevertheless appears unwilling to utilize the U.S. market as a weapon.

240. ECONOMIST, Jan. 13, 1990 at 68.

*C. Governmental Means of Obtaining Increased Intellectual Property Protection in Taiwan*

Taiwan has become a master "con artist." When Taiwan is threatened with trade sanctions for inadequate protection promises are made that protection will improve. Once the risk of sanctions is gone for the moment, the promises are forgotten. Taiwan is managing to avoid the trade sanctions of their largest trading partner, and yet not institute the intellectual property protection improvements that the country has promised to enact, (and are apparently so desirous to avoid). The false face of concern has worked well to deceive and influence the United States.

Taiwan's government is clearly afraid of trade sanctions. Apparently, the only means of assuring that Taiwan will act to improve protection of intellectual property is to institute such sanctions. Continued threats of sanctions alone have not worked. Trade is the life of the Taiwanese economy,<sup>241</sup> and a source of income that Taiwan cannot afford to lose. Therefore, if governments with trade agreements with Taiwan want to insure improved intellectual property protection, they should institute the sanctions that they threaten to use if protection is not increased.<sup>242</sup> While the institution of trade sanctions is certain to be the best means of insuring improvement of intellectual property protection, governments need not fight this battle for increased protection alone.

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241. See generally *supra* note 35.

242. But see Comment, *The Next "Little Tiger": Manufacturing and Intellectual Property Rights in Thailand*, 3 TRANSNAT'L LAW. 275, 333-35 (1990) (discussing the view that some serious risks are involved in the full use of the "Super 301" powers and sanctions).

IX. INDIVIDUAL AVENUES TO AID IN CONVINCING  
TAIWAN TO COMPLY WITH INTERNATIONAL  
STANDARDS

*A. Withhold Investments in Taiwan*

Individual companies concerned with protection of intellectual property can independently exercise their economic clout to convey their dissatisfaction with the lack of protection for intellectual property in Taiwan. Taiwanese officials are looking for companies to invest in Taiwan.<sup>243</sup> They claim that opportunities now exist for companies to market anything from high tech consumer goods to agricultural goods.<sup>244</sup> Refusal by multinational companies to invest in Taiwan until protection is improved could have very positive affects. The current downturns in the Taiwanese economy<sup>245</sup> make it essential that Taiwan keep as many businesses within the country as possible.

For example, Dialog, a computer information company takes this type of approach to all countries known to violate intellectual property laws.<sup>246</sup> Dialog has users in over 100 countries, but sales are refused to countries known to violate copyright laws. The company internally monitors purchases and licensing and refuses to deal with pirated copies. Dialog does this "for the benefit of themselves and their database suppliers."<sup>247</sup>

Businesses with interests in protecting intellectual property which have been or were considering doing business with Taiwan should hold back on their investing in Taiwan if the laws continue under the status quo. By investing, not only is there inferential support for the poor state of the law, but there is also a significant risk that one's own intellectual property will be stolen and duplicated en masse.

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243. 6 Int'l Trade Rep. (BNA) No. 37, at 1182 (Sept. 20, 1989).

244. *Id.*

245. *Asian Wall St. J.*, Sept. 10, 1990, at 1 & 24.

246. Pagell, *International Information Copyright Issues: A Personal View*, 13 DATABASE 5 (1990).

247. *Id.*

*B. Independent Investigations and Raids*

Another option for those that have property pirated in Taiwan, would be to conduct their own investigations and raids. In April, the Business Software Alliance<sup>248</sup> staged a raid against companies suspected of using stolen software programs.<sup>249</sup> The raids and subsequent monetary settlements (without litigation) have had some deterrent effect.<sup>250</sup> Companies need to form an anti-piracy coalition composed of similar corporations doing business in Taiwan and follow the example of the Business Software Alliance.

*C. Industry Education Associations*

Education is also important to increase general public understanding of the problem and to change the public's view to support intellectual property laws. Some organizations have already set up their own educational programs dealing with intellectual property theft issues.<sup>251</sup> The United States Information Association works closely with the American Association of Publishers in international copyright adherence and in raising understanding and concern over issues of piracy.<sup>252</sup> Grants have been given by various industries, businesses, and intellectual property organizations for educational seminars on intellectual property protection in various countries.<sup>253</sup>

Understanding the laws and their purpose is necessary for the law to be seen as legitimate.<sup>254</sup> Thus, educational programs would go far in raising the level of perceived legitimacy of improved intellectual property laws in Taiwan.

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248. See *supra* note 25 and accompanying text (explaining the Business Software Alliance and listing which companies are members of the Alliance).

249. Chicago Tribune, June 18, 1990, Bus. Sec., at 7, Zone N.

250. 7 Int'l Trade Rep. (BNA) No. 23, at 811 (June 6, 1990).

251. Pagell, *International Information Copyright Issues: A Personal View*, 13 DATABASE 5 (1990).

252. *Id.*

253. See generally *id.*

254. See generally Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 705-13 (1988).

*D. Contractual Agreements*

Another avenue to aid in education is to include anti-piracy clauses in all contracts with Taiwanese businesses. This means of legal recourse acts both as an educational source as well as a remedy for intellectual property violations. It is possible to decrease risk of loss, and increase understanding of the importance and purpose of intellectual property by including protection of intellectual property in the contracts that they enter into in countries where their intellectual property is at risk.<sup>255</sup> It cannot be assumed that Taiwanese organizations which enter into contracts with multinational corporations understand the degree of compliance with intellectual property protection that is expected of them.<sup>256</sup>

*E. Gain Access to the Taiwanese Court System*

Preparation, raids, and contracting reforms will be useless without ready access to the courts. More work must be done to examine ways in which access to the courts may be more easily obtained.<sup>257</sup>

*F. Keep Up To Date on Developments in Intellectual Property Protection if Dealing With Taiwan*

Intellectual property protection laws in Taiwan are in a state of extreme uncertainty. The laws can easily change from month to month. The American Bar Association's International Business Law Committee of the Business Law Section held a working meeting on

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255. Pagell, *International Information Copyright Issues: A Personal View*, 13 DATABASE 5 (1990). Chemical Abstracts and the American Chemical Society use their contracts to aid in protecting themselves from intellectual property theft. *Id.*

256. *Id.*

257. See Hickman, *Protecting Intellectual Property in Taiwan -- Non-Recognized United States Corporations and their Treaty Right of Access to Courts*, 60 WASH. L. REV. 117 (1984). Professor Hickman asserts that access to the courts in Taiwan is guaranteed by the U.S.-R.O.C. Friendship Agreement. *Id.*

August 6, 1990.<sup>258</sup> Based on information received in that meeting, the ABA suggests that for the general practitioner, when a transaction involves Taiwan, recent developments should be reviewed to determine the current state of intellectual property protection.<sup>259</sup> If business is being conducted in Taiwan, legal practitioners recommend that no advertising of products should be done before registering patents in Taiwan; otherwise the patent will be lost by the time of registration.<sup>260</sup>

## X. CONCLUSION

In this age of expanding technological growth, protection of intellectual property is arguably the most crucial aspect of economic development and international trade. Every product in the flow of international trade is dependent in some way on intellectual property protection. Every time a good enters the stream of international commerce it becomes an open target for intellectual property pirates. It is therefore essential to use any and all means available to guard against these thieves.

The international community refuses to recognize Taiwan as a sovereign. Thus, the international community does not have the right to demand Taiwan's compliance with international intellectual property protection standards. Such insistence would require Taiwan to assume the obligations of those nations which are internationally recognized, but would leave Taiwan unable to obtain the rights associated with recognition.

Although the international community has no right to demand that Taiwan adopt adequate intellectual property protection laws, Taiwan's trading partners have the right to expect fair trade practices from the thirteenth largest trading entity in the world. Those expectations are not being met, and the task of obtaining

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258. See 7 Int'l Trade Rep. (BNA) No. 34, at 1311 (Aug. 22, 1990) (outlining the issues of intellectual property discussed at ABA meetings).

259. See *id.*

260. Chicago Tribune, June 18, 1990, Bus. Sec., at 7, Zone N. (quoting Laura Young, an attorney with the San Francisco office of Wang and Wang). Ms. Young's advice is to keep the product a secret until the patent is registered and approved. *Id.*

Taiwan's compliance with acceptable levels of intellectual property protection now falls to individuals, corporations, and governments dealing with Taiwan.

Taiwan continues to be one of the greatest sources of intellectual property piracy. The inadequacy and constant vacillation of intellectual property laws in Taiwan is only one aspect of the problem. The hostile attitude of the government and the judiciary toward intellectual property protection also contributes to theft and to the public's refusal to recognize the principle of granting property rights for ideas.

Taiwan cannot continue its current course of throwing scraps of promises to its trading partners and those that seek increased intellectual property protection, while continuing to gorge itself on the stolen ideas of others. It is understandable that Taiwan is hesitant to accept *international* standards, but the negotiations, threats, and supplications which have been tried thus far have not proven to be effective.

It is therefore necessary to take hard-line approaches to reinforce the idea that the fight for increased intellectual property protection will be won by those playing by the rules. The world must not lose, and Taiwan must not be permitted to continue to cheat. Harsh actions such as institution of 301 sanctions by the United States are not the optimum means of obtaining concessions, but Taiwan's intransigence makes last resort options such as trade embargoes justified and necessary.

Trade sanctions, withdrawal of investments, and other such economic actions are now necessary to ensure that Taiwan realizes the importance of intellectual property protection. By placating its trading partners with empty assurances, and creating laws with no intention of enforcing them, Taiwan has brought economic retaliation on itself. By making public statements that the changes in the laws have been adopted merely to placate the United States, the Taiwanese government has achieved its goal; it has rendered these laws ineffective. The time has come to end Taiwan's charade.

Intellectual property theft in Taiwan has caused annual losses of hundreds of millions of dollars. All attempts at negotiating with the Taiwanese government have failed. Businesses have been unable

to effectively find relief in Taiwanese courts. Even independent raids to recover stolen property have proved only marginally successful. None of the means used thus far to improve the situation in Taiwan has had any significant or long term effect.

Nevertheless, the false face of concern over intellectual property which Taiwan puts forth is opaque. If examined closely the false heart of disregard for the concept of intellectual property can be seen beating strong and steady. Achieving protection of intellectual property in Taiwan will require stripping away that mask and curing the diseased heart. If intellectual property is worth protecting, then it is essential to take all steps necessary to remedy the problem. Failure to act to protect those rights will ensure their continued disregard.

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