

INTERNATIONAL ILLICIT CONVERGENCE: THE GROWING PROBLEM OF TRANSNATIONAL ORGANIZED CRIME GROUPS' INVOLVEMENT IN INTELLECTUAL PROPERTY RIGHTS VIOLATIONS

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I. THE GROWING PROBLEM OF TRANSNATIONAL ORGANIZED CRIME GROUPS CONVERGING WITH INTELLECTUAL PROPERTY RIGHT CRIMES: AN INTRODUCTION

The European Council's case study of Russia and economic crimes showed intellectual property as one of "the primary targets for the infiltration of organised economic crime."¹ All six organized crime groups from Taiwan and Hong Kong in a pilot study were involved in pirating CDs and DVDs, and pirating was the dominant activity for one group.² NATO reported that Nigerian organized crime groups were engaged in large-scale counterfeiting operations.³ DrinkOrDie, a group founded in Russia, grew to the largest online piracy network before getting caught by U.S. federal authorities and included hackers from the United States, Australia, Norway, Finland, the United Kingdom, and others.⁴

The preceding examples reveal a recent phenomenon. Intellectual property crimes are increasingly facilitated through the involvement of transnational organized crime groups.⁵ The market for intellectual property rights violations "has now become a global 'industry' managed by sprawling organizations in much the same way as drug-trafficking, gun-running and money-laundering."⁶ Organized crime

1. COUNCIL OF EUR., ORGANISED CRIME SITUATION REPORT 2005: FOCUS ON THE THREAT OF ECONOMIC CRIME 98 (2005), available at http://www.coe.int/T/E/Legal_affairs/Legal_cooperation/Combating_economic_crime/8_Organised_crime/Documents/Report2005E.pdf.

2. JAMES O. FINCKENAUER & KO-LIN CHIN, ASIAN TRANSNATIONAL ORGANIZED CRIME AND ITS IMPACT ON THE UNITED STATES: DEVELOPING A TRANSNATIONAL CRIME RESEARCH AGENDA 10, 37 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/213310.pdf>.

3. KEES ZIJLSTRA, ECON COMM., N. ATL. TREATY ORG. PARLIAMENTARY ASSEMBLY, TRANSNATIONAL ORGANISED CRIME—AN ESCALATING THREAT TO THE GLOBAL MARKET, para. 26 (1998), available at <http://www.nato-pa.int/archivedpub/comrep/1998/ar278ec-e.asp>.

4. Josh White, *Pa. Man Admits Internet Conspiracy; Defendant Headed International Ring that Stole Software, Games and Movies*, WASH. POST, Feb. 28, 2002, at B4; see also HEDI NASHERI, ADDRESSING GLOBAL SCOPE OF INTELLECTUAL PROPERTY LAW 64 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/208384.pdf>.

5. There is much debate about the definition of organized crime. The focus of this Note is not on what is organized crime, so that parsing of the definition will not be included. The following definition will be used for purposes of this Note:

"Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit. . . .

Interpol, U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex 1, at Art. 2(a), U.N. Doc. A/RES/55/25/Annex 1 (Jan. 8, 2001) [hereinafter G.A. Res.], available at http://www.undoc.org/pdf/crime/a_res_55/res5525e.pdf.

6. Janet Reno, Attorney Gen., U.S. Dep't of Just., Statement by the Attorney General at the Symposium of the Americas: Protecting Intellectual Property in the Digital Age (Sept. 12, 2000), available at <http://www.usdoj.gov/criminal/cybercrime/ipsymposium.htm>. See also Interpol, Intellectual Property Crime Action Group (IIPCAG) (2002), <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publications/IIPCAG.p>

groups are becoming more involved particularly in piracy and counterfeiting.⁷ As early as 1998, NATO identified the trend of intellectual property violations as a common activity of organized crime groups.⁸ Although there is some skepticism about the exact percentage of organized crime comprising intellectual property crime⁹ and the need for stricter penalties, as discussed in Part II, 65 to 70% of piracy cases, for example, involve organized crime groups.¹⁰ Additionally, three industry representative groups from the United Kingdom, France, and the United States have recently published findings of connections between intellectual property theft and organized crime, demonstrating the global nature of the problem and industry concern.¹¹ As a result of these studies, as well as several other exem-

df (last visited June 23, 2007) (“Extensive evidence is now available from both the public and private sectors which demonstrates that organised criminals and terrorists are heavily involved in planning and committing these crimes.”); Harjit Sandhu, *Product Counterfeiting and Interpol*, 2 INT’L CRIM. POLICE REV. No. 476-477 98, 101 (1999), available at <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publications/ICPR2.pdf> (“What was once a cottage industry has developed into a sophisticated network of organized crime.”); OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUST., REPORT OF THE DEP’T OF JUSTICE’S TASK FORCE ON INTELLECTUAL PROPERTY 9 (2004), available at http://www.eff.org/IP/20041013_DOJ_IPTaskForceReport.pdf; PHIL WILLIAMS, CERT COORDINATION CTR., ORGANIZED CRIME AND CYBER-CRIME: IMPLICATIONS FOR BUSINESS 7 (2002), available at <http://www.cert.org/archive/pdf/cybercrime-business.pdf> (noting “the growing overlap between organized crime and cyber-crime”); FED. BUREAU OF INVESTIGATION, STRATEGIC PLAN 2004-2009, pt. II.G (2004), available at <http://www.fbi.gov/publications/strategicplan/strategicplanfull.pdf> (stating that criminal enterprises are flourishing globally and that “their impact on the United States is expected to increase over the next five years”).

7. Reno, *supra* note 6; see also FINCKENAUER & CHIN, *supra* note 2, at 10 (“A relatively recent and growing crime problem that is transnational in nature is the production and distribution of pirated CDs and DVDs.”); UNION DES FABRICANTS, COUNTERFEITING & ORGANISED CRIME 10 (2003), available at <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publications/UDFCounterfeiting.pdf> (“[Counterfeiting] clearly has links with other forms of criminal activity and its networks cooperate or overlap with known criminal organisations.”).

8. Zijlstra, *supra* note 3, at para. 18.

9. UNION DES FABRICANTS, *supra* note 7, at 2 (“[There] is still a real gap between the official perception of counterfeiting and the experience on the ground of rights holders, who see obvious links between counterfeiting and organised crime.”). *But see* OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUST., *supra* note 6, at 11 (placing “the highest priority on the prosecution of intellectual property crimes that are complex and large in scale”).

10. UNION DES FABRICANTS, *supra* note 7, at 11 (citing Lain Grant, Head of Enforcement, Int’l Fed’n of the Phonographic Indus., Address at the European Forum for the Prevention of Organised Crime (Jan. 30, 2003)).

11. UNION DES FABRICANTS, *supra* note 7; ALLIANCE AGAINST COUNTERFEITING AND PIRACY, PROVING THE CONNECTION: LINKS BETWEEN INTELLECTUAL PROPERTY THEFT AND ORGANISED CRIME, available at <http://www.allianceagainstiptheft.co.uk/images/Proving-the-Connection.pdf>; INTERNATIONAL ANTICOUNTERFEITING COALITION [IACC], THE NEGATIVE CONSEQUENCES OF INTERNATIONAL INTELLECTUAL PROPERTY THEFT: ECONOMIC HARM, THREATS TO THE PUBLIC HEALTH AND SAFETY, AND LINKS TO ORGANIZED CRIME AND TERRORIST ORGANIZATIONS (2005), available at <http://www.iacc.org/resources/IACC-WhitePaper.pdf>. This Note is distinct from those cited here because it is not aiming to prove there is a connection, but instead exactly what the connections are and what can be used to eradicate them.

plary events and studies, awareness of the issue is increasing and becoming generally accepted by developed state governments.¹²

The convergence of the two areas into one now forms a new subject area of transnational organized intellectual property crime. The focus of this Note remains on the narrow subject of the connection between organized crime groups and intellectual property violations and its not-so-narrow impacts. This Note does not advocate that *all* intellectual property rights violations should be criminalized, but focuses on the need for stricter laws and enforcement of intellectual property violations that are part of organized crime. This Note (1) shows the importance of stopping this convergence through both sides—intellectual property violations and organized crime activities—due to the distinct negative consequences of each, (2) delineates what loopholes and common factors enhance the exploitation of intellectual property rights by organized crime groups, and also (3) offers multilateral solutions parallel to the common factors that can help limit the rapid convergence of these two areas.

II. THE INTELLECTUAL PROPERTY SIDE OF THE CONVERGENCE: THE HISTORICALLY LOW PRIORITY TO CRIMINALIZE INTELLECTUAL PROPERTY VIOLATIONS

To date, there has been much debate about how much intellectual property protection is too much, particularly, which violations should be criminal rather than civil. This Note does not claim that all intellectual property rights violations warrant tougher sanctions such as criminal penalties—only those that are a part of organized crime group activity. This is because there is concern about the ramifications of overbroad protection of intellectual property rights, particularly, with criminalizing those violations.

Several concerns have curtailed the scope of intellectual property protections. Limiting the public domain is just one of these concerns. “Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain.”¹³ Also, free speech as a fundamental right may also be hindered by overbroad intellectual property laws.¹⁴ Furthermore, the public perceptions of intellectual property rights, as well as the perceptions of states that have addressed the issue, are not in line with criminaliz-

12. See *supra* text accompanying note 11.

13. Keith Aoki, *How the World Dreams Itself to Be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms*, 17 *LOY. L.A. ENT. L. REV.* 523, 532 (1997) (quoting *White v. Samsung Elec. Am. Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing en banc)).

14. See John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 *BYU L. REV.* 1201, 1216.

ing all intellectual property violations.¹⁵ Despite the availability of criminal sanctions, “[i]n practice, regulators often favour giving guidance and quiet advice in the first instance, this being backed up by the possibility of administrative or civil actions, with criminal law being kept as something of a last resort or as a symbolic indicator that particularly blatant or harmful activities are not [to] be tolerated.”¹⁶ While these ideas may be currently accepted and considered legitimate limitations on a broader scale of intellectual property violations, when organized crime groups are involved with intellectual property violations, different rules and harsher sanctions need to be applied, as discussed in Parts III-V.

III. THE ORGANIZED CRIME SIDE OF THE CONVERGENCE: THE UNIQUE ASPECTS OF ORGANIZED CRIME THAT DEMONSTRATE THE IMPORTANCE OF PREVENTING INTELLECTUAL PROPERTY VIOLATIONS COMMITTED BY THESE GROUPS

There are several methods of intellectual property rights enforcement, including administrative, civil, technological, and criminal.¹⁷ Organized intellectual property crimes pose different threats and warrant a different view of criminalization and enforcement from intellectual property violations in general, as crimes on these large commercial scales need greater deterrence. These distinctions make intellectual property violations by organized crime groups a distinct and important area to address.

In general, organized crime is dangerous to society as a result of the numerous effects it poses with streamlined, coordinated actions. Since it poses special dangers to society,¹⁸ it is treated more expansively via conspiracy statutes, among others. Committing crimes through organized groups creates obvious efficiencies through “[s]pecialization of [l]abor and [e]conomies of [s]cale”—which the groups “exploit by creat[ing] a framework of trust to reduce the transaction costs involved in forming new contracts with each other.”¹⁹ Additionally, negative psychological implications make the commission of crime more likely in a group setting. Individuals in a group are more likely to take risks, go against self-interest, and engage in crime they are committed to (similar to an obligation to fulfill

15. See discussion *infra* Parts IV.H, V.D.

16. COUNCIL OF EUR., *supra* note 1, at 87.

17. NASHERI, *supra* note 4, at 62.

18. There is debate about the specifics of dangers, but this Note provides only a brief overview and thus only discusses the generally accepted reasoning for prohibitions against organized crime.

19. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1325 (2003); see also Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1219 (1985).

a contract).²⁰ The United State Supreme Court recently reiterated this groupthink effect: “[C]ombination in crime makes more likely the commission of [other] crimes” and it “decreases the probability that the individuals involved will depart from their path of criminality.”²¹ The very nature of organized crime makes it important that all nations fight against it.²²

Specifically, the limitations stemming from the concerns in Part II about intellectual property laws’ expansiveness have allowed the problem of intellectual property violations to grow into a commercial scale exploited for huge profits. These commercial scale operations need to be looked at as a distinct problem instead of being grouped with all intellectual property violations. Negative implications are inherent in organized crime, as opposed to individual crimes generally. Consequently, the importance of combating intellectual property rights in the organized crime realm is examined as a distinct topic in this Note.

A balance must be reached between the rights of all people and the criminalization of thefts that violate intellectual property rights of the rights holders. The area where organized crime and intellectual property violations converge is one that needs stricter criminal enforcement in order to effectively impact the large scale criminal enterprises. By focusing on this area of convergence, it will prevent laws from being overbroad while still combating some of the most egregious rights violations.

Both transnational organized crime and intellectual property crime are separately creating enforcement problems throughout the world. The combination of these two developments exponentially in-

20. Katyal, *supra* note 19, at 1318-23.

21. Callanan v. United States, 364 U.S. 587, 593-94 (1961).

[T]he act of combining with another is significant both psychologically and practically, the former because it crosses a clear threshold in arousing expectations, the latter because it increases the likelihood that the offense will be committed. Sharing lends fortitude to purpose. The actor knows, moreover, that the future is no longer governed by his will alone; others may complete what he has had a hand in starting, even if he has a change of heart.

Katyal, *supra* note 19, at 1315 n.22 (quoting Model Penal Code § 5.03 cmt. (1985)).

22 There are critics who have questioned the reality and extent of the organization of crime. See, e.g., Gerben Bruinsma & Wim Bernasco, *Criminal Groups and Transnational Illegal Markets: A More Detailed Examination on the Basis of Social Network Theory*, 41 CRIME, L. & SOC. CHANGE 79 (2004); L. Paoli, *The Paradoxes of Organized Crime*, 37 CRIME, L. & SOC. CHANGE 51 (2002); James Sheptycki, *Against Transnational Organized Crime*, in CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION 120-44 (Margaret Beare ed., 2003); Michael Woodiwiss, *Transnational Organized Crime: The Strange Career of an American Concept*, in CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION 1-31 (Margaret Beare ed., 2003). For purposes of this Note, these will not be discussed at length, and instead the more commonly accepted notion, as defined *infra* note 5, is used, while recognizing that there can be various degrees and forms of organization and flexibility thereof.

creases the negative effects felt by either in isolation. The facilitation of intellectual property crime by sophisticated transnational organizations is a critically important issue deserving heightened awareness. These subsequent Parts do so by examining factors leading to the convergence and ideas for counteractive measures.

IV. EXPLOITED FACTORS LEADING TO ORGANIZED CRIME GROUPS' INVOLVEMENT IN INTELLECTUAL PROPERTY CRIME

Many developments in society provide similar, efficient avenues of exploitation in intellectual property crime and organized crime. Several similar characteristics of the two areas of crime have likewise promoted a convergence into one organized intellectual property crime area. Criminals once separate under the two headings seem to be converging.²³ This Part identifies several similar characteristics and modes of attack making convergence possible: low risk-high profit margins, technological advances, globalization, networking of small-time criminals with organized crime groups, intellectual property crimes utilized as subactivities for increased funding, adaptability, jurisdictional arbitrage, and capitalizing on societal tolerance of intellectual property violations.

Identifying the factors that create and/or increase the likelihood of this convergence problem is necessary in this analysis. The common factors highlighted below demonstrate that this phenomenon has the potential to grow rapidly. The focus of this Note is why the convergence is growing and the factors identified are what may be making this convergence *more* likely. "The factors," developed from observed recurring topics addressed in numerous articles, will subsequently be used to refer to the above individual factors as a set.

A. *The Central Factor: Low Risk-High Profit Margins*

Low risks-high profits is the central motivating factor for transnational organized crime groups' connection to intellectual property crime.²⁴ Inconsistent application of organized crime laws,²⁵ as well as inconsistencies in laws amongst states, have contributed to the "low-risk" perception of both intellectual property theft and involvement

23. See sources cited *supra* note 5.

24. This factor has been discussed in numerous articles. See, e.g., sources cited *infra* notes 24-26.

25. Edgardo Buscaglia et al., UNDERMINING THE FOUNDATIONS OF ORGANIZED CRIME AND PUBLIC SECTOR CORRUPTION: AN ESSAY ON BEST INTERNATIONAL PRACTICES 4-7, (Hoover Press, Essays in Public Policy No. 114, 2005), available at <http://www.hoover.org/publications/epp/2833946.html> (follow "pdf" hyperlinks for "Executive Summary," "Essay," and "Notes").

in transnational organized crime groups altogether.²⁶ These groups select which illegal markets to participate in depending on the risk versus profit margins. This may be a main reason why intellectual property crimes are becoming more popular for organized groups. One study, for example, showed counterfeiting has similar profits to drug trafficking but much weaker penalties.²⁷ As one of the most frequently cited problems with intellectual property crime,²⁸ the fact that the benefits outweigh the risks is a highway to success for organized crime groups. The other factors that follow all seem to have this low risk-high profits notion lingering in the background.

B. Using Advanced Technology for Commission and Facilitation of Crimes

Technology plays a major role in organized crime groups, similar to its role in licit businesses. These groups have the best of both worlds: they can be effective both cheaply and quickly with new technologies. Integral uses of technology include exploiting intellectual property and facilitating operations, including rapid communications and lowering barriers for entry into intellectual property organized crime.

Exploiting intellectual property on a commercial scale is possible with advanced technologies. Particularly, counterfeiting, piracy, and other copyright violations by their nature are extremely vulnerable to exploitation via technology. The use of technology has allowed for “flawless and rapid counterfeiting.”²⁹ The sophisticated methods used by these groups enable them to pirate billions of dollars worth of counterfeit software every year.³⁰ Additionally, groups once focused on drug trafficking can now use technologies to exploit intellectual property rights in ways, such as over wireless networks, that may be harder to detect than smuggling of tangible items such as drugs.

26. See COMM. ON THE JUDICIARY, ANTICOUNTERFEITING CONSUMER PROTECTION ACT OF 1995, S. REP. NO. 104-177, at 5, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:sr177.104.pdf; THE U.K. PATENT OFFICE, COUNTER OFFENSIVE: AN IP CRIME STRATEGY, at paras. 11, 13, available at <http://www.patent.gov.uk/ipcrimestrategy.pdf>.

27. UNION DES FABRICANTS, *supra* note 7, at 9 (“Taking just France as an example, selling counterfeit products is punishable by a two-year prison term and a €150,000 fine, while selling drugs is punishable by a ten-year prison term and a €7,500,000 fine.”).

28. See, e.g., THE U.K. PATENT OFFICE, *supra* note 26, at paras 11, 13.

29. OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUST., *supra* note 6, at 9.

30. *Copyright Piracy and Links to Crime and Terrorism: Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Property*, 108th Cong. (2003) (statement of Richard C. LaMagna, Senior Manager, Worldwide Anti-Piracy Investigations, Law and Corporate Affairs, Microsoft Corp.).

Facilitating transnational operations is easier with the internet and other instantaneous communication methods.³¹ Exchange of ideas can be sent thousands of miles in seconds with various online communication methods.³² “[O]rganized crime groups use the Internet for communications”³³ as well as for their criminal targets that can be exploited for considerable gain at low risk.³⁴

Technology has not only increased the importance of intellectual property rights, but at the same time has lowered the barriers of entry for criminal groups and activities.³⁵ Not only are more people able to enter, but technology has also “diversified the nature and types of activities that the criminal groups are involved in.”³⁶ It is also easier for groups to recruit; the Internet not only aids in rapid communication but also allows for greater anonymity for new (and recurring) criminals to enter into these criminal groups.³⁷ Advanced technology has played an integral role in the access of organized crime groups to potential recruits and vice versa. The following section discusses the result of the individual’s networking with groups to increase the expansiveness and expertise of the groups, enabling them to further exploit intellectual property rights.

C. Networking of “Small-Time” Criminals and Organized Crime Groups

Intellectual property crimes can be committed by individuals acting independently, through their own expertise. Organized crime groups, however, are also expanding into intellectual property rights violations by connecting with these individuals, who often have expertise in violating intellectual property rights.³⁸ The connection between the two kinds of criminals is “likely both to deepen and to

31. *Copyright Piracy and Links to Crime and Terrorism: Rep. Before the H. Subcomm. on Courts, the Internet, and Intellectual Property.*, 108th Cong. (2003) (statement of John G. Malcolm, Deputy Assistant Att’y Gen. of the U.S., Criminal Div.) (“These criminal organizations are extremely security conscious, utilizing state-of-the-art technology to attempt to shield their illegal activity . . .”).

32. OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUST., *supra* note 6, at 25.

33. WILLIAMS, *supra* note 6, at 5.

34. Phil Williams, *Organized Crime and Cybercrime: Synergies, Trends, and Responses*, GLOBAL ISSUES, Aug. 2001, at 22, 23, available at <http://usinfo.state.gov/journals/itgic/0801/ijge/ijge0801.pdf>.

35. U.N. OFFICE ON DRUGS AND CRIME, RESULTS OF A PILOT SURVEY OF FORTY SELECTED ORGANIZED CRIMINAL GROUPS IN SIXTEEN COUNTRIES 6 (2002) [hereinafter UNODC, RESULTS OF A PILOT SURVEY], available at http://www.unodc.org/pdf/crime/publications/Pilot_survey.pdf.

36. *Id.*

37. OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUST., *supra* note 6, at 9.

38. See Joseph E. Ritch, *They’ll Make You an Offer You Can’t Refuse: A Comparative Analysis of International Organized Crime*, 9 TULSA J. COMP. & INT’L L. 569, 579 (2002); see also WILLIAMS, *supra* note 6, at 5.

widen.”³⁹ Counterfeiters have become more like “‘international entrepreneurs’ with connections to highly organised networks.”⁴⁰ Organized crime groups often recruit based on specialized knowledge to enhance their operations, much like a legitimate business, and “draw[] on the skills of talented individuals who have included university graduates, accountants and lawyers.”⁴¹

For criminals to conduct operations on a greater scale, there is a need for more money and resources, which leads many to a connection with organized crime groups.⁴² With large amounts of money at stake and perceptions of intellectual property crime as victimless and/or justified,⁴³ individuals may be more likely to get involved in transnational organized crime, which has potential for greater profits than when acting alone. There is a willingness of both individual criminals and organized crime groups to diversify their activities, which is important to this networking convergence.⁴⁴

D. Engaging in Intellectual Property Violations at Varying Levels

Intellectual property crime fits into one of two categories in organized crime groups: either as a subactivity to facilitate and fund the larger criminal goals or as the group’s central activity for profit. This inconsistency poses difficulties for enforcement.

Sometimes intellectual property crimes are subactivities of transnational organized crime groups, designed to make another primary activity of the group possible.⁴⁵ Thus, those side activities often are not done for profiting from the violation itself.⁴⁶ Although some organized crime groups are known to specialize in one kind of crime, more and more participate in two or more criminal fields.⁴⁷ A pilot survey published in September 2002 revealed that twenty-three of forty organized groups participated in more than one primary criminal enterprise.⁴⁸ Additionally, those that participated primarily in one activity often still had some subactivities to attain the overall goal. In these cases the subactivities “were not carried out in the pursuit of

39. See WILLIAMS, *supra* note 6, at 5.

40. UNION DES FABRICANTS, *supra* note 7, at 7.

41. Peter Lowe, *The Scope of the Counterfeiting Problem*, 2 INT’L CRIM. POLICE REV. No. 476-477 91, 95 (1999), available at <http://www.interpol.org/Public/FinancialCrime/IntellectualProperty/Publications/ICPR2.pdf>.

42. UNION DES FABRICANTS, *supra* note 7, at 7.

43. See *infra* Parts IV.H, V.D (discussing negative public perceptions).

44. See WILLIAMS, *supra* note 6, at 3 (discussing the diversification of organized crime into the white collar crime area).

45. UNODC, RESULTS OF A PILOT SURVEY, *supra* note 35, at 24.

46. *Id.*

47. COUNCIL OF EUR., *supra* note 1, at 9.

48. See UNODC, RESULTS OF A PILOT SURVEY, *supra* note 35, at 24.

profit but instead aimed at making the primary activity of the group possible.”⁴⁹ Frequently, these included intellectual property crime.

Intellectual property violations also recently have become central activities to organized crime groups. Counterfeiting, for example, has been deemed “not peripheral to other criminal activities but at the very heart of them.”⁵⁰ Yet, the previously discussed low enforcement priority of intellectual property crimes has fostered the notion that intellectual property crimes are typically subactivities to larger crimes.⁵¹ As intellectual property becomes the main criminal activity in some organized crime groups, laws and enforcement will have to adapt to both larger and smaller intellectual property crime conducted by these groups. This poses difficulty because it may entail using different types of investigations and enforcement initiatives depending on the purpose and role of the violations within the group.

E. Utilizing the “Dark Side”⁵² of Globalization

Globalization gives criminals opportunities to have the same impacts in the same places while conducting the business from elsewhere, often from multiple locations. “If you can sit in a kitchen in St. Petersburg, Russia, and steal from a bank in New York, you understand the nature of the problem.”⁵³ Products can be “manufactured in one country, assembled in another, transported through a third one and eventually sold in a fourth country.”⁵⁴ Another study recently conducted revealed that typical organized crime groups are themselves penetrating five or more countries with their criminal activities.⁵⁵

The increasing permeability of states’ borders to international trade has magnified the problem of protecting international intellectual property rights⁵⁶ and the exploitation of these developments by transnational organized crime groups.⁵⁷ A smuggling ring, for example, imported over 100 million counterfeit cigarettes by indicating they were toys and plastic parts on shipping documents.⁵⁸ Expanding border measures to help seize counterfeit goods has been offset by

49. *Id.*

50. Raymond E. Kendall, Editorial, *Special Issue Counterfeiting*, 1 INT’L CRIM. POLICE REV. No. 476-477 1, 2 (1999), available at <http://www.interpol.int/public/FinancialCrime/IntellectualProperty/Publications/ICPR1.pdf>.

51. See Reno, *supra* note 6 (discussing the historically low enforcement priority of intellectual property crimes).

52. UNION DES FABRICANTS, *supra* note 7, at 7; see also ZIJLSTRA, *supra* note 3, at pt. II.

53. Reno, *supra* note 6.

54. UNION DES FABRICANTS, *supra* note 7, at 7.

55. UNODC, RESULTS OF A PILOT SURVEY, *supra* note 35, at 24 (“In the largest number of cases (just under half of the total number), the criminal groups in question spread their activities across five or more states.”).

56. Buscaglia et al., *supra* note 25, at 5.

57. See UNODC, RESULTS OF A PILOT SURVEY, *supra* note 35, at 24.

58. IACC, *supra* note 11, at 17.

the trend to promote the ease of flow of goods across borders, such as by the European Union and North American Free Trade Agreement.⁵⁹ “[I]ncreasing cross-border porosity” has added to the difficulties of transnational organized crime enforcement, as these groups have utilized and developed their illicit businesses in a parallel manner to the licit businesses.⁶⁰

F. Adaptability of Sophisticated Yet Flexible Groups

Dynamic and fluid structures of organized crime groups also pose threats to law enforcement, which are highly rigid and directed groups.⁶¹ Organized crime groups are showing the potential to adapt and be flexible in exploiting the internet, as evidenced in the area of cybercrimes.⁶² Network-type groups, thought to be the main type in transnational organized crime, act more like “opportunistic businesspeople rather than violent gangsters” and are “developed in response to criminal opportunities.”⁶³

There are several ways these groups are adapting to make detection more difficult. For example, in counterfeiting, routes often change and groups do not use conventional or consistent networks for transit of products.⁶⁴ Organized crime groups can compartmentalize and/or separate production and distribution levels and channels to evade legal penalties.⁶⁵ Furthermore, genuine and illicit products are often mixed so the illicit products are harder to detect.⁶⁶ These groups have even set up seemingly legitimate “shell companies” to disguise their operations⁶⁷ and have “diversified into outwardly legitimate businesses.”⁶⁸ In conjunction with the use of technology, permeability of borders, and jurisdictional arbitrage (subsequently discussed), the ability of these groups to adapt to avoid detection poses serious threats.

59. Lowe, *supra* note 41, at 94.

60. See Buscaglia et al., *supra* note 25, at 5.

61. UNODC, RESULTS OF A PILOT SURVEY, *supra* note 35, at 6.

62. Williams, *supra* note 34, at 25.

63. FINCKENAUER & CHIN, *supra* note 2, at 22, 26; see also COUNCIL OF EUR., *supra* note 1, at 86-87 (discussing organized crime as a subset of the broader area of economic/white-collar crime).

64. UNION DES FABRICANTS, *supra* note 7, at 8.

65. See *id.* at 7.

66. *Id.* at 8.

67. *Id.* at 9.

68. Lowe, *supra* note 41, at 95.

G. “Jurisdictional Arbitrage”

A lack of sufficient legal penalties and enforcement make counterfeiting and piracy a high margin-low risk activity.⁶⁹ Right now, there are still countries with poor intellectual property rights enforcement; thus, there is still a “safe place to hide.”⁷⁰ Jurisdictional arbitrage refers to criminals initiating their crimes from jurisdictions that have few or no laws against the crimes and/or little to no enforcement capabilities.⁷¹ These criminals are taking advantage of the increasing communications technology and lower trade barriers to commit the crimes where they know there is low risk of detection and punishment. They do a sort of forum shopping of where to conduct their illicit business based on limiting their exposure to risk, similar to a licit business’s evaluations. They often use a developing country with few resources and lax enforcement as a base and then export to other countries.⁷² The groups are able to spread the risk in ways that alleviate them from criminal liability but maintain their complexity.⁷³ Even if caught, for example, they stay under minimum thresholds that would subject them to liability in one nation while disbursing illegal activities throughout other nations.⁷⁴

H. Capitalizing on External Perceptions of Societal Tolerance of Intellectual Property Crimes

“[A] large portion of the public apparently believes that violating intellectual property laws of various sorts is not wrong.”⁷⁵ The public commonly sees intellectual property rights enforcement as advancing commercial and private interests—rights that do not need criminal protection, but instead can be remedied by civil and administrative proceedings.⁷⁶

Recent studies have shown that: more than half of all college students in the United States use illegal software; between fifty and

69. *Counterfeiting and Theft of Tangible Intellectual Property: Before the S. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter Wayne] (statement of Anthony Wayne, Ass. Sec’y of State for Econ. and Bus. Affairs), available at 2004 WL 576628.

70. Reno, *supra* note 6 (suggesting that denial of a safe haven to organized crime group criminals be a top priority).

71. See WILLIAMS, *supra* note 6, at 4 (discussing jurisdictional arbitrage as it relates to cybercrime and organized crime).

72. Greg Creer, *The International Threat to Intellectual Property Rights Through Emerging Markets*, 22 WIS. INT’L L.J. 213, 232-33 (2004).

73. See UNION DES FABRICANTS, *supra* note 7, at 5.

74. See *id.*

75. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 238 (2002).

76. Reno, *supra* note 6; UNION DES FABRICANTS, *supra* note 7, at 4-5 (“[A]uthorities . . . often still see counterfeiting as infringing the intangible property rights of financially sound corporate entities: businesses.”)

ninety percent of all computer software used is unauthorized; more than a third of all business software used is pirated; and unauthorized taping of music CDs and video tapes is widely regarded as acceptable.⁷⁷

Organized crime groups can take advantage of this perception by blending in with the already expansive violations and recruiting other violators to participate in the organized setting.

In addition to negative public attitudes in general, counterfeiting and piracy crimes historically have been low enforcement priority for officials.⁷⁸ Only recently the U.S. Department of Justice decided to “[e]mphasize the importance of charging intellectual property offenses in every type of investigation where such charges are applicable, including organized crime, fraud, and illegal international smuggling.”⁷⁹ Law enforcement of intellectual property rights stems from the notion that these are smaller crimes; if crimes with bigger penalties are also being prosecuted, intellectual property violations are often ignored.⁸⁰

Developing countries’ hunger “for rapid economic growth” may also lead them to ignore the future negative effects of intellectual property violations.⁸¹ The present activities provide countries with jobs and foreign currency in the short run.⁸² These near future attitudes often lead to lack of enforcement of intellectual property crimes, even if they have domestic laws against the crimes.⁸³ Organized crime groups are able to take advantage of countries that do not punish intellectual property crimes through jurisdictional arbitrage as a result of the low risks of detection.

V. MULTILATERAL SOLUTIONS TO LIMIT THE EFFECTS OF THE FACTORS LEADING TO INFILTRATION OF TRANSNATIONAL ORGANIZED CRIME INTO INTELLECTUAL PROPERTY RIGHTS CRIME

The United States and several other nations have, in recent years, acknowledged the growing problems of transnational organized intellectual property crime.⁸⁴ Many taskforces and divisions in agencies

77. Green, *supra* note 75, at 236-37 (citations omitted).

78. Reno, *supra* note 6.

79. OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUST., *supra* note 6, at 20.

80. *See id.* at 27.

81. Creer, *supra* note 72, at 232.

82. Sandhu, *supra* note 6, at 98.

83. *See, e.g.*, Jennifer S. Fan, *The Dilemma of China’s Intellectual Property Piracy*, 4 UCLA J. INT’L L. & FOREIGN AFF. 207, 217 (1999).

84. Bruce Swartz, *Helping the World Combat International Crime*, GLOBAL ISSUES, Aug. 2001, at 9, 10, available at <http://usinfo.state.gov/journals/itgic/0801/ijge/ijge0801.pdf>. For example, “[t]he U.S.-E.U. Working Group on Intellectual Property Rights Enforcement held its first meeting on January 26-27, 2006 to begin planning strategies for closer cooperation between the United States and EU on intellectual property rights (IPR) enforce-

have recently been dedicated to these particular issues.⁸⁵ Scholars often disagree with prosecutorial agencies and industry rights holders as to how best to sanction intellectual property violations. Consequently, there are still many areas that need enhancement and/or development to combat the infiltration of transnational organized crime into the intellectual property crime arena.

While domestic efforts to combat intellectual property and organized crime are important, international harmonization of laws, as well as international cooperation, are of utmost importance. Applying criminal intellectual property laws when the violations are part of an organized crime⁸⁶ (as previously discussed in Parts II and III) and changing the public perceptions of acceptance are key to effective general deterrence. Taking into consideration the factors making this convergence flourish, the following demonstrates some of the prominent areas in need of attention and action by all nations.

More resources need to be dedicated to identification and enforcement measures of transnational organized crime networks.⁸⁷ When laws are implemented under either organized crime or intellectual property, both domestically and internationally, an awareness of the others' implications on the area at issue is necessary.

A. *Harmonization of Laws Against Organized Crime Groups Exploiting Intellectual Property Rights*

Groups use differences in laws to spread out risk amongst different states to avoid criminal liability. "The fluid nature of international networks makes it difficult for a single country, acting independently, to combat criminal problems."⁸⁸ Consequently, criminals are basing primary functions of their operation in those countries

ment issues." Stopfakes.gov., SME China IPR Advisory Program, http://www.stopfakes.gov/sf_archive.asp (last visited June 30, 2007).

85. See Swartz, *supra* note 84, at 10; see generally, e.g., TRANSNATIONAL CRIME & CORRUPTION CTR., TRANSNATIONAL CRIME, CORRUPTION, AND INFORMATION TECHNOLOGY (2000), available at <http://www.american.edu/traccc/events/reports/tcit2000.pdf> (discussing various studies, initiatives, and directives to utilize information technology as a solution method to transnational crime).

86. States may choose to criminalize membership in an organized crime group, as did the United States and Italy, or just criminalize those crimes that are part of a conspiracy, so long as organized crime groups are prohibited from performing intellectual property violations on a commercial scale. See generally Ugljesa Zvekcic, *International Cooperation and Transnational Organized Crime*, 90 AM. SOC'Y INT'L L. PROC. 533, 535 (1996).

87. See Reno, *supra* note 6 (discussing how the high profit potential and low risk of getting caught requires law enforcement officials to dedicate significant resources to investigation and prosecution).

88. Bruce Zagaris & Alvaro Aguilar, *Enforcement of Intellectual Property Protection Between Mexico and the United States: A Precursor of Criminal Enforcement for Western Hemispheric Integration?*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 41, 48 (1994).

that have less strict laws (that is noncriminal) against organized crime, including intellectual property organized crime.

While some scholars oppose criminal sanctions because of the concerns addressed in Part II, organized crime groups are generally unaffected by noncriminal remedies.⁸⁹ “Large-scale, commercial counterfeiting and piracy operations have traditionally looked upon civil fines as merely the cost of doing business.”⁹⁰ Because the other remedies available are seen as more of a nuisance than a deterrence to these groups, criminal penalties for intellectual property rights violations by organized crime groups will better overcome the “cost of doing business” attitude.

These all demonstrate the need for states to harmonize substantive laws to criminalize organized crime groups violating intellectual property rights as well as procedural laws to facilitate effective enforcement and prosecution.⁹¹ Laws against organized crime should be harmonized within each nation to include intellectual property as predicate acts. Lastly, other laws and methods against instruments utilized by organized crime, such as drug trafficking and money laundering, may provide insight as well.

*1. Harmonizing International Intellectual Property Laws and Organized Crime Criminalization: Substantive and Procedural*⁹²

Because intellectual property crimes and organized crime criminalization are generally addressed under different treaties and laws, gaps remain that contribute substantially to the convergence problem. There are treaties and laws that fall under the subject of intel-

89. See NASHERI, *supra* note 4, at 53 (“There is fairly general agreement that the most effective methods and procedures in the fight against infringement of IPRs are those involving criminal enforcement.”); UNION DES FABRICANTS, *supra* note 7, at 9 (“As the risk for a counterfeiter of being sentenced to a severe penalty is relatively low, the organisers of such trafficking can easily afford the fine of a few thousand euros that they may be ordered to pay.”); Carol Noonan & Jeffery Raskin, *Intellectual Property Crimes*, 38 AM. CRIM. L. REV. 971, 973 (2001).

90. NASHERI, *supra* note 4, at 53; *see also* Noonan & Raskin, *supra* note 89, at 972 (discussing the necessity of criminal penalties, as opposed to civil remedies, for intellectual property violations for deterrence).

[B]ecause of increased technological complexity, delays in civil litigation, and advances in computer technology, all of which permit thieves to profit more rapidly from trade secrets, traditional remedies, such as injunctions and civil damages, have become largely ineffective. Furthermore, considering the intangible nature of trade secrets and the fact that thieves are often judgment proof or too sophisticated to pursue, the civil remedy is quite illusory.

Id. at 972 n.1.

91. *See generally* COUNCIL OF EUR., *supra* note 1, at 111 (“The challenges of globalisation and economic crime cannot be addressed by individual governments or countries alone but must be regulated at European and global levels.”).

92. Note that this Section does not aim to examine differences in individual countries’ laws, but instead to discuss the main applicable treaties as they provide the minimum standards.

lectual property and those under organized crime. While these are historically distinct, it is important, since the crimes are converging, that nations harmonize laws in these areas, both substantive and procedural.

Coordination and transparency⁹³ of nations' criminal laws and enforcement efforts are paramount to curbing the trend of organized crime infiltrating the intellectual property theft realm. The Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Universal Copyright Convention are the central multilateral intellectual property protection treaties. The territorial differences in intellectual property law stemming from these treaties, as well as differences in conspiracy and organized crime laws, contribute to jurisdictional arbitrage and demonstrate the need for harmonization of international laws to combat transnational organized crime exploiting intellectual property rights of such great magnitude.

These conventions, along with substantial other additions, gave rise to the TRIPs agreement.⁹⁴ The purpose of the TRIPs Agreement was "to narrow the gaps in the way [intellectual property] rights are protected around the world, and to bring them under common international rules. It establishe[d] minimum levels of protection that each government ha[d] to give to the intellectual property of fellow WTO members."⁹⁵ Some measures and procedures are optional or not covered by the agreement—European Directives have been introduced to address this but often remain very general.⁹⁶ "The Agree-

93. A 2002 survey by WIPO attributed the ineffectiveness of enforcement systems to these problems, among others. NASHERI, *supra* note 4, at 71-72 (citing WIPO Doc., WIPO/EIM/3).

94. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1197 (1994), available at www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPs Agreement]; Florida Ruth P. Romero, *Legal Challenges of Globalization*, 15 IND. INT'L & COMP. L. REV. 501, 508-09 (2005).

95. World Trade Organization, Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited June 23, 2007).

96. Patrick Ravillard, *Combating Counterfeiting and Piracy in the European Union*, 2 INT'L CRIM. POLICE REV. No. 476-477 60, 65 (1999), available at <http://www.interpol.org/Public/FinancialCrime/IntellectualProperty/Publications/ICPR2.pdf>. See, for example, Corrigendum to Directive 2004/48/EC, 2004 O.J. (L 195) 16, 17, available at http://europa.eu.int/eur-lex/pr/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf, which states the following:

[D]espite the TRIPs Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another.

ment does not stipulate which dealings in counterfeit trademark goods and pirated copyright goods must be treated as crimes”⁹⁷ In sum, the provisions in this treaty give substantial discretion to the member states as to *how* they penalize intellectual property crimes,⁹⁸ making consistency of intellectual property rights laws in the organized crime realm less likely.

Organized crime’s involvement in intellectual property violations was likely not a chief concern when TRIPS was adopted. TRIPS does provide for criminal enforcement in Article 61⁹⁹ when there is “wil[ly]ful trademark counterfeiting or copyright piracy on a commercial scale.”¹⁰⁰ It seems that the “commercial scale” emphasis would be sufficient to cover organized crime involvement. As discussed in Part IV, however, this commercial scale requirement is evaded by distribution of responsibilities and activities in the groups throughout different nations, and thus the need for harmonization of laws throughout these different nations is still needed.

A way to harmonize the intellectual property and organized crime laws across all nations is to add a protocol to the United Nations Convention Against Transnational Organized Crime (TOCC),¹⁰¹ specifically addressing intellectual property. The TOCC was “the first

However, it then goes on to state that the “Directive *shall not affect*: . . . Member States’ international obligations and notably the TRIPS Agreement, including those relating to *criminal procedures and penalties*.” *Id.* at 19 (emphasis added).

97. Matthew Kennedy, *The World Trade Organization*, 2 INT’L CRIM. POLICE REV. No. 476-477 87, 88 (1999), available at <http://www.interpol.org/Public/FinancialCrime/IntellectualProperty/Publications/ICPR2.pdf>.

98. UNION DES FABRICANTS, *supra* note 7, at 5.

99. TRIPS Agreement, *supra* note 94, at 345.

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

Id.

100. *Id.*

101. G.A. Res. 55/25, *supra* note 5. As of February 2007, there were 147 signatories and 118 parties to the treaty. The United States recently ratified the Convention in November 2005. See U.N. Office on Drugs and Crime, Signatories—U.N. Convention against Transnational Organized Crime, http://www.unodc.org/unodc/en/crime_cicp_signatures_convention.html (last visited June 23, 2007); see also Elizabeth Verville, *U.S. Joins Global Convention Against Transnational Organized Crime*, GLOBAL ISSUES, Aug. 2001, at 7, available at <http://usinfo.state.gov/journals/itgic/0801/ijge/ijge0801.pdf>. For a thorough discussion of the TOCC, see Bruce Zagaris, *Revisiting Novel Approaches to Combating the Financing of Crime: A Brave New World Revisited*, 50 VILL. L. REV. 509, 536-45 (2005).

legally binding UN instrument in the field of crime.”¹⁰² Aims of the new treaty include “stronger common action against money-laundering, greater ease of extradition, measures on the protection of witnesses and enhanced judicial cooperation,”¹⁰³ areas commonly used in support of transnational crime¹⁰⁴ (all of which also contest the factors discussed in Part IV).

As enacted in September 2003, this treaty was accompanied by three optional substantive protocols,¹⁰⁵ none of which focused on intellectual property organized crime. While the treaty itself will aid in the harmonization of laws by taking aim at some of the factors in general, a protocol focusing on intellectual property crimes’ connections to transnational organized crime may be a pertinent next step for the members.

The protocols already adopted are meant to ensure basic minimum principles that would eliminate “safe havens.”¹⁰⁶ In an intellectual property organized crime protocol, more consistent criminal penalty guarantees, as well as measures to fight the spread of risk, are necessary. In intellectual property, minimum levels for laws as currently provided for in the treaties encourage wide variation in ap-

102. United Nations Office on Drugs and Crime, U.N. Convention Against Transnational Organized Crime, <http://www.unodc.org/palermo/convmain.html> (follow “The Convention” hyperlink) (last visited June 23, 2007).

103. Zagaris, *supra* note 101, at 537.

Signatory countries undertake the following commitments in the TOCC: (1) to “criminalize offenses committed by organized crime groups, including corruption and corporate or company offenses; (2) to combat money-laundering and the proceeds of crime; (3) to accelerate and extend the scope of extradition; (4) to protect [] witnesses testifying against criminal groups; (5) to strengthen cooperation to locate and prosecute suspects; (6) to enhance prevention of organized crime at the national and international levels; and (7) to develop [] a series of protocols containing measures to combat specific acts of transnational organized crime.”

Id. at 537 (quoting U.N. Office on Drugs and Crime, *After Palermo: An Overview of What the Convention and Protocols Hope to Accomplish*, <http://www.unodc.org/adhoc/palermo/sum1.html> [hereinafter UNODC, *After Palermo*] (last visited June 23, 2007)).

104. U.N. Office on Drugs and Crime, *Summary of the United Nations Convention Against Transnational Organized Crime and Protocols Thereto*, at pt. A.5(b) [hereinafter UNODC, *Summary*], <http://www.unodc.org/palermo/convsummm.htm> (last visited June 23, 2007).

105. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, U.N. Doc. A/55/25/Annex 2 (Dec. 15, 2000); Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the U.N. Convention Against Transnational Organized Crime, U.N. Doc. A/55/25/Annex 3 (Nov. 15, 2000); Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the U.N. Convention Against Transnational Organized Crime, U.N. Doc. A/55/255/Annex (May 31, 2001).

106. UNODC, *Summary*, *supra* note 104, at pt. A.5(b) (“Beyond this, many provisions are intended to ensure that the approaches taken by different states under their domestic legislative and law-enforcement regimes are as co-ordinated as possible to make collective international measures both efficient and effective.”).

plication. The mandates of such a protocol will relate to the intra-state harmonization discussed in Part V.A (2), including making intellectual property rights violations predicate offenses under organized crime and conspiracy statutes or enacting separate intellectual property organized crime laws. Mandating comparable levels when organized crime is involved is a more effective enforcement alternative, especially with organized crime, because inconsistency in levels of criminalization and punishment leads to loopholes and jurisdictional arbitrage by large-scale groups.

An intellectual property protocol is consistent with the treaty's aim to develop "a series of protocols containing measures to combat specific acts of transnational organized crime."¹⁰⁷ The treaty is relatively new, however, so it may be some years to determine if extra guidance is needed. If the members determine additional regulation is necessary, intellectual property agencies—such as WIPO, WTO, and the Interpol Intellectual Property Crime Action Group—should be consulted in conjunction with the United Nations Office on Drugs and Crime (UNODC).

In addition to the protocols, the UNODC expects that members will go beyond these minimums to adopt domestic measures and formulate bilateral and multilateral treaties to create a more cohesive and consistent backdrop for organized criminal prosecution.¹⁰⁸ These are also important, even if an intellectual property protocol is adopted, to coordinate organized crime laws and intellectual property protections. Not only must nations enhance enforcement coordination, but they must also harmonize their laws so that the organized crime, conspiracy, or predicate offense at issue is a crime in both jurisdictions.¹⁰⁹ Thus, while entering into this protocol and other treaties to increase cooperation amongst countries is important (as subsequently discussed in Part V.B), it is only the first step. The treaty itself must mandate that each nation bring its organized intellectual property crime laws to a comparable level.

Moreover, the TOCC also provides procedural guidelines for transnational criminal offenses, which are relevant to intellectual property violations occurring across borders. Extradition and witness concerns are addressed in the TOCC. Predicate offenses eligible for extradition are defined in the treaty as any offense punishable by a maximum of four or more years of deprivation of liberty.¹¹⁰ Intellectual property violations may qualify in some countries, such as the United States, but not in others. If extradition is not an option for

107. UNODC, *After Palermo*, *supra* note 103.

108. *Id.*

109. Williams, *supra* note 34, at 25.

110. G.A. Res. 55/25, *supra* note 5, at Art. 2(b).

the organized crime intellectual property offenses, parties to the treaty should develop processes and procedures that will bring cases to trial quickly and address issues of victim-witness coordination intrastate.¹¹¹ Both substantive and procedural laws need to be at comparable levels among nations to ensure efficient and effective prosecution of these criminals.

2. Harmonizing Intellectual Property Laws with Organized Crime Laws Within a Single Nation

The United States implemented RICO¹¹² in the 1970s to eliminate “the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce,”¹¹³ particularly the Mafia. Similarly, states must delineate and parse out ways to impose harsher punishments on commercial scale organized crime groups violating intellectual property rights, even when parts of the overall organized crime are spread throughout many states. This should be considered when developing mandates of the potential protocol under the TOCC, previously discussed. Just as the harsher punishments were warranted for members of the Mafia committing crimes, as opposed to individuals committing those same crimes on their own, the same should be the case for intellectual property rights violators. The larger the scale of the crime, the greater the harm to societies throughout the world; thus, there is a greater need to deter.

Each nation must take action to coordinate its own laws, so intellectual property crimes qualify as predicate offenses under its own organized crime laws. Alternatively, states that do not already have organized crime statutes such as RICO can create specific intellectual property organized crime statutes to address the convergence problem, following these similar guidelines. Accordingly, legislators must set the maximum sentences for intellectual property crimes at a threshold consistent with the minimums required by organized crime laws.¹¹⁴ An industry organization’s study addressing counterfeiting in relation to organized crime in France showed, for example, that “setting the maximum sentence at a three-year prison term would mean that industrial and commercial counterfeiting cannot be characterised an organised criminal activity, as the European Council’s Joint Action . . . set the threshold of the sentence for the definition of this type of activity [organized crime] at four years.”¹¹⁵ Instead, countries should make intellectual property violations predi-

111. Reno, *supra* note 6 (suggesting closed-circuit TV for witnesses).

112. Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968 (2000).

113. S. Rep. No. 91-617, at 76 (1969).

114. UNION DES FABRICANTS, *supra* note 7, at 19.

115. *Id.*

cate offenses such as in the United States, where “trademark counterfeiting, theft of trade secrets, and copyright violations” have all been made predicate acts for money laundering and RICO.¹¹⁶

Under the TOCC, countries are required to adopt domestic laws to “prevent or suppress certain types of organized-crime-related activities.”¹¹⁷ Similarly, with the adoption of an intellectual property protocol, signatories would be required to make their intellectual property laws consistent with the organized crime laws. Some measures in the current protocols are mandatory, while some are more flexible.¹¹⁸ Because organized crime groups generally have been unresponsive to civil penalties,¹¹⁹ mandatory measures to bring intellectual property offenses as predicate offenses that can be criminally prosecuted under organized crime statutes are necessary.

3. Analogizing Ideas from Other Substantive Areas to Encourage Harmonization of Noncompliant Nations

While creating treaties and mandatory guidelines is useful, it is only valuable for signatory countries; nonjoining nations pose another hurdle. Organized intellectual property crime is an “‘industry’ managed by sprawling organizations in much the same way as drug-trafficking, gun-running and money-laundering.”¹²⁰ Based on this idea, nations can look to these areas for guidance in harmonizing laws to combat this new phenomenon. Money laundering and drug trafficking laws are related to organized crime in a similar manner as intellectual property and can serve as a guide for encouraging compliance with international standards.

A few examples taken from other substantive criminal areas shed light on a few of many available possibilities to address noncompliant nations. The Financial Action Task Force of the G-7 created minimum standards for countries to follow in the fight against money laundering.¹²¹ It named fifteen states with grossly inadequate laws, which prompted a change in several of those countries.¹²² The Council of Europe on Cybercrime has created a similar movement against cybercrime.¹²³ Economic sanctions and making intellectual property organized crime laws part of other important treaties are two other

116. Green, *supra* note 75, at 236; *see also* 18 U.S.C. §§ 1956, 1961, 2319 (2000).

117. UNODC, *Summary*, *supra* note 104, at pt. A.5(b).

118. *Id.*

119. *See supra* text accompanying note 90.

120. Reno, *supra* note 6.

121. Williams, *supra* note 34, at 25.

122. *Id.*

123. *Id.*

methods currently utilized to enhance compliance.¹²⁴ A similar movement for intellectual property exploitation by organized crime groups indicating which countries need to increase both penalties and enforcement standards may provide a successful path for harmonization, even with once noncompliant nations.

B. Coordinated Sharing of Information, Evidence, and Education by Law Enforcement, Intelligence Agencies, and International Organizations

Even if criminal laws are harmonized, “procedural, cultural and institutional asymmetries can impede law enforcement cooperation.”¹²⁵ Sharing information and resources amongst nations is of utmost importance to combat transnational organized crime groups exploiting intellectual property protections.¹²⁶ “The ability of a country to institute adequate statutory protections is inextricably linked to its ability to respond to continuous refinements of technology and the sophistication of offenders in evading the law.”¹²⁷ In order to do so, access to information, evidence, and resources must be available to all jurisdictions in which organized crime criminals are acting and/or affecting. Education about the developing technologies and methods used by these groups is paramount to eradicating organized crime groups’ manipulation of intellectual property rights.

1. Information and Evidence Sharing

Coordination amongst various agencies, taskforces, and law enforcement personnel involved in these areas, including both state and nonstate actors,¹²⁸ is necessary due to the complexity of intellectual property and organized crime.¹²⁹ “The main flaw in current treaties and negotiations to protect intellectual property rights is the lack of

124. See generally, e.g., Steve Charnovitz, *The World Trading Organization and Law Enforcement: Paper Prepared for the Round Table on “Old Rules, New Threats,”* COUNCIL ON FOREIGN REL., Mar. 6, 2003, at pt. II.C, available at http://www.cfr.org/publication/5860/world_trade_organization_and_law_enforcement.html (discussing WTO rules that apply broadly to goods trading, including the more specific category of intellectual property rights as well as “Sanctions Against Governments to Address Non-Compliance Within a Treaty System”).

125. Zagaris & Aguilar, *supra* note 88, at 45.

126. See Grace P. Nerona, *The Battle Against Software Piracy: Software Copyright Protection in the Philippines*, 9 PAC. RIM L. & POL’Y J. 651, 657 (2000) (“Improving the enforcement of intellectual property rights also requires training and educating enforcement officials in intellectual property.”).

127. Zagaris & Aguilar, *supra* note 88, at 44.

128. *Id.* at 48 (citing PHILLIP TAYLOR, *NONSTATE ACTORS IN INTERNATIONAL POLITICS FROM TRANSREGIONAL TO SUBSTATE ORGANIZATIONS* (1984) for a background discussion on the emergence of non-state actors).

129. See JHARNA CHATTERJEE, RESEARCH & EVALUATION BRANCH, COMMUNITY, CONTRACT, & ABORIGINAL POLICING, ROYAL CANADIAN MOUNTED POLICE, *THE CHANGING STRUCTURE OF ORGANIZED CRIME GROUPS* 25-26 (2005).

a global enforcement mechanism.”¹³⁰ Interpol, albeit a nonstate actor, can help provide this global enforcement mechanism on behalf of states. Interpol has the “ability to transmit, collect, evaluate, process, analyse and disseminate criminal intelligence among its 177 Member States to help the investigations.”¹³¹ Other relevant organizations need to reciprocate. For example, an important objective for the World Customs Organization, which polices the borders for counterfeit products “is to build and maintain co-operation with Interpol.”¹³² Intellectual property agencies should follow suit.

Models of enforcement should be developed based on studies and investigations into organized crime involvement in intellectual property crime.¹³³ Models should focus upon “organized crime and terrorist group involvement in intellectual property crime . . . ,” “[i]nternational cross-border multi-agency investigations into intellectual property crime,” and “[e]xamin[ing] the extent to which organized crime is involved in the international trade of counterfeit and pirated products.”¹³⁴

The TOCC has specific measures regarding “law-enforcement cooperation and collection and exchange of information.”¹³⁵ This should be used as a framework in the intellectual property prosecutions. Also, similar to the National Intellectual Property Law Enforcement Coordination Council in the U.S. that brings together executives from many agencies to coordinate intellectual property law enforcement domestically and abroad,¹³⁶ the international organizations need to do the same to coordinate multistate enforcement initiatives.

One way to enhance information sharing is better communication channels and shared publications regarding trends, successes, and failures in the fight against transnational organized intellectual property crime. As of the 2002 report, “[n]o international organization including INTERPOL, publishes regular global reports” on emerging trends in organized crime.¹³⁷ The UN Transnational Organized Crime Treaty members have regularly scheduled meetings,¹³⁸

130. Creer, *supra* note 72, at 241.

131. Sandhu, *supra* note 6, at 101.

132. Will Robinson, *The World Customs Organization*, 2 INT’L CRIM. POLICE REV. No. 476-477 81, 83 (1999), available at <http://www.interpol.org/Public/FinancialCrime/IntellectualProperty/Publications/ICPR2.pdf>.

133. NASHERI, *supra* note 4, at 75.

134. *See id.* at 75-76.

135. UNODC, *Summary*, *supra* note 104, at pt. A.5(b).

136. 15 U.S.C. § 1128 (2000); Reno, *supra* note 6.

137. UNODC, RESULTS OF A PILOT SURVEY, *supra* note 35, at 7 (“The TOC Convention however lists the exchange of information on patterns and trends in transnational organized crime as one of the main tasks of the Conference of State Parties and its Secretariat.”).

138. *See* Media Release, Interpol, Interpol General Assembly Opens in Rio de Janeiro, Brazil, Bringing Interpol Tools to Frontline Officers a Priority (Sept. 19, 2006), available at <http://www.interpol.int./Public/ICPO/PressReleases/PR2006/PR200631.asp>.

which should be utilized to aid in the effort to disseminate related information. Interpol has also recently released its first issue of an intellectual property newsletter.¹³⁹ This newsletter should include articles about large-scale criminal enterprise statistics, data, and progress (or lack thereof), similar to its Interpol-United Nations Security Council Special Notices regarding terrorism. This terrorism information publication, for example, is used to help coordinate the efforts by alerting nations about who are targeted fugitives.¹⁴⁰ A publication regarding targeted fugitives in organized intellectual property crime would also be beneficial. Also analogous is information currently disseminated about organized drug trafficking.¹⁴¹ It can serve as a model for what information is helpful in the fight against intellectual property organized crime.¹⁴² These publications can serve as models to coordinate enforcement and disseminate the pertinent information regarding the intellectual property/transnational organized crime convergence. Incorporating these ideas into Interpol's already existing, new intellectual property newsletter will make all nations better informed.

These are not the only methods to enhance coordination and communication, but are representative of the possible opportunities. As noted in the next section, education is extremely important as well. With better education and understanding of the complexities involved with both intellectual property rights and organized crime groups, better coordination will follow.

2. *Educating Through Past Success and Training for Future*

A convergence of intellectual property protection groups and criminal enforcement groups is necessary to enhance education of each. Expertise of traditionally-focused-intellectual-property groups is needed, so governments and enforcement officials can understand the importance of intellectual property violations, criminal tactics, and other related issues. Law enforcement agencies, namely Interpol, need to work more closely with agencies that have substantive experience and knowledge in intellectual property, including WIPO, WTO, and Interpol's Intellectual Property Crime Action Group, which is a subgroup of the only international enforcement agency focusing on substantive problems in intellectual property protection.

139. Interpol Intellectual Property Crime Action Group Newsletter (IIPCAG, Lyon, France), Winter 2006, available at <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publications/IIPCAGNewsletter01.pdf>.

140. Interpol, United Nations Security Council Special Notices, <http://www.interpol.int/Public/NoticesUN/Default.asp> (last visited June 23, 2007).

141. See Interpol, Drugs and Criminal Organizations, <http://www.interpol.int/Public/Drugs/default.asp> (last visited June 23, 2007).

142. *Id.*

Governments must also be educated regarding best practices to implement laws and other solutions. “States are encouraged to support one another with resources or technical expertise where needed” in implementing laws to bring the terms of the TOCC into force in its jurisdiction.¹⁴³

The U.S. government, in cooperation with Italy and international organizations, such as the United Nations, has been active in helping interested countries, such as Mexico, develop their own organized crime legislation to facilitate the investigation and prosecution of organized crime. As a result, Mexico enacted a Federal Organized Crime Act on October 18, 1996.¹⁴⁴

Another example of educational efforts include providing guidance for legislation under the TOCC and its new legislative guide.¹⁴⁵ The World Customs Organization also has drafted model customs legislations to help countries drafting or revising their texts.¹⁴⁶ As these examples indicate, past successes shared among nations help train them for effective enforcement in the future.

In addition to educating governments, instructing law enforcement officials about emerging trends¹⁴⁷ and best practices is also critical. Interpol, as the world’s largest police organization, should take a central role coordinating and distributing educational forums and materials. Programs similar to the World Customs Organizations’ videos created to increase intellectual property rights violations awareness amongst its staff members should also be implemented¹⁴⁸ to increase intellectual property awareness within criminal enforcement agencies and organized crime awareness in intellectual property protection groups. Experiences in drug trafficking enforcement and other crimes often associated with organized crime can serve as examples for enforcement, as the use of drug trafficking to support these enterprises has been compared to these groups’ uses of intellectual property crimes.¹⁴⁹

143. UNODC, *Summary*, *supra* note 104, at pt. A.5(a).

144. Zagaris, *supra* note 101, at 517.

145. DIVISION FOR TREATY AFFAIRS, U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO (2004), *available at* http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.

146. Robinson, *supra* note 132, at 84.

147. Reno, *supra* note 6.

148. Robinson, *supra* note 132, at 84.

149. *See, e.g.*, Reno, *supra* note 6.

C. Investigations: Focus on the Finances, a Central Element to Transnational Organized Crime and Intellectual Property Crime

Transnational organized crime groups engage in their activities primarily for profit.¹⁵⁰ Similarly, money laundering is a primary activity of organized crime groups.¹⁵¹ They also need money to facilitate the actions of their groups and, therefore, must transfer money amongst members. Finances and corresponding concerns infiltrate almost every aspect of organized crime. Controlling the exchange of money that facilitates and provides profits for these groups has proven to be one of the most successful approaches to combating organized crime.¹⁵²

Detecting “dirty” money and illicit transactions, however, has proven to be difficult. Groups that have outwardly entered into legitimate businesses, as discussed in Part IV.F and G, have created an ideal structure to hide financial streams of illegitimate activities. “[P]rofits . . . [are] being washed through outwardly legitimate enterprises.”¹⁵³ Thus, increased efforts and resources need to be concentrated on financial routes and transfers during investigations.

The TOCC “aims to tackle the root cause of transnational crime—profit.”¹⁵⁴ It requires “signatory countries to enact anti-money laundering and asset forfeiture techniques against transnational organized crime.”¹⁵⁵ In addition to these relevant provisions, enforcement official must study financial aspects, as well as focus investigations on the methods groups are using to evade detection in their financial transfers. By stopping the means by which the groups operate, more intellectual property crimes will be identified and groups uncovered.

D. Changing the Public Perception of Intellectual Property Crimes in General

Current perceptions, previously discussed in Part IV.H, can be changed in a variety of ways. The focus must be to raise knowledge on the issue and change the general cultural acceptance of theft of intellectual property, so the will to enforce intellectual property laws

150. Chip Arvantides & Jamey Butcher, What Is Organized Crime?, <http://www.american.edu/ted/hpages/crime/text2.htm> (last visited June 23, 2007) (“Whatever the activity, the underlying purpose is to make a profit from the illegal ‘work’ of a large number of people that is coordinated over time.”).

151. See, e.g., GLENN E. CURTIS ET AL., FED. RES. DIV., LIBRARY OF CONGRESS, TRANSNATIONAL ACTIVITIES OF CHINESE CRIME ORGANIZATIONS (2003) (discussing Chinese crime groups’ presences in many countries and noting that in many of these countries, the groups are involved in money laundering).

152. See Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT’L L.J. 1649, 1659 (2003).

153. Lowe, *supra* note 41, at 95.

154. UNODC, *After Palermo*, *supra* note 103.

155. Zagaris, *supra* note 101, at 513.

will be stronger.¹⁵⁶ Even though there are many reasons for public disagreement regarding intellectual property, as noted in Part II, changing the acceptance of violations is important to combating the avenues organized crime groups utilize to exploit intellectual property rights and ultimately profit.

To induce other countries—especially developing countries, which frequently oppose enforcement¹⁵⁷—to cooperate in initiatives and take on their own enforcement initiatives, the psychological impact and reasoning of why intellectual property rights are important must penetrate those societies. Many of the United States reports, such as the Department of Justice’s Task Force report, focus on the growth and innovation in the American economy.¹⁵⁸ This view needs to be expanded to a consistent global view of economic growth—how intellectual property right protections can enable growth in all societies. One report notes that the U.S. is interested in strengthening intellectual property enforcement for at least two reasons: “(1) the economic benefits to the United States which enhanced enforcement of IP could yield; and (2) a belief that improved protection of IP is essential for the economic development of all countries.”¹⁵⁹ Whether these claims are valid or not is not at issue. Rather, the perceptions these goals portray are important; the focus needs to be on the latter to change the tide of cultural acceptance of intellectual property theft in other countries. Instead of focusing on benefits to only the United States and other developed countries, the primary focal point must include all the societies of the world, with a special emphasis on developing countries.

There is a need to educate people that the local artists and innovators, especially in countries with poor legal and enforcement

156. Wayne, *supra* note 69 (“We need to spread the message that protection of intellectual property is good for these countries too [W]hatever we do has to address the key aspects of the problem—knowledge, capacity and will.”); *see also* Reno, *supra* note 6 (“Law enforcement officials too often perceive intellectual property enforcement as advancing purely private, commercial interests, or interests that can be adequately vindicated by administrative or civil courts.”). *But see* Part II, *supra*, for limiting concerns.

157. NASHERI, *supra* note 4, at 64.

158. *E.g.*, OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUST., *supra* note 6, at 7 (noting that “intellectual property theft threatens the very foundation of a dynamic, competitive and stable economy”); *see also* Wayne, *supra* note 69 (stressing the importance of IP for the American economy and for “promoting peace and prosperity around the globe”). While this may seem a minor difference, many reports examined during this research had similar patterns. The important aspect in combating international intellectual property crime is better enforcement throughout the world. The world will only begin to see this importance if the U.S.’s economic prosperity is not always more extensively talked about and put before the rest of the world. As an aside, this Note is not claiming that intellectual property crimes are not hurting the U.S. economy nor that this effect is unimportant; it is only suggesting that a possible change in the focus and the general perception of intellectual property protection may aid in harmonization of laws and enforcement.

159. NASHERI, *supra* note 4, at 64 (citations omitted).

frameworks, are the ones often hurt because counterfeiters and pirates defeat any chances to even begin showcasing talents.¹⁶⁰ The nations and their constituents need to understand the importance of intellectual property protection in the relevant context of their own economic development, rather than the benefit for the United States and other developed countries only. By building domestic constituencies who see the importance of intellectual property protections, there will be greater, positive pressure on each domestic government to comply.¹⁶¹ Only with changes in perception will other possible solutions, like legal harmonization and enforcement coordination, be possible.

VI. CONCLUSION

Prompt attention to the connection between transnational organized crime and intellectual property crime can combat the potential permanency of organized crime in intellectual property theft. Much of organized crime and intellectual property theft is seemingly an untouchable problem because it often occurs unnoticed. This is only exacerbated by the fact that intellectual property rights themselves are intangible property. The key to combating this problem is to “disable each link in the chain of these crimes”¹⁶² by defeating organized crimes that are fostering the spread of intellectual property violations. By examining commonalities, as well as multilateral solutions, this convergence can be decelerated.

160. Wayne, *supra* note 66.

161. *Id.*

162. Reno, *supra* note 6.