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1997

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39. *Id.* at 247.

40. Hampel, *supra* note 19, at 575.

41. *Id.* at 247.

42. Levy, *supra* note 3, at 89.

43. See e.g., *Marks v. Leo Feist, Inc.*, 290 F. 959 (2nd Cir. 1923); *Elsmere Music, Inc., v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2nd Cir. 1980).

44. *Marks*, 290 F. Supp. at 959.

45. *Elsmere Music*, 482 F. Supp. at 741.

46. Hampel, *supra* note 19, at 576.

47. *Harper & Roe, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 566 (quoting *Nimmer & Nimmer* § 13.05[A][3], at 13-76).

48. Hampel, *supra* note 19, at 576.

49. *Haberman v. Hustler Magazine Inc.*, 626 F. Supp. 201, 211 (D. Mass. 1986). The court reasoned that those purchasing Hustler magazines are certainly not doing so as a substitute for fine art. *Id.*

50. *Id.*

51. 17 U.S.C.A. § 101 (stating that "the terms 'including' and 'such as' are illustrative and not limitative" to indicate that other factors may be utilized in the fair use doctrine).

52. *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

53. 780 F. Supp. 182 (S.D.N.Y. 1991).

54. *Id.* at 183.

55. *Id.*

56. *Id.* at 183-84.

57. *Id.* at 184.

58. *Id.* at 185.

59. *Id.* at 183 (quoting Exodus, Chapter 20: verse 15).

60. *Id.* at 185 The opinion ended with the court's referral of the matter to the United States Attorney for the Southern District of New York for possible criminal violations. *Id.*

61. *Id.* at 183-84.

62. *Id.* at 184.

63. *Id.* at 183-84.

64. *Id.* at 184.

65. *Id.* The court stated "one would not agree to pay to use the material of another unless there was a valid copyright." *Id.*

66. Pareles, *supra* note 3, at C23. For example, Phil Collins, whose unique drum sounds are frequently sampled, opined that infringement occurs every time a sample is taken of his drum sequences. *Id.*

Battling International Piracy of the Copyright Industries through NAFTA

Donna L. Eng¹

Generally, in the United States, the purpose of copyright law is to divide between permissive and non-permissive uses of "original works of authorship."² The United States Constitution provides that copyright law is designed "[t]o promote the Progress of Science and useful arts."³ Therefore, providing an author with copyright protection of his works gives the author an economic incentive to continue the creative process in which he is involved, produce new creative works, and then distribute those works to the public.⁴

The importance of the copyright industries to the United States economy and the to the overall level of international trade cannot be understated. According to the International Intellectual Property Alliance, the core copyright industries represent a large part of the United States economy as approximately 3.3% of the United States gross domestic product.⁵ For example, America is the largest producer and exporter of movies and television programs in the world, contributing as much as \$3.5 billion annually to the United States trade balance.⁶

In addition, Bill Gates, Chief Executive Officer of Microsoft Corporation, has stated that software is the nation's sixth largest manufacturing business.⁷ The United States software industry provides over fifty billion dollars each year in domestic revenues for international sales and services.⁸ Given the large scale of international trade in the copyright industries, the United States is rightly interested in ensuring that the rights of domestic copyright holders are protected from piracy both domestically and internationally.

To battle the international piracy of copyrighted goods such as computer software, music, and movies, the United States has generally followed two paths. First, as a unilateral measure to stop piracy once it has occurred, the United States, through the United States Trade Representative ("USTR"), has used "Special 301" actions to

put a country suspected of copyright infringement on differing levels of "watch lists" corresponding to the seriousness of the copyright violations; if the infringing action does not cease, the United States may issue trade sanctions to cure the copyright violations.⁹

Second, as a more preventative measure, the United States has joined various multilateral agreements, such as the General Agreement on Tariffs and Trade (Hereinafter "GATT"), the Agreement on the Trade Related Aspects of Intellectual Property ("TRIPs"), and the North American Free Trade Agreement ("NAFTA"). In those contexts, piracy has been defined as "any unauthorized and uncompensated reproduction or use of someone else's creative intellectual achievement."¹⁰ Generally, the goal of such multilateral agreements is to prevent piracy from occurring in the first place by encouraging trade cooperation and harmonization of the nation's respective domestic laws in the realm of intellectual property.

The scope of this paper will cover the United States' attempts to protect its copyright industries of computer software, movies, and music under the auspices of NAFTA. Specifically, coverage will discuss the general scope of copyright protection given to the software, music, and movie industries under NAFTA, and then focus on United States relations with Canada and Mexico under NAFTA.

COPYRIGHT PROTECTION UNDER NAFTA

The United States Congress stated that NAFTA is the "most comprehensive trade agreement ever negotiated [to] create the world's largest integrated market for goods and services."¹¹ NAFTA, signed on November 4, 1993, and effective on January 1, 1994, is intended to cover almost every aspect of trade between the countries of the United States, Mexico, and Canada.¹²

The agreement addresses the international piracy of intellectual property rights, a particularly troublesome barrier to trade.¹³ The Preamble provides that NAFTA is designed to "foster creativity and innovation, and promote trade in goods and ser-

vices that are the subject of intellectual property rights."¹⁴ Generally speaking, NAFTA requires all the Party nations to amend or supplement their existing intellectual property laws.¹⁵ Then, within the next ten years, all North American tariffs will be phased out.¹⁶

THE SCOPE OF NAFTA

In addition to copyright, the intellectual property provisions of NAFTA address such varied topics as encryption of satellite signals, patents, trademarks, and trade secrets.¹⁷ At the most basic level, the United States, Canada, and Mexico have agreed "to provide in its territory to the nationals of another Party adequate and effective protection of and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade."¹⁸

NAFTA provides that while the level of protection under NAFTA is the minimum required, the parties are free to enact more extensive domestic legislation.¹⁹ Similar to the TRIPs agreement, the United States, Canada, and Mexico agree to abide by the Berne Convention, certain parts of the Washington Treaty relating to semiconductor chips, and other non-copyright treaties.²⁰ Additionally, while the United States does not have to comply with the moral rights provisions of Article 6 of the Berne Convention,²¹ Mexico and Canada are still bound by that provision.²² As to neighboring rights, while the TRIPs agreement refers to the Rome Convention for its standard, NAFTA adopts the provisions of the Geneva Convention because neither the United States nor Canada adheres to the Rome Convention.²³

SUBSTANTIVE PROVISIONS OF NAFTA

Many provisions of NAFTA duplicate the same substantive levels of copyright protection currently available under Canadian law and Mexico's new Industrial Property Law.²⁴ The parties to NAFTA are obligated to extend copyright protection to many types of copyrightable works, such as

computer software programs and data compilations.²⁵ NAFTA provides that the copyright is transferable.²⁶ Additionally, NAFTA specifically provides rights to the author regarding importation, first public distribution, and communication to the public.²⁷ For example, the author has the right to authorize or prohibit the commercial rental of computer programs; however, NAFTA qualifies this right to authorize or prohibit commercial rental by providing that "putting the original or a copy of the computer program on the market with the right holder's consent shall not exhaust the rental right."²⁸

Furthermore, NAFTA provides that exceptions to the author's right to prohibit or authorize commercial rental must be "confined to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."²⁹ Finally, NAFTA prohibits translations of copyrighted works "where legitimate needs in that Party's territory for copies or translations of the work could be met by the right holder's voluntary actions but for obstacles created by the Party's measures."³⁰

Regarding musical rights, NAFTA separately accords neighboring rights to sound recordings, including reproduction, importation, and public distribution.³¹ Like the rights of software copyright holders, the music author has the right to ban commercial rental except where otherwise provided in a contract between the recording producer and the author of the work.³² Additionally, the copyright term lasts for fifty years, and as with computer software, the exceptions to the author's sound recording rights are limited to the same special cases.³³

ENFORCEMENT OF NAFTA

NAFTA provides that the domestic law of each Party is required to "permit action to be taken against any infringement . . . including expeditious remedies to prevent infringements and remedies to prevent further infringements."³⁴ The remedies available under NAFTA for copyright infringement are: 1) ordering the infringing

party to stop the infringing activity; 2) ordering the infringing party to pay damages when he knew or should have known that he was engaging in an infringing activity; 3) ordering the infringing party to pay the right holder's expenses, including reasonable attorney fees; and 4) ordering a party to compensate parties who were wrongfully enjoined or restrained in the proceeding, including reasonable attorney's fees.³⁵

One of NAFTA's major achievements is providing for injunctive enforcement of copyright violations.³⁶ NAFTA specifically requires the United States, Canada, and Mexico to authorize their respective judicial authorities to issue injunctions ordering violators to cease the copyright infringement.³⁷ Additionally, NAFTA provides for preliminary injunctions to prevent the entry into commerce of the allegedly infringing goods.³⁸ The NAFTA provision regarding injunctive relief fills a large gap in pre-trial remedies available under Mexican law.³⁹

For enforcement of copyright protection at the borders, NAFTA contains special provisions designed for this unique situation.⁴⁰ For example, NAFTA requires that the Parties adopt procedures allowing copyright holders to request the appropriate authorities impound the allegedly infringing goods at the customs level upon the depositing of a bond or other security.⁴¹

NAFTA requires that all proceedings be fundamentally fair, that decisions be based on the evidence, that appeals be available, and that all judicial procedures include notice and representation by counsel.⁴² Furthermore, like the TRIPs agreement, damages or criminal penalties may be imposed in appropriate cases.⁴³

THE NAFTA IMPLEMENTATION ACT

The NAFTA Implementation Act ("Act"), enacted by the United States in December 1993, contains two special copyright provisions: 1) resurrection of certain movies; and 2) rental rights.⁴⁴ For the resurrection of certain movies, a NAFTA annex provides that the United States is obligated to provide copyright protection to motion pictures produced in either Canada or

Mexico that have been declared to be in the public domain under 17 U.S.C. § 405.⁴⁵ To implement this provision, Congress amended the Copyright Act to include section 104A.⁴⁶

The Act's film resurrection provision provides copyright protection to films that were never properly registered.⁴⁷ Under NAFTA, this copyright protection applies to "any motion picture that is first fixed or published in the territory of a NAFTA country," including the film's constituent elements, such as songs on the movie's sound track.⁴⁸ While one might think that this protection is afforded to all movies first fixed or published in the United States, Mexico, or Canada, because all are NAFTA countries, ironically, the United States is not included within the definition of a NAFTA country under the NAFTA Implementation Act.⁴⁹ Therefore, this protection is not afforded to movies that were first fixed or published within the United States.

In general, to qualify for film resurrection protection, the motion picture or constituent elements must have entered the United States public domain by virtue of a defective copyright notice between the years of January 1, 1978, and March 1, 1989.⁵⁰ The effect of the resurrection of the film is that, even if a curing registration were never undertaken, the motion picture nonetheless benefits from copyright protection for the period that the film would have been protected under United States law had the film been published with proper notice in the first place.⁵¹

To take advantage of the film resurrection provisions, the copyright owner must first file with the United States Copyright Office, within one year of the calendar year 1994, a "statement of intent to have copyright protection restored" under the NAFTA Implementation Act.⁵² Failure to file for protection by January 1, 1995, means that the films will continue to languish in the public domain.⁵³

If an individual was unfortunate enough to press a large number of videotapes of a film that he thought was in the public domain, or a movie theater owner held a gala screening of the movie without paying any licensing fee, the Act provides

these individuals some protection from liability for copyright violation. Specifically, the Act allows domiciliaries or nationals of the United States who made or acquired copies of motion pictures, or their constituent elements, before NAFTA, to sell or distribute the copies or continue showing the movie or other work publicly without being liable for the sale, distribution, or performance for a period of one year following the publication of the resurrected films in the Federal Register.⁵⁴

In addition to film resurrection, the NAFTA Implementation Act also prohibits of sound recording rentals.⁵⁵ Previously, under the Record Rental Amendment of 1984, the prohibition of rentals only lasted a limited time; however, under the NAFTA Implementation Act, the prohibition against record rentals is now permanent.⁵⁶

THE IMPORTANCE OF NAFTA

According to the official view of the United States, NAFTA provides the United States, Canada, and Mexico with the highest level of intellectual property protection than can be found in any other bilateral or multilateral agreement because of the NAFTA provisions regarding semiconductor manufacturing, compulsory licensing, and the availability of injunctive relief.⁵⁷ However, at least one scholar states that the most important feature of NAFTA is that NAFTA elevates the existing level of intellectual property protection to the status of treaty obligation, and ties the performance of these treaty obligations to the receipt of benefits such as reduced tariffs.⁵⁸

The dual aspects of the NAFTA imposed obligation to enforce intellectual property rights, and the inducement mechanisms of treaty benefits as a reward for doing so will ensure that intellectual property rights will be honored among the parties.⁵⁹ Most importantly, the dual aspects of NAFTA should greatly reduce the international piracy of copyright industries.

UNITED STATES-CANADIAN RELATIONS UNDER NAFTA

The relationship between United

States and Canada poses unique problems to the copyright industries of the United States due to Canada's traditionally protectionist treatment afforded the "cultural industries" of recording, software, and films. Historically speaking, Canada has singled out the cultural industries for special treatment as far back as 1922 in order to keep Canadian culture alive, and to prevent the Americanization of Canadian culture, and the loss of culturally valuable domestic industries.⁶⁰ Because Canada is the United States' largest trading partner,⁶¹ the significance of this Cultural Industries Exemption cannot be overstated.

NAFTA embodies the concept of "national treatment," thereby requiring the Parties to treat the businesses of the other Parties as they would treat their own businesses.⁶² NAFTA specifically requires the application of national treatment principles to intellectual property.⁶³ However, there is one major exception to this requirement of national treatment: the Canadian cultural industries exemption ("CIE").⁶⁴

The CIE, carried over from the United States-Canada Free Trade Agreement ("FTA"), permits Canada to deny national treatment to the "cultural industries," and applies to: 1) the sale of books; 2) the production, sale, and distribution of film or video recordings; and 3) the publishing industry.⁶⁵ NAFTA effectively allows Canada to discriminate against almost every copyright industry of the United States.⁶⁶ Also, due to the Canadian CIE in NAFTA, the United States cultural industries are left without the benefit of national treatment in their biggest export market.⁶⁷ However, the United States did reserve the right, under NAFTA, to retaliate against Canada should Canada discriminate against the copyright industries.⁶⁸

Unfortunately, the United States copyright industries have no choice but to accept that the CIE is a part of NAFTA. However, United States intellectual property rights need not go unprotected. For example, the United States cultural industries have argued that the Special 301 actions under the Trade and Tariff Act of 1974 should be used more often as a safeguard.⁶⁹

Additionally, the Recording Industry

Association of America has stated that in response to the CIE under NAFTA, it is ready to take any necessary actions through the USTR Special 301 actions.⁷⁰

Finally, one scholar notes that the possibility of mirror legislation by the United States should not be forgotten, nor should the possibility of legislation limiting the level of Canadian investment in U.S. cultural industries.⁷¹ But perhaps the most dangerous aspect of the CIE's presence in NAFTA is that the Canadian CIE could set an example for other nations to take the same type of protectionist measures against the United States in future trade negotiations concerning the copyright industries.⁷²

MEXICAN-UNITED STATES RELATIONS UNDER NAFTA

The United States has often taken unilateral measures against various countries to enforce copyright protection abroad.⁷³ For example, during the late 1980's, Mexico was placed on a "priority watch list" under Special 301, and the United States only removed Mexico from the list in 1990 after Mexico promised to improve its intellectual property laws.⁷⁴ This action taken by the United States, in combination with Mexico's desire to join NAFTA, has been credited with Mexico's extensive intellectual property reforms undertaken in 1991.⁷⁵

Mexico's Law for the Promotion and Protection of Industrial Property ("Industrial Property Law"), enacted in 1991, was a prerequisite to the United States ratification of NAFTA.⁷⁶ Before enacting the Industrial Property Law, Mexico had been identified as one of the seven largest pirating countries, and one of the countries with the least effective intellectual property protection.⁷⁷ However, Mexico's new law has been reported as a significant strengthening of intellectual property protection, and has been cited as a "milestone" by the World Intellectual Property Organization (WIPO) as a "model for other developing countries struggling to rewrite their own laws to lure investment and technology."⁷⁸

Under the changes in Mexican law, copyright protection has been specifically extended to computer software and sound

recordings for the first time in history.⁷⁹ The amendments to the Mexican copyright law also now give owners the exclusive rights to reproduction and distribution for a fifty year term, and provide exclusive rental rights for authors as well.⁸⁰ The new Mexican law provides stronger criminal and civil penalties for copyright infringement.⁸¹ Moreover, software piracy has expressly been made illegal.⁸²

One should note that while the Mexican intellectual property reforms have come a long way, there are still problems that remain. For example, the new law lacks protection for layout designs used in semiconductor manufacturing, and satellite encrypted programming to prevent its interception and distribution.⁸³ In addition, civil pre-trial enforcement remedies such as injunctions are not traditionally recognized under Mexican civil law, thereby hampering the rights of aggrieved copyright holders.⁸⁴ Additionally, the relatively lengthy judicial process of Mexico, combined with the traditionally small damage awards given, may have the effect of discouraging aggressive private enforcement of intellectual property rights.⁸⁵ Due to the problems in civil enforcement of intellectual property rights in Mexico, there has been an increased reliance on criminal penalties for copyright infringement. Unfortunately, while the criminal penalties may be able to halt the infringing actions, the copyright holder remains uncompensated for his losses.⁸⁶

Nevertheless, while piracy of copyrighted goods continues to be a problem in Mexico, there is a promising trend of the enforcement of copyright laws, and greater sales of copyrights goods such as software.⁸⁸ Therefore, overall, Mexico and its strengthened intellectual property laws serve as an important illustration of how trade benefits can be linked with the enforcement of intellectual property rights, as has been done under the NAFTA framework.⁸⁸ Therefore, one can hope that NAFTA will successfully decrease the problem of international piracy of copyrighted goods by Mexico.

CONCLUSION

In conclusion, the United States has

long had to battle the problem of international piracy of its copyrighted goods, in part because it is one of the world's leading exporters of such goods. NAFTA is an important framework for combatting international piracy by facilitating trade with the United States nearest neighbors, Canada and Mexico. Hopefully, NAFTA will have the effect of curbing, if not totally preventing, the international piracy of the United States copyright industries of computer software, music, and movies.

ENDNOTES

1. Loyola University Law School (J.D. 1997). The author is currently employed as an Assistant State Attorney in Fort Lauderdale, Florida.

2. Nicholas E. Sciorra, *Note: Self Help & Contributory Infringement: The Law and Legal Thought Behind A Little "Black Box,"* 11 CARDOZO ARTS & ENT. L.J. 905, 905 (1993), citing 17 U.S.C. § 102(a) (1988).

3. *Id.* at 905, citing U.S. CONST. art I, sec. 8, cl. 8.

4. *Id.* at 905. Domestically speaking, the Copyright Act of 1976 provides that copyright owners have the exclusive right to reproduce, distribute, perform, display, recast, transform, or to otherwise authorize such uses. *Id.* at 905, citing 17 U.S.C. § 106 (1988 & Supp. II 1990).

5. Hale E. Hedley, *Canadian Cultural Policy and the NAFTA: Problems Facing the U.S. Copyright Industries*, 28 GEO. WASH. J. INT'L. L. & ECON. 655, 676 (1995), citing International Federation of the Phonographic Industry, *World Sales Figures 1992*.

6. Sciorra, *supra* note 2, at 906, n.11, citing Motion Picture Anti Piracy Act: Hearings on S. 1096 before the Senate Subcommittee on Patents, Copyrights, and Trademarks, 102d Cong., 1st Sess. (1991).

7. Amy R. Edge, *Preventing Software Piracy Through Regional Trade Agreements: The Mexican Example*, 20 N.C.J. INT'L. L. & COM. REG. 175, 175 (Fall 1994) citing Bill Gates, "Protection From Pirates," *Wash. Post*, Oct. 18, 1993 at A19.

8. Himanshu S. Amin, *The Lack of Protection Afforded Software Under the Current Intellectual Property Laws*, 43 CLEV. ST. L. REV. 19, 19 (1995). It has been estimated that seventy-five percent of the prepackaged software sold internationally is manufactured in the United States. *Id.* at 19-20. International piracy of computer software has

reached such epidemic proportions that for every one legitimate copy of a computer program out in the market, there are anywhere from four to ten pirated copies on the market, and that international piracy of software costs the software industry from \$8 billion to \$10 billion each year. *Id.*

9. Under the 1988 Omnibus Trade and Competitiveness Act, the scope of section 301 of the 1974 Trade Act gives the USTR increased power to identify "priority foreign countries" that fail to provide fair and equitable market opportunities or fail to provide adequate and effective protection of U.S. intellectual property rights. Pub. L. No. 100-418, 301, 102 Stat. 1107, 1164-1168 (1988) (codified at 19 U.S.C. § 2411); 19 U.S.C. § 2242.

10. Frank J. Garcia, *Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U.J. INT'L. L. & POL'Y 817, 818 (Summer 1993); Frank Emmert, *Intellectual Property in the Uruguay Round-Negotiating Strategies in the Western Industrialized Countries*, 1 MICH. J. INT'L. L. 1317, 1318 (1990); J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 775 (1989).

11. David Nimmer, *GATT's Entertainment: Before and NAFTA*, 15 LOY. L.A. ENT. L.J. 133, 160 (1995).

12. Garcia, *supra* note 10, at 817, citing the North American Free Trade Agreement, July, 1992, 31 I.L.M. 997 (1992). See also, Nimmer, *supra* note 11, at 160.

13. Garcia, *supra* note 10, at 817. The United States indicated that its goal for NAFTA regarding intellectual property protection was to address any shortcomings of Mexican and Canadian intellectual property law, and to improve the competitiveness of the copyright industries within all three nations through the enforcement of the nations' respective copyright protection systems. *Id.* at 819, n.15.

14. Hedley, *supra* note 5, at 666, n.63, citing NAFTA art. 1703.

15. Garcia, *supra* note 10, at 824.

16. Nimmer, *supra* note 11, at 160. One should note that GATT approves of regional trade agreements such as NAFTA as deviations from the most favored nation treatment generally required by GATT members. *Id.*

17. *Id.*

18. *Id.*, citing NAFTA arts. §§ 1701(1), 1702.

19. Garcia, *supra* note 10, at 830.

20. Nimmer, *supra* note 11, at 160, citing NAFTA art. § 1701(2)(b) and Paris Convention,

(2)(d).

21. *Id.* at 161-62, citing Edward W. Ploman and L. Clark Hamilton, *Copyright: Intellectual Property in the Information Age*, at 77 (1980).

22. *Id.* at 161, n.264, citing NAFTA Annex 1701.3(2), made applicable by NAFTA art. § 1701(3).

23. *Id.* at 161, citing NAFTA art. 1701(2)(a). The Geneva Convention of 1971 was designed to combat the piracy of gramophone records and sound tapes. *Id.* at 161, citing Ploman and Hamilton, *Copyright: Intellectual Property in the Information Age*, 22 (1980).

24. Garcia, *supra* note 10, at 831, referring to NAFTA art. 1709(12).

25. Nimmer, *supra* note 11, at 161. NAFTA also requires the United States, Canada, and Mexico to recognize computer programs as "literary works within the meaning of the Berne Convention." Edge, *supra* note 7, at 199, citing NAFTA art. 1705(1)(a). NAFTA provides protection for "the entire structure, sequence, and organization of software programs, data bases, layout sequences, and semiconductors for a minimum of fifty years. *Id.*, citing "Mexico Lures High Tech Exports by Reform of Investment, Intellectual Property Laws," 10 INT'L. TRADE REP. (BNA) No. 37 at 1583, 1584 (Sept. 22, 1993).

26. Nimmer, *supra* note 11 at 161, citing NAFTA art. 1705(3).

27. *Id.* at 162, citing NAFTA art. 1705(2).

28. *Id.*

29. *Id.*

30. *Id.*, citing NAFTA art. 1705(6).

31. *Id.*, citing NAFTA art. 1706(1).

32. *Id.* at 162, citing NAFTA art. 1706(1)(d).

33. *Id.* at 163, citing NAFTA art. 1706(3).

34. Nimmer, *supra* note 11, at 164, citing NAFTA art. 1714(1).

35. Edge, *supra* note 7, at 200, citing NAFTA art. 1715(2)(c)-(f)

36. Garcia, *supra* note 10, at 833.

37. *Id.*, citing NAFTA art. 1715(2)(c).

38. *Id.*, citing NAFTA art. 1716. Both the impoundment and the preliminary injunction articles provide procedural safeguards to importers whose goods are impounded or enjoined by copyright holders whose claims subsequently prove to be invalid, where the claims are not further prosecuted, or where the goods are determined to not be infringing. *Id.* at 833-834, citing NAFTA art. 1718.

39. *Id.* at 833.

40. Nimmer, *supra* note 11, at 163, citing NAFTA art. 1718.

41. Garcia, *supra* note 10, at 833, citing

NAFTA art. 1718.

42. Nimmer, *supra* note 11, at 163, citing NAFTA art. 1715(1).

43. *Id.* at 164, citing NAFTA art. 1717. See also Garcia, *supra* note 10, at 833.

44. Nimmer, *supra* note 13, at 163-5, citing Pub. L. No. 103-82, 107 Stat. 2057 (Dec. 8, 1993).

45. *Id.* at 165, citing NAFTA Annex 1705.7, made applicable to NAFTA through NAFTA art. 1705(7). This obligation shall apply to the extent consistent with the Constitution of the United States, and is subject to budgetary constraints. *Id.*

46. *Id.*, citing Pub. L. No. 103-82, 107 Stat. 2057 (Dec. 8, 1993).

47. 17 U.S.C. § 104A(a).

48. Nimmer, *supra* note 11, at 165, citing 17 U.S.C. § 104A(a)(1) and NAFTA Implementation Act, 2(4).

49. *Id.* at 165, citing NAFTA Implementation Act, 2(4).

50. 17 U.S.C. § 104A(a).

51. *Id.*

52. 17 U.S.C. § 104A(b). Protection for the resurrected films began in 1995, and the Copyright Office is required to publish a list of all resurrected titles in the Federal Register. *Id.*

53. Nimmer, *supra* note 11, at 166.

54. 17 U.S.C. § 104A(c).

55. Nimmer, *supra* note 11, at 166.

56. *Id.*, citing Pub. L. No. 103-82, 107 Stat. 2057 (Dec. 8, 1993).

57. Garcia, *supra* note 10, at 834, citing White House Fact Sheet on NAFTA, reprinted in Bus. Am. (Aug. 24, 1992).

58. Garcia, *supra* note 20, at 834.

59. *Id.*

60. Hedley, *supra* note 5, at 655-656, 667; Susan Walker, Sinking Arts Groups Send SOS to New Government," Toronto Star, Oct. 23, 1993, at L15 (quoting Paul Audley, media consultant); Peter C. Newman, "Defending the Canadian Dream," MacLean's, July 8, 1991, at 50.

61. Hedley, *supra* note 5, at 689.

62. In other words, the United States cannot require more of a Canadian or Mexican business than it can require of its own businesses. *Id.* at 666; U.S. GAO, North American Free Trade Agreement: Assessment of Major Issues, GAO/GGD-93-137, at 15 (1993) (describing NAFTA as upholding the concept of national treatment).

63. Hedley, *supra* note 5, at 666. See *supra* note 18 and accompanying text.

64. *Id.*, citing NAFTA Annex 2106, at 702.

65. *Id.*, citing NAFTA art. 2106 at 702, and

FTA art. 2102 at 398.

66. Hedley, *supra* note 5, at 666. "U.S. copyright-based industries such as film, video, sound recording, and publishing companies may be subject to market-access barriers, investment limitations, and discriminatory application of copyright laws in Canada." Gen. Accounting Office, North American Free Trade Agreement: Assessment of Major Issues," GAO/GGD-93-137 at 92 n.2., 100.

67. *Id.* at 682. However, it is important to note that there are four exceptions to the Canadian CIE under the FTA, carried over to NAFTA: 1) the removal of tariffs on certain materials such as recording tapes and records, in FTA art. 401(2)(a); 2) the offering of "fair open-market value" for any foreign-owned cultural enterprise when Canadian law requires its sale to Canadians, in FTA art. 1607(4); 3) the capture and rebroadcast of United States television and radio signals, in FTA art. 2006; and 4) the removal of the print-in-Canada requirement for deduction of advertising expenses from Canadian taxpayer's income, in FTA arts. 2005, and 2012. *Id.* at 670.

68. *Id.* at 667, citing NAFTA Annex 2106, at 702. Since NAFTA has been in effect, the Omnibus Trade and Competitiveness Act has been amended to include special provisions requiring the USTR to "identify any, act, policy, or practice of Canada which . . . affects cultural industries." 19 U.S.C. § 2242(f)(1) (1994).

69. Hedley, *supra*, note 5, at 686. For example, given the fact that Canada is one of the largest export markets for U.S. films, the motion picture industry could prove to be a focal point for application of the Canadian cultural policy, and a target of U.S. retaliation in return. *Id.* at 687, citing International Trade Admin., U.S. Dept. of Commerce, U.S. Industrial Outlook 1993.

70. Hedley, *supra*, note 5, at 687, citing "NAFTA Intellectual Property Provisions in North American Trade Pact Called 'Model,'" INT'L. TRADE DAILY (BNA), Aug. 20, 1992, at 1433 (quoting Jay Berman, president of the Recording Industry Association of America).

71. Hedley, *supra*, note 5, at 687-688.

72. *Id.* at 688. See also "Timing for the Free Trade Deal with the United States Said Poor because of Decline in U.S. Economy," 32 INT'L. TRADE REP. (BNA) No. 32 at 1017 (Aug. 12, 1987).

73. George Y. Gonzalez, "Symposium on the North American Free Trade Agreement: An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement," 34 HARV. INT'L. L.J. 305, 313 (Spring

1993). Specifically, the United States has chosen to use its economic leverage to unilaterally enforce intellectual property protections on other states through section 337 of the Tariff Act of 1930, and the "Special 301" provision of the 1988 Omnibus Trade and Competitiveness Act. *Id.*

74. Gonzalez, *supra* note 73, at 313; ABA Meeting Looks at NAFTA and Intellectual Property Rights, INT'L. TRADE REP., Apr. 22, 1992, 724, 724-725; see also Garcia, *supra* note 10, at 820. For more information on how the United States Trade Representative (USTR) administers the Special 301 Actions, see Edge, *supra* note 7, at 186-188.

75. Garcia, *supra* note 10, at 821.

76. Gonzalez, *supra* note 73, at 314.

77. Emmert, *supra* note 10, at 1318 (1990).

78. Garcia, *supra* note 10, at 824-25, n. 40, citing Sigars-Malina, "Free Trade--Changes in the Legal Environment, Mexico and Beyond: Intellectual Property," Fifth Annual Legal Aspects of Doing Business in Latin America at 9.13, (Fl. State Bar) (Feb. 6-7, 1992).

79. Garcia, *supra* note 10 at 827-28, citing 8 Int'l. Trade. Rep., 1068 (July 17, 1991).

80. Garcia *supra* note 10 at 827, citing art. 87 of the decree Amending the Federal Copyright Law, Official Diary of Mexico (July 17, 1991).

81. Garcia, *supra* note 10 at 827, citing arts. 135-143 of the decree Amending the Federal Copyright Law, Official Diary of Mexico (July 17, 1991).

82. Edge, *supra* note 7 at 196, citing Computer Software and Services, Mex. Trade & L. Rep., Nov. 1, 1992, available in LEXIS, World Library, Mtlr File.

83. 19 U.S.C. § 2901 (1992); 18 U.S.C. § 2511 (1993).

84. Garcia, *supra* note 10, at 828, citing International Property Enforcement Issues to Play a Major Role in NAFTA Talks, Int'l. Trade Rep., (BNA) at 1553 (Oct. 23, 1991).

85. *Id.*

86. *Id.*

87. Edge, *supra* note 7, at 193. United States software producers have indicated a greater willingness to do business in Mexico.

88. *Id.*