

# THE BATTLE AGAINST SOFTWARE PIRACY: SOFTWARE COPYRIGHT PROTECTION IN THE PHILIPPINES

Grace P. Nerona

*Abstract:* The Philippines enacted the Intellectual Property Code ("IPC") on June 6, 1997 to comply with its World Trade Organization ("WTO") treaty obligations and to respond to U.S. concerns regarding intellectual property protection in the Philippines. The IPC streamlines administrative procedures, increases criminal penalties for copyright infringement, and provides copyright protection for computer software. Despite the enactment of the IPC, the United States has kept the Philippines on its Special 301 "Watch List" of intellectual property rights violators. The United States maintains that the level of intellectual property protection in the Philippines is inadequate and ineffective, particularly in the areas of software and enforcement. The United States is pressuring the Philippines to improve its intellectual property protection, threatening trade sanctions against the Philippines if it fails to do so. The decision to keep the Philippines on the Special 301 Watch List is unreasonable. The use of Special 301 directly conflicts with the U.S. obligations under the WTO. Moreover, the decision to place a country on the Watch List is often influenced by private industries. Even if Special 301 did comply with U.S. obligations under the WTO, the U.S. position that the Philippines denies adequate intellectual property protection is unjustified. Special 301 unfairly requires the Philippines to go beyond intellectual property protection standards required by international treaties. The United States has failed to consider that the Philippines has implemented both short-term and long-term solutions to address piracy and improve enforcement of intellectual property rights. The United States has also failed to consider the Philippines' level of economic development when evaluating Philippine efforts to improve intellectual property protection.

## I. INTRODUCTION

In 1998, roughly one out of every three computer software applications installed worldwide was pirated.<sup>1</sup> This represents a thirty-eight percent piracy rate for the global software industry and an eleven billion dollar loss in revenue.<sup>2</sup> These numbers demonstrate the enormous amount

---

<sup>1</sup> International Planning & Research Corporation, Business Software Alliance & Software & Information Industry Assoc., *1998 Global Software Piracy Report 2* (May 1999) available in <<http://www.bsa.org>> [hereinafter *1998 Global Software Piracy Report*]. The study analyzed market information and sales data of 85 countries in the six major world regions based on 26 different business software applications. *Worldwide Business Software Piracy Losses Reach \$11 billion in 1998*, BUS. WORLD (Phil.), May 27, 1999, available in 1999 WL 17715309. "Software piracy" is "the unauthorized copying of computer software." Lois W. Abraham, *The Uphill Battle Against Software Piracy Abroad (and at Home)*, 453 PRAC. L. INST./PAT., COPYRIGHTS, TRADEMARKS & LITERARY PROP. HANDBOOK SERIES 449, 451 (Sept. 1996).

<sup>2</sup> *1998 Global Software Piracy Report*, *supra* note 1, at 2.

of money the growing software industry is losing to pirates who illegally reproduce copyrighted works.

The Philippines is a large market for pirated software. In 1998, nearly eight out of ten software applications in the Philippines were pirated.<sup>3</sup> The country has in the past faced pressure from the World Trade Organization ("WTO") to meet its international treaty obligations, particularly under the Agreement on Trade Related Aspects of Intellectual Property ("TRIPs"),<sup>4</sup> and has been under fire from the United States for having inadequate and ineffective intellectual property protection.<sup>5</sup> The United States has also threatened to impose trade sanctions against the Philippines unless the country makes immediate improvements in intellectual property protection, particularly for computer software.<sup>6</sup>

On June 6, 1997, the Philippine government enacted the Intellectual Property Code ("IPC"),<sup>7</sup> which revamped the Philippines' intellectual property system.<sup>8</sup> According to one Philippine commentator, the IPC was one of the most well-considered pieces of legislation passed by the Philippine government in 1997.<sup>9</sup> The new law took effect on January 1, 1998,<sup>10</sup> and includes copyright protection for works such as computer software.<sup>11</sup> Despite the passage of the IPC, the United States has continued to criticize the Philippines for failing to remedy its software piracy problem and improve its enforcement of intellectual property rights<sup>12</sup> and has maintained the Philippines on its Special 301<sup>13</sup> "Watch List" of intellectual

---

<sup>3</sup> See 1998 *Global Software Piracy Report*, *supra* note 1, at 4 (indicating that the software piracy rate in the Philippines was 77% in 1998).

<sup>4</sup> 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 vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPs]. See also discussion *infra* Part III.B.1.

<sup>5</sup> See discussion *infra* Part III.B.2.

<sup>6</sup> See *id.*

<sup>7</sup> Intellectual Property Code (Republic Act No. 8293) (Phil.) available in Chan Robles Virtual Law Library (visited Jan. 8, 2000) <<http://www.chanrobles.com/legal/ipcp.htm>> [hereinafter Republic Act No. 8293].

<sup>8</sup> *New Intellectual Property Law Takes Effect in Philippines*, 10 J. PROPRIETARY RTS. 19 (Apr. 1998).

<sup>9</sup> Alonzo Q. Ancheta, *Philippines Begins New IP Regime*, IP Worldwide Feb. 1998, available in LEXIS, News Library, IP Worldwide [hereinafter *Philippines Begins New IP Regime*]. Mr. Ancheta is a senior partner at Quasha Ancheta Penn & Nolasco in Manila, Philippines, and is also a past president and past chairman of the Intellectual Property Association of the Philippines. Alonzo Q. Ancheta, *Philippines Wages Uphill Battle Against IP Pirates*, IP Worldwide, Aug. 1996, available in LEXIS, News Library, IP Worldwide [hereinafter *Philippines Wages Uphill Battle Against IP Pirates*].

<sup>10</sup> Republic Act No. 8293, *supra* note 7, § 241.

<sup>11</sup> *Id.* § 172.1(n).

<sup>12</sup> *Poor Record For Intellectual Property Rights Cited By U.S.*, BUS. WORLD (Phil.), Apr. 28, 1999, available in 1999 WL 17713649.

<sup>13</sup> 19 U.S.C. § 2242 (1994).

property rights violators.<sup>14</sup> Special 301 refers to the statutory authority of the United States to identify and investigate countries that deny the United States adequate intellectual property protection or fair market access.<sup>15</sup>

This Comment argues that the U.S. decision to keep the Philippines on the Watch List is unreasonable. Using U.S. copyright law as a model,<sup>16</sup> Part II discusses the concept of copyright law, copyright protection for computer software, and the problems of counterfeiting and piracy. Part III outlines the history of intellectual property protection in the Philippines and describes the motivations behind the enactment of the IPC. Part IV discusses the copyright provisions of the IPC, particularly those applicable to computer software, and examines the continued criticism of the Philippine intellectual property regime even after the enactment of the IPC. Part V discusses the problems with the use of Special 301 and explains why the U.S. decision to keep the Philippines on the Special 301 Watch List is unreasonable.

## II. COPYRIGHT LAW AND SOFTWARE COPYRIGHT PROTECTION

### A. Overview of Copyright Law

Copyright law gives authors certain property rights in their original works of authorship and prohibits a party from copying or using a work without the author's permission.<sup>17</sup> For instance, in the United States, copyright owners have the exclusive right to reproduce, adapt, distribute, perform, and publicly display their copyrighted works.<sup>18</sup>

For a work to receive copyright protection, the work must be original and fixed in a tangible medium of expression.<sup>19</sup> To be original, the work must be independently created by its author and not copied from another.<sup>20</sup> A work is "fixed" when an author places it on a material object,<sup>21</sup> also known as a copy.<sup>22</sup> For example, a person that writes a poem has created a literary work composed of words and symbols.<sup>23</sup> That poem can be fixed on

---

<sup>14</sup> See discussion *infra* Part III.B.2.

<sup>15</sup> See discussion *infra* Part III.B.2.

<sup>16</sup> U.S. copyright law is considered by many in the international community as the standard of choice. Abraham, *supra* note 1.

<sup>17</sup> See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 2, 3 (3d ed. 1999).

<sup>18</sup> U.S. Copyright Act of 1976, 17 U.S.C. § 101 et. seq., § 106.

<sup>19</sup> 17 U.S.C. §102(a).

<sup>20</sup> LEAFFER, *supra* note 17, at 56.

<sup>21</sup> 17 U.S.C. § 101.

<sup>22</sup> *Id.*

<sup>23</sup> See LEAFFER, *supra* note 17, at 47.

various material objects such as a piece of paper, magnetic tape, or a block of marble.<sup>24</sup> The copyright exists once the author creates his work by fixing it in such tangible medium of expression for the first time.<sup>25</sup>

In addition to originality and fixation, a work qualifies for copyright protection if it fits into a category of copyrightable subject matter. The United States considers certain categories of works as copyrightable subject matter, including (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorials, graphics, and sculptures; (6) audiovisual works, including motion pictures; (7) sound recordings; and (8) architectural works.<sup>26</sup>

A copyright infringer who violates one or more of the copyright owner's exclusive rights is subject to civil actions brought by the copyright owner as well as criminal penalties. In a civil proceeding, the copyright owner may seek various remedies, including an injunction prohibiting continued infringement of the copyright,<sup>27</sup> the impounding of all copies used in violation of a copyright owner's rights,<sup>28</sup> the destruction of infringing articles,<sup>29</sup> costs and attorneys fees,<sup>30</sup> as well as the awarding of monetary damages and the infringer's profits.<sup>31</sup> Criminal penalties, including fines and imprisonment, may also be imposed against a person who willfully and for purposes of commercial advantage or private gain infringes a copyright.<sup>32</sup>

The protection of intellectual property<sup>33</sup> has become a source of tension in the international community.<sup>34</sup> The extent of intellectual property protection and enforcement of rights varies from country to country, yet intellectual property has become an important part of global trade.<sup>35</sup> Intellectual property protection for U.S. products and services has become increasingly important to U.S. businesses.<sup>36</sup> The percentage of U.S. exports containing elements of intellectual property has more than doubled since the

---

<sup>24</sup> *Id.*

<sup>25</sup> 17 U.S.C. §101.

<sup>26</sup> *Id.* § 102(a).

<sup>27</sup> *Id.* § 502(a).

<sup>28</sup> *Id.* § 503(a).

<sup>29</sup> *Id.* § 503(b).

<sup>30</sup> *Id.* § 505.

<sup>31</sup> *Id.* § 504(b).

<sup>32</sup> *Id.* § 506(a)(1); 18 U.S.C. § 2319 (1994).

<sup>33</sup> As used in this Comment, the term "intellectual property protection" refers to protection for not only copyrightable works, but also to other forms of intellectual property such as patents and trademarks.

<sup>34</sup> *The Agreements: Intellectual Property-Protection and Enforcement* (visited Apr. 5, 2000) <<http://www.wto.org/wto/about/agmnts6.htm>>.

<sup>35</sup> *Id.*

<sup>36</sup> See Robert W. Kastenmeier & David Beier, *Int'l Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT'L L. 285, 286 (1989).

end of World War II.<sup>37</sup> U.S. industries receive royalties of more than \$8 billion annually from the licensing of intellectual property, six times more than that paid to foreign firms.<sup>38</sup> However, piracy significantly diminishes these earnings, costing U.S. industries more than forty billion dollars in lost sales each year from the unauthorized copying of U.S. products worldwide.<sup>39</sup>

### B. *Copyright Protection for Software*

U.S. copyright laws extend protection to computer software by treating the software as a literary work.<sup>40</sup> A computer program is "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."<sup>41</sup> The owner of a copyright in software is usually the software publisher.<sup>42</sup> A person who buys a copy of software does not become the copyright owner, but rather purchases the right to use the software.<sup>43</sup>

In most countries, computer software is protected under copyright law.<sup>44</sup> The nature of computer software makes it hard to classify under either copyright or patent law; it is both an expression of an idea, and thus akin to copyright, and also the algorithmic solution to the problem of operating a machine, making it akin to patent.<sup>45</sup> However, copyright law has become the principal method of legal protection for computer programs.<sup>46</sup> Copyright protection is easy to administer because an author receives protection from the time he or she creates a work<sup>47</sup> without the need of an enforceable agreement, and copyright protection is generally available in more countries than is patent protection.<sup>48</sup>

---

<sup>37</sup> *Id.* Twenty-five percent of U.S. exports now have high intellectual property content. *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> H.R. REP. No. 94-1476, at 54 (1976) [hereinafter HOUSE REPORT].

<sup>41</sup> 17 U.S.C. § 101 (computer program).

<sup>42</sup> Business Software Alliance, *Software Piracy and U.S. Law* (visited Feb. 5, 2000) <[http://www.nopiracy.com/swandlaw\\_c.html](http://www.nopiracy.com/swandlaw_c.html)>.

<sup>43</sup> *Id.*

<sup>44</sup> See PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY 823 (4th ed. 1999).

<sup>45</sup> See Robert R. Deveza, *Legal Protection of Computer Software in Major Indus. Countries: A Survey of Copyright and Patent Protection for Computer Software*, 9 UCLA PAC. BASIN L.J. 166, 168, 207-08 (1991).

<sup>46</sup> Fred M. Greguras, *1998 Trends in Software Licensing and Legal Protection for Software* (June 4, 1998) available in Fenwick & West LLP Publications <[http://www.fenwick.com/pub/1998\\_trends\\_in\\_software\\_licens.htm](http://www.fenwick.com/pub/1998_trends_in_software_licens.htm)>.

<sup>47</sup> See 17 U.S.C. § 101 (created).

<sup>48</sup> *Id.*

The use of copyright law to protect software has not precluded software piracy from becoming "the greatest single threat to the advancement of the software industry."<sup>49</sup> Piracy is the "illegal reprinting or reproduction of copyrighted matter" or the unlawful plagiarism of it.<sup>50</sup> Piracy is distinguishable from counterfeiting in that the counterfeiter makes an unauthorized copy of a work "with [a] view to deceive or defraud by passing copy as original or genuine."<sup>51</sup> Software is particularly susceptible to piracy and counterfeiting because of the ease with which software can be copied through the use of a personal computer.<sup>52</sup> In addition, countries that lack the technology and funds to independently develop or purchase new software products depend on counterfeiting to obtain software.<sup>53</sup> Moreover, counterfeiting and piracy are profitable ventures.<sup>54</sup> In 1998, the global software industry lost eleven billion dollars in revenue due to piracy.<sup>55</sup> All of these factors encourage software piracy.

### C. *Curing Counterfeiting and Piracy*

Countries should undertake both short-term and long-term efforts to address the problem of software piracy.<sup>56</sup> In the short term, a country should review and update its current intellectual property laws.<sup>57</sup> Doing so sends the message to counterfeiters and pirates that the government has adopted a policy of protecting intellectual property. Government agencies in charge of administering a country's intellectual property laws also need an adequate number of properly trained staff members who understand and apply the details of a country's intellectual property laws.<sup>58</sup>

In the long-term, a country should invest in research and development in science and technology, funding projects that increase the country's

---

<sup>49</sup> Robert Holleyman, *Software Piracy Abroad: Challenges and Opportunities*, 453 PRAC. LAW INST./PAT., COPYRIGHTS, TRADEMARKS & LITERARY PROP. HANDBOOK SERIES 419, 422 (1996).

<sup>50</sup> BLACK'S LAW DICTIONARY 795 (5th ed. 1991).

<sup>51</sup> *Id.* at 244.

<sup>52</sup> Holleyman, *supra* note 49, at 422.

<sup>53</sup> See Paul C.B. Liu, *A Review of the Intellectual Property Laws in Taiwan: Proposals to Curb Piracy and Counterfeiting in a Developing Country*, 3 BYU L. REV. 619, 633 (1988) [hereinafter *Proposals to Curb Piracy and Counterfeiting in a Developing Country*].

<sup>54</sup> *Id.*

<sup>55</sup> 1998 *Global Software Piracy Report*, *supra* note 1, at 2.

<sup>56</sup> *Proposals to Curb Piracy and Counterfeiting in a Developing Country*, *supra* note 53, at 633.

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 637-38 (suggesting that inadequate staffing and training in Taiwan's administration for intellectual property protection contributed to a weak administration, preventing it from properly resolving disputes).

technical capabilities in areas such as software.<sup>59</sup> By doing this, a country strengthens efforts to develop its own intellectual property.<sup>60</sup> This, in turn, reduces dependency on foreign technology and curbs the need for counterfeiting and piracy.<sup>61</sup>

A country plagued by counterfeiting and piracy should also educate its population on intellectual property. In developing countries, the philosophy behind and the values of intellectual property are generally unfamiliar to the public.<sup>62</sup> In these countries, both legal professionals and the general public must be educated in the concept and value of intellectual property in order to promote respect for intellectual property rights.<sup>63</sup>

Improving the enforcement of intellectual property rights also requires training and educating enforcement officials in intellectual property. An "existing knowledge base within the judiciary and practising bar about intellectual property rights" is fundamental to the enforcement of an intellectual property regime.<sup>64</sup> In most Pacific Rim countries, enforcement of intellectual property laws has been difficult because the laws are new and technical, and enforcement officials (i.e., judges, prosecutors, and police personnel) are not familiar with the laws and the proper procedure to enforce them.<sup>65</sup>

### III. INTELLECTUAL PROPERTY AND COPYRIGHT LAW IN THE PHILIPPINES

#### A. *History of Intellectual Property and Copyright Law in the Philippines Prior to the Intellectual Property Code*

Unlike many other Asian countries, the Philippines has recognized intellectual property protection for over fifty years.<sup>66</sup> Historically, the Philippines provided intellectual property protection through statutes, its

---

<sup>59</sup> *Id.* at 633-34.

<sup>60</sup> *See id.* at 634.

<sup>61</sup> *Id.*

<sup>62</sup> Ruth L. Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 770 (1996).

<sup>63</sup> *Proposals to Curb Piracy and Counterfeiting in a Developing Country*, *supra* note 53, at 634.

<sup>64</sup> Gana, *supra* note 62, at 770.

<sup>65</sup> PAUL C.B. LIU, OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, COMPUTER SOFTWARE AND INTELLECTUAL PROPERTY LAW IN THE PACIFIC RIM COUNTRIES 7-8 (1991).

<sup>66</sup> *Philippines: Economy*, World of Information Country Report, Aug. 1999, Investment and Trading, available in LEXIS, Asia/Pacific News, Business Analysis, Country Information [hereinafter *Philippines: Economy*].

constitution, and executive orders.<sup>67</sup> The Philippines first enacted intellectual property laws in 1947 to protect patents<sup>68</sup> and trademarks.<sup>69</sup> Subsequently, the Philippines provided copyright protection under Presidential Decree No. 49, which the copyright provisions of the IPC repealed.<sup>70</sup> These measures, as well as other Philippine intellectual property protections, were modeled after U.S. laws, regulations, and practices.<sup>71</sup>

The Philippine Constitution also contains provisions on the protection and promotion of intellectual property rights. The 1973 Constitution states that "the exclusive right to inventions, writings, and artistic creations shall be secured to inventors, authors and artists for a limited period."<sup>72</sup> The 1987 Constitution, which replaced the 1973 Constitution, mandates that the government "protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations . . ."<sup>73</sup>

Despite the recognition of intellectual property rights for the past fifty years,<sup>74</sup> the Philippine government did not aggressively enforce Philippine intellectual property laws prior to the passage of the IPC in 1997. For example, there was not a single criminal conviction for intellectual property infringement or unfair competition under the Philippines' 1947 intellectual property laws.<sup>75</sup> Before the passage of the IPC in 1997, the Philippine government did not consider intellectual property protection a high priority and thus did not give serious attention to the enforcement of such laws.<sup>76</sup>

---

<sup>67</sup> See *Intellectual Property Rights in the Philippines: Brief Background*, available in Chan Robles Virtual Law Library (visited May 12, 2000) <<http://www.chanrobles.com/legal7history.htm>> [hereinafter *Philippine Intellectual Property Brief*].

<sup>68</sup> Intellectual Property Office, *Historical Highlights: 50 Years of Industrial Property System* (visited Feb. 28, 2000) <<http://www.dti.gov.ph/ipo/aboutus.htm>>. Republic Act No. 165 was known as "An Act Creating a Patent Office, Prescribing its Powers and Duties, Regulating the Issuance of Patents and Appropriating Funds Therefor[sic]." *Id.*

<sup>69</sup> *Id.* Republic Act No. 166 was known as "An Act to Provide for the Registration and Protection of Trade Marks, Trade Names and Service Marks, Defining Unfair Competition and False Marking and Providing Remedies Against the Same, and for other Purposes." *Id.*

<sup>70</sup> Susan D. Villanueva, *Intellectual Property Laws On Copyright in the Philippines*, in PROCEEDINGS FROM THE LECTURE-FORUM ON THE INTELLECTUAL PROPERTY RIGHTS OF THE UNIVERSITY OF THE PHILIPPINES UNDER THE INTELLECTUAL PROPERTY CODE 4, 4 (Lily Rose Roxas-Tope ed., 1998).

<sup>71</sup> *Philippines: Economy*, *supra* note 66, at Investment and Trading; see also *Philippines Wages Uphill Battle Against IP Pirates*, *supra* note 9.

<sup>72</sup> *Philippine Intellectual Property Brief*, *supra* note 67.

<sup>73</sup> PHIL. CONST. art. XIV, § 13 (1987), available in Chan Robles Virtual Law Library (visited May 7, 2000) <<http://www.chanrobles.com/article14sciencetech.htm>>.

<sup>74</sup> *Philippines: Economy*, *supra* note 66, at Investment & Trading.

<sup>75</sup> *Philippines Wages Uphill Battle Against IP Pirates*, *supra* note 9. Although there were some insignificant cases, they amounted to modest fines and "slaps on the wrist." *Id.*

<sup>76</sup> *Id.*



Enforcement agencies lacked adequate staffing and funding.<sup>77</sup> Judges were also reluctant to imprison offenders for intellectual property violations.<sup>78</sup> Moreover, lengthy, protracted trial proceedings caused intellectual property owners to eventually lose interest in the criminal prosecution of copyright infringers.<sup>79</sup>

## B. *Motivations Behind the Intellectual Property Code*

The Philippines enacted the IPC in order to meet its treaty obligations under the Agreement on Trade Related Aspects of Intellectual Property and to respond to pressure from the United States. This Part provides an overview of TRIPs and its copyright provisions, then discusses the use of Special 301 by the United States and its application to the Philippines.

### 1. *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)*

The Philippine government enacted the IPC to comply with TRIPs.<sup>80</sup> TRIPs is an annex to the WTO agreement and describes the intellectual property protection obligations of WTO members.<sup>81</sup> TRIPs came into effect on January 1, 1995.<sup>82</sup> It requires member countries to provide minimum standards of intellectual property protection.<sup>83</sup> In the area of copyright protection, TRIPs requires WTO members to recognize certain subject matter as copyrightable and to grant the copyright owners certain exclusive rights. TRIPs extends copyright protection to much of the same subject matter covered under the U.S. Copyright Act,<sup>84</sup> including literary, dramatic, and musical works.<sup>85</sup> Like U.S. law, TRIPs includes computer software as

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* Under the prior law, an intellectual property violator faced a prison term between six months and one day to a maximum of two years and four months, or alternatively would be fined an amount equivalent to \$2.00 to \$8.00 (U.S.dollars). *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *New Intellectual Property Law Takes Effect in Philippines*, *supra* note 8.

<sup>81</sup> TRIPs, *supra* note 4, Preamble.

<sup>82</sup> World Trade Organization, *An Overview of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)* (visited April 5, 2000) <<http://www.wto.org/wto/intellect/intell2.htm>>.

<sup>83</sup> TRIPs, *supra* note 4, art. 1(1).

<sup>84</sup> 17 U.S.C. §102(a); *see* discussion *supra* Part II.A.

<sup>85</sup> TRIPs, *supra* note 4, art. 9(1) (adopting the Berne Convention standards). The Berne Convention is the oldest multilateral convention on copyrights and is administered by the World Intellectual Property Organization ("WIPO"). LEAFFER, *supra* note 17, at 510. The Berne Convention protects the "literary and artistic works" of authors which, in addition to literary, dramatic and musical works, also includes lectures, choreographic works, cinematographic works, drawings, paintings, architecture, sculptures, engravings,

copyrightable subject matter under the category of literary works.<sup>86</sup> Under TRIPs, members must grant authors of copyrightable subject matter exclusive rights, including the right to reproduce,<sup>87</sup> adapt,<sup>88</sup> translate,<sup>89</sup> publicly perform,<sup>90</sup> and communicate their works.<sup>91</sup> TRIPs also grants copyright owners of computer software the additional right to control commercial rental of their works.<sup>92</sup>

WTO members must establish mechanisms for the protection of intellectual property. Under TRIPs, members must implement both civil and administrative procedures to address infringement claims<sup>93</sup> and must impose criminal punishments in cases of copyright piracy on a commercial scale.<sup>94</sup> Members must also implement measures that prohibit the importation of infringing products.<sup>95</sup>

WTO members, under TRIPs, must also provide a minimum term of copyright protection to copyright owners. The minimum term is the life of the author plus fifty years after the author's death.<sup>96</sup> Alternatively, TRIPs permits members to provide terms that are based on the date an author published a work instead of the life of the author, as long as the period is no

lithographs, photographs, works of applied art, illustrations, sketches, maps, plans, and three-dimensional works related to geography, topography, science or architecture. Berne Convention for the Protection of Literary and Artistic Works, Paris Text, 1971, art. 2(1) [hereinafter Berne Convention]. TRIPs adopts Articles 1-21 of the Berne Convention. TRIPs, *supra* note 4, art. 9(1).

<sup>86</sup> TRIPs, *supra* note 4, art. 10; see discussion *supra* Part II.B. Under TRIPs:

(1) Computer programs, whether in source or object code, shall be protected as *literary works* under the Berne Convention (1971).

(2) Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents, constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

TRIPs, *supra* note 4, art. 10 (emphasis added). The United States defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. §101 (computer program).

<sup>87</sup> Berne Convention, *supra* note 85, art. 9(1).

<sup>88</sup> *Id.* art. 12.

<sup>89</sup> *Id.* art. 8.

<sup>90</sup> *Id.* art. 11(1)(i).

<sup>91</sup> *Id.* art. 11(ii), art. 11<sup>bis</sup>(1). TRIPs grants the same rights as those under the Berne Convention except for moral rights. *Id.* art. 9(1). Moral rights allow an author to "claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." *Id.* art. 6<sup>bis</sup>(1).

<sup>92</sup> TRIPs, *supra* note 4, art. 11.

<sup>93</sup> *Id.* arts. 42, 49.

<sup>94</sup> *Id.* art. 61.

<sup>95</sup> *Id.* art. 51.

<sup>96</sup> Berne Convention, *supra* note 85, art. 7(1).

less than fifty years starting from the end of the calendar year in which the author published the work.<sup>97</sup> If the author fails to publish the work within fifty years of its creation, the term is fifty years beginning from the year in which the author created the work.<sup>98</sup>

TRIPs requires member countries to treat all other member countries equally with regard to intellectual property protection. Under the principle of "national treatment," member countries must give no less favorable treatment to nationals of other member countries than they give to their own nationals with regard to intellectual property protection.<sup>99</sup> In addition, TRIPs requires member countries to implement Most Favored Nation ("MFN") treatment.<sup>100</sup> MFN treatment means that if one member country gives any favor, privilege, advantage, or immunity to the nationals of another member country, the member country must give the same benefits to the nationals of all other WTO member countries.<sup>101</sup>

While TRIPs came into effect on January 1, 1995,<sup>102</sup> it delineated a flexible timetable that gave the less economically developed WTO members additional time to comply with its provisions.<sup>103</sup> TRIPs permits members to comply with its terms on a transitional basis and permits further delays for members that are considered "developing" or "least-developed" countries.<sup>104</sup> A developing country such as the Philippines had up to five years (until January 2000) to comply with TRIPs.<sup>105</sup>

The WTO enforces TRIPs by using a dispute settlement procedure that allows members to bring complaints against other members regarding their compliance with TRIPs.<sup>106</sup> Members bring their complaints before a panel<sup>107</sup> that makes an initial ruling.<sup>108</sup> The panel's ruling may be appealed

---

<sup>97</sup> TRIPs, *supra* note 4, art. 12. TRIPs adopts the Berne definition of "published works." *Id.* art. 9(1). The Berne Convention defines "published works" as "works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work." Berne Convention, *supra* note 85, art. 3(3).

<sup>98</sup> TRIPs, *supra* note 4, art. 12.

<sup>99</sup> *Id.* art. 3(1).

<sup>100</sup> *Id.* art. 4.

<sup>101</sup> *Id.* Article 4 also includes four exceptions to this general rule. *Id.*

<sup>102</sup> WORLD TRADE ORGANIZATION, GUIDE TO THE URUGUAY ROUND AGREEMENTS 1 (1999) [hereinafter GUIDE TO THE URUGUAY ROUND].

<sup>103</sup> TRIPs, *supra* note 4, arts. 65-66.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* arts. 65(1), 62(2); see also USTR Announces Results of Special 301 Annual Review, Apr. 30, 1999, available in <<http://www.ustr.gov/releases/1999/04/index.html>> [hereinafter 1999 Special 301 Review].

<sup>106</sup> See GUIDE TO THE URUGUAY ROUND, *supra* note 102, at 17.

<sup>107</sup> The panel consists of three to five individuals who are a highly qualified governmental or nongovernmental persons, including individuals who have prior experience as a panel member, have been

to the Appellate Body, and the disputing parties must unconditionally accept the Appellate Body's decision.<sup>109</sup> A party at fault under a WTO ruling must comply with the decision or face retaliation in the same area of trade in which it injured the other party.<sup>110</sup> If a party found at fault by a panel or the Appellate Body does not comply with the rulings and recommendations, the offending party may instead provide appropriate compensation to the other party for any injury incurred.<sup>111</sup> If the member government at fault still fails to compensate the injured party, the WTO may grant the injured party the right to retaliate against the party at fault.<sup>112</sup> As much as possible, the retaliation must (1) be in the same area of trade in which the offending party injured the other party and (2) provide to the injured party adequate compensation "equivalent to the level of the nullification or impairment."<sup>113</sup>

As a result of becoming a WTO member in 1995,<sup>114</sup> the Philippines must comply with all WTO agreements, including TRIPs.<sup>115</sup> The Philippines' decision to become a WTO member was influenced by the worldwide trend of economic openness and privatization that seemed to be leading to economic success for other Asian countries.<sup>116</sup> If the Philippines fails to bring its intellectual property laws into compliance with TRIPs, other WTO members may bring complaints against the Philippines,<sup>117</sup> which could ultimately result in authorized trade retaliations.<sup>118</sup>

---

government representatives to the GATT or WTO, have served as senior trade policy officials or with the WTO Secretariat, or who have published or taught on international trade policy or law. GUIDE TO THE URUGUAY ROUND, *supra* note 102, at 21. The panelists cannot be from the countries that are involved in the particular dispute. *Id.* Once the matter is settled, the panel ceases to exist. *Id.*

<sup>108</sup> See World Trade Organization, *Settling Disputes Summary* (visited Apr. 5, 2000) <<http://www.wto.org/wto/about/dispute0.htm>>. The WTO's dispute settlement arrangements are supervised by the Dispute Settlement Body ("DSB"), a body which functions as the WTO's General Council. GUIDE TO THE URUGUAY ROUND, *supra* note 102, at 20.

<sup>109</sup> GUIDE TO THE URUGUAY ROUND, *supra* note 102, at 22. The Appellate Body, appointed by the DSB, is composed of seven members, three of whom hear a particular case. *Id.* The DSB appoints the members for four-year terms. *Id.*

<sup>110</sup> *Id.* at 23.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.* For example, for an injury related to intellectual property, retaliation must be in this same sector and could be in the form of withdrawing concessions or trade benefits for products of intellectual property. *Id.* If limiting the retaliation to the particular sector is not "practicable or effective," the WTO may permit retaliation in other sectors or under a different WTO agreement. *Id.*

<sup>114</sup> World Trade Organization, *The Organization Members* (visited Feb. 28, 2000) <<http://www.wto.org/wto/about/organsn6.htm>>. The United States is also a member. *Id.*

<sup>115</sup> See TRIPs, *supra* note 4, Part I, art. 1(1).

<sup>116</sup> See Paul D. Hutchcroft, *Sustaining Economic and Political Reform: The Challenges Ahead, in THE PHILIPPINES: NEW DIRECTIONS IN DOMESTIC POLICY AND FOREIGN RELATIONS* 23, 24 (David G. Timberman, ed., 1998).

<sup>117</sup> See *Settling Disputes Summary*, *supra* note 108.

<sup>118</sup> GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 102, at 24.

## 2. *The United States and Special 301*

In the late 1980s and throughout the 1990s,<sup>119</sup> the United States unilaterally pressured the Philippines to strengthen intellectual property protection by threatening to impose trade sanctions.<sup>120</sup> Under Section 301 of the Trade Act of 1974 ("Section 301"), the U.S. Trade Representative ("USTR"), has authority to take unilateral action against a foreign country to enforce U.S. rights under a trade agreement or to retaliate against a country for unreasonable or discriminatory practices that restrict or burden U.S. commerce.<sup>121</sup> The 1984 Trade Act amended Section 301, broadening the statute to include enforcement of intellectual property rights in trade.<sup>122</sup> The amendment authorizes the President to impose trade sanctions against foreign countries that provide inadequate intellectual property protection and engage in "unreasonable or unjustifiable" trade practices.<sup>123</sup> Additionally, in 1988, Congress added the "Special 301"<sup>124</sup> provision to Section 301, expanding the USTR's authority to address the lack of intellectual property protection in foreign countries.<sup>125</sup> While Section 301 refers to the general statutory authority to protect U.S. exports from unfair trade practices in foreign countries,<sup>126</sup> Special 301 refers specifically to the provision of Section 301 under which countries that deny the United States adequate intellectual property protection or fair market access are identified and investigated.<sup>127</sup>

The United States enacted Special 301 to protect U.S. economic interests with regard to intellectual property and to ensure that U.S. businesses relying on intellectual property rights have fair and equitable access to foreign markets.<sup>128</sup> Each year, the USTR, as the President's

<sup>119</sup> The United States has cited the Philippines for having inadequate and ineffective intellectual property protection since 1989, when it first placed the Philippines on the Watch List. Rosielyn Alviar Pulmano, Comment, *In Search of Compliance with TRIPs Against Counterfeiting in the Philippines: When is Enough Enough?* 12 TRANSNAT'L L. 241, 279-80 (1999).

<sup>120</sup> See La Vina, Antonio G.M., *Traditional Knowledge: Challenge to Intellectual Property Rights*, 70 PHIL. L. J. 140, 160 (1995). See also *Philippines Wages Uphill Battle Against IP Pirates*, *supra* note 9.

<sup>121</sup> 19 U.S.C. §§ 2411(a)(1), 2411(c).

<sup>122</sup> Myles Getlan, *TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 179 (1995).

<sup>123</sup> *Id.*

<sup>124</sup> 19 U.S.C. § 2242.

<sup>125</sup> Getlan, *supra* note 122, at 179.

<sup>126</sup> *Id.* at 178.

<sup>127</sup> Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPs" over Special 301*, 7 MINN. J. GLOBAL TRADE 179, 196-97 (1998).

<sup>128</sup> Judith H. Bello & Alan F. Holmer, "Special 301": Its Requirements, Implementation, and Significance, 13 FORDHAM INT'L L.J. 259, 261 (1989-1990).

advisor on trade and related matters,<sup>129</sup> identifies foreign countries that "deny adequate and effective protection of intellectual property rights"<sup>130</sup> or "deny fair and equitable market access"<sup>131</sup> to U.S. persons who rely on intellectual property protection.<sup>132</sup> The USTR places these countries in one of three categories based on how deficient the acts, policies, and practices of that country are with regard to intellectual property protection.<sup>133</sup> The USTR lists countries as "priority foreign countries" if (1) they have the most onerous or egregious acts, practices, or policies<sup>134</sup> that greatly impact the United States,<sup>135</sup> and (2) they fail to enter into good faith negotiations or make progress in negotiations to provide adequate and effective intellectual property rights protection.<sup>136</sup> The USTR maintains "Priority Watch List" for those countries "whose actions, policies, and practices meet some, but not all, of the criteria for priority foreign country identification."<sup>137</sup> The USTR also maintains a "Watch List" for countries whose intellectual property protection problems are less severe than those of priority watch list countries but who still need special attention.<sup>138</sup>

The Philippines is no stranger to Special 301. The USTR listed the Philippines on the Watch List from 1989 to 1991.<sup>139</sup> In 1992, the USTR placed the Philippines on the more serious Priority Watch List,<sup>140</sup> but the

<sup>129</sup> The USTR has the responsibility of "developing and coordinating U.S. international trade, commodity, and direct investment policy, and leading or directing negotiations with other countries on such matters." *Office of the United States Trade Representative: Mission* (visited Feb. 28, 2000) <<http://www.ustr.gov/mission/index.html>>. In line with these responsibilities, the USTR has the authority to implement the provisions of Special 301. 19 U.S.C. § 2242(a).

<sup>130</sup> 19 U.S.C. § 2242(a)(1)(A). Special 301 defines the "den[ial] [of] adequate and effective protection of intellectual property rights" as the "den[ial] [of] adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such foreign country to secure, exercise, and enforce rights" relating to intellectual property. *Id.* § 2242(d)(2).

<sup>131</sup> A country "denies fair and equitable market access" if it "effectively denies access to a market for a product protected by copyright or related right . . . through the use of laws, procedures, practices, or regulations which—(A) violate provisions of international law or international agreements to which both the United States and the foreign country are parties, or (B) constitute discriminatory nontariff trade barriers." *Id.* § 2242(d)(3).

<sup>132</sup> *Id.* § 2242(a)(1)(B).

<sup>133</sup> Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L. J. 87, 95 (1994) [hereinafter *U.S. Industry's Influence*].

<sup>134</sup> 19 U.S.C. § 2242(b)(1)(A).

<sup>135</sup> *Id.* § 2242(b)(1)(B).

<sup>136</sup> *Id.* § 2242(b)(1)(C). After identifying "priority foreign countries," the USTR has 30 days to decide whether to initiate an investigation, and then six months to complete the investigation and pursue bilateral negotiations. 1999 *Special 301 Review*, *supra* note 105; 19 U.S.C. § 2414(a)(3)(A). If the onerous or egregious acts, practices or policies persist, the USTR is authorized to retaliate by imposing trade restrictions such as increasing duties. *Id.* § 2416(b).

<sup>137</sup> *U.S. Industry's Influence*, *supra* note 133, at 95.

<sup>138</sup> *Id.*

<sup>139</sup> Pulmano, *supra* note 119, at 279-80.

<sup>140</sup> *Id.*

next year moved the Philippines down to the Watch List again as a result of a 1993 bilateral agreement under which the Philippines committed itself to addressing U.S. concerns about intellectual property protection.<sup>141</sup> Since then, the United States has kept the Philippines on the Watch List.<sup>142</sup> Although the Watch List countries are in the least severe category of intellectual property rights violators,<sup>143</sup> the USTR can authorize retaliation against Watch List countries.<sup>144</sup> Thus, the United States maintains a constant threat of unilateral retaliation to "persuade" trading partners such as the Philippines to improve their intellectual property protection.<sup>145</sup>

U.S. trade sanctions could be devastating to the Philippine economy. The United States is its top trading partner.<sup>146</sup> The duty-free trade benefits the Philippines receives are worth roughly two billion dollars annually.<sup>147</sup> Thus, if the United States were to remove the duty-free trade benefits that the Philippines receives for its exports to the United States, the Philippines would face a tremendous loss in revenue.<sup>148</sup> Foreign investors may also be reluctant to invest in the Philippines if the United States continues to label the country as an intellectual property rights violator, especially investors in industries such as software development that rely on strong intellectual property protection.<sup>149</sup>

Software piracy and lack of enforcement of intellectual property rights are the primary reasons the United States placed the Philippines on Watch List. Piracy of intellectual property in the Philippines has been a problem;<sup>150</sup> the software piracy rate in the Philippines has been extremely high, reaching

---

<sup>141</sup> International Intellectual Property Alliance, *Philippines* (visited Feb. 28, 2000) <[http://www.iipa.com/html/rbc\\_philippines\\_301\\_99.html](http://www.iipa.com/html/rbc_philippines_301_99.html)> [hereinafter IIPA].

<sup>142</sup> *Id.*

<sup>143</sup> *U.S. Industry's Influence*, *supra* note 133, at 95.

<sup>144</sup> Bello & Holmer, *supra* note 128, at 262.

<sup>145</sup> *Id.* at 259.

<sup>146</sup> See Jose T. Almonte, *New Directions and Priorities in Philippine Foreign Relations*, in THE PHILIPPINES: NEW DIRECTIONS IN DOMESTIC POLICY AND FOREIGN RELATIONS, *supra* note 116, 137, 150. The Philippines registered a trade surplus of \$1.3 billion in 1998. Asia-Pacific Economic Cooperation (APEC), *Republic of the Philippines: Overall Economic Performance* (visited Jan. 8, 2000), available in <[http://www.apecsec.org.sg/member/philec\\_report.html](http://www.apecsec.org.sg/member/philec_report.html)>.

<sup>147</sup> Jose Joel M. Sy Egco, *U.S.-Opposed Provision to Stay in IPR Bill: Solons*, BUS. DAILY, Nov. 15, 1996, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories [hereinafter *U.S.-Opposed Provision*]. Philippine exports that receive duty-free benefits from the United States include electronics, raw sugar, wiring harnesses, metals, Christmas ornaments and lighting sets, rattan baskets, wood furniture, baseball gloves, and bags. Jennifer D. Baldivino, *RP's Poor IPR Compliance Threatens Duty Free Perks*, BUS. DAILY, Dec. 7, 1998, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories.

<sup>148</sup> *U.S.-Opposed Provision*, *supra* note 147.

<sup>149</sup> *Poor Record For Intellectual Property Rights Cited by U.S.*, *supra* note 12.

<sup>150</sup> See Jirapan Boonnoon, *BSA Vows to Continue Fight Against Piracy*, NATION, May 12, 1998, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories; see also discussion *supra* Part I.

a peak of ninety-four percent in 1994.<sup>151</sup> The United States was also concerned about the lack of enforcement of intellectual property rights in the Philippines.<sup>152</sup> For these reasons, the United States urged the Philippines to reform its intellectual property protection.<sup>153</sup> Specifically, the United States pushed the Philippines to enact modern intellectual property laws,<sup>154</sup> eliminate the use of pirated software,<sup>155</sup> and improve its enforcement of intellectual property rights.<sup>156</sup> Partly in response to this pressure, the Philippines enacted the Intellectual Property Code in 1997.

#### IV. THE INTELLECTUAL PROPERTY CODE

##### A. *Copyright Provisions of the Intellectual Property Code*

The IPC, which took effect on January 1, 1998,<sup>157</sup> established a new intellectual property regime for the Philippines. The IPC includes patent, trademark, and copyright provisions.<sup>158</sup> It streamlines administrative procedures for registering patents, trademarks, and copyrights, and establishes the Intellectual Property Office,<sup>159</sup> a single government agency that oversees the protection of intellectual property rights.<sup>160</sup> Like the Philippines earlier intellectual property laws, the IPC is modeled after U.S. law.<sup>161</sup>

The IPC provisions for copyright protection grant copyright owners exclusive rights to works that qualify as copyrightable subject matter. Copyright owners have a right to control the reproduction, transformation, first public distribution, and rental of their works.<sup>162</sup> The IPC also grants copyright owners the right to display, perform, and communicate their works

---

<sup>151</sup> See 1998 *Global Software Piracy Report*, *supra* note 1, at 7.

<sup>152</sup> USTR Announces Results of Special 301 Annual Review (Apr. 30, 1997), at 15-16, available in <<http://www.ustr.gov/releases/>> [hereinafter 1997 *Special 301 Review*].

<sup>153</sup> See USTR Announces Two Decisions: Title VII and Special 301 (April 29, 1995) available in <<http://www.ustr.gov/releases/1995/04/95-32>> [hereinafter 1995 *Special 301 Review*] (stating that the USTR is looking to the Philippine government to make changes to its intellectual property regime).

<sup>154</sup> 1997 *Special 301 Review*, *supra* note 152, at 15-16.

<sup>155</sup> 1995 *Special 301 Review*, *supra* note 153.

<sup>156</sup> *Id.*

<sup>157</sup> Republic Act No. 8293, *supra* note 7, § 241.

<sup>158</sup> *Philippines Begins New IP Regime*, *supra* note 9.

<sup>159</sup> Republic Act No. 8293, *supra* note 7, § 5. The Intellectual Property Office is analogous to the Copyright Office and the Patent and Trademark Office in the United States.

<sup>160</sup> *Philippines Begins New IP Regime*, *supra* note 9.

<sup>161</sup> See *Philippines: Economy*, *supra* note 66, at Investment and Trading.

<sup>162</sup> Republic Act No. 8293, *supra* note 7, §§ 177.1-177.4.



to the public.<sup>163</sup> These exclusive rights are substantially similar to the rights granted to copyright owners under the U.S. Copyright Act<sup>164</sup> and to rights that must be granted under TRIPs.<sup>165</sup> A person other than the copyright owner who infringes on any of these rights could be liable for copyright infringement.<sup>166</sup>

By enacting the IPC, the Philippines extended copyright protection to "literary and artistic works,"<sup>167</sup> including computer programs.<sup>168</sup> Like the U.S. Copyright Act<sup>169</sup> and TRIPs,<sup>170</sup> the IPC protects "literary and artistic works."<sup>171</sup> The IPC also follows U.S. law<sup>172</sup> and TRIPs<sup>173</sup> in protecting software as a literary work.<sup>174</sup> The IPC's definition of a computer program is similar to that under the U.S. Copyright Act.<sup>175</sup> A computer program under the IPC is "a set of instructions expressed in words, codes, schemes or in any other form, which is capable when incorporated in a medium that the computer can read, of causing the computer to perform or achieve a particular task or result."<sup>176</sup>

While the IPC provides intellectual property protection for software, it also includes a decompilation provision that permits some copying of software.<sup>177</sup> Decompilation refers to the reverse engineering of computer

<sup>163</sup> *Id.* §§ 177.5-177.7. "Public performance" is defined as "the recitation, playing . . . or otherwise performing the work, either directly or by means of any device or process . . ." *Id.* § 171.6. "Communication to the public" means "the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them." *Id.* § 171.3. The IPC does not define "public display." *See id.* § 171.

<sup>164</sup> *See* discussion *supra* Part II.A.

<sup>165</sup> *See* discussion *supra* Part III.B.1.

<sup>166</sup> Republic Act No. 8293, *supra* note 7, § 216.

<sup>167</sup> *Id.* § 172.1.

<sup>168</sup> *Id.* § 172.1(n). The IPC protects literary and artistic works from the moment the author creates them. *Id.* § 172.1.

<sup>169</sup> *See* 17 U.S.C. § 102(a); *see also* discussion *supra* Part II.A.

<sup>170</sup> *See* TRIPs, *supra* note 4, art. 9(1) (adopting the Berne Convention standards, including Article 2(1) which requires copyright protection for "literary and artistic works"); *see also supra* note 85 and accompanying text.

<sup>171</sup> Under the category of "literary and artistic works," the IPC lists the following: writings; periodicals and newspapers; lectures; letters; dramatic works and choreographic works; musical works; works of art; works of applied art; illustrations, maps, charts, plans, sketches, and three-dimensional works; plastic works or drawings scientific or technical in character; photographs; audiovisual works and cinematographic works; pictorials; computer programs; and "other literary, scholarly, scientific and artistic works." Republic Act No. 8293, *supra* note 7, § 172.1.

<sup>172</sup> HOUSE REPORT, *supra* note 40, Categories of Copyrightable Works; *see also* discussion *supra* Part II.B.

<sup>173</sup> TRIPs, *supra* note 4, art. 10; *see also* discussion *supra* Part III.B.1.

<sup>174</sup> Republic Act No. 8293, *supra* note 7, § 172(n).

<sup>175</sup> *See* discussion *supra* Part II.B.

<sup>176</sup> Republic Act No. 8293, *supra* note 7, § 171.4.

<sup>177</sup> *Id.* § 185.1.

programs<sup>178</sup> or the reproduction of the code by breaking it up into parts<sup>179</sup> for the purpose of facilitating the inter-operability between different computer programs.<sup>180</sup> In effect, the decompilation provision permits a person to duplicate copyrighted software.<sup>181</sup> When the Philippines began drafting the IPC, the United States expressed strong opposition to the decompilation provision.<sup>182</sup> The U.S. concern was that such a provision would permit parties to commit software piracy under the guise of decompilation.<sup>183</sup>

In an effort to resolve this debate with the United States, the Philippine government limited decompilation and made it available only in circumstances related to the fair use of the copyrighted material.<sup>184</sup> The principle of fair use permits the use of a copyrighted work without permission from the copyright owner for purposes of criticism, comment, news reporting, teaching, and other similar purposes.<sup>185</sup> The IPC permits software decompilation under circumstances amounting to fair use.<sup>186</sup> The Philippine government hoped that the fair use standard would provide the Philippines with the needed flexibility to develop its own computer software technology.<sup>187</sup>

Computer software may be copied in other limited circumstances without the permission of the copyright owner and without fear of infringement. One back-up copy or adaptation of the computer program is permitted if it is necessary for the intended use of the software in combination with a computer.<sup>188</sup> Also, a back-up copy or adaptation may be made for archival purposes and to replace a lawfully owned copy of software in the event that the software is lost, destroyed, or becomes unusable.<sup>189</sup> Such copying is also legal under U.S. copyright law.<sup>190</sup>

A person who seeks to bring an action for copyright infringement in the Philippines has several options. In addition to civil procedures in which

---

<sup>178</sup> *Fair Use Rules Considered in the Philippines*, 9 J. PROPRIETARY RTS 20 (1997).

<sup>179</sup> Jose Joel M. Sy Egco, *U.S. Threatens to Withdraw Concessions*, BUS. DAILY, Nov. 14, 1996, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories [hereinafter *US Threatens to Withdraw Concessions*].

<sup>180</sup> Republic Act No. 8293, *supra* note 7, § 185.1.

<sup>181</sup> See *US Threatens to Withdraw Concessions*, *supra* note 179.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* The United States went as far as to say that it would leave the Philippines on the Watch List unless this specific provision was deleted. *Id.*

<sup>184</sup> *Fair Use Rules*, *supra* note 178.

<sup>185</sup> Republic Act No. 8293, *supra* note 7, § 185.1.

<sup>186</sup> *Id.*

<sup>187</sup> *Fair Use Rules*, *supra* note 178.

<sup>188</sup> Republic Act No. 8293, *supra* note 7, § 189(a).

<sup>189</sup> *Id.* § 189(b).

<sup>190</sup> See 17 U.S.C.A. § 117.

a person files a claim with the regular courts,<sup>191</sup> the IPC provides administrative procedures through which claims may be filed with the Intellectual Property Office.<sup>192</sup> A claim may be filed through both channels concurrently, and an action commenced through one channel is independent of, and does not prejudice the other channel,<sup>193</sup> suggesting that a person may recover twice.

A copyright infringer in the Philippines may face criminal penalties.<sup>194</sup> These penalties apply to a party infringing any rights under the copyright provisions, as well as to a party aiding or abetting such infringement.<sup>195</sup> This provision goes beyond TRIPs, which only requires that criminal punishment apply to copyright piracy on a commercial scale.<sup>196</sup>

The IPC significantly increases the criminal penalties for copyright infringement.<sup>197</sup> Under the old law, the maximum fine for infringement was 2000 Philippine pesos<sup>198</sup> (approximately fifty U.S. dollars).<sup>199</sup> Under the IPC, the maximum fine is 150,000 Philippine pesos (approximately 3700 U.S. dollars)<sup>200</sup> for a first offense,<sup>201</sup> up to 500,000 Philippine pesos (approximately 12,300 U.S. dollars)<sup>202</sup> for a second offense, a maximum of 1.5 million Philippine pesos (approximately 37,000 U.S. dollars)<sup>203</sup> for a third offense,<sup>204</sup> and 1.5 million Philippine pesos<sup>205</sup> for each subsequent offense.<sup>206</sup> Under the old law, an infringer could receive a maximum of one year in prison.<sup>207</sup> Under the IPC, a court may impose a sentence of up to

---

<sup>191</sup> Villanueva, *supra* note 70, at 13.

<sup>192</sup> Rules and Regulations Implementing the Intellectual Property Code of the Philippines, Rule 2, §§ 1-2 available in Chanrobles Virtual Law Library (visited Jan. 27, 2000) <<http://www.chanrobles.com/legal7ipcrules.htm>> [hereinafter IPC Rules and Regulations].

<sup>193</sup> *Id.* Rule 2, § 2.

<sup>194</sup> Republic Act No. 8293, *supra* note 7, § 217.1.

<sup>195</sup> *Id.*

<sup>196</sup> TRIPs, *supra* note 4, art. 61.

<sup>197</sup> See Republic Act No. 8293, *supra* note 7, §§ 216, 217; see also *Philippines Begins New IP Regime*, *supra* note 9.

<sup>198</sup> Bureau of Patents, Trademarks and Technology Transfer, 1997 Annual Report 42 (visited Feb. 28, 2000) available in Dept. of Trade & Industry Homepage <<http://www.dti.gov.ph/ipo/services.htm>> [hereinafter BPTTT].

<sup>199</sup> See Universal Currency Converter (visited May 14, 2000) available in <<http://www.xe.net/ucc/converter>> (indicating the exchange rate for the Philippine peso is 0.0246305 U.S. dollars as of May 14, 2000).

<sup>200</sup> Republic Act No. 8293, *supra* note 7, § 10.2; see Universal Currency Converter, *supra* note 199.

<sup>201</sup> BPTTT, *supra* note 198, at 42.

<sup>202</sup> See Universal Currency Converter, *supra* note 199.

<sup>203</sup> See *id.*

<sup>204</sup> BPTTT, *supra* note 198, at 42.

<sup>205</sup> See Universal Currency Converter, *supra* note 199.

<sup>206</sup> BPTTT, *supra* note 198, at 42.

<sup>207</sup> *Id.*

three years for the first offense, up to six years for the second offense, and up to nine years for the third offense.<sup>208</sup>

In addition to setting penalties for copyright infringement, the IPC establishes a term of copyright protection that meets the minimum term required by TRIPs. The IPC measures the period of copyright protection based on the life of the author, granting protection throughout the author's life and for fifty years after the author's death.<sup>209</sup>

By enacting the IPC, the Philippines gives the same intellectual property protection to foreign copyright owners that it gives its own domestic copyright owners. The IPC provides foreign copyright owners the same exclusive rights as domestic copyright owners<sup>210</sup> as required by the "national treatment" provision of TRIPs.<sup>211</sup> TRIPs also requires that a WTO member extend Most Favored Nation treatment to other WTO members.<sup>212</sup> MFN treatment means that if a WTO member gives any favor, privilege, advantage, or immunity to the nationals of another WTO member country, it must extend the same such benefits to the nationals of all other WTO member countries.<sup>213</sup> The IPC does not include an MFN provision,<sup>214</sup> but it does entitle foreign copyright owners to additional benefits as required by any treaties, conventions, or agreements relating to intellectual property to which both the country of the foreign copyright owner and the Philippines are parties.<sup>215</sup> The IPC, however, seems to conflict with the MFN requirement because of an additional provision in the IPC entitled "Reverse Reciprocity of Foreign Laws."<sup>216</sup> This provision states that if a foreign country imposes any legislative condition, restriction, penalty, or similar encumbrance on a Philippine national seeking intellectual property protection in that country, then the Philippines will place the same burden on the nationals of the foreign country who seek intellectual property protection in the Philippines.<sup>217</sup>

In sum, the IPC incorporates provisions for copyright protection that are similar to those in U.S. law and largely conform to TRIPs requirements. The IPC protects computer software as copyrightable subject matter, but permits decompilation of software in cases of fair use. In addition, the IPC

---

<sup>208</sup> Republic Act No. 8293, *supra* note 7, § 217.1.

<sup>209</sup> *Id.* § 213.

<sup>210</sup> *See id.* § 221.2; Villanueva, *supra* note 70, at 13-14.

<sup>211</sup> TRIPs, *supra* note 4, art 3(1); *see also* discussion *supra* Part III.B.1.

<sup>212</sup> TRIPs, *supra* note 4, art. 4; *see also* discussion *supra* Part III.B.1.

<sup>213</sup> TRIPs, *supra* note 4, art. 4.

<sup>214</sup> *See* Republic Act No. 8293, *supra* note 7, §§ 3, 221.2 (providing no mention of MFN treatment).

<sup>215</sup> *Id.* § 3.

<sup>216</sup> *Id.* § 231.

<sup>217</sup> *Id.*

strengthens the penalties for copyright infringement, provides an adequate term of copyright protection, and provides foreign copyright owners with the same treatment that it extends to Philippine nationals.

*B. Reactions to the Intellectual Property Code*

In September 1999, the WTO released a review that concluded the Philippines had made significant progress in complying with TRIPs.<sup>218</sup> Although the report did not specifically state that the Philippines is now completely in compliance with TRIPs, the report did commend the Philippines for its commitment to comply "to the best of its ability" with WTO rules, in particular its obligations under TRIPs.<sup>219</sup> The WTO recently granted a request by the Philippines to extend its TRIPs compliance deadline to 2005.<sup>220</sup>

The United States, however, has not come to the same conclusions. Despite the enactment of the IPC, the Philippines remains on the U.S. Watch List.<sup>221</sup> In its 2000 Special 301 Review, the USTR justified leaving the Philippines on the Watch List because enforcement remains a problem.<sup>222</sup> The USTR alleges that the Philippines' enforcement efforts have been applied inconsistently nationwide and have seldom resulted in deterrent penalties.<sup>223</sup> In terms of copyright protection, the USTR continues to be concerned about the Philippines' high level of piracy of software and other copyrighted material.<sup>224</sup> In addition, the USTR claims that the Philippines has not promulgated any substantive regulations implementing the copyright provisions of the IPC.<sup>225</sup> Moreover, the USTR continues to oppose the software decompilation provision, arguing that this provision is too broad<sup>226</sup> even though the provision is limited to fair use purposes.

The Business Software Alliance ("BSA"), an influential organization that represents the software industry and makes recommendations to the

---

<sup>218</sup> *Trade Policy Review Body Review of the Philippines* (Sept. 29, 1999) available in WTO homepage <<http://www.wto.org/wto/reviews/tprb116.htm>>. The previous review of the Philippines occurred in 1993. *Id.*

<sup>219</sup> *Id.* The Trade Policy Review Body recognized the Philippines' adoption of the IPC. *Id.*

<sup>220</sup> *See Indonesian Govt Urged to Delay TRIPs Agreement*, ASIA PULSE, Sept. 30, 1999, available in LEXIS, News Library, Asia/Pacific Rim News, Current File.

<sup>221</sup> Connie D. Vercasion, *Officials Warned on Intellectual Property*, MANILA TIMES, Apr. 28, 1999, available in 1999 WL 14155573.

<sup>222</sup> *2000 Special 301 Report* (May 2000) 25-26, <<http://www.ustr.gov/releases/2000/05/index.html>>.

<sup>223</sup> *Id.* at 25; see also *1999 Special 301 Review*, *supra* note 105.

<sup>224</sup> *Poor Record for Intellectual Property Rights Cited by U.S.*, *supra* note 12.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

USTR, is even more critical of the Philippines' intellectual property protection regime.<sup>227</sup> The BSA represents the personal computer software industry and cooperates with various countries to conduct enforcement, education, and public policy activities designed to eradicate software piracy.<sup>228</sup> Its membership includes companies such as Apple Computer, Lotus Corporation, Microsoft Corporation, and Novell.<sup>229</sup> Private organizations such as the BSA heavily influence the USTR and the Special 301 process; the BSA lobbies in Washington, D.C. and submits its own recommendations on which countries should be listed as intellectual property rights violators.<sup>230</sup> According to the BSA, the Philippines has failed to comply with its obligations under TRIPs, and the IPC does not adequately protect the rights of copyright owners in educational settings.<sup>231</sup> The BSA has recommended that the USTR place the Philippines on the Priority Watch List, a category of countries with more severe intellectual property rights violations than those on the Watch List.<sup>232</sup>

## V. THE UNREASONABLENESS OF SPECIAL 301

### A. *Inherent Defects of Special 301*

The USTR's criticisms of countries under Special 301 lack credibility because Special 301 directly violates U.S. treaty obligations under the WTO, including TRIPs.<sup>233</sup> Under Special 301, the United States takes unilateral action to address intellectual property-related issues with its trading partners.<sup>234</sup> However, TRIPs requires members to use the WTO dispute settlement mechanism to settle trade conflicts and forbids members from resorting to unilateral measures.<sup>235</sup> The United States may also be in violation of TRIPs because it uses Special 301 to pressure WTO members to develop intellectual property protection beyond that required under

---

<sup>227</sup> See *BSA Highlights Importance of TRIPs Compliance in 301 Filing* (Feb. 18, 2000) <<http://www.bsa.org/pressbox/policy/950900759.html>> [hereinafter *BSA Highlights Importance of TRIPs Compliance*].

<sup>228</sup> Robert Holleyman, *Copyright Protection for Computer Software: A Global Overview*, 416 PRAC. L. INST./PAT., COPYRIGHTS, TRADEMARKS & LITERARY PROP. HANDBOOK SERIES 313, 326 (Sept. 1995).

<sup>229</sup> *U.S. Industry's Influence*, *supra* note 133, at 104.

<sup>230</sup> *Id.* at 92-93.

<sup>231</sup> *BSA Highlights Importance of TRIPs Compliance*, *supra* note 227.

<sup>232</sup> *Id.*

<sup>233</sup> See Pechman, *supra* note 127, at 204.

<sup>234</sup> See discussion *supra* Part III.B.2.

<sup>235</sup> Nicole Telecki, Note, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights after the Uruguay Round*, 14 B.U. INT'L L.J. 187, 213-14, 218-19.

TRIPs.<sup>236</sup> In effect, the United States may be forcing developing countries to forego the transition period that they are entitled to under TRIPs.<sup>237</sup> Finally, the remedies authorized by Section 301 conflict with TRIPs.<sup>238</sup> TRIPs permits a member country to retaliate against another member country, but such retaliation must occur in the same sector in which the member country was injured.<sup>239</sup> However, Section 301 is more coercive and permits the USTR to impose tariffs on a variety of products, even on those that have no relation to the product at issue.<sup>240</sup>

Special 301 decisions have also been criticized as being heavily influenced by private U.S. industries.<sup>241</sup> Section 301 permits any interested person to file petitions with the USTR to compel the government to investigate or take actions against a country,<sup>242</sup> but the primary accusers have been industries.<sup>243</sup> Industry actions to enforce intellectual property rights have recently increased.<sup>244</sup> Special interest groups actively participate in the Special 301 process by testifying before Congress and submitting recommendations and comments to the USTR.<sup>245</sup> Software companies are well-represented by these interest groups, which include the BSA<sup>246</sup> and the International Intellectual Property Alliance ("IIPA").<sup>247</sup> Private industries have thus shaped U.S. trade policy.<sup>248</sup> Intellectual property, especially software, has become an important part of the global economy,<sup>249</sup> and private industry heavily influences the USTR's decisions under Special 301.<sup>250</sup> Thus, the USTR's decision to keep the Philippines on the Watch List

---

<sup>236</sup> Pechman, *supra* note 127, at 203.

<sup>237</sup> See Timothy C. Bickham, *Protecting U.S. Intellectual Property Rights Abroad with Special 301*, 23 AIPLA Q.J. 195, 208 (1995).

<sup>238</sup> Pechman, *supra* note 127, at 203.

<sup>239</sup> GUIDE TO THE URUGUAY ROUND AGREEMENTS, *supra* note 102, at 24.

<sup>240</sup> See Pechman, *supra* note 127, at 197-98, 201 (stating that in a Section 301 case against Brazil relating to pharmaceuticals, the United States imposed 100% tariffs on a variety of products that were unrelated to pharmaceuticals, yet if the same case had been brought under TRIPs, retaliation would have been limited to Brazilian exports related to the pharmaceuticals sector).

<sup>241</sup> See, e.g., *U.S. Industry's Influence*, *supra* note 133, at 87.

<sup>242</sup> 19 U.S.C. § 2412(a).

<sup>243</sup> *U.S. Industry's Influence*, *supra* note 133, at 94.

<sup>244</sup> *Id.* at 95.

<sup>245</sup> *Id.* at 98.

<sup>246</sup> See discussion *supra* Part IV.B.

<sup>247</sup> *U.S. Industry's Influence*, *supra* note 133, at 102. The IIPA represents U.S. copyright industries in an effort to improve international protection for copyrighted works. International Intellectual Property Alliance, *What We Do* (visited May 8, 2000) <[http://www.iipa.com/homepage\\_index.html](http://www.iipa.com/homepage_index.html)>.

<sup>248</sup> *U.S. Industry's Influence*, *supra* note 133, at 116. For example, in both 1992 and 1993, the USTR's final list of countries designated as Priority Foreign Countries, on the Priority Watch List, and on the Watch List resembled the IIPA's suggested list by 70%. *Id.* at 102.

<sup>249</sup> See discussion *supra* Part II.A.

<sup>250</sup> See *U.S. Industry's Influence*, *supra* note 133, at 116.

is likely a result of pressure from the U.S. software industry.<sup>251</sup> However, Special 301 investigations should be governed by national interests based on economic, legal, and political considerations rather than the interests of a particular private industry.<sup>252</sup> "No single industry or petitioner should have a veto over settlements that affect diverse interests throughout the nation."<sup>253</sup>

*B. Unfairness of Maintaining the Philippines on the Watch List*

Even if Special 301 is not in violation of U.S. treaty obligations under the WTO, the USTR's Special 301 Review and the BSA's criticisms unreasonably characterize the Philippines as denying adequate protection for intellectual property rights. Special 301 is unfair because it requires the Philippines to meet standards beyond those required under TRIPs. Special 301 also fails to consider the responsiveness of the Philippines to U.S. demands. Furthermore, Special 301 is unreasonable because it requires developing countries such as the Philippines to meet U.S. standards without regard to their level of economic development.

*1. Special 301 Requires Standards Beyond TRIPs*

It is unfair for the USTR to expect a country to go above and beyond the standards under TRIPs, standards which the United States played a major role in developing. The United States spearheaded the effort to include the intellectual property protection provided by TRIPs in the WTO agreements.<sup>254</sup> Even so, the United States continues to use Special 301 to make unilateral decisions about whether a country's intellectual property protection is satisfactory, regardless of whether the country meets the intellectual property standards of TRIPs.<sup>255</sup> For developing countries, the USTR seeks to both accelerate compliance with TRIPs during the transition period and to go beyond TRIPs requirements.<sup>256</sup> Thus, although the WTO is satisfied with the efforts the Philippines has made to improve copyright

---

<sup>251</sup> See generally *id.* (suggesting that private industries such as the software industry strongly influence the USTR's decisions under Special 301).

<sup>252</sup> Patricia I. Hansen, *Defining Unreasonableness in Int'l Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1130 (1987).

<sup>253</sup> *Id.*

<sup>254</sup> Kastenmeier & Beier, *supra* note 36, at 287.

<sup>255</sup> See 19 U.S.C. § 2242(d)(4) (stating that the USTR may determine that a foreign country denies adequate and effective protection of intellectual property rights even if that country is in compliance with TRIPs).

<sup>256</sup> Bickham, *supra* note 237, at 207.



protection under TRIPs,<sup>257</sup> the USTR continues to keep the Philippines on the Watch List.<sup>258</sup>

2. *The Philippines has Responded to U.S. Demands with both Short- and Long-Term Steps to Combat Piracy*

In addition to requiring higher standards for the Philippines than those required under TRIPs, the USTR fails to consider that the Philippines has vastly improved its intellectual property regime since the first time it was placed on the Watch List in 1989. The Philippines has implemented both short-term and long-term solutions to address software piracy and improve the enforcement of intellectual property laws. In determining which countries fall under Special 301, the USTR is required to consider the country's history of intellectual property laws and practices,<sup>259</sup> as well as the history of U.S. efforts, and responses by the foreign country, to achieve adequate and effective protection and enforcement of intellectual property.<sup>260</sup> In the case of the Philippines, the USTR's review does not reflect the Philippines' responsiveness to U.S. demands and the short-term and long-term solutions it has implemented to address piracy and improve enforcement. The Philippines responded to U.S. demands for improvements by signing a bilateral agreement with the United States in 1993.<sup>261</sup> Under this agreement, the Philippines made a commitment to address U.S. concerns related to intellectual property protection.<sup>262</sup> The Philippine government has since implemented short-term and long-term steps to combat piracy.<sup>263</sup>

a. *Short-Term Steps to Combat Piracy*

The Philippines has taken both long-term and short-term steps to fight piracy. In terms of short-term solutions, the Philippines has updated its intellectual property laws by enacting the IPC,<sup>264</sup> streamlined administrative procedures under the IPC, promulgated rules and regulations that implement

---

<sup>257</sup> See discussion *supra* Part IV.B.

<sup>258</sup> Vercasion, *supra* note 221.

<sup>259</sup> *Id.* § 2242(b)(4)(A).

<sup>260</sup> *Id.* § 2242(b)(4)(B).

<sup>261</sup> See IIPA, *supra* note 141.

<sup>262</sup> *Id.*

<sup>263</sup> See discussion *infra* Part V.B.2.

<sup>264</sup> See discussion *supra* Part IV.

the IPC,<sup>265</sup> and created the Intellectual Property Office to administer the IPC.<sup>266</sup>

In addition, the Philippines has taken long-term steps to combat piracy by strengthening research and development programs in science and technology, improving education in intellectual property, and dedicating more resources to the enforcement of intellectual property rights.

*b. Strengthening Research and Development Programs in Science and Technology*

Investing in science and technology increases technical knowledge in areas such as software,<sup>267</sup> and aids the development of intellectual property.<sup>268</sup> The Philippine government included a provision in the IPC that requires the Intellectual Property Office to make research and development a priority.<sup>269</sup> The Intellectual Property Office must "[e]stablish working relations with research and development institutions as well as with local and international intellectual property professional groups and the like."<sup>270</sup> Also, the government, together with private industries, recently launched National Information Technology for the Twenty-First Century, or IT21, a plan to lay down the infrastructure for all businesses, government agencies, schools, and homes to have access to information technology by the year 2005.<sup>271</sup> The government expects that information technology will become increasingly important in the daily lives of Filipinos and that Philippine companies will develop competitive information technology products in the world market.<sup>272</sup> Both the government and private industry will play leading roles in implementing the IT21 program.<sup>273</sup>

Although the software industry in the Philippines is currently dominated by foreign companies, the Philippine government is attempting to reverse this trend. Income from software exports from the Philippines has

---

<sup>265</sup> See IPC Rules and Regulations, *supra* note 192 (providing the rules and regulations established by the Philippine government to implement the IPC).

<sup>266</sup> Republic Act. No. 8293, *supra* note 7, § 5.1.

<sup>267</sup> *Proposals to Curb Piracy and Counterfeiting in a Developing Country*, *supra* note 53, at 633-34.

<sup>268</sup> *Id.*; see also discussion *supra* Part II.C.

<sup>269</sup> See Republic Act No. 8293, *supra* note 7, § 11.4.

<sup>270</sup> *Id.*

<sup>271</sup> Jerry A. Maramara, *A Nationwide Partnership Towards Global Competitiveness*, BUS. DAILY, Mar. 6, 1998, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories. Executive Order 269 approves and adopts IT21. *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* The implementation of the stages of IT development will be overseen by the National Information and Technology Council (NITC). *Id.*

been steadily increasing, growing from \$40 million in 1992 to \$120 million in 1995.<sup>274</sup> These numbers are somewhat deceiving, as most software exporters in the Philippines are subcontractors for foreign software producers from countries such as the United States.<sup>275</sup> The Philippine government recognizes this and understands the need to promote the growth of domestic software producers.<sup>276</sup> To this end, the government is encouraging private investment in the local software industry through laws that create a favorable business environment.<sup>277</sup>

c. *Improving Education in Intellectual Property*

In addition to promoting research and development, the Philippine government is attempting to educate the Philippine people about intellectual property. Under the IPC, the Intellectual Property Office is required to "educate the public and build awareness of intellectual property through the conduct of seminars and lectures, and other similar activities."<sup>278</sup> The government has also recognized that improving education in mathematics and sciences will help it achieve its long-term goal of developing a local software industry, and thus encourage careers in technology.<sup>279</sup> The Ways and Means Committee of the House of Representatives of the Philippines recently approved House Bill 8278, which imposes a tax on cellular phone calls and proposes to use the tax revenue to fund a computer literacy program for public schools and other educational institutions.<sup>280</sup> The Committee emphasized that the lack of funds for such a program has hampered the Philippines' goal of becoming globally competitive in computer-related areas.<sup>281</sup> To address the lack of computer literacy in the Philippines, the Committee proposed to establish a fifteen-year computer

---

<sup>274</sup> *RP to Become Asian Center of Computer Software*, BUS. DAILY, Mar. 11, 1997, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories.

<sup>275</sup> *Id.*

<sup>276</sup> *See id.*

<sup>277</sup> *Id.* For example, in 1991 the Philippines enacted the Foreign Investments Act, which gives incentives such as tax breaks to firms that are involved in particular business sectors such as semiconductor electronics. *Philippines: Economy*, *supra* note 66, at Investment and Trading. The Act requires that the firms have a majority of Filipinos on their executive boards. *Id.*

<sup>278</sup> Republic Act No. 8293, *supra* note 7, at § 11.3.

<sup>279</sup> *RP to Become Asian Center of Computer Software*, *supra* note 274.

<sup>280</sup> May Czarina A. Baetiong, *NTC to Pursue Plans to Get Part of Cellphone Tax Funds*, BUS. WORLD (Phil.), Nov. 19, 1999, available in 1999 WL 29169224. As of the time of this comment, the Philippine Congress had not passed the bill.

<sup>281</sup> *See* Yasmin Lee G. Arpon, *House Tax Body Approves Tax on Cellular Phone Calls*, BUS. WORLD (Phil.), Nov. 1, 1999, available in LEXIS, News, By Country & Region, Philippines.

literacy education program in the country's public schools.<sup>282</sup> The Philippine government has also promoted computer literacy by allocating funds for the computer training of public school teachers and the purchase of computers for public high schools.<sup>283</sup> At the college level, there are about 200 colleges and universities in the Philippines that offer information technology courses.<sup>284</sup> The Philippines still needs to improve its faculty development in information technology and upgrade its libraries and educational equipment.<sup>285</sup>

Schools in the Philippines are also modernizing and computerizing with the assistance of private companies such as Microsoft, which has offered assistance in expanding intellectual property education in the Philippines. In 1998, Microsoft offered to help the Philippines develop technology in the country's education sector and in information technology education itself.<sup>286</sup> The company is currently working to set up intellectual property rights education and service centers in Cebu and Manila, two major cities in the Philippines.<sup>287</sup>

d. *Dedicating Resources to Intellectual Property Rights Enforcement*

In terms of improving enforcement, the Philippines has reorganized its judiciary to speed up the trial process. In 1995, the Philippine Supreme Court issued an order that dedicated special courts to hear cases involving intellectual property violations.<sup>288</sup> These courts must commence a trial immediately and complete as much of a case as possible within sixty days from the initial date of trial.<sup>289</sup>

Recently, intellectual property protection for software in the Philippines has improved. The rate of software piracy in the Philippines has

---

<sup>282</sup> *Id.*

<sup>283</sup> Veronica C. Silva, *DECS Plans to Institute Computer-Aided Instruction in State-Run High Schools*, BUS. WORLD (Phil.), Oct. 8, 1998, available in LEXIS, News, By Country & Region, Philippines.

<sup>284</sup> Maramara, *supra* note 271.

<sup>285</sup> *Id.*

<sup>286</sup> Anna Lisa S. Guiwa, *Gates Opens Gates of Technologies to RP*, BUS. DAILY, Mar. 27, 1998, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories.

<sup>287</sup> Glorinda May R. Alcalde, *Asia's Own Microsoft Chief*, BUS. DAILY, Aug. 21, 1998, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories. This is part of Microsoft's agenda to improve intellectual property rights, e-commerce, and education in Asia. *Id.* Bill Gates, former Chief Executive Officer, also agreed to act as an advisor to the Philippine government as it strives to build a broad-based information technology framework. Guiwa, *supra* note 286.

<sup>288</sup> *Philippines Wages Uphill Battle Against IP Pirates*, *supra* note 9; Intellectual Property Office, *supra* note 68.

<sup>289</sup> *Philippines Wages Uphill Battle Against IP Pirates*, *supra* note 9.

fallen steadily for two consecutive years.<sup>290</sup> From 1996 to 1997, the software piracy rate fell by nine percent—from ninety-two percent to eighty-three percent.<sup>291</sup> In 1998, the rate fell to seventy-seven percent.<sup>292</sup> This trend will likely continue as the Philippine government continues to dedicate more resources to develop infrastructure and as the recent changes in software copyright protection and intellectual property rights enforcement continue to take effect.

### 3. *Treatment of Developing Countries*

The USTR's review of the Philippines is also unfair because it fails to consider the level of economic development in the Philippines. Special 301 treats developing countries such as the Philippines as if they were the same as a developed state;<sup>293</sup> it fails to recognize that these countries are at different stages of economic development.<sup>294</sup> Intellectual property is critically important to the U.S. economy.<sup>295</sup> From 1977 to 1997, the U.S. core copyright industries<sup>296</sup> grew at more than twice the rate of the rest of the U.S. economy.<sup>297</sup> In 1997, these industries also experienced tremendous growth in foreign sales and exports, exceeding all other sectors including automobiles, agriculture, and aircraft.<sup>298</sup> The United States currently produces more than half of the software for the world market, and will likely continue to do so at an increasing rate.<sup>299</sup> The Philippines, on the other hand, is a developing country with an economy dependent on its agricultural, industrial, and service sectors for growth.<sup>300</sup> The country is also recovering

---

<sup>290</sup> *Worldwide Business Software Piracy Losses Reach \$11 Billion in 1998*, *supra* note 1.

<sup>291</sup> *1998 Global Software Piracy Report*, *supra* note 1, at 7.

<sup>292</sup> *Id.* at 4.

<sup>293</sup> See Bello & Holmer, *supra* note 128, at 273.

<sup>294</sup> See Elizabeth Chien-Hale, *Asserting U.S. Intellectual Property Rights in China: Expansion of Extraterritorial Jurisdiction?* 44 J. COPYRIGHT SOC'Y USA 198, 227 (Spring 1997) (criticizing the United States Special 301 determinations as being made without regard to the cultural and economic difference between the U.S. and the foreign country).

<sup>295</sup> See LEAFFER, *supra* note 17, at 1-2.

<sup>296</sup> The core copyright industries include computer software, music, movies, television programs, books, sound recordings and home videos. *Id.*

<sup>297</sup> International Intellectual Property Alliance, *New Study Reveals Copyright Industries Are Engine Driving the U.S. Economy* (Dec. 16, 1999) <[http://www.iipa.com/html/121699\\_press\\_release.html](http://www.iipa.com/html/121699_press_release.html)>. The core copyright industries grew 6.3% while the rest of the U.S. economy as a whole grew 2.7%. *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> LEAFFER, *supra* note 17, at 2.

<sup>300</sup> See *Philippines: Economy*, *supra* note 66, at Background (chart indicating that in 1997, the Philippine GDP consisted of the following sectors as a percentage of GDP: (1) services, 49.2%; (2) industry, 32.3%; and (3) agriculture, 18.7%). The service sector includes finance, transport, and communications. *Id.* The industrial sector includes electronics and food and beverage processing. *Id.* at

from the Asian financial crisis,<sup>301</sup> experiencing an increase in Gross Domestic Product of only 0.2 percent in the first nine months of 1998.<sup>302</sup> Unlike in the United States, intellectual property is not yet a core industry in the Philippines.<sup>303</sup> Despite these factors, the Philippines has already worked hard to create a strong intellectual property regime within a developing country framework, enacting the IPC and taking steps to combat piracy, especially for software.

## VI. CONCLUSION

It is unreasonable for the United States to keep the Philippines on the Watch List. The use of Special 301 is highly suspect because it directly conflicts with U.S. obligations under the WTO and is heavily influenced by private U.S. industries. Even if Special 301 was in compliance with U.S. obligations under the WTO, the USTR position that the Philippines denies adequate intellectual property protection is not justified. Special 301 unfairly requires the Philippines to provide intellectual property protections in excess of those required under TRIPs. The USTR's review also fails to consider that the Philippines has vastly improved its intellectual property regime since the first time it was placed on the Watch List in 1989. The Philippines implemented both short-term and long-term solutions to address piracy and improve enforcement of intellectual property rights. In addition, the USTR's review fails to consider the Philippines' level of economic development. Software copyright protection in the Philippines has improved substantially; the rate of software piracy has been steadily declining since 1994.<sup>304</sup> This positive trend will likely continue as the long-term solutions implemented by the Philippine government take effect, creating a stable domestic intellectual property regime. After over a decade of labeling the Philippines as an intellectual property rights violator, the United States should remove the Philippines from the Special 301 Watch List.

---

Industry, Manufacturing and Services. The agricultural sector crops such as rice, maize, sugar, copra, coconut oil, and bananas. *Id.* at Farming.

<sup>301</sup> See *id.* at Macroeconomic Performance, Economic Outlook.

<sup>302</sup> See *id.* at Summary.

<sup>303</sup> See *id.* at Background.

<sup>304</sup> See 1998 *Global Software Report*, *supra* note 1, at 7 (indicating that the rate of piracy in the Philippines has gone down steadily from 94% in 1994 to 77% in 1998).