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ROBIN HOOD VERSUS THE BULLIES: SOFTWARE PIRACY AND DEVELOPING COUNTRIES

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**Robin Hood Versus the Bullies:
Software Piracy and Developing Countries**

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INTRODUCTION: SOFTWARE PIRACY AND DEVELOPING COUNTRIES

The discussion of globalization, a term laden with confusion, has filled volumes of political science, economics and sociology journals. However, the effect of globalization on the legal community has yet to be fully explored. With the birth of the GATT (General Agreements on Tariffs and Trade) after World War II and the subsequent creation of the WTO (World Trade Organization) in the early 1990's, the entire arena of international trade changed shape.¹ Issues formerly considered the sovereign business of nation-states to enforce are suddenly fair game for global adjudication.² The rise of private actors, usually described with a multitude of acronyms such as TNC's, MNC's, NGO's or IGO's (and variations thereof) suddenly have a role to play in international legal enforcement.³

Furthermore, the rise of the internet has exacerbated the ease with which intellectual property can be pirated overseas.⁴ Countries such as Thailand, China and even Canada are under fire from the Office of the United States Trade Representative (USTR) for piracy of United States' intellectual property.⁵ In order to protect their interests, many multinational corporations have teamed up to fight for their right to profit from intellectual property.⁶ This is significant because

1. See THOMAS OATLEY, INTERNATIONAL POLITICAL ECONOMY 17 (2d ed., Pearson Longman 2006).

2. See, e.g., WTO, *Understanding the WTO*, 59 (3d ed. Oct. 2005)
http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf (last visited Feb. 24, 2006).

3. Trans-National Corporations, Multi-National Corporations, Non-Governmental Organizations and Inter-Governmental Organizations, respectively. For definitions, see generally, Oatley, *supra* note 1.

4. See, e.g., Press Release, U.S. Department of Justice Criminal Division, Federal Law Enforcement Targets International Piracy Syndicates (December 11, 2001) <http://www.cybercrime.gov/warezoperations.htm> (last visited Feb. 24, 2006).

5. U.S. Trade Representative, 2005 Special 301 Report, 2
http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf (last visited Feb. 24, 2006).

6. Take for example, the following organizations: International Intellectual Property Alliance (IIPA); Business Software Alliance (BSA); Association of American Publishers, Inc. (AAP); Entertainment Software Association (ESA); Independent Film and Television Alliance (IFTA); Motion Picture Association of America (MPAA); and Recording Industry Association of America (RIAA).

without any initiation from nation-states or world governments, private actors have become, in essence, a world police for hire.⁷ The implications of this practice are worrisome: if too many infant businesses are penalized for their illegal use of intellectual property, the economies of developing countries can be negatively impacted.⁸

The purpose of this paper is to explore the complex web of international enforcement mechanisms for intellectual property in developing countries, especially in the area of software piracy. In order to discuss this, however, it is important distinguish between the *de jure* intellectual property regime (the law in the books) and *de facto* regime (the law that is actually enforced). Put simply, many developing nations have domestic laws protecting software, but they do not enforce those laws as much as others.⁹

Why would a country fail to enforce all of its own laws? As this paper will explore, many reasons exist.¹⁰ However, as the tension rises between those who desire intellectual property enforcement and those who do not, a line between developed and developing countries emerges.¹¹ Software creators – who tend to come from highly-developed economies – want to charge a fee for their product.¹² Yet users in developing countries do not want (and in some cases cannot) pay for software, especially when the money goes to the already “rich” software creators.¹³

From here we have a clash: a conflict between the “Robin Hood” mentality of developed countries – who want to steal from the rich to help their own poor – and the “Bullies” – players in the developed countries who want tougher international enforcement for their hard-earned

7. See discussion *infra* Part II(C).

8. *Id.*

9. See discussion *infra* Part II(A).

10. *Id.*

11. See discussion *infra* Part I(C).

12. See *infra* note 64 and accompanying text.

13. See discussion *infra* Part II(C).

software creations.¹⁴ In classic economics, this is called the logic of collective action.¹⁵ In the logic of collective action, free riders – individuals who “rely on others to bear the costs of a program from which” they benefit – have no incentive to pay for something they can get for free.¹⁶ In the case of software piracy, software users who find these products available for free or discounted rates will most often select that cheaper option.¹⁷

According to the logic of collective action, the only way software creators can stop this from happening is to create regulation declaring such behavior illegal and then “bully” the infringers into compliance.¹⁸ This is why many of the intellectual property laws in developing countries did not originate domestically; they were required by the international community.¹⁹ Until developing countries start to see tangible benefits from enforcing anti-piracy laws, it is unlikely that they will take intellectual property laws for software seriously.²⁰ To explore this issue thoroughly, part one will cover the evolution of intellectual property, including the recent incorporation of software into international law. Part two will discuss the *de facto* system of enforcement for software protection in developing countries and the barriers that must be overcome for enforcement success.

I. SOFTWARE PROTECTION “DE JURE”

A. History of Intellectual Property

The general concept of protecting intangible ideas as property is a relatively new phenomenon

14. See discussion *infra* Parts I and II.

15. OATLEY, *supra* note 1, at 77-78.

16. *Id.*

17. *Id.*

18. *Id.* This is why “producers, rather than consumers dominate trade politics.” *Id.* at 78-79.(see comment n. 17)

19. See discussion *infra* Part I(C).

20. See discussion *infra* Conclusion.

in the history of the world: the first law protecting ideas occurred in Venice in 1474.²¹ The idea behind it was that if inventors had the right to profit from their ideas, they would be motivated to continue inventing, which would increase technological advance.²² After European countries realized the gains from intellectual property rights, many, most notably England, passed a number of intellectual property laws.²³ Taking from its predecessors in England, the United States codified the concept in its Constitution: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁴ Since then, intellectual property has become commonplace among Western powers: by 1883, 14 states had joined the Paris Convention,²⁵ the first international intellectual property treaty, which protected trademarks, patents and industrial designs.²⁶ By 1886, the international community protected copyrights for artistic works with the Berne Convention.²⁷

Stemming from these treaties, the modern concept of intellectual property covered three major types: patents, copyrights and trademarks.²⁸ A patent is protection for an invention that is new to the world, such as a chemical compound or a new type of computer equipment.²⁹ Patent holders

21. International Game Developer’s Association (IGDA), A Quick History of IP Rights, http://www.igda.org/wiki/index.php/IP_Rights_SIG/A_Quick_History_of_IP_Rights (last visited Feb. 25, 2006).

22. *See generally*, JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 73-77 (Lexis Publishing 2000); *see also* WTO, Understanding the WTO, *supra* note 2, at 42.

23. IGDA, *supra* note 21.

24. U.S. CONST. art. I, § 8.

25. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 *date in force* Sept. 5, 1970, *available at* http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf (last visited Feb. 25, 2006).

26. WIPO, General Information, <http://www.wipo.int/about-wipo/en/gib.htm> (last visited Feb. 25, 2006).

27. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 828 U.N.T.S. 221 *available at* http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf (last visited Feb. 25, 2006).

28. *See generally*, SPRANKLING, *supra* note 22.

29. *See generally*, PAUL STEPHAN ET AL., INTERNATIONAL BUSINESS AND ECONOMICS LAW AND POLICY 532-533 (3d ed. LexisNexis 2004).

are allowed exclusive profit and use of their invention for a fixed period of time.³⁰ After that period, others may use the technology to create new inventions from it.³¹ A copyright is protection for a creative expression of an idea, such as a song, a poem or other artistic creation.³² Typically, the American rule is that the idea itself – such as a song about love – cannot be copyrighted, but the expression of the love song – such as the words, melody etc. – can be copyrighted.³³ Finally, a trademark is any recognizable device that is associated with the quality of the owner’s product (such as, say, Mickey Mouse ears are associated with the company Walt Disney).³⁴

From there the idea is, as the registered owner of the intellectual property, the creator may profit exclusively from his or her invention or creation.³⁵ If another uses the property without agreement from the owner, this is considered an illegal infringement of the owner’s intellectual property rights.³⁶ The owner can then – ideally - sue for damages.³⁷ Regardless, the typical procedure for protection of any of these creations is to first register the item with some sort of central body in order to identify the owner of a particular product clearly.³⁸ However, as will be discussed at length later, being registered with an agency by no means guarantees any collection on damages, especially overseas.³⁹

In 1967, the World Intellectual Property Organization (WIPO) was developed by the United

30. *See generally*, WTO, What are Intellectual Property Rights? http://www.wto.org/english/tratop_e/TRIPS_e/intel1_e.htm (last visited Feb. 25, 2006).

31. *Id.*

32. *Id.*

33. Peter J. Pizzi and Noel D. Humphreys, *Idea Versus Expression*, 233 N.Y. L.J. 1 (2005) available at <http://www.cfg-lawfirm.com/articles/pizzi-hump-nylj-022305.pdf> (last visited Feb. 25, 2006).

34. *See* STEPHAN, *supra* note 29, at 529.

35. *See* WTO, What are Intellectual Property rights *supra* note 30; WTO, Understanding the WTO, *supra* note 2, at 42.

36. *Id.*; *See also generally*, BLACK’S LAW DICTIONARY 785 (7th ed. 1999).

37. *Id.*

38. *See generally*, SPRANKLING, *supra* note 22.

39. *See* discussion, *infra* Part II(A).

Nations in 1967 “to contribute to better understanding and cooperation among States . . . to promote the protection of intellectual property throughout the world.”⁴⁰ However, despite WIPO’s overarching goal of harmonizing international intellectual property legislation,⁴¹ there are no “worldwide” registration offices.⁴² Intellectual property owners must still register with each individual country (such as the United States Patent Office or the United Kingdom Patent Office) or a regional office (such as the European Patent Office, or the African Regional Intellectual Property Organization).⁴³

B. History of Intellectual Property Rights for Software

Even with the growing international support for intellectual property, the concept of protecting software as intellectual property had not even been considered prior to 1976. Bill Gates was one of the first to address this issue,⁴⁴ writing an open letter to computer hobbyists accusing them of “stealing” software.⁴⁵ “The value of the computer time we have used exceeds \$40,000” while “[t]he amount of royalties we have received from sales to hobbyists makes the time spent on [the program] worth less than \$2 an hour . . . Most directly, the thing you do is theft.”⁴⁶ Prior to then, neither WIPO nor the existing international trade regime, the General Agreements on Tariff and Trade (GATT), had made any provisions for software as intellectual property.⁴⁷ While domestic

40. Convention Establishing the World Intellectual Property Organization, July 19, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3. *available at* http://www.wipo.int/treaties/en/convention/pdf/trtdocs_wo029.pdf (last visited Feb. 25, 2006).

41. WIPO, General Information, *supra* note 26.

42. Fenwick & West LLP, *Report on International Legal Protection for Computer Software*, 21 COMP. & INTERNET LAW. 2 (2004).

43. WIPO, Frequently Asked Questions (FAQs), http://www.wipo.int/patentscope/en/patents_faq.html#who_grants (last visited Feb. 26, 2006).

44. Ville Oksanen and Mikko Välimäki, *Free Software and Copyright Enforcement - A Tool for Global Copyright Policy?* KNOWLEDGE, TECH. & POL’Y (forthcoming) *available at* 3 http://www.valimaki.com/org/free_software_ktp.pdf (last visited Feb. 24, 2006).

45. William Henry Gates III, General Partner, Micro-Soft, An Open Letter to Hobbyists, (Feb. 3, 1976), <http://www.blinkenlights.com/classiccmp/gateswhine.html> (last visited Feb. 24, 2006).

46. *Id.*

47. *See* WTO, General Information, *supra* note 26.

countries scrambled to work software protection into their existing copyright treaties, the United States was the first country to grant official copyright protection for software⁴⁸ with its Software Copyright Act of 1980.⁴⁹

Despite the progress for software on the domestic front, it took until the mid-1990's for the international community to realize the economic benefit of protecting software as intellectual property. The first GATT document regarding intellectual property (not including software) was not produced until 1986 and it circulated under special distribution to member countries.⁵⁰ It was the first time the international community publicly drew a link between intellectual property protection and free trade: "Technological progress is an increasingly important aspect of international competitiveness . . . Trade distortions and impediments arise when a country's sales of products of innovation and creation are lost to foreign infringement activities."⁵¹ Because of this realization, the contracting parties of the GATT argued that "[t]he GATT can and should play an important role in reducing and eliminating trade-distortive deficiencies in intellectual property protection."⁵²

When the World Trade Organization (WTO) was born out of the Uruguay Round of GATT negotiations in 1994⁵³ its purpose was to ensure that trade between nations goes "smoothly, predictably and freely as possible."⁵⁴ Realizing the connection between free trade and intellectual property rights, the WTO parties agreed to Trade-Related Aspects of Intellectual

48. Oksanen, *supra* note 44, at 3.

49. Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015 (codified as amended at 17 U.S.C. 101, 117 (2000)).

50. General Agreement on Tariffs and Trade Preparatory Committee, *Trade and Intellectual Property Rights*, PREP.COM(86)W/46 (Jul. 8, 1996) available at <http://gatt.stanford.edu/bin/object.pdf?91210215> (last visited Feb. 26, 2006).

51. *Id.* at 2.

52. *Id.* at 3.

53. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) available at http://www.wto.org/english/docs_e/legal_e/03-fa.pdf (last visited Feb. 26, 2005).

54. WTO, The World Trade Organization 1 (April 2005) available at http://www.wto.org/english/res_e/download_e/inbr_e.pdf (last visited Feb. 26, 2006).

Property Rights, or the TRIPS Agreement.⁵⁵ By this time, software had become a solid part of international trade and was protected as a literary work under TRIPS.⁵⁶ Finally, WIPO followed suit in 1996 with the WIPO Copyright Treaty⁵⁷ and granted protection to software as a literary work.⁵⁸ Currently, software can be copyrighted or patented, depending on the novelty of the product, but it still must be registered with the appropriate domestic or regional agency.⁵⁹

C. Developing Countries and Intellectual Property Protection

While laws protecting software exist both domestically and internationally, the concept of intellectual property rights (let alone software protection) is by no means universal. China, for example, does not enforce foreign copyrights “because it sees the development of its economy as dependent in part upon such illicit activity.”⁶⁰ South Korea has also avoided enforcing intellectual property rights until it was threatened with trade sanctions by the United States.⁶¹ India, too, has revolted against the idea of intellectual property. When American firms considered patenting traditional Indian spices because of the disparity in intellectual property laws, many Indians complained, saying, “Everyone in India knows about turmeric. It belongs to us and we offer it to the world so long as they don’t forget that it’s Indian.”⁶² In fact, the majority of the top 20 software piracy offenders are developing countries, showing there is a

55. Agreement on Trade-Related Aspects of Intellectual-Property Rights, Apr. 15, 1994, 33 I.L.M. 81, [hereinafter, *TRIPS*] available at http://www.wto.org/english/docs_e/legal_e/27-TRIPS.pdf (last visited Feb. 25, 2006).

56. *Id.* at Part II § 1 Art. 10.

57. WIPO, WIPO Copyright Treaty, adopted Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 65, 1997 WL 447232 (1997), available at http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf (last visited Feb. 26, 2006).

58. *Id.* at Art. 4.

59. See Raymond Nimmer and Patricia Krauthaus, *Classification of Computer Software for Legal Protection: International Perspectives*, 21 INT’L LAW. 733, 742-47 (1987).

60. Jishnu Guha, *Time For India’s Intellectual Property Regime To Grow Up*, 13 CARDOZO J. INT’L & COMP. L. 225, 245 (2005).

61. IIPA, Appendix E: Historical Summary of Selected Countries’ Placement For Copyright-Related Matters on the Special 301 Lists 1, 49 (Feb. 2005), <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf> (last visited Feb. 25, 2006).

62. Guha, *supra* note 60, at 247-48.

clear lack of interest in enforcement for software copyright or patent protection.⁶³

In contrast, the enforcement of intellectual property – especially in the area of software – has become a hallmark for truly developed economies.⁶⁴ The majority of software patents and copyrights originate from the mega-firms in the United States, such as Microsoft, Adobe, Novell, Apple and many more.⁶⁵ Meanwhile, software piracy barely exists in the least-developed countries because they cannot even afford to have computers!⁶⁶ This illustrates a clear clash in interests between the developed and developing world over intellectual property rights: software copyright has proven to be a tough sell in developing countries while the West is accused of being an “‘unholy alliance’ controlling culture and information.”⁶⁷ Considering the deep pockets of the western software firms, the thought of developing countries punishing their own people in order to pump more money into these agencies seems counterintuitive at best.⁶⁸

In addition, with the onset of globalization and the increasing authority of multilateral institutions such as the WTO and WIPO, developing countries – even those who stand most to gain from software copyright protection⁶⁹ – are understandably feeling “‘bullied” into compliance.⁷⁰ As of 2005, there are 148 Members of the WTO,⁷¹ 32 of which are considered “‘least-developed.”⁷² In order to join as an official member, nations must agree to rules and regulations on issues such as tariffs, agriculture, safety standards, textiles, the service industry,

63. Oksanen, *supra* note 44, at 6.

64. *See, e.g.*, Martin Khor, *WTO Yet to Bridge the North-South Divide*, THIRD WORLD NETWORK (September 2000) available at <http://www.twinside.org.sg/title/2095.htm> (last visited Feb. 26, 2006).

65. *Id.*; *see also*, Richard Florida, *The World Is Spiky: Globalization Has Changed the Economic Playing Field, But Hasn't Leveled It*, 296 ATLANTIC MONTHLY 48, 50 (October 2005).

66. Oksanen, *supra* note 44, at 6.

67. Lisa Lerer, *Meet the dotCommunist*, 4 IP L. & BUS. 36, 36 (Feb. 1, 2006).

68. *See generally*, Khor, *supra* note 64.

69. *See generally*, BSA, *Expanding the Frontiers of Our Future: Reducing Software Piracy to Accelerate Global IT Benefits* (December 2005), http://www.bsa.org/idcstudy/pdfs/White_Paper.pdf (last visited Feb. 26, 2006).

70. *See generally*, Khor, *supra* note 64.

71. WTO, *Members and Observers*, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 26, 2006).

72. WTO, *Least-Developed Countries*, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Feb. 26, 2006).

intellectual property, anti-dumping, subsidies and many more.⁷³ The underlying hope in creating such an organization is twofold: 1) that trade disagreements will result in international courtroom battles instead of international war and 2) that by creating a forum for enforcement, countries will play by the rules in order to ensure the collective gain that comes from a liberalized economy.⁷⁴

The most significant aspect of the WTO's existence is that for the first time in history, a governing body has the authority to adjudicate trade disputes between nation-states.⁷⁵ This includes disputes involving intellectual property: members who join the WTO are required to agree to TRIPS, which requires them to establish a minimum level of protection.⁷⁶ The General Provision explains:

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade . . .

Recognizing, to this end, the need for new rules and disciplines concerning [intellectual property] . . .⁷⁷

Western nations – with massive constituents depending 100 percent on trading intellectual property – consider enforcement of intellectual property rights to be a non-negotiable issue in WTO agreements.⁷⁸ If an intellectual property framework was not a part of WTO protections,

73. WTO, Understanding the WTO, *supra* note 2, at 23.

74. *See generally*, OATLEY, *supra* note 1, at 42-67.

75. *See* WTO, Understanding the WTO, *supra* note 2, at 59.

76. *Id.* at 23-24.

77. TRIPS, *supra* note 55, at Annex IC, Preamble.

78. *See generally*, Theft of American Intellectual Property Fighting Crime Abroad and at Home: Hearing Before S. Comm. On Foreign Relations, 1-2, 107th Cong. 23-25, S. Hrg. 107-457 (Feb. 12, 2002) (statement of Hilary Rosen, Pres. and CEO of Recording Industry Association of America) [hereinafter *Statement of Rosen*] available at

whole industries could not exist.⁷⁹ These industries – especially the software industry – simply cannot afford to invest in research and development if there is no hope to recoup costs.⁸⁰ This means that all members would establish intellectual property rights in their country, whether they agreed with the concept or not:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.⁸¹

Of course, not all states at WTO negotiations are created equal. In fact, states are oftentimes considerably unequal. Those that are in the midst of economic struggle, social unrest, or political upheaval are often more concerned with feeding their people than developing legal infrastructure, let alone intellectual property infrastructure.⁸² Because of this, the Council for TRIPS allowed grace periods for least-developed nations to comply with TRIPS.⁸³ This would allow the countries time to create the laws and infrastructure necessary to enforce intellectual property rights.⁸⁴ Article 66 provides:

In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable

http://www.riaa.com/news/newsletter/pdf/rosen_foreign_relations021202.pdf (last visited Feb. 26, 2006).

79. *Id.*; see generally, WTO, Understanding the WTO, *supra* note 2, at 42.

80. See, e.g., *Statement of Rosen*, *supra* note 78, at 1; see also, The Anticounterfeiting Amendments of 2003, 2, H.R. 3632, Testimony Before the H. Comm. on Courts, the Internet, and Intellectual Property (statement of Richard C. LaMagna, Senior Manager, Worldwide Investigations L. & Corp. Affairs, Microsoft Corp.) available at <http://judiciary.house.gov/media/pdfs/lamagna021204.pdf> (last visited Feb. 26, 2006); Judith Kaufmann, *Intellectual Property Rights and the Pharmaceutical Industry*, Focus on Intellectual Property Rights, U.S. Dep't of St. Int'l Information Program, (Jan. 2006) available at <http://usinfo.state.gov/products/pubs/intelprp/industry.htm> (last visited Feb. 26, 2006).

81. TRIPS, *supra* note 55, at Part III § 1, Art. 41.

82. See, e.g., Source Translation Optimization, Intellectual Property Rights in Africa, <http://www.bustpatents.com/forafri.htm> (last visited Feb. 26, 2006).

83. *Id.* at Part IV, Art. 66, cl. 1.

84. *Id.*

technological base, such Members shall not be required to apply the provisions of this Agreement . . . for a period of 10 years from the date of application . . . The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.⁸⁵

Additionally, the TRIPS Council and WIPO agreed in 1996 to work together to help developing countries meet the requirements for the TRIPS within the 10 year deadline⁸⁶ and least developed countries were allowed a 1-year extension:

The least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. The least-developed countries shall be given additional time of one year from 15 April 1994 to submit their schedules as required in Article XI of the Agreement Establishing the World Trade Organization.⁸⁷

Currently, the WTO has agreed to allow further extension for TRIPS compliance on a case-by-case basis for the 32 least-developed countries:⁸⁸ “least-developed countries will not have to provide the intellectual property protection covered by the TRIPS Agreement until 1 July 2013

85. *Id.*

86. WTO, WTO-WIPO Cooperation Agreement, http://www.wto.org/english/tratop_e/TRIPS_e/wtowip_e.htm (last visited Feb. 26, 2006).

87. WTO, Decision on Measures in Favour of Least-Developed Countries, *available at* http://www.wto.org/english/docs_e/legal_e/31-dlldc.pdf (last visited Feb. 26, 2005)

88. WTO, Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members, Decision of the Council for TRIPS of 29 November 2005 (available at Poorest Countries Given More time to Apply Intellectual Property Rules) (Nov. 29, 2005) http://www.wto.org/english/news_e/pres05_e/pr424_e.htm (last visited Feb. 27, 2006).

unless they graduate from being least-developed.”⁸⁹

The dispute resolution mechanism provided by TRIPS allows states to use the WTO dispute settlement system to enforce members’ compliance with its provisions.⁹⁰ This means that if one member thinks another is not living up to its WTO obligation under TRIPS, the member can complain to the TRIPS Council and in effect, “sue” the other member.⁹¹ Of the 22 TRIPS disputes, the U.S. has been the complainant in 15 of the cases,⁹² with the remaining six complainants divided between the European Communities, Canada, Australia, India and Thailand.⁹³ Brazil added itself as a complainant when it requires consultation with the U.S. on provisions of the U.S. Patent Code. This exemplifies the common perception that when the time limit for least-developing countries expires, the fragile markets of these countries will become a proverbial meal for the West, with its insatiable appetite for litigation and self-sustaining economic growth.⁹⁴

Realizing the *quid pro quo* nature of multilateral institutions, developing countries joined to protect their interests in the WTO negotiations. This alignment was largely responsible for the 1999 WTO negotiations that ended in failure⁹⁵ when developing countries put a deadlock on negotiations over its fundamental disagreement with TRIPS (often tagged, the “Battle in

89. Press Release, WTO, Poorest Countries Given More Time to Apply Intellectual Property Rules, Press/424 (Nov. 29, 2005), http://www.wto.org/english/news_e/pres05_e/pr424_e.htm (last visited Feb. 27, 2006).

90. TRIPS, *supra* note 55, at Part V, Art. 64.

91. *Id.* at Part V, Art. 68; *see also* WTO, Understanding the WTO, *supra* note 2, at 59-65.

92. WTO, Index of Dispute Issues, http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#computers (last visited Feb. 26, 2006).

93. As of 2006, Brazil is the lone developing country that brought suit against the existing U.S. Patent Law and its alleged violation of the TRIPS Agreement. Request for Consultation by Brazil, United States – U.S. Patents Code, G/L/437, G/TRIMS/D/18, IP/D/24, WT/DS224/1 (Feb. 7, 2001) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds224_e.htm (last visited Feb. 26, 2006). India requested to join the consultation as well, but no resolution has come as of this discussion. Request to Join Consultation by India, United States – U.S. Patents Code, WT/DS224/2 (Feb. 19, 2001).

94. *See, e.g., North Tactics to Split Developing Countries Alliance Exposed*, THIRD WORLD NETWORK Jul. 26, 2004, <http://www.twinside.org.sg/title2/5623c.htm> (last visited Feb. 26, 2006); *see generally*, Khor, *supra* note 64.

95. *See, e.g., World Trade Talks Collapse*, BBC News (Dec. 4, 1999) available at <http://news.bbc.co.uk/1/hi/business/549439.stm> (last visited Feb. 26, 2006).

Seattle”).⁹⁶ Talks resumed once the West made certain concessions (mostly over medical patents)⁹⁷ and now the WTO insists that the former alliance of developing countries has weakened.⁹⁸ However, now that the 10 year grace period for certain countries to enforce TRIPS has ended, it remains to be seen whether the prediction that future TRIPS disputes will increase the divide between developed and developing countries will come true. This leads to the next discussion, about the reality of future enforcement for software in developing countries.

II. “DE FACTO” SOFTWARE IP ENFORCEMENT: ROBIN HOOD VERSUS THE BULLIES

A. The Six Barriers to Software Protection in Developing Countries

In his article about the intellectual property rights in India, Jishnu Guha lists six reasons why developing countries choose not to enforce IP laws.⁹⁹ They are: 1) a lack of resources, 2) a lack of cost-benefit tradeoffs, 3) a need for economic growth and protection of domestic industry, 4) a different cultural value, 5) “a ‘Robin Hood’ mentality of justifiably robbing the rich to help the needy,” and finally, 6) suspicion of Western intentions.¹⁰⁰ In order to analyze these six factors fully, it is easiest to limit discussion to one country, ideally one with high software piracy rates. Additionally, it makes sense to choose an emerging market that has “graduated” from the TRIPS least-developed country list and fully entered the “bullying” force of the international intellectual property regime.

India is one such country, where software piracy rates – and tensions over the issue – are

96. See, *Battle in Seattle: WTO Talks Collapse, Many Protesters Are Still in Jail*, *Democracy Now*, (Dec. 6, 1999) available at <http://www.democracynow.org/article.pl?sid=03/04/07/0414215> (last visited Feb. 26, 2006).

97. See, e.g., WTO, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (Nov. 14, 2001) at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_TRIPS_e.pdf (last visited Feb. 26, 2006).

98. WTO, Understanding the WTO, *supra* note 2, at 102.

99. Guha, *supra* note 60, at 238-40.

100. *Id.*

extremely high.¹⁰¹ As a founding member of the WTO and WIPO, India is obligated under TRIPS to support intellectual property rights;¹⁰² but as a developing country, it was given the obligatory eleven years plus an extension (which ended on January 1, 2005)¹⁰³ to comply.¹⁰⁴ And like many developing countries, India created the requisite laws to gain membership to the WTO but habitually failed to enforce them.¹⁰⁵ According to the International Intellectual Property Alliance (IIPA), India has pirated over \$443 million worldwide in intellectual property in 2005 alone, and the number is expected to grow.¹⁰⁶ The numbers for software piracy were emphasized in the 2006 report, saying:

Corporate end-user piracy (unauthorized use of business software in a business setting) continues unabated in both large and small Indian companies, while piracy at the retail and wholesale level is also prevalent, including hard disk loading and the outright sale of pirate software in many of the famous pirate markets throughout India. Losses increased again in 2005, to US\$265.1 million, while the piracy rate stayed the same – at 74%, much higher than the regional average in Asia of 53%. India is out of step with the region, and there is little sign things can be turned around unless courts begin adjudicating with greater efficiency and meting out more deterrent sentences.¹⁰⁷

What are the reasons for this high level of piracy? Doesn't India have a vested interest in pleasing its potential foreign investors by enforcing their beloved software copyrights and

101. IIPA, 2005 Special 301 Report India *infra* note 113, at 121.

102. Press Release, WTO, Trade Policy Reviews: India: April 1998, PRESS/TPRB/71 (Apr. 1, 1998) available at http://www.wto.org/English/tratop_e/tp71_e.htm (last visited Feb. 27, 2006).

103. Manoj Pillai, *India and the 'Data Exclusivity' Dilemma*, THE INTELLECTUAL PROPERTY LAW SERVER 1, <http://www.intelproplaw.com/Articles/files/Data%20Exclusivity%20-%20the%20Indian%20Dilemma.pdf> (last visited Feb. 27, 2006) WTO, Intellectual Property (TRIPS) Review of Legislation, http://www.wto.org/english/tratop_e/TRIPS_e/intel8_e.htm (last visited Feb. 26, 2006).

104. WTO, Council for Trade-Related Aspects of Intellectual Property Rights - Review of Legislation – India, IP/Q/IND/1, IP/Q2/IND/1, IP/Q3/IND/1, IP/Q4/IND/1, 03-5318 (Oct. 8, 2003).

105. *See generally*, IIPA, 2006 Special 301 Report India *supra* note 106.

106. *Id.* at 65.

107. *Id.* at 67.

patents? What about India's growing domestic software developing industry?¹⁰⁸ Guha's six reasons will prove especially useful in answering these questions.¹⁰⁹

As Guha explains, one of the reasons developing countries do not enforce intellectual property laws is a lack of resources. This is especially applicable to India, where 38% of its population makes less than \$1 per day.¹¹⁰ While India's British colonial past resulted in the requisite legal systems for software enforcement, India's size, inefficiency, and lack of resources for training are often cited as major drawbacks to intellectual property enforcement.¹¹¹ The courts, with their lengthy and cumbersome legal processes, delay cases and oftentimes allow software piracy to continue much longer than it would otherwise.¹¹²

Once [a] raid has been completed, the process is often further hampered by lack of follow-up, excessive delays in case preparation, and delays in commencement of prosecution. For example, following a raid, police often take up to a year to prepare the charge sheet on a defendant. Instead of investigating the links to larger criminal organizations and pirates, investigations are often cursory, with no attempt, for example, to follow the source of supply through to the source of pirate production. Because criminal cases proceed so slowly, the investigative officers are often transferred to remote locations by the time of trial, which only further delays the trial. By the time of trial, evidence is often missing or unusable.¹¹³

Put simply, the Indian judiciary is "overburdened to the point of dysfunction," and struggles,

108. See *Country Profile 2004: India*, THE ECONOMIST INTELLIGENCE UNIT (EIU) 1, 37 (2004) (on file with author; current data available for purchase at <http://www.eiu.com/schedule>).

109. Guha, *supra* note 60, at 238-240.

110. UN, Millennium Development Goals Statistics Division, India, http://unstats.un.org/unsd/mi/mi_results.asp?crID=356&fID=r15 (last visited Feb. 27, 2006).

111. IIPA, 2006 Special 301 Report India *supra* note 106, at 63.

112. *Id.*

113. IIPA, 2005 Special 301: India, 130 (2005), <http://www.iipa.com/rbc/2005/2005SPEC301INDIA.pdf> (last visited Feb. 27, 2006).

like many developing countries, with a mandate disproportionate to its resources.¹¹⁴

The second reason developing countries fail to enforce IP laws – the lack of cost to benefit tradeoffs – certainly affects India as well.¹¹⁵ Typically, when Indian courts enforce software protection laws, the benefits mostly go to *foreign* owners of intellectual property.¹¹⁶ For example, in a recent landmark case, the Delhi High Court granted the highest amount of damages for software copyright infringement in Indian history.¹¹⁷ The plaintiff? Microsoft.¹¹⁸ With over one-third of the world's poor living in India, why would it spend money putting people in jail only to fatten the richest wallets? Put simply, until India witnesses tangible benefits to enforcing intellectual property, its police force and judges will likely remain ambivalent to doing so.

However, recent data shows that India is losing more than it is gaining from software piracy.¹¹⁹ In its 2005 Piracy study, Business Software Alliance (BSA) notes:

India, whose IT exports are more than triple the size of its domestic IT market, still has a piracy rate of 74 percent — despite the strength of its world-class software development skills and government efforts to quell piracy. This is a major inhibitor to the growth of a local packaged software industry.¹²⁰

Outside big cities like Bangalore and Hyderabad, where Indian high tech businesses are

114. Guha, *supra* note 60, at 240.

115. *Id.* at 238-239.

116. *See* Florida, *supra* note 65, at 49.

117. Microsoft Corporation v. Yogesh Popat, 2005 (Delhi H.C.); 103 CS (OS) No. 103 of 2003, available at <http://www.nishithdesai.com/IP-hotline/2005/Microsoft-case-july29-2005.pdf> (last visited Feb. 27, 2006); *see also* IIPA, 2006 Special 301 Report India *supra* note 106, at 70.

118. *Id.*

119. *See, e.g.*, BSA, Press Release, New BSA study shows that India's Dynamic IT Sector Could Nearly Triple by 2009 (Dec. 8, 2005), <http://www.bsa.org/india/press/newsreleases/IDC-study.cfm> (last visited Feb. 27, 2006); *BMC Software to Invest \$12 m in India*, CYBER INDIA ONLINE LIMITED (CIOL) (May 20, 2005) <http://www.ciol.com/content/news/Investment/2005/105052001.asp> (last visited Feb. 27, 2006); *Intel Plans \$1bn India Investment*, BBC NEWS (Dec. 5, 2005) <http://news.bbc.co.uk/1/hi/business/4499362.stm> (last visited Feb. 27, 2005).

120. BSA, Second Annual BSA and IDC Global Software Piracy Study 3 (2005), <http://www.bsa.org/globalstudy/upload/2005-Global-Study-English.pdf> (last visited Feb. 27, 2005).

growing, Indian judiciaries are impervious to losses in domestic revenue.¹²¹ The IIPA argues that “[t]he Home Ministry should take the lead in providing training and resources, and the Home Minister should issue a strong and widely publicized condemnation of piracy and *the damage it is doing to India* and urge all police forces to take immediate action to root it out.”¹²²

The third factor preventing enforcement – the desire to protect domestic industries – is another valid concern for India. While India is advancing economically, it is still emerging from many years of a self-reliance movement known as the *swadeshi* movement.¹²³ During the *swadeshi* movement, India closed off trade from the outside world as much as possible, supplying its own material for economic development and importing only what was necessary.¹²⁴ In order to promote economic growth, the government became the largest employer in the country.¹²⁵

As Guha explains, “[w]hen the state holds most of the country’s capital, and is thus responsible for funding much of the state’s initial economic activity, sufficient IPR enforcement can only take place at the expense of state-funded capital-intensive projects, such as road-building.”¹²⁶ Not surprisingly, the most “fundamental” barrier to enforcing intellectual property rights in India – according to the IIPA – is the lack of national direction in combating piracy.¹²⁷ In 2002, for example, the national government announced that it would set up 19 special piracy task forces.¹²⁸ However, “since enforcement in India is a ‘state’ matter,” only two states have

121. IIPA, 2006 Special 301 Report India, *supra* note 106, at 63; IIPA, 2005 Special 301 Report India, *supra* note 113, at 122.

122. IIPA, 2006 Special 301: India, *supra* note 105, at 64 (emphasis added).

123. See, e.g., Skip Worden, *The Role of Religious and Nationalist Ethics in Strategic Leadership: the Case of J. N. Tata*, 47 J. BUS. ETHICS 147, 157 (2003).

124. GURCHARAN DAS, *INDIA UNBOUND*, 87 (Anchor 2002); see also, *id.* at Ch. 7, *Capitalism for the Rich, Socialism for the Poor*. For a general discussion on import substitution strategies and developing countries, see OATLEY, *supra* note 1, at 138-141.

125. E. Sridharan, *The Growth and Sectoral Composition of India’s Middle Class: Its Impact on the Politics of Economic Liberalization* 3 INDIA REVIEW 405, 418 (2004).

126. Guha, *supra* note 60, at 243.

127. IIPA, 2005 Special 301: India, *supra* note 113, at 129.

128. *Id.*

used the funds to set up these cells.¹²⁹ This is most likely because states do not want to divert precious resources from projects that produce a higher number of low-level jobs.¹³⁰ Anti-piracy teams produce fewer jobs because they require a higher level of training.¹³¹

The fourth factor, cultural differences, is another barrier to India's full embrace of software protection.¹³² To maintain its closed import substitution economic policy, India's socialist government took measures to dissuade private enterprise from becoming too profitable.¹³³ In addition to exacerbating the many centuries of Hindu-bred disdain for merchants, this completely stunted India's spirit of entrepreneurialism.¹³⁴ Brahmins, the most educated of the Indian castes, were not usually the wealthiest.¹³⁵ In contrast, the Vaishyas, or merchants, often saw the most prosperity, but were considered lower in caste rank to Brahmins and Kshatriyas, the warrior class.¹³⁶ Because of this disdain for business, the concept of intellectual property as a sellable commodity was unlikely to be born.¹³⁷

The fifth factor, the so-called "Robin Hood" mentality, comes from the idea that stealing from the rich to give to the poor is a good thing.¹³⁸ This is most evident in the astounding level of police acquiescence to local piracy efforts.¹³⁹ In addition to the mysterious "leaks" that protect infringers from being caught, Indian police seize only the materials associated with the official complaint.¹⁴⁰ The IIPA maintains that this is a violation of TRIPS Part III, Section 2, Article 46,

129. *Id.*

130. Guha, *supra* note 60, at 243.

131. IIPA, 2006 Special 301: India, *supra* note 105, at 70.

132. Guha, *supra* note 60, at 239.

133. *See, e.g.*, DAS, *supra* note 124, at 94-99.

134. *See, e.g.*, *id.* at 63-64, 94-99.

135. *Id.* at 17. For a discussion of caste, *see also*, ROBERT. W. STERN, CHANGING INDIA 56-87 (2d ed. Cambridge 2003).

136. *Id.*; DAS, *supra* note 124, at 140.

137. *Id.* at 16-17.

138. Guha, *supra* note 60, at 239.

139. IIPA, 2006 Special 301: India, *supra* note 101, at 129.

140. *Id.* at 130.

which gives judges “the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.”¹⁴¹

Yet the police are not the only Indians caught up in the “Robin Hood” mentality. Pirate syndicates – alliances of infringers – are a growing problem in India.¹⁴² These leaders of organized crime will hire professionals to infiltrate the investigation team and disrupt raids.¹⁴³ Sometimes, they will even hire professionals to “use the slow court system to initiate false claims” against the real copyright holders.¹⁴⁴ These syndicates “steal from the rich” by forcing valid copyright owners to defend themselves in court, which further aggravates the decreasing profit margin in the industry, defames the valid copyright owners, and undermines the already-fragile intellectual property industry in India.¹⁴⁵

Finally, the sixth factor, the colonial stigma, plays a deep and powerful role in India’s aversion to protecting intellectual property.¹⁴⁶ Although not specifically the former “masters” of India, the powerful western nations collectively remind India of British oppression.¹⁴⁷ Having lost one hundred years of sovereignty already to the British, India is not willing to give up its stronghold over internal affairs.¹⁴⁸ This is most evident in India’s general secrecy about amending its laws

141. *TRIPS*, *supra* note 55, at III § 2, Art. 46. Whether or not having “the authority” imposes an obligation upon the judicial authorities is unclear.

142. IIPA, 2006 Special 301: India, *supra* note 105, at 69.

143. *Id.*

144. *Id.*

145. *Id.*

146. Guha, *supra* note 60, at 239-40.

147. For a general discussion of British colonialism on India, *See*, BARBARA D. METCALF AND THOMAS R. METCALF, *A CONCISE HISTORY OF INDIA* (Cambridge 2002). For a general discussion of the effect of British colonialism on Indian business, *see* DWIJENDRA TRIPATHI, *THE OXFORD HISTORY OF INDIAN BUSINESS* (Oxford 2004).

148. DAS, *supra* note 124, at 14-15.

to become compliant with the WIPO Copyright Treaty:¹⁴⁹

IIPA again urges the government of India to open up this process fully to all interested parties, and to release immediately the text of the draft of such amendments now being discussed. We believe the government can benefit from the wide experience of U.S. right holders, as well as other right holders and governments that have been operating under new laws that have implemented these treaties.¹⁵⁰

It took five years for India to release this data¹⁵¹ and now that it is public, the IIPA has found these amendments not only insufficient to meet India's obligations under the WIPO Copyright Treaty, but TRIPS and its other international obligations as well.¹⁵²

B. The United States a.k.a. the "Big Bully"

Though software creators are protecting their own rights as much as possible, national governments still have an important role in the process of enforcing software protection overseas. There are many developed nations with an interest in enforcing intellectual property because of the tax dollars and jobs the industry provides. While there are options for multilateral enforcement (such as WTO dispute procedures), the United States has a very complex unilateral method of compelling foreigners to comply with their TRIPS obligations.¹⁵³ This system is worth noting because it is incredibly effective and countries around the world take heed to the

149. WIPO, WIPO Copyright Treaty, *supra* note 57.

150. IIPA, 2005 Special 301: India, *supra* note 113, at 134.

151. To see the proposed amendments, *see* Ministry of Human Resource Development, Government of India, <http://www.education.nic.in/copyright/cprsec/Material%20for-View%20Comments.htm> (last visited Feb. 27, 2006).

152. IIPA, 2006 Special 301: India, *supra* note 105, at 71.

153. Trade Act of 1974, Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices, §§ 301-310, 19 U.S.C. §§ 2411-20 (2006).

process, even without the involvement of the WTO.¹⁵⁴

Here is how it works: the United States Trade Representative (USTR) is the executive body in charge of determining the country's trade policy, which includes defending the country's intellectual property interests abroad.¹⁵⁵ Among other things, the body determines whether foreign countries are in compliance with their TRIPS obligations and whether these actions have burdened the United States.¹⁵⁶ Based on this information, the USTR determines what kind of "treatment" to give certain countries, which can be in the form of a "Super 301" or a "Special 301."¹⁵⁷

The number 301 is named after Section 301 of the Trade Act of 1974, which grants the USTR certain powers to assess whether "(A) the rights of the United States under any trade agreement are being denied" or "(B) an act, policy or practice of a foreign country (i) violates, or is inconsistent with . . . any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce."¹⁵⁸ The Trade Act of 1974 was revised by the Omnibus Trade and Competitiveness Act of 1988, which explicitly created the Super 301 Report and the Special 301 Report.¹⁵⁹

A Super 301 Report is a report identifying key U.S. trade expansion priorities.¹⁶⁰ A Special

154. See, USTR, The Work of USTR – Intellectual Property, http://www.ustr.gov/Trade_Sectors/Intellectual_Property/The_Work_of_USTR_-_Intellectual_Property.html (last visited Mar. 2, 2006). So effective, in fact, that the European Community launched a WTO dispute, arguing (along with a number of joining states) that Sections 301-210 of the Act violated the United States' obligations under WTO. See WTO, United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R; (99-5454), (Dec. 22, 1999).

155. For a general explanation of the history and evolution of the USTR, see, Office of the United States Trade Representative, History of the United States Trade Representative, http://www.ustr.gov/Who_We_Are/History_of_the_United_States_Trade_Representative.html (last visited Feb. 27, 2006.)

156. *Id.*; Trade Act of 1974, 19 U.S.C. § 2414(a)(1).

157. A. Lynne Puckett and William L. Reynolds, *Current Development: Rules, Sanctions And Enforcement Under Section 301: At Odds with the WTO?* 90 A.J.I.L. 675, 680 (1996).

158. Trade Act of 1974, 19 U.S.C. § 2411(a)(1).

159. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (2006).

160. 19 U.S.C. § 2420(a)(1)(A) & (B) (as amended); see also, Puckett, *supra* note 157, at 680.

301, however, is a report focusing specifically on intellectual property rights abroad that is published every year.¹⁶¹ In the Special 301 report, countries who fail to meet their intellectual property requirements under TRIPS are publicly named.¹⁶² From there the countries are placed on either the “Priority Watch List” (the list for the highest level of abuse) or the “Watch List” (the list for abuse that is closely monitored).¹⁶³

The Super 301 requires the USTR to determine, of these countries, which, if any “has the most onerous and egregious acts, policies, and practices which have the greatest adverse impact (actual or potential) on the relevant U.S. products.”¹⁶⁴ Once this is determined, the USTR launches a Super 301, where it investigates the country and determines if trade sanctions are necessary.¹⁶⁵ If the country manages to quell its piracy rates (or at least take measures to appear compliant), it remains on the Priority Watch List.¹⁶⁶ If the situation worsens, the USTR can use trade sanctions to push compliance.¹⁶⁷

One sanction available to the USTR is to bring a disagreement to the WTO for dispute settlement.¹⁶⁸ Another is to pull the infringing country from the trade-beneficial Generalized System of Preferences (GSP) Program.¹⁶⁹ The GSP program allows the U.S. President to give special non-reciprocal benefits to developing countries if it promotes their economic development.¹⁷⁰ If a developing country is pulled from the GSP program, their goods are taxed

161. 19 U.S.C. § 2420(a)(2)(A) & (B) (as amended); *see also*, Puckett, *supra* note 157, at 680.

162. *See, e.g.*, USTR, 3005 Special 301 Report: Executive Summary, 14 http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file1957636.pdf (last visited Mar. 1, 2006).

163. *Id.*

164. *Id.* at 15.

165. Puckett, *supra* note 157, at 680.

166. *Id.*

167. *Id.*

168. WTO, Understanding the WTO, *supra* note 2, at 60-61.

169. USTR, The Work of USTR – Intellectual Property, *supra* note 154.

170. The Generalized System of Preferences Renewal Act of 1984 was enacted as § 501 of the Trade and Tariff Act of 1984. *See* Pub. L. No. 98- 573, 98 Stat. 2948, 3018 (codified at 19 U.S.C. §§ 2461-2465 (1988)).

in the United States at the same rate as other countries, invariably blocking their access to a wide and very-necessary market.¹⁷¹

The threat of this action is enough to bully almost every developing country into complying with TRIPS, or at least make an effort to “[engage] in good faith negotiations or [make] significant progress in negotiations to address these problems.”¹⁷² The USTR maintains that even “the listing process itself has often helped win improvements in enforcement.”¹⁷³

B. The Private Sector a.k.a. “The Little Bully”

Yet nation states are not the only players in software enforcement overseas. With the onset of globalization, the actors involved in the arena of international trade are changing dramatically.¹⁷⁴ Globalization, an emerging field of study in international relations, can be defined as “the latest stage in a long accumulation of technological advance which has given human beings the ability to conduct their affairs across the world without reference to nationality, government authority, time of day or physical environment.”¹⁷⁵ In practical terms, this means that societies that were formerly organized in hierarchical pyramids are changing shape because of technological advance.¹⁷⁶

International trade, which historically occurred vis-à-vis the top peaks (i.e. government to government), now occurs daily by businesses and individual citizens.¹⁷⁷ With the click of a button, a person in Australia can buy a computer – that was designed by an American, assembled

171. See generally, UNCTAD, Generalized System of Preferences Rules of Origin, TD/B/GSP/FORM/1 (Dec. 7, 2004) available at http://www.unctad.org/en/docs/tdbgspform1_en.pdf (last visited Mar. 1, 2006).

172. USTR, 3005 Special 301 Report: Executive Summary, *supra* note 172, at 14.

173. USTR, The Work of USTR – Intellectual Property, *supra* note 154.

174. See, e.g., JAMES N. ROSENAU, DISTANT PROXIMITIES: DYNAMICS BEYOND GLOBALIZATION 294 (Princeton 2003).

175. RICHARD LANGHORNE, THE COMING OF GLOBALIZATION 2 (Palgrave 2001).

176. *Id.* at 2.

177. *Id.*

in Mexico, containing chips manufactured in Korea and shipped by a European company – all without express permission from the Australian, American, Mexican, Korean or European governments.¹⁷⁸ Put simply, globalization has changed the way individuals communicate, develop business relationships and complete economic transactions.¹⁷⁹

In the case of the software industry, this means that sales are worldwide, which is good for software producers, but it also means that regulatory and enforcement issues are not within the software-friendly laws of a home country.¹⁸⁰ Microsoft for example, does its best to protect its interest within U.S. law, routinely lobbying the government to support certain favorable trade policies or arguing for extraterritorial application of U.S. law.¹⁸¹ Yet despite these efforts, Microsoft still loses billions of dollars to international software pirates.¹⁸²

Since most software companies are in the business of creating software and not creating mechanisms of international intellectual property enforcement, they have combined resources to protect their interests.¹⁸³ For example, the major intellectual property industries in the United States align to lobby the government to enforce their interests under the umbrella of the International Intellectual Property Alliance, or IIPA.¹⁸⁴ The IIPA collects information about intellectual property piracy overseas and reports it to the USTR.¹⁸⁵ Members include other alliances of industry specific groups such as: the Association of American Publishers (AAP),

178. See Oatley, *supra* note 1, at 17; see also THOMAS FREIDMAN, THE WORLD IS FLAT 6-7 (1st ed. Farrar, Strauss & Giroux 2005). This illustrative example is a modified version of Oatley and Thomas' commentary on the changing format and increased internationalization of commerce.

179. See LANHORNE, *supra* note 175, at 2.

180. See generally, Fenwick & West LLP, *supra* note 42.

181. See, e.g., AT&T Corp. v. Microsoft Corp., 414 F.3d 1366 (Fed. Cir. 2005); [Microsoft Corp. v. Lindows.com, Inc., 319 F. Supp. 2d 1219 \(D. Wash. 2004\)](#); Microsoft Corp. v. Multi-Tech Sys., 357 F.3d 1340 (Fed. Cir. 2004).

182. Interview by Jennifer LeClaire with Bonnie McNaughton, Attorney, Microsoft, in *Microsoft Attorney Bonnie McNaughton on Software Counterfeiting*, E-COMMERCE TIMES (part of the ECT news network) (Jan. 1, 2005) available at <http://technewsworld.com/story/39539.html> (last visited Mar. 1, 2006).

183. See, e.g., IIPA, Description of the IIPA, <http://www.iipa.com/aboutiipa.html> (last visited Mar. 2, 2006).

184. *Id.*

185. *Id.*

Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), and the Recording Industry Association of America (RIAA).¹⁸⁶

One of these groups, Business Software Alliance (BSA), is a major coalition of software companies such as Microsoft, Sun Microsystems, Hewlett Packard and many more intellectual property holders.¹⁸⁷ In order to protect its members' interest, BSA sets up offices in foreign countries (there are over 80 BSA offices worldwide) with piracy reporting hotlines and a team of attorneys to investigate and prosecute software infringement cases under domestic law.¹⁸⁸ These teams have many functions. They coordinate raids with local police, investigate and prosecute crimes,¹⁸⁹ set up training for local enforcement officials, and finally, set up public awareness campaigns about software piracy.¹⁹⁰ The offices typically advertise a grace period date before starting prosecution, and many times they offer discounted rates for the users who turn in their pirated copies of software.¹⁹¹ Regardless, BSA gathers the data in each country and files a Special 301 report with the USTR and also the IIPA, which then accumulates data for its own Special 301 report to the USTR.¹⁹² Based on this information, the USTR determines what status to give each country.¹⁹³

186. Their websites are, respectively: <http://www.publishers.org/>; <http://www.bsa.org/>; <http://www.theesa.com/>; <http://www.iftaonline.org/>; <http://www.mpa.org/>; <http://www.nmpa.org/>; <http://www.riaa.com/>.

187. BSA, About BSA, <http://www.bsa.org/usa/about/> (last visited Mar. 1, 2006).

188. BSA, BSA Offices & Hotlines, <http://www.bsa.org/usa/about/BSA-Offices-and-Hotlines.cfm> (last visited Mar. 1, 2006).

189. See, e.g., *BSA Initiates Legal Action for 'Piracy,'* BUSINESS LINE (Feb. 28, 2006).

190. See, e.g., *Business Software Alliance Global CEO Lauds Regional Efforts in Curbing Software Piracy*, AL-BAWABA (Feb. 26, 2006).

191. See, e.g., BSA, 90 Days Truce Campaign; http://www.bsa.org/southafrica/events/90_Days_Truce_Campaign.cfm (last visited Mar. 7, 2006).

192. Peter Drahos, Symposium, *The Future of International Intellectual Property: The International Relations of Intellectual Property Law: Securing The Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 72 (2004).

193. See discussion *supra* Part II(B).

Yet BSA and the IIPA are only two actors of hundreds in the international software protection enforcement regime. As Peter Drahos emphasizes during a symposium on international piracy, the private enforcement regime is “nodular” with overlapping membership.¹⁹⁴ For example, in addition to being a member of the IIPA, BSA is a part of the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), which advises both the Congress and the President on the effectiveness of certain trade agreements on intellectual property.¹⁹⁵ Furthermore, the software enforcement regime described thus far does not even include BSA’s “competitors” in the field of international software protections, such as the Software and Information Industry Association (SIIA) or the Entertainment and Leisure Software Publishers Association (ELSPA).¹⁹⁶ Additionally, this does not include the many individual software companies that have their own anti-piracy departments.¹⁹⁷

Concerned with the ongoing pressure placed on developing countries and intellectual property, one scholar laments:

With these three levels of pressure—WTO, IIPA, and IFPI¹⁹⁸—the schismogenetic dominant-submissive relationship between developed and developing nations is further enforced. As the industrial world presses the rest to conform to its standards, the question arises: with the vast diversity of races, cultures, beliefs, ideals, philosophies, societies, and economies in the world, is it feasible to expect every nation to conform to the same IP standards and methods of

194. Drahos, *supra* note 192, at 68.

195. *Id.*

196. See the SIIA Website at <http://www.sii.net/> and the ELSPA Website at <http://www.elspa.com/> (last visited Mar. 8, 2006).

197. See, e.g., <http://www.microsoft.com/piracy/default.msp>, http://www.mcafee.com/us/antipiracy_policy.htm, <http://www.intuit.com/piracy/>.

198. Refers to the International Federation of Phonographic Industry; <http://www.ifpi.org/> (last visited Mar. 8, 2006).

enforcement as espoused by the United States, the European Union, and Japan?¹⁹⁹

Obviously aware of this issue, BSA includes support for small business in purchasing authentic, licensed software.²⁰⁰ So arguably, BSA is actually helping these industries by giving them legal validity, which leads to increased investment; it also gets the business set up with more effective software that presumably works better and includes warranties and support networks.²⁰¹ Furthermore, BSA provides expensive training to police that is especially welcomed by the low-budget operations in developing countries.²⁰²

More alarming are the tensions that could potentially rise between these private actors and the public sector. For example, BSA's objectives are obviously in line with TRIPS; it clearly reports to the USTR, WIPO, the IIPA; it complies with the domestic laws of each country when it sets up its international branches.²⁰³ However, if there was a private actor that was campaigning in a manner that caused an effect inconsistent with the goals of any of these organizations, which has the authority to stop it?

To date, there is no international law controlling the actions of private actors. The International Court of Justice (ICJ) is only able to settle legal disputes for international persons, which, by legal definition, are states.²⁰⁴ Likewise, the WTO arbitration system is for members only, which again, means states only.²⁰⁵ However, as these private actors continue to grow and

199. Jack Bishop, *Building International Empires of Sound: Concentrations of Power and Property in the "Global" Music Market*, 28 *POPULAR MUSIC & SOCIETY* 443,465 (2005).

200. *See, e.g.*, BSA, 90 Days Truce Campaign, *supra* note 191.

201. *Id.*

202. *See, e.g.*, *Business Software Alliance Global CEO Lauds Regional Efforts in Curbing Software Piracy*, *supra* note 202.

203. *See* discussion, *supra* Part II(B).

204. LORI FISLER DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER, HANS SMIT, *INTERNATIONAL LAW*, 421-422 (4th ed. West 2004).

205. *See* WTO, *Understanding the WTO*, *supra* note 2, at 59-61.

impact the economic viability of nation-states around the world, there needs to be some form of adjudication process whereby a country can request sanctions against these private actors.

CONCLUSION: ROBIN HOOD VERSUS THE BULLIES: WHO WILL WIN?

The future of software piracy is dependent on a number of factors. As Raymond Nimmer and Patricia Krauthaus explain, technologically advanced countries go through a pattern of stages before normalizing software protection in their legal system.²⁰⁶ The early period usually involves case law, where lawyers and judges alike are uncertain about how to handle software within the purview of existing law.²⁰⁷ In due course, they will typically extend current law to encompass software protection.²⁰⁸ Eventually, the legislative body promulgates law to reflect the judicial determinations from earlier cases.²⁰⁹ In this scenario, the legal system is already functional, and software is merely a new product that has become useful for citizens and lucrative for creators.²¹⁰

For many developing countries however, the legislation for software is present before countries realize the usefulness or profitability of the product.²¹¹ This creates the clash between advanced countries who want software protection and developing countries who hardly know what it is.²¹² Because developing countries have not had time to evolve their intellectual property systems naturally, they have felt bullied into accepting other countries' awkward values.²¹³ And because they *feel bullied*, developing countries resort to Robin Hood schemes.²¹⁴

206. Nimmer, *supra* note 59, at 738-739.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 733-734.

211. *Id.*

212. *Id.* at 740.

213. *See supra* notes 138-145 and accompanying text.

214. *Id.*

Feeling victimized by the alien rules forced upon them, developing countries feel justified in “stealing” software from their “oppressors.”²¹⁵

Eventually however, this will change. As countries begin to develop their own software industries, they will see the benefit of enforcing software protection.²¹⁶ However, many of these countries – especially those in Africa – are absurdly far from developing *any* profitable industry, let alone a profitable *software* industry.²¹⁷ A software industry requires a solid infrastructure (electricity, computers, networks, etc.), which in turn requires an educated labor force.²¹⁸ In addition to all these things, the country must already value intellectual property as a sellable commodity in order for a software industry to emerge.²¹⁹ Put simply, because software is such an advanced form of trade it is likely to be one of the LAST things that is protected by emerging market countries.²²⁰

Regardless, the international community and those who have advanced far enough to create software will fight vehemently to protect their own future value.²²¹ Because the natural interest for software protection does not yet exist in some developing countries, however, these owners will try to develop an artificial interest for developing countries.²²² Most often, this artificial interest comes in the form of threats (such as trade sanctions), or temptations (such as funding).²²³ Whether or not these measures will speed up the natural evolution of software protection remains to be seen, but it is not all bad. By ensuring a future for their own businesses, the “bullies” will also leave open the option for a future emerging market software industry: an

215. *Id.*

216. *See* discussion *supra* Part I(B).

217. *See supra* Parts I(C) and II(A).

218. *Id.*

219. *Id.*

220. *Id.*

221. *See supra* Parts II(B) and II(C).

222. *See supra* Part II.

223. *Id.*

industry that even Robin Hood will find feeds the poor better than he could.

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