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SPECIAL 301: AN EFFECTIVE TOOL AGAINST THAILAND'S INTELLECTUAL PROPERTY VIOLATIONS

Preeti Sinha

Abstract: Special 301 of the 1988 Omnibus Trade and Competitiveness Act grants the United States Trade Representative the authority to target countries that do not adequately protect intellectual property rights. The USTR has been investigating and negotiating with several countries, including Thailand, in an effort to improve intellectual property protections for American products. As a result, Thailand has instituted noteworthy changes in its copyright and patent laws. This Comment recommends that the USTR continue to negotiate with Thailand, and that the USTR continue to exert pressure on Thailand. This Comment also suggests that because Thailand has taken steps to improve protection of intellectual property rights, the USTR should refrain from imposing any trade sanctions under Special 301 against Thailand at this time.

I. INTRODUCTION

Intellectual property rights play an increasingly significant role in world trade.¹ The problems associated with pirated goods have caused a divisive debate between developing countries and industrialized countries. The governments of industrialized countries are anxious to see stiffer intellectual property laws enacted in developing countries to prevent the unauthorized production and sale of products originally created in industrialized countries. Business interests in industrialized countries also have a stake in increased regulation, since researching and developing products can be costly. These enterprises want to ensure they can recoup their initial costs, and obtain any profits generated from their inventions and innovations. On the other hand, developing countries are reluctant to channel funds toward enacting and enforcing intellectual property legislation. Developing countries benefit by permitting pirated goods to be sold in their domestic markets.

Recently, the United States has adopted the use of a bilateral trade weapon to obtain increased intellectual property protections from its trading partners. Under the aegis of the Omnibus Trade and Competitiveness Act of 1988,² the U.S. threatens countries with a selected set of trade retaliation

¹ See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 Iowa L Rev 273, 275 (1991).

² Trade Act of 1974 (Omnibus Trade and Competitiveness Act), as amended by the Trade Act of 1988, 19 USC §§ 2101-2495 (1988) ("1988 Trade Act").

devices if countries do not ensure that intellectual property rights are being protected. In response to warnings from the U.S., Thailand has increased its enforcement of copyright laws and has improved its patent protections. Thailand's actions fall short of what the U.S. believes is an adequate amount of protection. Nonetheless, the 1988 Trade Act has had a measurable impact on Thai policies regarding intellectual property rights.

This Comment will first explore why industrialized and developing countries view intellectual property protection differently, and why developing countries conclude that it is not in their interests to enact legal protections. It next describes the enforcement procedures under the 1988 Trade Act generally, and their use against Thailand specifically. This Comment will conclude that the 1988 Trade Act has proven to be an effective means of vitalizing Thailand's commitment to intellectual property protection.

II. INTELLECTUAL PROPERTY PROTECTIONS: DIFFERING IDEOLOGIES BETWEEN DEVELOPING AND INDUSTRIALIZED COUNTRIES

Intellectual property issues necessarily play a role in the global economy, because inventions and innovations cross national boundaries. The debate continues, however, about the benefits and drawbacks that intellectual property protection poses for countries. Developing countries and industrialized countries view intellectual property protection with strikingly different perspectives. Because of this difference, intellectual property protection has been characterized as a weapon used by the "haves" against the "have nots."³

A. *Developing Countries' Views*

Developing countries believe that intellectual property protection hinders their economic development because of the costs imposed. One of the immediate economic effects of legal protections is to cause an increase in domestic prices of patented goods.⁴ The price increase results from market monopolies held by patent holders.⁵ Also, more royalty payments have to be

³ Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View From the South*, 22 Vand J Transnatl L 243, 252 (1989).

⁴ Richard T. Rapp and Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J World Trade 75, 90 (1990).

⁵ Francis W. Rushing and Carole Ganz Brown, *Intellectual Property Rights in Science, Technology, and Economic Performance* at 27 (Westview Press, 1990).

remitted to foreign firms because of an increased presence of patented products.⁶

Developing countries will also face other, more indirect costs if they enforce intellectual property rights. Domestic firms in developing countries, which previously produced or sold pirated products, will be displaced.⁷ Developing countries will also have to use their resources to establish an effective intellectual property protection system,⁸ both to pass and to enforce restrictive legislation. Additionally, developing countries, through public and private means, will have to finance domestic research and development, since they will not be able to copy patented products and processes.⁹

Developing countries believe that advanced technology should be furnished to them at a low cost to assist them in their general economic development.¹⁰ Instead of channeling their scarce financial resources toward providing intellectual property protection, developing countries often prefer to allow their domestic markets to remain unrestricted. The risks involved with unprotected markets are minimal in contrast to the healthy return these countries can expect by permitting piracy.¹¹ Developing countries also believe they can industrialize more rapidly if their domestic firms can copy advanced technology rather than having to generate this technology on their own.¹² For example, pharmaceutical products, chemical products and computers are easier and less costly to copy than to invent.¹³ Producing original work in these areas requires a significant amount of investment.¹⁴

B. *Industrialized Countries' Views*

Industrialized countries counter the preceding arguments by pointing out the benefits that accrue to all nations when intellectual property protections are adopted by both industrialized and developing countries. Industrialized countries believe that if there are no incentives for individuals and companies to market their inventions, then society as a whole will receive

⁶ R. Michael Gadbow and Timothy J. Richards, *Intellectual Property Rights: Global Consensus, Global Conflict?* at 256 (Westview Press, 1988).

⁷ *Id.*

⁸ *Id.* at 257.

⁹ *Id.* at 256.

¹⁰ Rushing and Brown, *Intellectual Property Rights* at 27 (cited in note 5).

¹¹ Leaffer, 76 Iowa L Rev at 282 (cited in note 1).

¹² Robert Weissman, *Patent Plunder: Tripping the Third World*, 11 *Multinational Monitor* 8 (1990).

¹³ *Id.* at 11.

¹⁴ *Id.*

fewer new products and processes.¹⁵ The original developers of new products should be assured they have property rights in their inventions, and should expect to derive some monetary reward, either from licensing fees or from actual profits.¹⁶ Also, those who provide capital to promote the development of new products and processes should receive a fair return on their investments to ensure that they continue to supply the required capital.¹⁷

Industrialized countries also assert that intellectual property protection does not lead to inordinately high prices, the supposed result of market monopolization. The exclusivity identified with a patent remains for a limited period of time, narrowly defined by the claims of the patent.¹⁸ This restriction is not equivalent to monopoly power, for it is common to have competition among patented products.¹⁹

III. AN OVERVIEW OF SPECIAL 301 OF THE 1988 TRADE ACT

Developing and industrialized countries have attempted to bridge their differences over intellectual property issues by participating in multilateral forums, and by becoming signatories to international conventions.²⁰ The United States has decided to take additional unilateral action against countries which do not adequately protect intellectual property rights. In the last few years, the 1988 Trade Act has become a primary means for the U.S. to target such countries.²¹ The relevant portion of the Act addressing intellectual

¹⁵ Rapp and Rozek, 24 J World Trade at 75 (cited in note 4).

¹⁶ *Id.* at 85.

¹⁷ Rushing and Brown, *Intellectual Property Rights* at 28 (cited in note 5). A spokesman from the Pharmaceutical Manufacturers Association, based in the U.S., estimated that the cost of developing a new medicine requires about \$200 million, and that 12 years of research, development and registration are required before it can be ascertained that the medicine is beneficial. *Americans Push Again for Patent Protection*, Bangkok Post (Nov 12, 1992) (LEXIS, Nexis library, Omni file).

¹⁸ Rapp and Rozek, 24 J World Trade at 91 (cited in note 4).

¹⁹ *Id.*

²⁰ See e.g., General Agreement on Tariffs and Trade, opened for Signature Oct 30, 1947, 61 Stat (5),(6), TIAS No 1700, 55 UNTS 187 (Article XX (d) of the GATT, the Trade Related Aspects of Intellectual Property (TRIPS), addresses intellectual property); Paris Convention for the Protection of Industrial Property, opened for signature Mar 20, 1883, as amended, 21 UST 1583, TIAS No 6923, 828 UNTS 305; Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 UST 1749, TIAS No 6932, 828 UNTS 3; The Berne Convention for the Protection of Literary and Artistic Works, Sept 9, 1886, 828 UNTS 221 (1972) (as amended), 102 Stat 2853.

²¹ Acts, policies, and practices that are unreasonable under the Act include those which deny "fair and equitable . . . provision of adequate and effective protection of intellectual property rights." 19 USC § 2411(d)(3)(B)(i)(II)(1988). The 1988 Trade Act also targets countries which impede the establishment of an enterprise, which promote export targeting practices, and which deny workers' rights. 19 USC § 2411(d)(3)(B).

property rights is commonly referred to as "Special 301." Special 301 allows the executive branch to institute retaliatory measures against countries that continually allow the production and sale of pirated goods.

A. *THE ROLE OF THE UNITED STATES TRADE REPRESENTATIVE*

1. *Statutory Authority*

The Office of the United States Trade Representative (USTR) is the executive agency responsible for implementing Special 301 actions. Special 301 envisions a bilateral approach to moderating intellectual property trade disputes between the U.S. and foreign governments. The USTR conducts regular investigations and negotiates directly with the offending country. Should the negotiations fail to achieve the desired goals under the Act, the U.S. threatens to use, and eventually will institute, retaliatory trade measures.

Special 301, which is Section 301 of the 1988 Trade Act, is a revised version of a comparable section of the prior Trade Act of 1974.²² The 1988 Trade Act introduced two significant changes to the statutory enforcement procedures of the 1974 Trade Act. One revision expanded the USTR's authority, and the other imposed a time limit on implementing Section 301 action.

Under the 1974 Trade Act, the President determined whether retaliatory action should be initiated against a country and, if action was taken, the President decided which measures would be appropriate. The 1988 Trade Act transferred the authority to make these determinations from the President to the USTR.²³ Additionally, the 1974 Trade Act had imposed no time limits on when retaliatory actions had to be executed against offending countries.²⁴ The 1988 Trade Act, however, requires the USTR to implement Section 301 actions within thirty days after deciding to take such action.²⁵

The USTR acts as a substantially independent actor in this capacity, since it is subject only to the President's direction.²⁶ The USTR shoulders primary responsibility for conducting investigations. The USTR is responsible

²² Trade Act of 1974, cited in note 2. Sections 301-306 of the 1974 Trade Act were rewritten and signed into law as the 1988 Trade Act by former President Ronald Reagan on August 23, 1988. *President Reagan Signs Trade Bill*, 36 Pat., Trademark & Copyright J 419 (1988).

²³ H Conf Rep 100-576, 100th Cong, 2d Sess 551 (1988).

²⁴ *Id* at 556.

²⁵ 19 USC § 2415(a)(1). See also H Conf Rep 100-576 at 556.

²⁶ 19 USC § 2411(a)(1).

for warning countries of the consequences of weak intellectual property legislation and enforcement. If a country does not improve its protections, the USTR can trigger retaliatory actions, including the withdrawal of trade benefits or tariffs, or the imposition of import restrictions.²⁷ The USTR may also form binding agreements with countries to eliminate, or phase out, the policies or practices which contravene the Act.²⁸

2. *Initiating an Investigation*

The first step in a Special 301 enforcement action is to determine which countries are denying intellectual property protections within the meaning of the 1988 Trade Act. The USTR conducts preliminary investigations to obtain the requisite information which allow it to make this determination. Investigations may be triggered either: 1) in response to a petition filed by an "interested person,"²⁹ or 2) because the USTR itself decides to examine a suspected country's practices.³⁰

An "interested person" who wishes to lodge a complaint with the USTR must submit a petition presenting evidence of a foreign government's practice which supports pirating activities. The petition should include information about the volume of trade affected, the manner in which the practice is unreasonable under the Trade Act, and the specific intellectual property right being violated.³¹ The petition should also estimate the impact on the petitioner's business and the overall effect on the United States' domestic and international commerce.³² The USTR is to determine whether the allegations warrant an investigation no later than forty-five days after receiving the petition.³³

The USTR may also take action on its own initiative, either as a discretionary action or as a mandatory action. A discretionary action is undertaken if the USTR determines that action by the United States is "appropriate."³⁴ However, the USTR is mandated to take action should it

²⁷ 19 USC § 2411(c)(1)(A)-(B).

²⁸ 19 USC § 2411(c)(1)(C).

²⁹ 19 USC § 2412(a). The term "interested person" includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by the USTR's actions. 19 USC § 2411(d)(9).

³⁰ 19 USC § 2412 (b).

³¹ 15 CFR § 2006.1 (1992).

³² 15 CFR § 2006.1(7)

³³ 19 USC § 2412(a)(2).

³⁴ 19 USC § 2411(b)(2).

find that a foreign country's practices are "unjustifiable, and burdens or restricts United States commerce."³⁵ The USTR arrives at its decisions after it submits the annual National Trade Estimate Report³⁶ to the President and to Congress.³⁷ Within thirty days of issuing the National Trade Estimate Report, the USTR must formally identify which countries "deny adequate and effective protection of intellectual property rights"³⁸ and must further identify which of these countries shall be labeled "priority foreign countries."³⁹ The USTR is required to publish its determinations in the Federal Register, along with facts supporting its determinations.⁴⁰ If an investigation will not be undertaken, the reasons why must be stated, and if an investigation will be undertaken, a summary of any petitions submitted must be published in the Federal Register.⁴¹

3. *Negotiating*

After an investigation has commenced, the USTR requests consultations with the targeted foreign country.⁴² If the U.S. and the targeted foreign country are unable to arrive at a mutually agreeable resolution, the two countries may enter formal dispute settlement procedures.⁴³ At this stage, a variety of situations may forestall or delay Special 301 action. For example, the targeted country may be making progress in providing adequate intellectual property protection.⁴⁴ Or, it may not be possible to resolve the dispute using normal settlement procedures.⁴⁵ After the USTR has undertaken investigations, consultations and other intermediate steps, the USTR may institute retaliatory trade actions against an offending country if such action is still found necessary.⁴⁶

³⁵ 19 USC § 2411(a)(1)(B)(ii).

³⁶ 19 USC § 2241(a)(1).

³⁷ 19 USC § 2241(b)(1). The USTR submits its report to the President, to the Committee on Finance of the Senate, and to various committees of the House of Representatives.

³⁸ 19 USC § 2242(a)(1)(A).

³⁹ 19 USC § 2242(a)(2).

⁴⁰ 19 USC § 2411(d)(3)(C)(ii).

⁴¹ 19 USC § 2412(a)(3)-(4).

⁴² 19 USC § 2413(a)(1).

⁴³ 19 USC § 2413(a)(2).

⁴⁴ 19 USC § 2414(a)(3)(B)(ii).

⁴⁵ 19 USC § 2414(a)(4).

⁴⁶ 19 USC § 2415(a)(1).

IV. A PRECURSOR TO USING SPECIAL 301 ACTIONS AGAINST THAILAND: THE GENERALIZED SYSTEM OF PREFERENCES

During the late 1980's, the U.S. vocalized its concern that piracy appeared to be rampant in Thailand and in other Asian countries.⁴⁷ At that time the U.S. announced its intention to deny tariff concessions to countries which did not protect American copyrights, trademarks and patents.⁴⁸ To keep their trade benefits from being withdrawn by the U.S., several countries took measures to strengthen their intellectual property protections. Thailand, although it was widely regarded as an egregious violator of intellectual property rights, took only negligible steps to improve legal protections.⁴⁹

In particular, the U.S. was pressuring Thailand to strengthen its weak copyright law.⁵⁰ Thailand did amend its copyright law to tighten control over imitation designer clothes, books, music tapes and other goods.⁵¹ However, this amendment was insufficient to ward off continuing criticism by the U.S. of Thailand's intellectual property protections.

As a result of its dissatisfaction, the U.S. discontinued trade benefits to Thailand under the Generalized System of Preferences (GSP). On January 19, 1989, President Ronald Reagan declined to grant Thailand additional duty-free treatment under the GSP program because Thailand was not honoring U.S. intellectual property rights.⁵² The measure was predicted to

⁴⁷ See e.g., *US Cites Asian Piracy*, NY Times D7 (Feb 15, 1988). Allen Wallis, then Under Secretary for Economic Affairs of the State Department, expressed the U.S.'s views at an annual meeting between the United States and the countries which form the Association of Southeast Asian Nations (ASEAN). Besides Thailand, other offenders named by Wallis were the Philippines, Malaysia, Indonesia, and Brunei. Singapore was the only country not criticized because of the progress it was making in the area of intellectual property rights protection. See also *Fighting Trespassing on 'Intellectual Property'; U.S. Tries to Prevent Overseas Copying of Everything From Music to Microchips*, Washington Post H1 (Dec 6, 1987). The article described Thailand as "a center of film and music piracy." Additionally, then USTR Clayton Yeutter downplayed the argument that allowing pirated goods in a developing country could aid in the country's development. He stated "I don't see how any nation in the world can defend piracy as a means of keeping consumer costs down."

⁴⁸ See *U.S. Plans to Defend its Patents*, NY Times D6 (Apr 7, 1986).

⁴⁹ See *East Asian Countries Strengthen Intellectual Property Protection*, 32 Pat, Trademark & Copyright J 38 (1986).

⁵⁰ See *Thailand Extends Copyright Protection*, Los Angeles Times part 4, at 3 (Apr 29, 1988).

⁵¹ *Id.*

⁵² 54 Fed Reg 3573 (1989). The GSP program has two types of eligibility criteria. Under the mandatory criteria, 19 USC § 2462(b), certain countries are rendered automatically ineligible for GSP beneficiary status. Under the discretionary criteria, the President is to take certain factors into account when designating a developing country as a beneficiary of GSP treatment. The President must consider "the extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." 19 USC § 2462(c)(5).

affect about \$165 million of U.S. imports of Thai goods, including some important Thai exports—wood furniture, mosaic ceramic floor tile, and artificial flowers.⁵³ Reagan also warned that future GSP requests for Thai products would not be viewed favorably until Thailand improved its intellectual property protections.⁵⁴

V. SPECIAL 301 IMPLEMENTATION AGAINST THAILAND

A. *The USTR's Actions: 1989 to 1991*

At approximately the same time that Thailand was denied beneficial GSP treatment, Thailand was also being closely watched by the U.S. to see if its practices measured up to the levels of intellectual property protection required under the 1988 Trade Act.⁵⁵ In 1989 the USTR began its enforcement actions under the 1988 Trade Act.⁵⁶ In January of 1989, the USTR invited the public to comment on foreign countries which had policies and practices that did not promote intellectual property protection.⁵⁷ Participants were asked to describe the problems experienced and the effects on U.S. industry.⁵⁸

In 1989, the USTR refrained from listing any countries as "priority foreign countries" within the meaning of Section 301.⁵⁹ Instead of naming "priority foreign countries," the USTR formed a "Watch List" and a "Priority Watch List."⁶⁰ The USTR identified twenty-five countries which it believed did not accord adequate safeguards to intellectual property.⁶¹ Seventeen of these were placed on the Watch List,⁶² and eight others, the more serious violators, were placed on the Priority Watch List.⁶³ Thailand had been

⁵³ *Thailand Denied Certain GSP Benefits for Weak Intellectual Property Laws*, 37 Pat, Trademark & Copyright J 279, 280 (1989).

⁵⁴ 54 Fed Reg 3573 (1989).

⁵⁵ *USTR Fact Sheet for "Special 301" on Intellectual Property*, reprinted in 38 Pat, Trademark & Copyright J 131 (1989).

⁵⁶ 54 Fed Reg 2033 (1989).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 38 Pat, Trademark & Copyright J at 131. See note 39.

⁶⁰ *Id.*

⁶¹ The USTR made its decisions in part by consulting with the interagency Trade Policy Staff Committee, the Patent and Trademark Office, and the Copyright Office. *Id.*

⁶² These seventeen countries were Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, Philippines, Portugal, Spain, Turkey, Venezuela, and Yugoslavia. *Id.*

⁶³ The eight countries were Brazil, India, Mexico, People's Republic of China, Republic of Korea, Saudi Arabia, Taiwan and Thailand. *Id.*

formally designated as a Priority Watch List country.⁶⁴ Neither the Watch List nor the Priority Watch List is mentioned in any of the statutory provisions of Special 301. Rather, the lists are the USTR's own enhancements, allowing the USTR to identify and negotiate with countries without immediately having to resort to Special 301 procedures.⁶⁵

The USTR was not the only entity monitoring Thailand's actions. U.S. industries were themselves concerned that their products were being reproduced and manufactured in Thailand without proper authorization. Consequently, petitions by two industry groups were filed with the USTR, one alleging copyright violations and one complaining of patent infringements. The industry petitions spurred separate investigations by the USTR that occurred concurrently with the USTR's own general investigations under Special 301.⁶⁶ The events surrounding both industry petitions will be examined below.

I. The Copyright Industry's Petition

On November 15, 1990, a coalition of U.S. copyright associations filed a petition with the USTR's office as "interested persons" under Special 301.⁶⁷ The coalition consisted of the International Intellectual Property Alliance (IIPA),⁶⁸ the Recording Industry Association of America (RIAA),⁶⁹ and the Motion Picture Export Association of America (MPEAA).⁷⁰ Special 301 petitioners are required to describe the effects to their economic interests which result from the offending country's practices.⁷¹ The copyright coalition claimed in its petition that the U.S. copyright industry lost between \$70 and \$100 million in 1990 from unauthorized copies of copyrighted goods being sold in Thailand.⁷² On December 21, 1990, in response to the recording

⁶⁴ The USTR established the following goals for enhancing intellectual property protection in Thailand: improved and adequate patent protection for all classes of inventions, effective copyright protection for U.S. works, including software, improved protection of foreign trademarks, and constructive participation in multilateral intellectual property negotiations. *Id.*

⁶⁵ *Id.*

⁶⁶ See text accompanying footnotes 61-64, *supra*.

⁶⁷ 56 Fed Reg 67114 (1991).

⁶⁸ The IIPA is composed of eight trade associations. The associations represent important segments of the U.S. copyright industry. *US Copyright Industries File Unfair Trade Action Against Thailand*, 41 Pat, Trademark & Copyright J 81 (1990).

⁶⁹ The RIAA is a trade association representing the U.S. sound recording industry. *Id.*

⁷⁰ The MPEAA is a trade association whose members are major producers and distributors of entertainment programs for cinema, television, cable and home video. *Id.*

⁷¹ 15 CFR § 2006.1 (1990).

⁷² 56 Fed Reg 292 (1991).

industry's petition, the USTR initiated an investigation of Thailand's copyright enforcement practices.⁷³ In January and November of 1991, the USTR invited public comment on this matter.⁷⁴

Thailand took steps to stiffen its copyright protections, presumably in response to the USTR's investigation. The Thai government amended its copyright law, which was to become effective in January 1992.⁷⁵ The new law extended protection to service marks and collective marks, and imposed heavy penalties for infringement.⁷⁶ Steps were also being taken to improve enforcement procedures to combat copyright piracy.⁷⁷ The Thai government raided establishments which sold pirated goods and seized evidence to prosecute pirates.⁷⁸ Due to the effectiveness of the Thai government's actions, the USTR terminated its Special 301 enforcement actions against Thai copyright practices.⁷⁹ On December 20, 1991, the USTR officially ended this particular investigation, which had been initiated in response to the copyright coalition's petition.⁸⁰

2. *The Pharmaceutical Industry's Petition*

On January 30, 1991, shortly over a month after the copyright coalition had filed its petition with the USTR, the Pharmaceutical Manufacturers Association (PMA)⁸¹ also filed a petition against Thailand under Special 301 of the 1988 Trade Act.⁸² The PMA estimated that U.S. pharmaceutical companies were losing \$25 to \$100 million annually due to patent piracy in Thailand.⁸³ Specifically, the PMA petition complained that Thailand lacked product patent protection for pharmaceuticals, had patent terms of short duration, and had excessively broad compulsory licensing provisions.⁸⁴ On

⁷³ *Id.*

⁷⁴ 56 Fed Reg 67114 (1991).

⁷⁵ Thailand's Trademark Act was passed on September 6, 1991. *New Thai Trademark Act*, 13 E Asian Executive Rep 19 (1991).

⁷⁶ *Id.*

⁷⁷ 56 Fed Reg 67114 (1991).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ The PMA has twenty members in its organization which maintain affiliates in Thailand. *PMA Files § 301 Complaint Against Thailand Over Drug Patent Protection*, 41 Pat, Trademark & Copyright J 315 (1991).

⁸² 57 Fed Reg 5029 (1992).

⁸³ *PMA Files § 301 Complaint*, 41 Pat, Trademark & Copyright J at 315 (cited in note 81).

⁸⁴ *USTR Launches Section 301 Investigation of Thailand's Pharmaceutical Patent Law*, 41 Pat, Trademark & Copyright J 430 (1991).

March 15, 1991, in response to the PMA petition, the USTR undertook a Special 301 investigation of Thailand's protection of pharmaceutical products.⁸⁵ As of this writing, this investigation continues and has not yet been terminated because patent protection for pharmaceutical products sold in Thailand remains inadequate under the 1988 Trade Act.

B. The USTR's Actions: 1991 to the Present

During the time the USTR was responding to the petitions filed by the recording industry and the pharmaceutical industry, the USTR was also continuing to monitor countries on its own Watch List and Priority Watch List. On January 11, 1991, the USTR requested public comments to once again assist it in the identification of "priority foreign countries."⁸⁶ On April 26, 1991, the USTR named three countries as the worst offenders of intellectual property violations, and, for the first time, placed them on the "priority foreign country" list within the meaning of Special 301.⁸⁷ Previously, the USTR had placed countries on its Watch List and Priority Watch List, and had refrained from formally designating countries as "priority foreign countries." Now, Thailand, India and the People's Republic of China are officially marked as "priority foreign countries."⁸⁸

On January 23, 1992, the USTR announced once again it was soliciting public comment on the identification of "priority foreign countries."⁸⁹ On February 11, 1992, the USTR announced it was seeking public comment in particular on the adequacy of patent protection in Thailand.⁹⁰

1. Thailand's Amendment of its Patent Laws

Thailand's designation as a "priority foreign country" in 1991 and the USTR's continuing investigations in 1992 appeared to have goaded the Thai government into action. On February 27, 1992, the Thai National Legislative Assembly passed a bill that amended its patent laws in several critical

⁸⁵ 57 Fed Reg 5029 (1992).

⁸⁶ 56 Fed Reg 1214 (1991).

⁸⁷ 56 Fed Reg 2006 (1991).

⁸⁸ *Id.* This listing followed a recommendation by President Bush's Economic Policy Council that all three be listed for violating American copyrights and patents. *China, India, and Thailand Named in First 'Priority Foreign Country' List*, 42 Pat., Trademark & Copyright J 7, 8 (1991).

⁸⁹ 57 Fed Reg 2795 (1992).

⁹⁰ 57 Fed Reg 5029 (1992).

respects. The new patent laws provide protection to many more kinds of products than the previous laws did.⁹¹ Patent protection was expanded to include pharmaceutical products, active pharmaceutical ingredients, food, beverages, farm machinery and bio-technological inventions.⁹² None of these items were available for patent protection before these amendments were passed.⁹³

Another expansive aspect of the legislation is that the period of protection has been extended to twenty years from the date the patent application is filed,⁹⁴ instead of fifteen years under the previous laws.⁹⁵ The new laws also grant additional protection to patent holders. Patentees will receive some patent protection before the actual granting of the patent if the patent application has already been published.⁹⁶ Patentees will also receive, for the first time, exclusive rights to imported patented products.⁹⁷

2. *The USTR's Discontent With the Amendments*

However, the USTR was not content with the changes Thailand instituted in its patent laws. USTR Carla Hills claimed the new laws were "deficient in several critical respects."⁹⁸ One of the alleged defects of the amended patent laws is that the laws do not provide protection for existing patented products.⁹⁹ Also, the USTR was displeased with the functions of the new Pharmaceutical Patent Board formed under the Thai bill.¹⁰⁰ Under the new laws, companies will have to submit cost and pricing information to the Patent Board, and severe penalties will be imposed on companies that do not comply.¹⁰¹ The Board is authorized to compare the prices of patented

⁹¹ The bill was opposed by the Public Health Ministry, which has the support of local Thai drug companies, physicians and pharmacist associations. The provision generating the most controversy was one in which the law would be effective 180 days after passage by the Thai Assembly. The Public Health Ministry and its supporters were insisting that the grace period be expanded to four years, to enable the Thai pharmaceutical industry to adjust to the changed conditions. *Thailand Attempts to Approve Patent Bill to Head Off Future U.S. Trade Sanctions*, 9 Pat, Trademark & Copyright J 64 (1992).

⁹² *Amendments to Patent Law Will Take Effect in September*, Pat, Trademark & Copyright L Daily (July 29, 1992).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *USTR Finds Against Thailand on Patents, Delays Action Until After Thai Election*, Intl Trade Daily (Mar 17, 1992).

⁹⁹ *Amendments to Thai Patent Act*, 14 E Asian Executive Rep, 8 (1992).

¹⁰⁰ *Id.*

¹⁰¹ *USTR Finds Against Thailand on Patents, Delays Action Until After Thai Election*, Intl Trade

products with those of non-patented products, and it may report its information to the government's Price-Fixing and Antimonopoly Committee.¹⁰² The USTR claimed this process would be a "disincentive" for companies to obtain patent protection.¹⁰³

Because of the deficiencies of Thailand's amendments, on March 13, 1992, USTR Carla Hills announced that Thailand had still failed to ensure satisfactory protection of U.S. patents on pharmaceutical products. Nonetheless, the USTR was reluctant to institute any retaliatory trade measures until the new government was formed in Thailand.¹⁰⁴ On April 29, 1992, the USTR once again identified Thailand, along with India and Taiwan as "priority foreign countries."¹⁰⁵ Taiwan was new to the list, and since Thailand and India were already on the "priority foreign country list," the USTR stated that it would continue to consult with those countries about intellectual property issues without initiating new investigations.¹⁰⁶

3. *The Problem of Thailand's Changing Governments*

Since March of 1992, when the USTR initially decided to await the formation of the new Thai government before instituting retaliatory action, Thailand has had three different governments. The most recent government (as of this writing) was established on October 1, 1992.¹⁰⁷ On October 16, 1992, the USTR reiterated that it would not institute retaliatory trade actions against Thailand in response to Thailand's unreasonable patent practices.¹⁰⁸ Again, Thailand's turbulent political climate was the reason cited for the USTR's delay. The USTR stated that the change in governments had "significantly hindered" the USTR's negotiations efforts.¹⁰⁹

The recurring change in governments, however, has not deterred the USTR in its informal negotiations efforts. USTR Carla Hills has instructed Special 301 negotiators to meet with officials from the current government (as of this writing) to resolve intellectual property disputes.¹¹⁰

Daily (Mar 17, 1992).

¹⁰² *Amendments to Thai Patent Act*, 14 E Asian Executive Rep 8 (1992).

¹⁰³ *Id.*

¹⁰⁴ *USTR Finds Against Thailand on Patents, Delays Action Until After Thai Election*, Intl Trade

Daily (Mar 17, 1992).

¹⁰⁵ 57 Fed Reg 19329 (1992).

¹⁰⁶ *Id.*

¹⁰⁷ 57 Fed Reg 47510 (1992).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *USTR Delays Action Against Thailand for Lack of Patent Protection*, Pat, Trademark &

VI. ANALYSIS OF SPECIAL 301'S EFFECTIVENESS

The problem of patented products being illegally copied and sold in foreign markets continues to plague U.S. industries. Each year, the lack of protection for copyrights, trademarks and patents costs U.S. industries billions of dollars.¹¹¹ Because intellectual property violations continue to be a significant problem in many countries, Special 301 legislation should continue to be implemented. Special 301 has several important features, as described below.

A. *Benefits of Special 301's Statutory Requirements*

First, Special 301 delineates time periods in which actions must be taken by the USTR. This ensures that enforcement actions against countries are not significantly delayed. The USTR has to follow deadlines by which it must respond to complaints, launch investigations, and make concrete determinations about the progress countries are making. This continual monitoring exerts time pressure on the targeted countries, encouraging them to institute reforms promptly. Also, Special 301 ensures regular reviews of the progress countries are making. Through these reviews, the USTR can see to it that once a country begins to locate and prosecute producers and sellers of pirated goods, the country does not ease up on its enforcement later.

Within the U.S., Special 301 addresses domestic industries' concerns. The petition process by "interested persons" allows U.S. industries to communicate directly with the USTR. Industries also assist the USTR by producing evidence to support their petitions. Their evidence describes how domestic industries are economically affected by foreign piracy, and allows the USTR to present specific demands in its negotiations with other countries.

Special 301 legislation is intended to threaten countries with trade sanctions if adequate intellectual property protections are not forthcoming. However, in its actual implementation of Section 301, the USTR aims to be diplomatic and not threatening. As exemplified by its treatment of Thailand, the USTR has not hastily marked countries as "priority foreign countries."

Copyright L Daily (Oct 15, 1992).

¹¹¹ *Industry Calls for Stiffer Enforcement of Anti-Counterfeiting Laws Abroad*, 44 Pat, Trademark & Copyright J 585 (1992). Intellectual property groups were testifying at a hearing held by the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks on September 29, 1992. One spokesman for the International Intellectual Property Alliance reported that 95 percent of the videos sold in Thailand were pirated. *Industry Calls For Stiffer Enforcement of Anti-Counterfeiting Laws Abroad*, Pat, Trademark & Copyright L Daily (Sept 30, 1992).

Instead, the USTR tries to ensure that it has a substantial basis for designating a country as a "priority foreign country." The formation of the Watch List and Priority Watch List have been useful intermediate steps to encourage negotiations and bilateral talks between the U.S. and targeted countries.

Special 301 is also effective because it lists specific enforcement mechanisms available to the USTR. The trade weapons,¹¹² enumerated in the statute, can cause great economic loss for the targeted country, and serve as a financial disincentive to permitting piracy. Countries are aware that if they do not attempt to control piracy, trade sanctions will eventually be levied. If the USTR does have to resort to using retaliatory trade weapons against a country, the country will have to respond with positive action if it wishes to renew its beneficial trade status.

B. Limiting the Scope and Intensity

The scope and intensity of the USTR's actions is one of the more debatable aspects of Special 301. Expanding the scope of Special 301 would certainly benefit U.S. industries, which have an economic interest in combating piracy problems in all countries. U.S. intellectual property alliances have recommended additions to the countries named on the USTR's Priority Watch List,¹¹³ and the Watch List.¹¹⁴ This would result in additional countries being investigated and facing possible retaliatory trade action under Special 301. However, if such an expansion were deemed necessary, funding for the USTR's efforts would have to be increased. Since the Office of the USTR is an executive agency, President Clinton and his staff would most likely be the persons who would decide whether the USTR's efforts warrant additional funding.

The intensity of the actions undertaken by the USTR will depend on the circumstances surrounding each targeted country. Special 301 has proven to be an effective tool in encouraging Thailand to take measures to combat piracy. In the last few years, Thailand has strengthened its enforcement of both copyright and patent rights. Still, as evinced by the fact that Thailand has been designated as a "priority foreign country," there remain additional

¹¹² 19 USC 2411(c)(1)(A)-(B).

¹¹³ They suggest adding Australia, Egypt, Germany, Italy, Korea, Paraguay, Turkey, and the United Arab Emirates. *IIPA, PMA Submit Lists of Nations They Want Added to USTR Lists*, Pat, Trademark & Copyright L Daily (Apr 21, 1992).

¹¹⁴ The countries suggested are Brazil, China, Cyprus, El Salvador, Guatemala, Mexico, Russia and the Commonwealth of Independent States, Saudi Arabia, and Venezuela. *Id.*

measures that Thailand must take before the USTR is fully satisfied with Thailand's performance. Nonetheless, Thailand has taken noteworthy steps to increase its intellectual property protections.

C. *The Thai Government's Efforts*

The Thai Government did enact significant amendments to its laws in February of 1992.¹¹⁵ The Thai National Legislative Assembly adopted internationally recognized rules, such as those included in the Paris Convention, the Patent Cooperation Treaty, the WIPO model Law, and the TRIPS Agreement of the GATT.¹¹⁶ Yet, the USTR was not satisfied with the Thai legislation, and it did not approve of the functions delegated to the newly formed Pharmaceutical Patent Board. However, the formation of the Patent Board is an understandable safeguard against Thailand's fear that patented products will have monopolies on the market and will be overpriced.¹¹⁷

The Thai government has been trying to improve its enforcement actions against intellectual property violators. The Thai police have been raiding the larger audio and video targets.¹¹⁸ They also began seizing equipment used in illegal copying.¹¹⁹ The U.S. should recognize that developing countries do not have the administrative enforcement mechanisms in place that many industrialized countries have. Enforcement of intellectual property rights is subject almost entirely to the political processes in developing countries.¹²⁰

The most recent Thai government has indicated its willingness to continue enacting stiffer intellectual property legislation and enforcement. Thailand's chairman of the International Economic Relations Policy Committee has stated that Thailand wants to avoid being sanctioned with further trade barriers.¹²¹ The same government official stated that there was a strong possibility that the government would amend its laws in both the pharmaceutical and copyright areas.¹²²

¹¹⁵ See notes 88-92 with accompanying text.

¹¹⁶ See *Amendments to Thai Act*, 14 E Asian Executive Rep 8 (1992).

¹¹⁷ See note 4.

¹¹⁸ See *USTR's Assessment of Thai Trade Barriers*, Bangkok Post (Apr 2, 1992) (LEXIS, Nexis library, Omni file).

¹¹⁹ *Id.*

¹²⁰ See *U.S. Trade Threats Spur Asian Laws on Intellectual Property*, National L J (July 13, 1992).

¹²¹ See *Commerce to Prepare for GSP Talks With US Govt*, Bangkok Post (Nov 14, 1992) (LEXIS, Nexis library, Omni file).

¹²² *Id.*

VII. CONCLUSION

The USTR should refrain from intensifying sanctions against Thailand at this time. Thailand has been responding positively to the USTR's demands thus far, and will probably continue to improve its legislation and enforcement activities. The USTR has taken into account the recent political instability of successive Thai governments, and, as a consequence, has delayed retaliatory action. But it is also important that the USTR recognize that, as a developing country, Thailand lacks a strong administrative system which can effectively monitor and prosecute intellectual property violators. Additionally, Thailand will be reluctant to grant complete freedom of sale of patented products, fearing that monopolization by such products will result in substantial price increases. Thus, the USTR should continue to implement Special 301 actions against Thailand, but should refrain from triggering retaliatory trade devices.