The Battle Against Software Piracy: Software Copyright Protection in the Philippines

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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 directly 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. This represents a thirty-eight percent piracy rate for the global software industry and an eleven billion dollar loss in revenue. These numbers demonstrate the enormous amount


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. 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’’), and has been under fire from the United States for having inadequate and ineffective intellectual property protection. 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.

On June 6, 1997, the Philippine government enacted the Intellectual Property Code (‘‘IPC’’), which revamped the Philippines’ intellectual property system. According to one Philippine commentator, the IPC was one of the most well-considered pieces of legislation passed by the Philippine government in 1997. The new law took effect on January 1, 1998, and includes copyright protection for works such as computer software. 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 and has maintained the Philippines on its Special 301 ‘‘Watch List’’ of intellectual

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3 See 1998 Global Software Piracy Report, supra note 1, at 4 (indicating that the software piracy rate in the Philippines was 77% in 1998).
5 See discussion infra Part III.B.2.
6 See id.
10 Republic Act No. 8293, supra note 7, § 241.
11 Id. § 172.1(n).
property rights violators. 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.

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, 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. For instance, in the United States, copyright owners have the exclusive right to reproduce, adapt, distribute, perform, and publicly display their copyrighted works.

For a work to receive copyright protection, the work must be original and fixed in a tangible medium of expression. To be original, the work must be independently created by its author and not copied from another. A work is “fixed” when an author places it on a material object, also known as a copy. For example, a person that writes a poem has created a literary work composed of words and symbols. That poem can be fixed on
various material objects such as a piece of paper, magnetic tape, or a block of marble.\textsuperscript{24} The copyright exists once the author creates his work by fixing it in such tangible medium of expression for the first time.\textsuperscript{25}

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.\textsuperscript{26}

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,\textsuperscript{27} the impounding of all copies used in violation of a copyright owner's rights,\textsuperscript{28} the destruction of infringing articles,\textsuperscript{29} costs and attorneys fees,\textsuperscript{30} as well as the awarding of monetary damages and the infringer's profits.\textsuperscript{31} 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.\textsuperscript{32}

The protection of intellectual property\textsuperscript{33} has become a source of tension in the international community.\textsuperscript{34} 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.\textsuperscript{35} Intellectual property protection for U.S. products and services has become increasingly important to U.S. businesses.\textsuperscript{36} The percentage of U.S. exports containing elements of intellectual property has more than doubled since the

\textsuperscript{24} Id.
\textsuperscript{25} 17 U.S.C. §101.
\textsuperscript{26} Id. § 102(a).
\textsuperscript{27} Id. § 502(a).
\textsuperscript{28} Id. § 503(a).
\textsuperscript{29} Id. § 503(b).
\textsuperscript{30} Id. § 505.
\textsuperscript{31} Id. § 504(b).
\textsuperscript{32} Id. § 506(a)(1); 18 U.S.C. § 2319 (1994).
\textsuperscript{33} 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.
\textsuperscript{35} Id.
end of World War II. 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. 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.

B. Copyright Protection for Software

U.S. copyright laws extend protection to computer software by treating the software as a literary work. 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." The owner of a copyright in software is usually the software publisher. A person who buys a copy of software does not become the copyright owner, but rather purchases the right to use the software.

In most countries, computer software is protected under copyright law. 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. However, copyright law has become the principal method of legal protection for computer programs. Copyright protection is easy to administer because an author receives protection from the time he or she creates a work without the need of an enforceable agreement, and copyright protection is generally available in more countries than is patent protection.

37 Id. Twenty-five percent of U.S. exports now have high intellectual property content. Id.
38 Id.
39 Id.
40 H.R. REP. No. 94-1476, at 54 (1976) [hereinafter HOUSE REPORT].
43 Id.
48 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." Piracy is the "illegal reprinting or reproduction of copyrighted matter" or the unlawful plagiarism of it. 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." 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. In addition, countries that lack the technology and funds to independently develop or purchase new software products depend on counterfeiting to obtain software. Moreover, counterfeiting and piracy are profitable ventures. In 1998, the global software industry lost eleven billion dollars in revenue due to piracy. 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. In the short term, a country should review and update its current intellectual property laws. 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.

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

51 Id. at 244.
52 Holleyman, supra note 49, at 422.
54 Id.
56 Proposals to Curb Piracy and Counterfeiting in a Developing Country, supra note 53, at 633.
57 Id.
58 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. By doing this, a country strengthens efforts to develop its own intellectual property. This, in turn, reduces dependency on foreign technology and curbs the need for counterfeiting and piracy.

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. 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.

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. 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.

III. INTELLECTUAL PROPERTY AND COPYRIGHT LAW IN THE PHILIPPINES


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

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59 Id. at 633-34.
60 See id. at 634.
61 Id.
63 Proposals to Curb Piracy and Counterfeiting in a Developing Country, supra note 53, at 634.
64 Gana, supra note 62, at 770.
The Philippines first enacted intellectual property laws in 1947 to protect patents and trademarks. Subsequently, the Philippines provided copyright protection under Presidential Decree No. 49, which the copyright provisions of the IPC repealed. These measures, as well as other Philippine intellectual property protections, were modeled after U.S. laws, regulations, and practices.

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." 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 . . ." Despite the recognition of intellectual property rights for the past fifty years, 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. 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.

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69 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.
71 Philippines: Economy, supra note 66, at Investment and Trading; see also Philippines Wages Uphill Battle Against IP Pirates, supra note 9.
72 Philippine Intellectual Property Brief, supra note 67.
74 Philippines: Economy, supra note 66, at Investment & Trading.
75 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.
76 Id.
Enforcement agencies lacked adequate staffing and funding. Judges were also reluctant to imprison offenders for intellectual property violations. Moreover, lengthy, protracted trial proceedings caused intellectual property owners to eventually lose interest in the criminal prosecution of copyright infringers.

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. TRIPs is an annex to the WTO agreement and describes the intellectual property protection obligations of WTO members. It requires member countries to provide minimum standards of intellectual property protection. 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, including literary, dramatic, and musical works. Like U.S. law, TRIPs includes computer software as

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77 Id.
78 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.
79 Id.
81 TRIPs, supra note 4, Preamble.
83 TRIPs, supra note 4, art. 1(1).
84 17 U.S.C. §102(a), see discussion supra Part II.A.
85 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.\textsuperscript{86} Under TRIPs, members must grant authors of copyrightable subject matter exclusive rights, including the right to reproduce,\textsuperscript{87} adapt,\textsuperscript{88} translate,\textsuperscript{89} publicly perform,\textsuperscript{90} and communicate their works.\textsuperscript{91} TRIPs also grants copyright owners of computer software the additional right to control commercial rental of their works.\textsuperscript{92}

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\textsuperscript{93} and must impose criminal punishments in cases of copyright piracy on a commercial scale.\textsuperscript{94} Members must also implement measures that prohibit the importation of infringing products.\textsuperscript{95}

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.\textsuperscript{96} 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

\begin{itemize}
\item computer programs, whether in source or object code, shall be protected as \textit{literary works} under the Berne Convention (1971).
\item 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.
\end{itemize}

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).

\begin{itemize}
\item Berne Convention, supra note 85, art. 9(1).
\item Id. art. 12.
\item Id. art. 8.
\item Id. art. 11(1)(i).
\item Id. art. 11(ii), art. 11bis(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. 6bis(1).
\item TRIPs, supra note 4, art. 11.
\item Id. arts. 42, 49.
\item Id. art. 61.
\item Id. art. 51.
\item Berne Convention, supra note 85, art. 7(1).
\end{itemize}
less than fifty years starting from the end of the calendar year in which the author published the work.97 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.98

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.99 In addition, TRIPS requires member countries to implement Most Favored Nation (“MFN”) treatment.100 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.101

While TRIPS came into effect on January 1, 1995,102 it delineated a flexible timetable that gave the less economically developed WTO members additional time to comply with its provisions.103 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.104 A developing country such as the Philippines had up to five years (until January 2000) to comply with TRIPS.105

The WTO enforces TRIPS by using a dispute settlement procedure that allows members to bring complaints against other members regarding their compliance with TRIPS.106 Members bring their complaints before a panel107 that makes an initial ruling.108 The panel’s ruling may be appealed

97 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).

99 TRIPS, supra note 4, art. 12.

100 Id. art. 3(1).

101 Id. art. 4.

102 Id. Article 4 also includes four exceptions to this general rule. Id.

103 WORLD TRADE ORGANIZATION, GUIDE TO THE URUGUAY ROUND AGREEMENTS 1 (1999) [hereinafter GUIDE TO THE URUGUAY ROUND].

104 TRIPS, supra note 4, arts. 65-66.

105 Id.

106 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].

107 See GUIDE TO THE URUGUAY ROUND, supra note 102, at 17.

108 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.\footnote{See World Trade Organization, The Organization Members (visited Feb. 28, 2000) <http://www.wto.org/wto/about/organm6.htm>. The United States is also a member. \textit{Id.}} 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.\footnote{Id. at 23.} 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.\footnote{Id. at 24.} 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.\footnote{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. \textit{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. \textit{Id.}} 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."\footnote{See TRIPs, \textit{supra} note 4, Part I, art. 1(1).}

As a result of becoming a WTO member in 1995,\footnote{See Paul D. Hutchcroft, \textit{Sustaining Economic and Political Reform: The Challenges Ahead}, in \textit{The Philippines: New Directions in Domestic Policy and Foreign Relations} 23, 24 (David G. Timberman, ed., 1998).} the Philippines must comply with all WTO agreements, including TRIPs.\footnote{See \textit{TRIPs, supra note 4, Part I, art. 1(1).}} 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.\footnote{See Settling Disputes Summary, \textit{supra} note 108.} If the Philippines fails to bring its intellectual property laws into compliance with TRIPs, other WTO members may bring complaints against the Philippines,\footnote{GUIDE TO THE URUGUAY ROUND AGREEMENTS, \textit{supra} note 102, at 24.} which could ultimately result in authorized trade retaliations.\footnote{GUIDE TO THE URUGUAY ROUND, \textit{supra} note 102, at 22. The Appellate Body, appointed by the DSB, is composed of seven members, three of whom hear a particular case. \textit{Id.} The DSB appoints the members for four-year terms. \textit{Id.}}
2. The United States and Special 301

In the late 1980s and throughout the 1990s, the United States unilaterally pressured the Philippines to strengthen intellectual property protection by threatening to impose trade sanctions. 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. The 1984 Trade Act amended Section 301, broadening the statute to include enforcement of intellectual property rights in trade. Additionally, in 1988, Congress added the "Special 301" provision to Section 301, expanding the USTR's authority to address the lack of intellectual property protection in foreign countries. While Section 301 refers to the general statutory authority to protect U.S. exports from unfair trade practices in foreign countries, 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.

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. Each year, the USTR, as the President's
advisor on trade and related matters, identifies foreign countries that "deny adequate and effective protection of intellectual property rights" or "deny fair and equitable market access" to U.S. persons who rely on intellectual property protection. 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. The USTR lists countries as "priority foreign countries" if (1) they have the most onerous or egregious acts, practices, or policies that greatly impact the United States, and (2) they fail to enter into good faith negotiations or make progress in negotiations to provide adequate and effective intellectual property rights protection. 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." 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.

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

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129 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).

130 19 U.S.C. § 2242(a)(1)(A). Special 301 defines the "denial[al] of adequate and effective protection of intellectual property rights" as the "denial[al] 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).

131 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).

132 Id. § 2242(a)(1)(B).


134 Id. § 2242(b)(1)(B).

135 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).

136 U.S. Industry's Influence, supra note 133, at 95.

137 Id.

138 Pulmano, supra note 119, at 279-80.

139 Id.
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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.\textsuperscript{141} Since then, the United States has kept the Philippines on the Watch List.\textsuperscript{142} Although the Watch List countries are in the least severe category of intellectual property rights violators,\textsuperscript{143} the USTR can authorize retaliation against Watch List countries.\textsuperscript{144} 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.\textsuperscript{145}

U.S. trade sanctions could be devastating to the Philippine economy. The United States is its top trading partner.\textsuperscript{146} The duty-free trade benefits the Philippines receives are worth roughly two billion dollars annually.\textsuperscript{147} 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.\textsuperscript{148} 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.\textsuperscript{149}

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,\textsuperscript{150} the software piracy rate in the Philippines has been extremely high, reaching

\textsuperscript{142} Id.
\textsuperscript{143} U.S. Industry's Influence, supra note 133, at 95.
\textsuperscript{144} Bello & Holmer, supra note 128, at 262.
\textsuperscript{145} Id. at 259.
\textsuperscript{148} U.S.-Opposed Provision, supra note 147.
\textsuperscript{149} Poor Record For Intellectual Property Rights Cited by U.S., supra note 12.
\textsuperscript{150} 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. The United States was also concerned about the lack of enforcement of intellectual property rights in the Philippines. For these reasons, the United States urged the Philippines to reform its intellectual property protection. Specifically, the United States pushed the Philippines to enact modern intellectual property laws, eliminate the use of pirated software, and improve its enforcement of intellectual property rights. Partly in response to this pressure, the Philippines enacted the Intellectual Property Code in 1997.

IV. THE INTELLECTUAL PROPERTY CODE


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

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. The IPC also grants copyright owners the right to display, perform, and communicate their works.

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154 1997 Special 301 Review, supra note 152, at 15-16.
156 Id.
157 Republic Act No. 8293, supra note 7, § 241.
158 Philippines Begins New IP Regime, supra note 9.
159 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.
156 Philippines Begins New IP Regime, supra note 9.
161 See Philippines: Economy, supra note 66, at Investment and Trading.
162 Republic Act No. 8293, supra note 7, §§ 177.1-177.4.
to the public. These exclusive rights are substantially similar to the rights granted to copyright owners under the U.S. Copyright Act and to rights that must be granted under TRIPs. A person other than the copyright owner who infringes on any of these rights could be liable for copyright infringement.

By enacting the IPC, the Philippines extended copyright protection to "literary and artistic works," including computer programs. Like the U.S. Copyright Act and TRIPs, the IPC protects "literary and artistic works." The IPC also follows U.S. law and TRIPs in protecting software as a literary work. The IPC's definition of a computer program is similar to that under the U.S. Copyright Act. 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."

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

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163 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.

164 See discussion supra Part II.A.

165 See discussion supra Part III.B.1.

166 Republic Act No. 8293, supra note 7, § 216.

167 Id. § 172.1.

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

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

170 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.

171 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.

172 HOUSE REPORT, supra note 40, Categories of Copyrightable Works; see also discussion supra Part II.B.

173 TRIPs, supra note 4, art. 10; see also discussion supra Part III.B.1.

174 Republic Act No. 8293, supra note 7, § 172(n).

175 See discussion supra Part II.B.

176 Republic Act No. 8293, supra note 7, § 171.4.

177 Id. § 185.1.
programs\textsuperscript{178} or the reproduction of the code by breaking it up into parts\textsuperscript{179} for the purpose of facilitating the inter-operability between different computer programs.\textsuperscript{180} In effect, the decompilation provision permits a person to duplicate copyrighted software.\textsuperscript{181} When the Philippines began drafting the IPC, the United States expressed strong opposition to the decompilation provision.\textsuperscript{182} The U.S. concern was that such a provision would permit parties to commit software piracy under the guise of decompilation.\textsuperscript{183} 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.\textsuperscript{184} 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.\textsuperscript{185} The IPC permits software decompilation under circumstances amounting to fair use.\textsuperscript{186} The Philippine government hoped that the fair use standard would provide the Philippines with the needed flexibility to develop its own computer software technology.\textsuperscript{187}

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.\textsuperscript{188} 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.\textsuperscript{189} Such copying is also legal under U.S. copyright law.\textsuperscript{190}

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

\begin{itemize}
  \item \textsuperscript{178} \textit{Fair Use Rules Considered in the Philippines}, 9 J. PROPRIETARY RTS 20 (1997).
  \item \textsuperscript{179} Jose Joel M. Sy Egco, \textit{U.S. Threatens to Withdraw Concessions}, BUS. DAILY, Nov. 14, 1996, available in LEXIS, Asia & Pacific Rim, News, Asia/Pacific Rim Stories [hereinafter \textit{US Threatens to Withdraw Concessions}].
  \item \textsuperscript{180} Republic Act No. 8293, supra note 7, § 185.1.
  \item \textsuperscript{181} See \textit{US Threatens to Withdraw Concessions}, supra note 179.
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} 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.
  \item \textsuperscript{184} \textit{Fair Use Rules}, supra note 178.
  \item \textsuperscript{185} Republic Act No. 8293, supra note 7, § 185.1.
  \item \textsuperscript{186} Id.
  \item \textsuperscript{187} \textit{Fair Use Rules}, supra note 178.
  \item \textsuperscript{188} Republic Act No. 8293, supra note 7, § 189(a).
  \item \textsuperscript{189} Id. § 189(b).
  \item \textsuperscript{190} See 17 U.S.C.A. § 117.
\end{itemize}
a person files a claim with the regular courts, the IPC provides administrative procedures through which claims may be filed with the Intellectual Property Office. 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, suggesting that a person may recover twice.

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

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

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191 Villanueva, supra note 70, at 13.
193 Id. Rule 2, § 2.
194 Republic Act No. 8293, supra note 7, § 217.1.
195 Id.
196 TRIPs, supra note 4, art. 61.
197 See Republic Act No. 8293, supra note 7, §§ 216, 217; see also Philippines Begins New IP Regime, supra note 9.
199 See Universal Currency Converter (visited May 14, 2000) available in <http://www.xe.net/ucc/convert> (indicating the exchange rate for the Philippine peso is 0.0246305 U.S. dollars as of May 14, 2000).
200 Republic Act. No. 8293, supra note 7, § 10.2; see Universal Currency Converter, supra note 199.
201 BPTTT, supra note 198, at 42.
202 See Universal Currency Converter, supra note 199.
203 See id.
204 BPTTT, supra note 198, at 42.
205 See Universal Currency Converter, supra note 199.
206 BPTTT, supra note 198, at 42.
207 Id.
three years for the first offense, up to six years for the second offense, and up to nine years for the third offense.  

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.

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 as required by the "national treatment" provision of TRIPs. TRIPs also requires that a WTO member extend Most Favored Nation treatment to other WTO members. 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. The IPC does not include an MFN provision, 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. The IPC, however, seems to conflict with the MFN requirement because of an additional provision in the IPC entitled "Reverse Reciprocity of Foreign Laws." 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.

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

\[208\] Republic Act No. 8293, supra note 7, § 217.1.
\[209\] Id. § 213.
\[210\] See id. § 221.2; Villanueva, supra note 70, at 13-14.
\[211\] TRIPs, supra note 4, art 3(1); see also discussion supra Part III.B.1.
\[212\] TRIPs, supra note 4, art. 4; see also discussion supra Part III.B.1.
\[213\] TRIPs, supra note 4, art. 4.
\[214\] See Republic Act No. 8293, supra note 7, §§ 3, 221.2 (providing no mention of MFN treatment).
\[215\] Id. § 3.
\[216\] Id. § 231.
\[217\] Id.
PHILIPPINE SOFTWARE PIRACY

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. 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. The WTO recently granted a request by the Philippines to extend its TRIPs compliance deadline to 2005.

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. In its 2000 Special 301 Review, the USTR justified leaving the Philippines on the Watch List because enforcement remains a problem. The USTR alleges that the Philippines' enforcement efforts have been applied inconsistently nationwide and have seldom resulted in deterrent penalties. In terms of copyright protection, the USTR continues to be concerned about the Philippines' high level of piracy of software and other copyrighted material. In addition, the USTR claims that the Philippines has not promulgated any substantive regulations implementing the copyright provisions of the IPC. Moreover, the USTR continues to oppose the software decompilation provision, arguing that this provision is too broad 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

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219 Id. The Trade Policy Review Body recognized the Philippines' adoption of the IPC. Id.


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

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

225 Id.

226 Id.
USTR, is even more critical of the Philippines’ intellectual property protection regime. 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. Its membership includes companies such as Apple Computer, Lotus Corporation, Microsoft Corporation, and Novell. 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. 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. 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.

V. THE UNREASONABILITY 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. Under Special 301, the United States takes unilateral action to address intellectual property-related issues with its trading partners. However, TRIPs requires members to use the WTO dispute settlement mechanism to settle trade conflicts and forbids members from resorting to unilateral measures. 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

227 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].
229 U.S. Industry’s Influence, supra note 133, at 104.
230 Id. at 92-93.
231 BSA Highlights Importance of TRIPs Compliance, supra note 227.
232 Id.
233 See Pechman, supra note 127, at 204.
234 See discussion supra Part III.B.2.
TRIPs. In effect, the United States may be forcing developing countries to forego the transition period that they are entitled to under TRIPs. Finally, the remedies authorized by Section 301 conflict with TRIPs. 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. 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.

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

236 Pechman, supra note 127, at 203.
238 Pechman, supra note 127, at 203.
239 GUIDE TO THE URUGUAY ROUND AGREEMENTS, supra note 102, at 24.
240 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).
241 See, e.g., U.S. Industry's Influence, supra note 133, at 87.
243 U.S. Industry's Influence, supra note 133, at 94.
244 Id. at 95.
245 Id. at 98.
246 See discussion supra Part IV.B.
248 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.
249 See discussion supra Part II.A.
is likely a result of pressure from the U.S. software industry. 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. "No single industry or petitioner should have a veto over settlements that affect diverse interests throughout the nation."  

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. 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. For developing countries, the USTR seeks to both accelerate compliance with TRIPs during the transition period and to go beyond TRIPs requirements. Thus, although the WTO is satisfied with the efforts the Philippines has made to improve copyright

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251 See generally id. (suggesting that private industries such as the software industry strongly influence the USTR's decisions under Special 301).
253 Id.
254 Kastenmeier & Beier, supra note 36, at 287.
255 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).
256 Bickham, supra note 237, at 207.
protection under TRIPs, the USTR continues to keep the Philippines on the Watch List.

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, 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. 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. Under this agreement, the Philippines made a commitment to address U.S. concerns related to intellectual property protection. The Philippine government has since implemented short-term and long-term steps to combat piracy.

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, streamlined administrative procedures under the IPC, promulgated rules and regulations that implement

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257 See discussion supra Part IV.B.
258 Vercasion, supra note 221.
259 Id. § 2242(b)(4)(A).
260 Id. § 2242(b)(4)(B).
261 See IIPA, supra note 141.
262 Id.
263 See discussion infra Part V.B.2.
264 See discussion supra Part IV.
the IPC,\textsuperscript{265} and created the Intellectual Property Office to administer the IPC.\textsuperscript{266}

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.

\textit{b. Strengthening Research and Development Programs in Science and Technology}

Investing in science and technology increases technical knowledge in areas such as software,\textsuperscript{267} and aids the development of intellectual property.\textsuperscript{268} The Philippine government included a provision in the IPC that requires the Intellectual Property Office to make research and development a priority.\textsuperscript{269} 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."\textsuperscript{270} 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.\textsuperscript{271} 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.\textsuperscript{272} Both the government and private industry will play leading roles in implementing the IT21 program.\textsuperscript{273}

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{265} See IPC Rules and Regulations, supra note 192 (providing the rules and regulations established by the Philippine government to implement the IPC).
\item \textsuperscript{266} Republic Act. No. 8293, supra note 7, § 5.1.
\item \textsuperscript{267} Proposals to Curb Piracy and Counterfeiting in a Developing Country, supra note 53, at 633-34.
\item \textsuperscript{268} Id.; see also discussion supra Part I.C.
\item \textsuperscript{269} See Republic Act No. 8293, supra note 7, § 11.4.
\item \textsuperscript{270} Id.
\item \textsuperscript{271} 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.
\item \textsuperscript{272} Id.
\item \textsuperscript{273} Id. The implementation of the stages of IT development will be overseen by the National Information and Technology Council (NITC). Id.
\end{itemize}
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been steadily increasing, growing from $40 million in 1992 to $120 million in 1995. 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. The Philippine government recognizes this and understands the need to promote the growth of domestic software producers. To this end, the government is encouraging private investment in the local software industry through laws that create a favorable business environment.

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.” 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. 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. 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. To address the lack of computer literacy in the Philippines, the Committee proposed to establish a fifteen-year computer

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275 Id.
276 See id.
277 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.
278 Republic Act No. 8293, supra note 7, at § 11.3.
279 RP to Become Asian Center of Computer Software, supra note 274.
280 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.
literacy education program in the country's public schools.\textsuperscript{282} 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.\textsuperscript{283} At the college level, there are about 200 colleges and universities in the Philippines that offer information technology courses.\textsuperscript{284} The Philippines still needs to improve its faculty development in information technology and upgrade its libraries and educational equipment.\textsuperscript{285}

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.\textsuperscript{286} 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.\textsuperscript{287}

d. \textit{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.\textsuperscript{288} 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.\textsuperscript{289}

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

\textsuperscript{282} Id.
\textsuperscript{284} Maramara, \textit{supra} note 271.
\textsuperscript{285} Id.
\textsuperscript{287} Glorinda May R. Alcalde, \textit{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. \textit{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, \textit{supra} note 286.
\textsuperscript{288} Philippines Wages Uphill Battle Against IP Pirates, \textit{supra} note 9; Intellectual Property Office, \textit{supra} note 68.
\textsuperscript{289} Philippines Wages Uphill Battle Against IP Pirates, \textit{supra} note 9.
fallen steadily for two consecutive years.\textsuperscript{290} From 1996 to 1997, the software piracy rate fell by nine percent—from ninety-two percent to eighty-three percent.\textsuperscript{291} In 1998, the rate fell to seventy-seven percent.\textsuperscript{292} 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,\textsuperscript{293} it fails to recognize that these countries are at different stages of economic development.\textsuperscript{294} Intellectual property is critically important to the U.S. economy.\textsuperscript{295} From 1977 to 1997, the U.S. core copyright industries\textsuperscript{296} grew at more than twice the rate of the rest of the U.S. economy.\textsuperscript{297} In 1997, these industries also experienced tremendous growth in foreign sales and exports, exceeding all other sectors including automobiles, agriculture, and aircraft.\textsuperscript{298} 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.\textsuperscript{299} The Philippines, on the other hand, is a developing country with an economy dependent on its agricultural, industrial, and service sectors for growth.\textsuperscript{300} The country is also recovering

\textsuperscript{290} Worldwide Business Software Piracy Losses Reach $11 Billion in 1998, supra note 1.
\textsuperscript{291} 1998 Global Software Piracy Report, supra note 1, at 7.
\textsuperscript{292} Id. at 4.
\textsuperscript{293} See Bello & Holmer, supra note 128, at 273.
\textsuperscript{294} 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).
\textsuperscript{295} See LEAFFER, supra note 17, at 1-2.
\textsuperscript{296} The core copyright industries include computer software, music, movies, television programs, books, sound recordings and home videos. Id.
\textsuperscript{297} International Intellectual Property Alliance, New Study Reveals Copyright Industries Are Engine Driving the U.S. Economy (Dec. 16, 1999) <http://www.iipa.com/htm/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.
\textsuperscript{298} Id.
\textsuperscript{299} LEAFFER, supra note 17, at 2.
\textsuperscript{300} 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, \(^{301}\) experiencing an increase in Gross Domestic Product of only 0.2 percent in the first nine months of 1998.\(^{302}\) Unlike in the United States, intellectual property is not yet a core industry in the Philippines.\(^{303}\) 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.\(^{304}\) 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.

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\(^{301}\) See id. at Farming.

\(^{302}\) See id. at Macroeconomic Performance, Economic Outlook.

\(^{303}\) See id. at Summary.

\(^{304}\) See id. at Background.

\(^{304}\) 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).