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Andrew Jaynes

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# WHY INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT REMAINS ENTRENCHED IN THE PHILIPPINES

Andrew Jaynes<sup>1</sup>

## I. INTRODUCTION

Nearly fifteen years has passed since the finalization of the Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). Like other World Trade Organization (WTO) member countries, the Philippines has enacted certain minimum standards of intellectual property rights (IPR) protection to comply with its TRIPS obligations.<sup>2</sup> Yet even with

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<sup>1</sup> U.S. Fulbright Scholar, Philippines, 2007-08; J.D., University of Wisconsin Law School, 2007; B.A., University of Michigan, 2003. This Article is based on the author's research in the Philippines. The author thanks Dr. Esmerelda Cunanan and everyone at the Philippine-American Educational Foundation, with a special thank you to Atty. Numeriano F. Rodriguez, Jr. and his family, John Lesaca, the IP Coalition, David Rovinsky, and the U.S. Embassy in Manila. The author takes responsibility for any errors.

<sup>2</sup> See, e.g., E-mail from the Intell. Prop. Coalition to Sybia Harrison, Special Assistant to the Section 301 Committee, Office of the United States Trade Representative (Feb. 12, 2007) (on file with the Intellectual Property Coalition and author) ("The Philippines has an adequate legal framework to protect intellectual property rights. Though imperfect, such a framework includes an Intellectual Property Code that substantially meets international standards set by TRIPS and other conventions.") [hereinafter IP COALITION 2007 SUBMISSION]; David Moser, *Piracy in the Philippines and the Proposed Optical Media Act*, 17 LAW. REV. 9 (2003) ("In 1997, the Philippines enacted a new Intellectual Property Code which strengthened intellectual property protection and brought the Philippines in line with international standards."); Grace P. Nerona, Comment, *The Battle Against Software Piracy: Software Copyright Protection in the Philippines*, 9 PAC. RIM L. & POL'Y J. 651, 671 (pointing out the WTO's acknowledgement that the Philippines has taken the necessary steps to comply with TRIPS); MOTION PICTURE ASS'N, ANTI-PIRACY FACT SHEET, ASIA-PACIFIC REGION (2007), [www.mpa.org/AsiaPacificPiracyFactSheet.pdf](http://www.mpa.org/AsiaPacificPiracyFactSheet.pdf) ("By and large, the countries in the Asia-Pacific region have strong anti-piracy legislation.") [hereinafter ANTI-PIRACY FACT SHEET]; David L. Llorito, *Technology, Weak Institutions Spawn Piracy*, MANILA TIMES, Jan. 4, 2003. ("The legal framework for IPR protection in the Philippines is well in place. . . [and] substantially compliant with the [TRIPS] component of the World Trade Organization. We have the right legal infrastructure."); but c.f. OFFICE OF THE U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT 476 (2007), available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/](http://www.ustr.gov/assets/Document_Library/Reports_Publications/)

the internationally mandated laws on the books, IPR infringement remains entrenched in the country. The question is, why? Evaluators of IPR protection in the Philippines, such as the International Intellectual Property Alliance (IIPA), blame the lack of effective enforcement for the country's thriving piracy business.<sup>3</sup> This response, while correct, only scrapes the surface. The more fundamental reason is that IPR protection and enforcement, in the eyes of those in power in the Philippines, are not priorities worthy of the government's attention and resources. Ignorance of and indifference towards IPR protection among the majority of Filipinos—whether private citizens or civil servants—has meant that the country can boast only minimal success when it comes to efforts to clamp down on piracy and counterfeiting.

For the average pirated optical media or counterfeit goods vendor, selling IPR-infringing products may simply be a means of existence. There is a chance that the vendor does not fully comprehend the illicit nature of his activities, but more likely he simply does not care that what he is doing is illegal. And for the organized crime syndicates that often supply the vendors with the pirated optical media and fake goods, the relatively low risk and high profit margins provide all the reasons they need to spurn the laws and continue producing and distributing their knock-offs.

Likewise, consumers share in the IPR ignorance and indifference. With the country's inadequate education system<sup>4</sup> and

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2007/2007\_NTE\_Report/asset\_upload\_file855\_10945.pdf (stating that the Intellectual Property Code still contains ambiguous provisions relating to the rights of copyright owners over broadcasting and licensing) [hereinafter 2007 NTE REPORT].

<sup>3</sup> INT'L INTELL. PROP. ALLIANCE, 2002 SPECIAL 301 REPORT 205 (2002) ("The systemic failure to deliver effective enforcement is the best explanation for why piracy is a thriving business throughout the Philippines."); see also Rosielyn Alviar Pulmano, Comment, *In Search of Compliance with TRIPS Against Counterfeiting in the Philippines: When is Enough Enough?*, 12 TRANSNAT'L LAW. 241, 269 (1999) ("The reasonable efforts of the legislature, executive, judiciary and the private sector did not terminate counterfeiting. The actual problem was the lack of effective enforcement mechanisms.").

<sup>4</sup> See Cai U. Ordinario, *Educated but Jobless Youth: A Global Problem*, BUS. MIRROR (Phil.), Dec. 20, 2007 [hereinafter Ordinario]; Volt Contreras & Michael Lim Ubac, *Education Summit Aims to Fix Mess in RP Schools*, PHILIPPINE DAILY INQUIRER, Feb. 1, 2008 [hereinafter *Education Summit*]; Ma. Isabel Ongpin, Op-Ed, *Improving Education*, MANILA TIMES, Jan. 25, 2008 [hereinafter *Improving Education*];

one out of three Filipinos living in poverty,<sup>5</sup> the average consumer may not understand IPR and may not be able to afford most legitimate products. Rather than forego the products altogether, she buys that counterfeit children's DVD or that fake pair of Adidas shoes. Even wealthier Filipinos who can comfortably afford legitimate products seek out pirated optical media or counterfeit goods for a variety of reasons, including getting their hands on a movie, bag or album otherwise unavailable in the country, or merely saving several hundred pesos.

The Philippine government is also responsible for the proliferation of pirated optical media and counterfeit goods. Despite statements by officials to placate the United States Trade Representatives' (USTR) office and industry associations such as the IIPA,<sup>6</sup> IPR protection and enforcement are not Philippine priorities. For a variety of reasons, the political will necessary to address IPR infringement effectively does not exist. People in power either do not understand or respect IPR, believe the resources would be better spent on other, more pressing, issues such as poverty or education, or fear that stronger IPR protection and enforcement would jeopardize their wealth and influence.

While the majority of Filipinos remain ignorant or indifferent toward IPR, the Philippines still has a passionate group of IPR advocates in government, business, and academia who are working hard to reduce IPR infringement. Thanks to these individuals, the country has been making some progress tackling piracy and counterfeiting. In the past few years there has been an increase in number of raids and the amount of IPR-infringing goods seized, better coordination among enforcement agencies, and an emphasis on IPR training and education programs.

Unfortunately, IPR advocates can accomplish only so much within the country's larger institutional constraints. Major reforms in the economic, legal, and political sectors are necessary before there will be a significant reduction in IPR infringement in the Philippines. As it is, the country will see only limited benefits should it choose to vigorously protect and enforce IPR.

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<sup>5</sup> Press Release, National Statistical Coordination Board, Poverty Worsens between 2003 and 2006 (Mar. 5, 2008), [http://www.nscb.gov.ph/pressreleases/2008/PR-200803-SS2-02\\_pov.asp](http://www.nscb.gov.ph/pressreleases/2008/PR-200803-SS2-02_pov.asp) [hereinafter Poverty Worsens].

<sup>6</sup> See discussion *infra* Parts III.C.

The insignificance of the country's IPR industries, whether foreign or domestic, makes justifying the devotion of scarce resources to IPR protection and enforcement problematic. Keith E. Maskus and other scholars note strong IPR protection and enforcement alone do not lead to economic development.<sup>7</sup> They may have the potential to result in "long-term economic growth and technological innovation[,]"<sup>8</sup> but this ultimately depends on other, institutional, factors such as an open and transparent economy, political stability, and a sound legal system—things the Philippines has yet to achieve.

Right now, the concentration of wealth in the hands of a limited few reduces investments in the country and limits its competitiveness. The economic oligarchs are often also part of the political elite, which is composed largely of dynasties that attempt to hold on to their power at all costs, including through violence and corruption. Moreover, the overburdened and dysfunctional legal system provides little deterrence, especially for IPR violators, and hurts the public's confidence in the administration of justice. Reforming these sectors, however, can facilitate economic growth. Once on this path, the Philippines will start to accrue more benefits from strong IPR protection and enforcement in the forms of foreign direct investment (FDI) and growth in its domestic IPR industries. Because they will be deriving more wealth from IPR, Filipinos will make strong IPR protection and enforcement a higher priority. That is when there will be a significant reduction in piracy and counterfeiting around the country.

This Article examines why IPR infringement remains entrenched in the Philippines, focusing on physical goods, piracy and counterfeiting. Part II provides a brief overview of Philippine IP laws and the government bodies responsible for overseeing and enforcing them. Part III discusses IPR infringement in the country, detailing the most prevalent types of trademark and copyright violations and highlighting recent IPR protection and enforcement successes and failures. Part IV takes a closer look at the roots of the IPR infringement problem, examining

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<sup>7</sup> See discussion *infra* Parts V.D, V.D.1.

<sup>8</sup> Keith E. Maskus, *Intellectual Property Challenges for Developing Countries: An Economic Perspective*, 2001 U. ILL. L. REV. 457, 457 [hereinafter *Intellectual Property Challenges*].

how an ignorance of and indifference towards IPR among the majority of Filipinos perpetuates IPR infringement in the country. Part V explains the keys to reducing IPR infringement in the country significantly—the need for Filipinos to understand IPR and have a stake in their protection and enforcement—and offers suggestions for accomplishing these goals. Part V also analyzes the link between a strong IPR regime and economic development, concluding that the Philippines will not be able to protect and enforce IPR vigorously until reforms in the economic, political, and legal sectors take place. Part VI examines specific reforms needed to permit effective IPR enforcement, describing how oligopolies, political dynasties, corruption, and a dysfunctional legal system restrict the Philippines' economic growth and, ultimately, its incentive to spend its limited resources on IPR protection and enforcement. In the end, this Article concludes that significantly reducing IPR infringement in the Philippines can happen over time.

## II. IPR LAWS AND GOVERNMENT BODIES RESPONSIBLE FOR THEIR OVERSIGHT AND ENFORCEMENT IN THE PHILIPPINES

The Philippines has the legal and regulatory framework in place, consistent with its international obligations, to handle the proliferation of pirated media and counterfeit goods around the country effectively.<sup>9</sup> The real problem, which will be examined later, lies in the implementation and enforcement of these laws.<sup>10</sup> This section provides an overview of IPR protection in the Philippines, discussing the laws pertaining to IPR and the government bodies that deal with IPR policy and enforcement.

### A. *Laws and International Agreements*

IPR protection in the Philippines dates back to the beginning of the 19th century—earlier than any other country in Southeast Asia—when then-colonizer Spain introduced decrees addressing IP.<sup>11</sup> Today, the primary source of IP laws in the

<sup>9</sup> See *supra* note 2.

<sup>10</sup> See discussion *infra* Parts III, IV.

<sup>11</sup> See Christoph Antons, *Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments*, ARC CENTRE OF EXCELLENCE FOR CREATIVE INDUSTRIES AND INNOVATION 3 (2006), <http://www2.warwick.ac.uk/fac/soc/>

Philippines is the Intellectual Property Code (IPC),<sup>12</sup> a “major turning point” in IPR protection in the country,<sup>13</sup> which was enacted in 1997 in order to fulfill the Philippines’s TRIPS obligations.<sup>14</sup> It contains laws covering patents, trademarks, and copyrights.<sup>15</sup> Also significant is the Optical Media Act (OMA), ratified in 2004,<sup>16</sup> which “regulates the manufacture, mastering, replication, importation and exportation of optical media.”<sup>17</sup> It “fills the gaps in the IPC for the protection of optical media[,]” which includes movies, music, video games, and software.<sup>18</sup> Additionally, the E-Commerce Act<sup>19</sup> complements the IPC by addressing liability for internet piracy.<sup>20</sup>

In addition to TRIPS, the Philippines is a party to a variety of other international agreements, including the Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works, Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure, Patent Cooper-

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law/elj/jilt/2006\_1/antons/antons.pdf. There is also evidence of a patent system in place before 1862 and trademarks that existed as early as the 1840s. Adrian S. Cristobal Jr., Op-Ed, *A Shared Passion*, BUS. MIRROR (Phil.), July 5, 2007 [hereinafter *Shared Passion*]. In general, the Philippine legal system “evolved as a synthesis of indigenous, Spanish (Roman), and American common laws, each building on its forerunner . . .” Amy Rossabi, *The Colonial Roots of Criminal Procedure in the Philippines*, 11 COLUM. J. ASIAN L. 175, 175 (1997) (discussing Spanish and American influence on criminal procedure in the Philippines).

<sup>12</sup> Intellectual Property Code, Rep. Act No. 8293 (June 6, 1997) (Phil.).

<sup>13</sup> INTELLECTUAL PROPERTY COALITION REPORT ON IPR PROTECTION 21 (2004) (on file with author) [hereinafter IP COALITION REPORT].

<sup>14</sup> Nerona, *supra* note 2, at 659.

<sup>15</sup> Rep. Act No. 8293, *supra* note 12. See generally IP COALITION REPORT, *supra* note 13, at 22 (comparing intellectual property laws before and after the IPC was enacted); Nerona, *supra* note 2, at 659-73 (discussing the IPC in-depth).

<sup>16</sup> An Act Regulating Optical Media, Reorganizing For This Purpose The Videogram Regulatory Board, Providing Penalties Therefor, And For Other Purposes, Rep. Act No. 9239 (Feb. 10, 2004) (Phil.).

<sup>17</sup> 4 TERRENCE F. MACLAREN, ECKSTROM’S LICENSING IN FOREIGN AND DOMESTIC OPERATIONS: JOINT VENTURES § 20:9 (West 2008).

<sup>18</sup> Ignacio S. Sapalo & Augusto R. Bundag, *The Philippines*, MANAGING INTEL. PROP., Apr. 2005, at 53, available at 2005 WLNR 7592634.

<sup>19</sup> An Act Providing For The Recognition And Use Of Electronic Commercial And Non-Commercial Transactions And Documents, Penalties For Unlawful Use Thereof And For Other Purposes, Rep. Act No. 8792 (June 14, 2000) (Phil.).

<sup>20</sup> INTELLECTUAL PROPERTY OFFICE, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (IPR): PHILIPPINES 2 (2007), [http://www.ecap-project.org/how\\_to\\_enforce\\_your\\_ipr/philippines.html](http://www.ecap-project.org/how_to_enforce_your_ipr/philippines.html) [hereinafter ENFORCEMENT OF IPR]. See also IP COALITION REPORT, *supra* note 13, at 22.



ation Treaty, and Rome Convention.<sup>21</sup> The Philippines is also a signatory to both the World Intellectual Property Organization (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty, but has yet to pass the required legislation implementing the treaties.<sup>22</sup>

## B. *Government Bodies*

A number of different government agencies have a role in IPR protection and enforcement.<sup>23</sup> These separate bodies often work together to share information<sup>24</sup> or to carry out enforcement operations.<sup>25</sup> Public-private partnerships between the government and private organizations such as the Business Software Alliance (BSA) and the Intellectual Property Coalition (IP Coalition) also play an important role in fighting IPR infringement.<sup>26</sup>

First, the Intellectual Property Office of the Philippines (IP Philippines), which was established under the IPC, “is primarily tasked to administer and implement the state policies on the protection, utilization and enhancement of enforcement of IPR in the country . . . [and] to coordinate with other government agencies and the private sector to strengthen IPR protection.”<sup>27</sup> While not directly responsible for enforcing laws, IP Philippines has oversight authority over enforcement efforts, and plays a coordinating and reporting role in the enforcement

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<sup>21</sup> U.S. DEPT. OF STATE, 2007 INVESTMENT CLIMATE STATEMENT – THE PHILIPPINES (2007), [www.philippine-embassy.de/bln/images/PTIC/2007%20investment%20climate%20statement.pdf](http://www.philippine-embassy.de/bln/images/PTIC/2007%20investment%20climate%20statement.pdf) [hereinafter INVESTMENT CLIMATE STATEMENT].

<sup>22</sup> E-mail from the Intellectual Property Coalition to Jennifer Choe Groves, Director of Intellectual Property and Innovation and Chair of the Special 301 Committee, Office of the United States Trade Representative 14 (Feb. 11, 2008) (on file with the Intellectual Property Coalition and author) [hereinafter IP COALITION 2008 SUBMISSION]; see also 2007 NTE REPORT, *supra* note 2, at 477.

<sup>23</sup> See ROUSE & CO. INT’L, PHILIPPINES: ENFORCEMENT GUIDE 1 (2006), [http://www.iprights.com/assets/pdf/PIL\\_enforcementguide.pdf](http://www.iprights.com/assets/pdf/PIL_enforcementguide.pdf) [hereinafter ENFORCEMENT GUIDE].

<sup>24</sup> See GOV’T OF THE REPUBLIC OF THE PHILIPPINES, STRENGTHENING THE IP SYSTEM: THE CAMPAIGN AGAINST PIRACY AND COUNTERFEITING IN THE PHILIPPINES (2005-2006) 8, [http://ipophil.gov.ph/ipenforcement/IPRCampaign2005-2006\\_Updated15March2007.pdf](http://ipophil.gov.ph/ipenforcement/IPRCampaign2005-2006_Updated15March2007.pdf) [hereinafter STRENGTHENING THE IP SYSTEM].

<sup>25</sup> See *id.* at 10-12 (discussing institutional linkages).

<sup>26</sup> See *id.* at 12-13.

<sup>27</sup> ENFORCEMENT OF IPR, *supra* note 20, § 1.



process.<sup>28</sup> Additionally, its Bureau of Legal Affairs can review and decide administrative complaints involving damages PHP200,000 (\$4,808)<sup>29</sup> and above, as well as cases involving compulsory licenses and cancellations of trademarks and patents.<sup>30</sup>

Next, the Optical Media Board (OMB) was established in 2005 by the Implementing Rules and Regulations of the OMA.<sup>31</sup> The OMB is the body responsible for regulating the optical media industry.<sup>32</sup> It is best known for “conducting raids and inspections, seizing infringing optical media and instituting criminal actions against erring optical disc plants and retailers. . . .”<sup>33</sup>

Additionally, the country’s law enforcement agencies, the Philippine National Police (PNP) and the National Bureau of Investigation (NBI), can bring a criminal case against a suspected IPR infringer, but only at the request of an IP holder or in conjunction with the OMB.<sup>34</sup> Both agencies have divisions that handle IPR violations,<sup>35</sup> and these divisions frequently work with the OMB in conducting raids against suspected IPR-infringing establishments such as malls or optical disc plants.<sup>36</sup>

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<sup>28</sup> See INT’L INTELL PROP. ALLIANCE, 2008 SPECIAL 301 REPORT 301 (2008), <http://www.iipa.com/rbc/2008/2008SPEC301PHILIPPINES.pdf> [hereinafter IIPA 2008 SPECIAL 301 REPORT]; 2007 NTE REPORT, *supra* note 2, at 477.

<sup>29</sup> U.S. dollar amounts are based on the exchange rate on April 1, 2008 (\$1=PHP41.6) from <http://www.exchange-rates.org/Rate/USD/PHP/4-1-2008>.

<sup>30</sup> IP COALITION REPORT, *supra* note 13, at 25.; *see also* ENFORCEMENT GUIDE, *supra* note 23, at 1-2.

<sup>31</sup> See INVESTMENT CLIMATE STATEMENT, *supra* note 21, at 11. The OMB replaced the Videogram Regulatory Board (VRB). *Id.*

<sup>32</sup> See IP COALITION 2007 SUBMISSION, *supra* note 2, at 8.

<sup>33</sup> *Id.* For a further discussion of the OMB and its problems, *see infra* Part III.D.3.

<sup>34</sup> See ENFORCEMENT GUIDE, *supra* note 23, at 1; *see also* INT’L INTELL. PROP. ALLIANCE, 2007 SPECIAL 301 REPORT 371, 382 (2007), *available at* <http://www.iipa.com/rbc/2007/2007SPEC301PHILIPPINES.pdf> [hereinafter 2007 SPECIAL 301 REPORT].

<sup>35</sup> See STRENGTHENING THE IP SYSTEM, *supra* note 24, at 21. The PNP has the Anti-Fraud and Commercial Crimes Division of the Criminal Investigation and Detection Group (AFCCD/CIDG-PNP), while the NBI has the Intellectual Property Rights Division (IPRD). *Id.* at 20-21.

<sup>36</sup> See 2008 SPECIAL 301 REPORT, *supra* note 28, at 302. In 2005, the PNP, NBI, and OMB signed a Memorandum of Understanding creating the Pilipinas Anti-Piracy Team (PAPT) in an effort to reduce software piracy and increase the country’s competitiveness in the IT sector. *Id.* Often acting on information pro-

Other agencies involved in IPR enforcement include the Bureau of Customs (BOC), the Department of Justice (DOJ), and the National Telecommunications Commission (NTC). The BOC maintains a registry of patents, trademarks, and copyrights, as well as a list of known or suspected IPR infringers.<sup>37</sup> IP owners can record their rights with the BOC in order to facilitate the seizure of infringing goods.<sup>38</sup> An *ad hoc* IP Unit within the BOC was created in 2002.<sup>39</sup> In the DOJ, a limited number of prosecutors (six at the head office in Manila and ninety-four nationwide in 2005, although the group is constantly reconstituted) handle IPR cases, but these cases make up only a small portion of their overall caseloads.<sup>40</sup> Finally, the NTC deals with piracy relating to satellite and cable programming.<sup>41</sup>

### III. IPR INFRINGEMENT IN THE PHILIPPINES

#### A. Overview

Counterfeiting and piracy continue to grow and evolve around the world.<sup>42</sup> Fake goods used to be limited to knock-offs of designer sunglasses or bags, but now include almost any product—shampoo, batteries, electronics, airline parts, and

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vided by the BSA, the PAPT has enjoyed continued success raiding businesses that use pirated software. *Id.*

<sup>37</sup> MICHAEL BLAKENEY, *GUIDEBOOK ON ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS* 46 (2005), available at <http://www.delpak.ec.europa.eu/WHATSNEW/Guidelines.pdf>; see also 2007 NTE REPORT, *supra* note 2, at 478. For more information on customs procedures and IPR, see Leonard Vinz O. Ignacio, *First Line of Defense Against Intellectual Property Rights Infringement*, BUS. WORLD (Phil.), Feb. 14, 2008.

<sup>38</sup> BLAKENEY, *supra* note 37, at 46.

<sup>39</sup> 2007 NTE REPORT, *supra* note 2, at 478; see also IP COALITION REPORT, *supra* note 13, at 23.

<sup>40</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 33.

<sup>41</sup> INVESTMENT CLIMATE STATEMENT, *supra* note 21, at 12.

<sup>42</sup> See 2007 SPECIAL REPORT, *supra* note 34, at 6; Guy Sebban & Urho Ilmonen, *Preface to INT'L CHAMBER OF COM., CURRENT AND EMERGING INTELLECTUAL PROPERTY ISSUES FOR BUSINESS: A ROADMAP FOR BUSINESS AND POLICY MAKERS* 1 (8th ed. 2007); accord Ian Traynor, *Forget the Rolexes, Fake Ferrari Proves \$600bn Industry Has Moved Up a Gear*, GUARDIAN (London), Mar. 11, 2008, available at <http://www.guardian.co.uk/world/2008/mar/11/internationalcrime.consumeraffairs>; Leo Cendrowicz, *Piracy Derailed Biz Growth, Report Says*, HOLLYWOOD REP., Oct. 30, 2007, available at [http://www.adweek-online.com/awresearch/article\\_display.jsp?vnu\\_content\\_id=1003665063](http://www.adweek-online.com/awresearch/article_display.jsp?vnu_content_id=1003665063).

even Ferraris.<sup>43</sup> The once localized fake goods industry has exploded into a worldwide enterprise worth as much as \$600 billion,<sup>44</sup> which is “growing exponentially in terms of volume, sophistication, range of goods, and countries affected.”<sup>45</sup> Rising internet use and technological developments with mobile devices such as phones have left music and movie executives scrambling for ways to protect their revenue.<sup>46</sup>

In the Philippines, IPR infringement remains entrenched. One of the chief problems is for-profit enterprises selling IPR-infringing tangible goods.<sup>47</sup> Walk around a medium-sized, multi-storied, indoor mall in Manila’s financial center such as Makati Cinema Square, or navigate the crowds, stalls, and chaos of the outdoor Quiapo market area, and you will find rampant, brazen copyright and trademark infringement involving pirated DVDs, CDs, video games, and software, and counterfeit clothes, bags, shoes, and other items.<sup>48</sup> But the problem is not limited to malls and markets.<sup>49</sup> Blankets displaying counterfeit DVDs are laid out on sidewalks as the workday comes to an end. Small shop owners on the side of the road frequently ped-

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<sup>43</sup> 2007 SPECIAL 301 REPORT, *supra* note 34, at 6; *see generally* Traynor, *supra* note 42 (describing a confiscated fake 1967 P4 cherry red Ferrari made with Japanese parts in the Thai countryside).

<sup>44</sup> Traynor, *supra* note 42.

<sup>45</sup> INT’L CHAMBER OF COM., *supra* note 42, at 1; *see also* 2007 SPECIAL 301 REPORT, *supra* note 34, at 6.

<sup>46</sup> *See* 2007 SPECIAL 301 Report, *supra* note 34, at 380; *see also* *Coming Soon*, *ECONOMIST*, Feb. 21, 2008.

<sup>47</sup> *See* Llorito, *supra* note 2 (“By 2000, one could buy. . .pirated [music, movies, and software] almost everywhere: in sidewalk and street vendors’ carts, corner stores, malls, and in LRT and MRT stations); *accord* Fel V. Maragay, *The War Against Pirates*, *MANILA STANDARD*, July 21, 2007 (commenting on the evolution of pirated movies and music from being sold in stalls on the side of the street to places such as higher-end shopping malls); Likha C. Cuevas, *Movie Outfit’s Losses Mount on Piracy*, *MANILA TIMES*, May 2, 2007 (“Pirated CDs, pirated CDs everywhere!”). For a discussion of “bad” copyright infringements, *see* Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305, 326 (2002).

<sup>48</sup> The USTR included the Quiapo area on its list of “Notorious Markets” for IPR infringement in the 2007 Special 301 report. 2007 SPECIAL 301 REPORT, *supra* note 34, at 376, 378; *see also* Abigail L. Ho, *Media ‘Pirates’ Remain Elusive as Ever*, *PHILIPPINE DAILY INQUIRER*, Feb. 28, 2005 (mentioning Quiapo as a notorious pirated optical media hub).

<sup>49</sup> *See, e.g.*, Abigail L. Ho, *Gov’t Seizes P2B in Pirated Goods as of HI*, *PHILIPPINE DAILY INQUIRER*, July 20, 2007, at 227, *available at* [http://business.inquirer.net/money/topstories/view\\_article.php?article\\_id=77733](http://business.inquirer.net/money/topstories/view_article.php?article_id=77733) (describing the ubiquity of pirated optical media in the country).

dle pirated CDs or trademark-infringing National Basketball Association (NBA) merchandise in addition to their legitimate goods. The more entrepreneurial sellers will even come to your home on request with a trunk full of fake DVDs.<sup>50</sup>

Because of the relatively low risk and high profit potential involved in selling counterfeit goods,<sup>51</sup> some vendors are surprisingly enterprising in their operations. They will often have a television and a DVD player or a boom box so that the prospective customer can view or listen to pirated DVDs or CDs. Some sellers even hand out business cards with their mobile phone numbers and issue receipts so that a customer can return items that do not work. When it comes to the likely law enforcement raids, these vendors treat their losses from confiscated counterfeit goods as a business expense, and blithely set up shop again the next day.<sup>52</sup>

The next section provides a more detailed look at IPR infringement in the Philippines, starting with the types of trademark and copyright infringement present in the country, which range from fake bags and watches to pirated movies and books. It then notes the positive steps the Philippines has taken to curb IPR violations, including conducting raids and seizing large amounts of infringing goods, and carrying out training and awareness campaigns. Finally, it analyzes the administrative and legal system problems that prevent the Philippines from significantly improving IPR protection and enforcement.

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<sup>50</sup> Additionally, in Taiwan, counterfeit goods vendors use home delivery as a way to avoid confrontation with law enforcement. Stephen K. Shiu, Note, *Motion Picture Piracy: Controlling the Seemingly Endless Supply of Counterfeit Optical Discs in Taiwan*, 39 VAND. J. TRANSNAT'L L. 607, 616 (2006).

<sup>51</sup> See Michael M. DuBose, *Criminal Enforcement of Intellectual Property Laws in the Twenty-First Century*, 29 COLUM. J.L. & ARTS 481, 484 (noting the low likelihood of conviction and small fines that accompany IPR crimes in most countries, as well as marginal start-up costs and high profit margins for sellers of counterfeit goods).

<sup>52</sup> See Clifford Coonan, *Studio Retool Anti-Piracy Tactics*, VARIETY ASIA, Dec. 2, 2007, available at <http://www.varietyasiaonline.com/content/view/5060/>; 2007 NTE REPORT, *supra* note 2, at 477.

## B. *Trademark Infringement*

Counterfeit products such as sunglasses,<sup>53</sup> designer clothing,<sup>54</sup> cigarettes, shoes,<sup>55</sup> and a variety of other goods can be found throughout the Philippines.<sup>56</sup> IP Philippines includes these counterfeit goods, along with copyright-infringing goods, in its annual enforcement data figures, which totaled over PHP2.9 billion (\$69.7 million) worth of seized goods in 2007.<sup>57</sup> However, some apparel and footwear firms, such as Levi Strauss, have complained that the counterfeit goods problem does not receive the same time and resources as those devoted to addressing pirated optical media and cable piracy.<sup>58</sup>

## C. *Copyright Infringement*

The IIPA estimated U.S. copyright industry losses in the Philippines to be \$212.3 million in 2007.<sup>59</sup> Compared to regional neighbors, that is more than Malaysia (\$174 million), but less than Thailand (\$361 million) and Indonesia (\$255 million), and nowhere close to China (\$2.975 billion).<sup>60</sup> The main copy-

<sup>53</sup> See Katrice R. Jalbuena, *P10-M Worth of Fake Sunglasses Seized*, MANILA TIMES, July 12, 2007 (describing a raid where the NBI seized over 35,000 fake Louis Vitton and Prada sunglasses worth an estimated PHP10 million (\$240,000)).

<sup>54</sup> See Tina Santos, *P30M Fake Lacoste Seized in Manila Raid*, PHILIPPINE DAILY INQUIRER, Oct. 3, 2007 (noting the NBI seized roughly PHP30 million (\$721,000) worth of fake Lacoste goods in a 2007 raid on stalls and warehouses), available at [http://newsinfo.inquirer.net/breakingnews/metro/view\\_article.php?article\\_id=92282](http://newsinfo.inquirer.net/breakingnews/metro/view_article.php?article_id=92282).

<sup>55</sup> The basketball-crazed Philippines is one of the bigger markets for Adidas basketball shoes in Asia. Raphael Bartholomew, *Arenas Savors a Filipino Embrace*, N.Y. TIMES, July 17, 2008.

<sup>56</sup> See 2007 NTE REPORT, *supra* note 2, at 476.

<sup>57</sup> IP COALITION 2008 SUBMISSION, *supra* note 22, at 4.

<sup>58</sup> See Felipe S. Salvosa, *RP Hit on Selective Anti-Piracy Drive*, BUS. WORLD (Phil.), Mar. 7, 2007 [hereinafter *Selective Anti-Piracy Drive*].

<sup>59</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 297. IIPA member associations (such as the BSA and the Recording Industry Association of America (RIAA)) calculate the estimated losses and piracy levels based on a number of (often complicated) methodologies. See INT'L INTELL. PROP. ALLIANCE 2007 SPECIAL 301 REPORT, APPENDIX B: METHODOLOGY (2007).

<sup>60</sup> Press Release, Int'l Intell. Prop. Alliance, *The Copyright Industries in the International Intellectual Property Alliance (IIPA) Submit to USTR their 2008 Report on Piracy in 51 Countries/Territories* (Feb. 11, 2008), <http://www.iipa.com/pdf/IIPA2008Special301PressRelease021108.pdf> [hereinafter *IIPA Press Release*]. China's market size, of course, is much, much larger than the Philippines. China has a population of roughly 1.3 billion while the Philippines' population is around 90 million. Central Intelligence Agency, *The World Factbook* (2008), <https://www>.

right enforcement issues of a developing Asian country such as the Philippines are slightly different from those of a developed country such as the United States. Optical disc production is the biggest piracy problem in Asia.<sup>61</sup> Enforcement agencies in the region are primarily concerned with raiding malls or warehouses and confiscating physical goods. In contrast, the counterfeit optical media problem takes a back seat to digital piracy in terms of media, law enforcement, and movie and music executives' attention in the United States.<sup>62</sup> This is because the proportion of internet users in a developed country such as the United States is far greater than that in a developing country such as the Philippines.<sup>63</sup> Moreover, internet piracy is more difficult to control than physical piracy.<sup>64</sup> Digital piracy is a growing problem in the Philippines, and the country will soon have to take further steps to address it.<sup>65</sup> For now, physical piracy garners the most attention from the authorities.

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[cia.gov/library/publications/the-world-factbook/geos/rp.html](http://cia.gov/library/publications/the-world-factbook/geos/rp.html). Thailand and Indonesia, which both account for more trade losses than the Philippines, have populations of 60 million and 250 million, respectively. See IIPA Press Release, *supra*; See also Central Intelligence Agency, The World Factbook (2008), <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html>; Central Intelligence Agency, The World Factbook (2008), <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>. Thus, Thailand accounts for \$150 million more in trade losses than the Philippines, even though its population is 30 million smaller. See *id.*

<sup>61</sup> ANTI-PIRACY FACT SHEET, *supra* note 2.

<sup>62</sup> However, pirated DVDs and CDs are still a very real problem in the United States, from New York to Los Angeles, and even to San Antonio. See DuBose, *supra* note 51, at 482 (noting New York City's Canal Street as a notorious area for pirated and counterfeit goods); Ryan Vaillancourt, *Legislators Attend Anti-Piracy Event*, GLENDALE NEWS-PRESS (Cal.), Feb. 1, 2008, <http://www.glendalenewspress.com/articles/2008/02/03/politics/gnp-entertainment02.txt> ("Counterfeiters and digital pirates cost Los Angeles County about 106,000 jobs with wages of \$5.6 billion in 2006"); KSAT.com, *6,000 Bootleg CDs, DVDs Seized in Raid*, Jan. 24, 2008, <http://www.ksat.com/news/15133427/detail.html> (describing a raid where San Antonio police confiscated over 6,000 bootleg CDs and DVDs).

<sup>63</sup> The United States has approximately 215 million internet users, or 71.4% of its population. Internet World Stats, North America Internet Users (Nov. 2007), <http://www.internetworldstats.com/stats14.htm>. However, the Philippines has only 14 million internet users, or 15.4% of the population. IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 298.

<sup>64</sup> *Coming Soon*, *supra* note 46 ("Online piracy costs Hollywood less than the physical variety, ripping off DVDs, but the gap is closing. 'We are more concerned about internet piracy than physical piracy, because controlling it is harder,' says Ron Wheeler, head of anti-piracy efforts at Fox Entertainment Group.")

<sup>65</sup> For more information about digital piracy, see *infra* Parts III.C.5, VI.



### 1. *Movie and Music Piracy*

Large quantities of pirated optical discs continue to be available throughout the Philippines.<sup>66</sup> A recent estimate put the motion picture piracy rate at around 80% in 2005,<sup>67</sup> while the music piracy rate doubled from 40% in 2005 to 80% in 2007.<sup>68</sup> Pirates in the Philippines import the illegal discs from countries such as China and Malaysia and also produce them on their own soil for domestic consumption or exportation.<sup>69</sup> Piracy has been blamed as one of the factors contributing to the local film industry's decline over the years.<sup>70</sup> Compared to the 1970s—dubbed the “Second Golden Age of Philippine Cinema”—local film production has been cut in half.<sup>71</sup>

The camcording of a film still in theaters is a growing concern in the country and threatens to be one of the major IPR issues in the near future.<sup>72</sup> Well-organized gangs seem to be more involved in the activity in addition to small-time players.<sup>73</sup> Plus, movies illegally recorded in Philippine cinemas are now being distributed globally, bolstering the country's role as an exporter of pirated content.<sup>74</sup>

Music piracy in the Philippines now consists mainly of counterfeit CDs.<sup>75</sup> The IP Coalition's “Report on IPR Protection” contains a quote from a local industry association group that uses a vivid image to capture the sentiments of at least

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<sup>66</sup> See 2007 NTE REPORT, *supra* note 2, at 476.

<sup>67</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 297 (showing the motion picture piracy rate at 78% in 2005, the last year data was available).

<sup>68</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 297.

<sup>69</sup> See Dave L. Llorito, *Loose Rules Make CD Pirates Feel at Home Here*, MANILA TIMES, Jan. 2, 2003 [hereinafter *Loose Rules*].

<sup>70</sup> See Cuevas, *supra* note 47; Ernesto F. Herrera, Editorial, *Help the Film Industry*, MANILA TIMES, May 1, 2007. One anonymous official of the former Videogram Regulatory Board (now the OMB) said, “Before, we use (sic) to produce 300 films per year. Now, it's good if we can have 50 films a year.” Dave L. Llorito & Kristine R. Payuan, *Intellectual Piracy a P9-billion Headache for Law Enforcers*, MANILA TIMES, Jan. 3, 2003 [hereinafter *Intellectual Piracy*]. Other factors contributing to the local movie industry's decline include a “high cost of production, competition from blockbuster foreign films, competition from free and pay television and low household entertainment budgets. Cuevas, *supra* note 47.

<sup>71</sup> See Herrera, *supra* note 70.

<sup>72</sup> See *supra* note 2, at 298 for a further discussion of camcording.

<sup>73</sup> See IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 298.

<sup>74</sup> See *id.*

<sup>75</sup> See IP COALITION REPORT, *supra* note 13, at 17.



some in the music business: “[T]he Philippine music industry was a thriving industry before the vicious tentacles of music piracy choked it to near collapse.”<sup>76</sup> With the increasing popularity of piracy through mobile devices,<sup>77</sup> as well as the inevitable ubiquity of the internet,<sup>78</sup> the music industry has even more reason for concern.

## 2. Software Piracy

Of the different types of software piracy,<sup>79</sup> end-user piracy<sup>80</sup> hurts the software industry in the Philippines the most.<sup>81</sup> BSA figures show that while the software piracy rates in the Philippines remained steady at around 71% from 2003 to 2006, U.S. industry losses in the country more than doubled over the same period, going from \$55 million to \$119 million.<sup>82</sup> Counterfeit software, both business and entertainment, is also readily available in many of the same places that sell fake DVDs or CDs. Software piracy receives much of the copyright infringement attention in the country, due largely to the efforts of the Pilipinas Anti-Piracy Team (PAPT).

## 3. Cable Piracy

Television signal theft, both cable and satellite, continues to escalate around the country.<sup>83</sup> Illegal cable television users

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<sup>76</sup> *Id.* (quoting a Music Piracy Situationer prepared by the Philippine Association of the Recording Industry (PARI) in 2002).

<sup>77</sup> See *infra* Part III.D.5.

<sup>78</sup> See *infra* Part VI.

<sup>79</sup> Bus. Software Alliance, *Software Piracy and the Law (Philippines)*, <http://portal.doh.gov.ph/chd10/piracy.pdf> (listing the five common types of software piracy: end-user, client-server overuse, internet, hard-disk loading, and software counterfeiting).

<sup>80</sup> End-user piracy consists of a business or organization making unauthorized copies of software. *Id.*

<sup>81</sup> See *id.*; IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 300.

<sup>82</sup> BUS. SOFTWARE ALLIANCE, 2006 GLOBAL SOFTWARE PIRACY STUDY: SUMMARY OF FINDINGS (2007), available at [http://global.bsa.org/idcglobalstudy2007/studies/summaryfindings\\_globalstudy07.pdf](http://global.bsa.org/idcglobalstudy2007/studies/summaryfindings_globalstudy07.pdf). However, estimated losses provided by organizations such as the BSA need to be approached with some skepticism, as calculation methods often include inflated infringement rates. Kaitlin Mara, *Panel Shows Flaws in Global IP Enforcement Push, Especially for Developing Countries*, INTELL. PROP. WATCH, July 31, 2008, <http://www.ip-watch.org/weblog/index.php?p=1182>.

<sup>83</sup> See IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 299.

now outnumber legitimate ones.<sup>84</sup> The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimates that revenue losses increased to \$85 million in 2007, a \$5 million jump from 2006.<sup>85</sup> The industry's chief concern remains rogue cable television operators, mostly outside the major cities.<sup>86</sup>

#### 4. *Book and Journal Piracy*

Book and journal piracy also poses a significant threat to domestic and international publishers.<sup>87</sup> According to the IIPA, "[i]llegal commercial-scale photocopying of entire books continues, in commercial establishments surrounding universities, or in street stalls in metropolitan areas. Photocopy shops also operate on campuses, in hospitals, and in medical and nursing schools, often in highly organized fashion, selling door-to-door to doctors' offices and medical establishments."<sup>88</sup> In some cases, teachers encourage students to photocopy material.<sup>89</sup> The IIPA estimates that U.S. trade losses due to book piracy increased slightly from \$45 million in 2003 to \$49 million in 2007.<sup>90</sup>

#### 5. *Mobile Devices and Piracy*

The use of mobile devices as a medium for copyright infringement, a growing issue around the world,<sup>91</sup> may soon be the biggest piracy problem in the Philippines.<sup>92</sup>

[I]llegal vendors set up dedicated booths and stalls within shopping malls and load pirate content (music, published materials, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. These downloads

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<sup>84</sup> Kristine L. Alave, *Authorities Face Uphill Battle in Campaign vs Cable Piracy*, BUS. WORLD (Phil.), Oct. 10, 2006; IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 299.

<sup>85</sup> See IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 299.

<sup>86</sup> See 2007 SPECIAL 301 REPORT, *supra* note 34, at 34; IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 299.

<sup>87</sup> See IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 297; *Before You Photocopy that Book*. . . , PHILIPPINE DAILY INQUIRER, July 24, 2006.

<sup>88</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 297 (citations omitted); see also *Before You Photocopy that Book*. . . , *supra* note 87 (describing the book piracy problem and efforts to curb it).

<sup>89</sup> See *Before You Photocopy that Book*. . . , *supra* note 87.

<sup>90</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 297.

<sup>91</sup> See 2007 SPECIAL 301 REPORT, *supra* note 34, at 10.

<sup>92</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 298.

onto mobile devices occur prior to sale as an added incentive, or after sale, or are offered as a download for a fee.<sup>93</sup>

While personal computers may be generally too expensive for people in developing countries such as the Philippines, mobile phones are much more affordable. The mobile phone subscription rate in the Philippines is nearly 50 percent.<sup>94</sup>

#### D. *Recent IPR Protection and Enforcement Successes*

So what is the Philippines doing well when it comes to IPR protection and enforcement? As mentioned above, the country has solid laws and regulations in place to combat counterfeiting and piracy.<sup>95</sup> It also has a strong base of IPR supporters, ranging from members of NGOs such as the IP Coalition<sup>96</sup> to government personnel in agencies such as IP Philippines and the PNP. President Gloria Macapagal-Arroyo has drawn attention to IPR by publicly ordering IP Philippines and the OMB to step up efforts against IPR infringement<sup>97</sup> and by asserting that fighting piracy is in the country's best interest because of the benefits strong IPR protection has on Philippine creativity and innovation.<sup>98</sup> In 2006, the Philippines received a big boost when the USTR rewarded the country for its improved IPR protection by moving it from the Special 301 Priority Watch List to the Watch List.<sup>99</sup> The USTR reasoned:

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<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See supra* note 2 and accompanying text.

<sup>96</sup> The IP Coalition:

is a non-stock, non-profit corporation duly registered under Philippine law. . . [that aims] through focused advocacy, education, and enforcement monitoring programs, to serve as the primary policy caucus of industry organizations and stakeholder associations that promote the protection and advancement of intellectual property rights in the Philippines.

IP COALITION 2007 SUBMISSION, *supra* note 2.

<sup>97</sup> *See GMA's Next War: DVD*, MANILA STANDARD, Mar. 9, 2005 (quoting President Arroyo in a speech at the World Bank 2005 Philippine Development Forum in Davao City).

<sup>98</sup> *See STRENGTHENING THE IP SYSTEM*, *supra* note 24, at 3 (quoting President Arroyo's policy statement at a luncheon for the National Committee for IPR (NCIPR) in 2006). However, in reality, IPR protection and enforcement remain low priorities in the country. *See discussion infra* Part V.

<sup>99</sup> *See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT (2007) [hereinafter 2006 SPECIAL 301 REPORT]*. The Philippines takes the Special 301 results very seriously. The country's ultimate gauge of IPR protection pro-

Throughout 2005, the Philippines took steps to bolster the implementation of its Optical Media Act, including increasing the number of raids against pirate optical disc production facilities and retail establishments. The Philippines' Intellectual Property Office coordinated among IPR enforcement agencies, which resulted in an increased number of raids and enforcement actions.<sup>100</sup>

In 2005, the government confiscated PHP1.08 billion (\$30 million) worth of IPR-infringing goods as the result of over 2,400 enforcement operations.<sup>101</sup> The value of IPR-infringing goods seized has nearly tripled since, reaching PHP2.9 billion (\$69.7 million) in 2007.<sup>102</sup> Part of the success in enforcement resulted from increased cooperation between the private and public sectors.<sup>103</sup> Improved institutional coordination within the govern-

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gress is its Special 301 status. See, e.g., Maricel E. Estavillo, *Gov't Expects Removal from US Watch List*, BUS. WORLD (Phil.), June 19, 2006. While IP Philippines has said that improving its investment climate is its major reason for increased IPR enforcement, it has also stated that its objective is to be removed from the Watch List. See Michael Geist, *The Sounds and Fury of the USTR Special 301 Report*, 1 KNOWLEDGE ECOLOGY STUDIES 1 (2007), <http://kestudies.org/ojs/index.php/kes/article/view/26/36>. The Philippines, like other countries with lackluster IPR protection, feels pressure from the U.S. government to make strides against IPR infringement, even to the point where Special 301 may negatively affect policy decisions. See IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 296. For instance, the Philippines' Strategic Plan (2007-09) has been criticized as "being designed with a political aim in mind (i.e., to get off the Special 301 list) rather than to be helpful to creators." *Id.* Moreover, the Philippines depends heavily on the U.S. government when it comes to trade and investment. See Chino S. Leyco, *Philippines Pushes Free-Trade Deal with US*, MANILA TIMES, Dec. 13, 2007 ("The US remains the Philippines' top economic partner in both trade and investments. The US is also the top destination for Philippine agricultural exports and its second-largest source of imports"). Also, IPR enforcement would be a major factor in any free-trade negotiation between the two countries. See Dugie Standeford, *US Government, Copyright Industry Continue Push for Stronger Enforcement*, INTELL. PROP. WATCH, Feb. 13, 2008, <http://www.ip-watch.org/weblog/index.php?p=922>.

<sup>100</sup> 2006 SPECIAL 301 REPORT, *supra* note 99.

<sup>101</sup> IP COALITION 2008 SUBMISSION, *supra* note 22, at 5. Enforcement operations included inspections, search warrants, and customs alert-hold orders. *Id.*

<sup>102</sup> *Id.* at 4. The number of enforcement operations has also risen to around 3,000 in 2007. *Id.*

<sup>103</sup> Rosa Katrina Venegas Banzon, *Interorganizational Coordination and Intellectual Property Rights Enforcement* 134, 138 (May 11, 2006) (unpublished M.A. thesis, University of Asia and the Pacific (Phil.)) (on file with University of Asia and the Pacific Institute of Political Economy) [hereinafter *Interorganizational Coordination*].

ment also played a role.<sup>104</sup> OMB Executive Director Rosendo Meneses' statement sums up the OMB's newfound vigor when it comes to raids and inspections: "Let this serve as a warning to all copyright violators: Your days are numbered! The OMB will stop at nothing until the menace of piracy is eradicated in the country."<sup>105</sup>

Another positive IPR protection development has been the government's training and education programs. IP Philippines organized fifty-two workshops and seminars for both the private sector and government agencies throughout the country in 2006.<sup>106</sup> Judges, customs officials, police officers, and other government workers also received IPR enforcement training outside of the Philippines.<sup>107</sup> Furthermore, IP Philippines has carried out IPR awareness campaigns targeting research and academic institutions and small and medium-sized enterprises,<sup>108</sup> which make up 99% of businesses in the country.<sup>109</sup>

#### E. *Persistent IPR Protection and Enforcement Problems*

Unfortunately, the positives—solid laws and regulations, passionate IPR advocates, impressive enforcement data, and training and awareness campaigns—go only so far in the Philippines's uphill battle against IPR infringement. The country's lack of resources and administrative capability, persistent problems with interagency coordination, and lackluster leadership and professionalism all play a role in preventing the coun-

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<sup>104</sup> See Ho, *supra* note 49 (noting Director-General of IP Philippines Attorney Adrian Cristobal Jr.'s comments about better coordination among government bodies such as the DOJ and NTC 2005-07, leading to more effective IPR enforcement).

<sup>105</sup> OMB: *Pirates' Days are Numbered with Joint Efforts*, MANILA TIMES, Nov. 2, 2007 (quoting Executive Director Meneses' statement to the media). For the downside to this focus on raids and seizures, see discussion *infra* Part III.D.3.

<sup>106</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 38.

<sup>107</sup> See *id.* at 39.

<sup>108</sup> Lawrence Casiraya, *IPO Reports Growth in Trademark Applicants*, INQUIRER.NET, Oct. 17, 2007, [http://technology.inquirer.net/infotech/infotech/view\\_article.php?article\\_id=95100](http://technology.inquirer.net/infotech/infotech/view_article.php?article_id=95100).

<sup>109</sup> Arun Agrawal, *Good Governance for SMEs with Special Reference to Practices in South/South-Asian Countries 2*, Econ. Comm'n for Europe, Working Party on Industry and Enterprise Dev. Paper No. 22, 2004, available at [https://www.businessgrowthinitiative.org/ResourceCenter/Studies%20Enterprise%20Development/Good%20Governance%20for%20SMEs%20with%20Special%20Reference%20to%20Practices%20in%20South%20and%20South-East%20Asian%20Countries\\_.pdf](https://www.businessgrowthinitiative.org/ResourceCenter/Studies%20Enterprise%20Development/Good%20Governance%20for%20SMEs%20with%20Special%20Reference%20to%20Practices%20in%20South%20and%20South-East%20Asian%20Countries_.pdf).

try from significantly reducing IPR infringement. A misplaced focus on raids and seizures rather than building administrative capabilities in the OMB and an inefficient legal system also add to the problem.

### 1. *Lack of Resources and Administrative Capability*

Government agencies obviously need adequate funding in order to carry out their mandates. For a developing country such as the Philippines, funding IPR enforcement “constitute[s] a palpable drain on very scarce resources.”<sup>110</sup> Limited resources continue to be one of the primary reasons for the lack of effective IPR protection and enforcement.<sup>111</sup> IP Philippines acknowledged that one of the major challenges standing in the way of effective implementation of IPR in the country is the “[l]ack of institutional and personal capacities of the IP community (practitioners, enforcers, prosecutors, judges, etc.)”<sup>112</sup> For instance, the OMB’s budget is only about PHP25 million (\$600,000) a year.<sup>113</sup> This leaves as little as PHP1 million (\$24,000) for enforcement actions after taking care of administrative costs such as payroll and rent.<sup>114</sup> A mere fifteen members are available for enforcement actions around the

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<sup>110</sup> J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441, 450 (2000) (discussing the high transaction costs associated with protecting IPR in developing countries); see also Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 20 (1996) (discussing China’s problem enforcing IPR effectively, due in part to lack of financial resources for enforcement bodies).

<sup>111</sup> See 2007 NTE REPORT, *supra* note 2, at 477; MACLAREN, *supra* note 17; Pulmano, *supra* note 3, at 269; *Intellectual Piracy*, *supra* note 70 (“We are doing all our best to address the problem of intellectual property rights violations . . . Yet there is this tendency for people to look at the problem alone and not at how far we have gone to address it given our very limited resources.”); Antons, *supra* note 11, at 7 (noting the difficulties in competing with the private sector and attracting qualified employees with limited government resources).

<sup>112</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 5.

<sup>113</sup> Erwin Oliva, *Amendments to Optical Media Law Needed to Increase Penalties*, INQUIRER.NET, Nov. 27, 2007, [http://newsinfo.inquirer.net/breakingnews/info/tech/view\\_article.php?article\\_id=10339](http://newsinfo.inquirer.net/breakingnews/info/tech/view_article.php?article_id=10339) [hereinafter *Amendments to Optical Media Law Needed*].

<sup>114</sup> See *id.*; Maragay, *supra* note 47.



country.<sup>115</sup> Moreover, the lack of both personnel and appropriate training for employees limit the agencies' ability to do their jobs.<sup>116</sup>

The lack of resources also prevents the much-needed strengthening of the BOC.<sup>117</sup> It is estimated that anywhere from 70-90% of counterfeit optical media in the country is imported.<sup>118</sup> While the BOC now has a permanent IP unit,<sup>119</sup> the agency remains too small,<sup>120</sup> and too prone to corruption,<sup>121</sup> to effectively limit IPR-infringing goods from entering the country.

Another IPR enforcement problem related to the lack of resources is that "[e]nforcement agencies generally will not proactively target infringement unless the IPR owner brings it to their attention and works with them on surveillance and enforcement actions."<sup>122</sup> Thus, IP owners end up footing of most the bill for any enforcement actions.<sup>123</sup> Cooperation between IPR owners and the government has proved somewhat success-

<sup>115</sup> Erwin Oliva, *OMB Changes Tack in Deterring Optical Media Piracy in RP*, INQUIRER.NET, Sept. 11, 2007, [http://technology.inquirer.net/infotech/infotech/view\\_article.php?article\\_id=87937](http://technology.inquirer.net/infotech/infotech/view_article.php?article_id=87937) [hereinafter *OMB Changes Tack*].

<sup>116</sup> See IP COALITION 2007 SUBMISSION, *supra* note 2, at 8.

<sup>117</sup> See 2007 SPECIAL 301 REPORT, *supra* note 34, at 34; IP COALITION 2008 SUBMISSION, *supra* note 22, at 13.

<sup>118</sup> See IP COALITION 2007 SUBMISSION, *supra* note 2, at 17. However, according to the IIPA, pirated optical media production in the Philippines is growing. *Id.* (quoting INT'L INTELL. PROP. ALLIANCE, 2006 SPECIAL 301 REPORT 133 (2006)).

<sup>119</sup> See Press Release, Bureau of Customs (Phil.), Customs Institutional Reforms Push Piracy Enforcement Up (2007) (on file with author).

<sup>120</sup> See IP COALITION 2008 SUBMISSION, *supra* note 22, at 13.

<sup>121</sup> Both BOC officials and members of the group responsible for overseeing the BOC, the Presidential Anti-Smuggling Group (PASG), have been linked to corruption. See, e.g., William B. Depasupil, *Importers' Documents for Sale to Smugglers*, MANILA TIMES, Aug. 7, 2007, available at [http://www.manilatimes.net/national/2007/aug/07/yehey/top\\_stories/20070807top7.html](http://www.manilatimes.net/national/2007/aug/07/yehey/top_stories/20070807top7.html) (describing an importer accreditation scam involving customs officials); Tonette Orejas, 179 in *Antismuggling Body Sacked*, PHILIPPINE DAILY INQUIRER, Jan. 31, 2008, available at <http://news.info.inquirer.net/inquirerheadlines/regions/view/20080131-116045/179-in-anti-smuggling-body-sacked> (recounting the dismissal of 179 personnel from the PASG for suspected involvement in the smuggling of cell phones and cars into the country).

<sup>122</sup> MACLAREN, *supra* note 14. Ultimately, the effective prosecution of IPR crimes will depend on the IPR owner cooperating with law enforcement authorities. See Press Release, U.S. Dept. of Justice, U.S. Department of Justice Leads International Effort to Combat Intellectual Property Crime (Oct. 22, 2007), <http://www.uspto.gov/web/offices/com/speeches/10-22-2007ir.htm>. See also Interorganizational Coordination, *supra* note 103, at 144.

<sup>123</sup> See Interorganizational Coordination, *supra* note 103, at 131.



ful,<sup>124</sup> but as will be examined later on, the lack of government initiative to address IPR infringement comes as no surprise considering the low place IPR protection and enforcement have on the country's list of priorities.<sup>125</sup>

## 2. *Interagency Cooperation*

Having resources to devote to IPR enforcement is one thing; using those resources efficiently is another. Interagency coordination, while improving, remains an obstacle to effective IPR protection and enforcement. According to IP Philippines, “[t]he lack of leadership, systems and procedures in the inter-agency task force led to weak coordination, gaps in enforcement and prosecution, lack of data and information for effective decision-making, transparency of operations and monitoring of execution policies.”<sup>126</sup> One of the interagency coordination issues is the “absence of retrievable data and information about IPR matters, particularly on enforcement and prosecution.”<sup>127</sup> IP Philippines, as the IPR coordination and oversight body,<sup>128</sup> has been working to address this issue by establishing a central counterfeiting and anti-piracy database to allow agencies such as the DOJ, OMB, and PNP to share more reliable data.<sup>129</sup> However, the system is still a work in progress, and its success will depend on the willingness and diligence of each agency to contribute information.<sup>130</sup>

IP Philippines also notes that “the absence of clearly defined roles, jurisdiction and responsibilities” hampers inter-agency coordination and, in turn, effective enforcement.<sup>131</sup> As is the case in countries ranging from China to the United States, turf wars between agencies have undermined IPR en-

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<sup>124</sup> See MACLAREN, *supra* note 17.

<sup>125</sup> *Id.* See discussion *infra* Part IV.

<sup>126</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 7.

<sup>127</sup> *Id.* at 5.

<sup>128</sup> *Id.* at 7.

<sup>129</sup> See *id.* at 9.

<sup>130</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 9-10. The database, launched in February 2007, “is a secure interactive web-based application that provides real time updating of cases and document tracking from any interest-enabled location through a standards complaint browser.” *Id.*

<sup>131</sup> *Id.* at 10.

forcement efforts in the Philippines.<sup>132</sup> Moreover, the fear of leaks often prevents one agency from sharing information with another.<sup>133</sup> Again, IP Philippines is working to address these problems, but the responsibility to share information and work together ultimately hinges on the willingness and trust among the agencies involved.

### 3. *Issues with the OMB*

Pirated optical media continue to be widely available in the Philippines, and the OMB is partly to blame. In addition to its lack of resources, the OMB suffers from questionable leadership and professionalism, and has focused mainly on raids and seizures that have limited effectiveness instead of devoting more of its efforts to institutionalization.

Some critics lay the blame for the continued pirated optical media problem on the OMB leadership and staff.<sup>134</sup> Despite winning an award for his efforts to curb the piracy problem in the Philippines,<sup>135</sup> OMB Chairman Eduardo Manzano has been criticized for his lack of vision for the agency<sup>136</sup> and for his questionable dedication to the job.<sup>137</sup> Also adding to the OMB's trou-

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<sup>132</sup> See *id.* at 10; Berkman, *supra* note 110, at 20 (describing interagency coordination problems in China); Janet Reno, U.S. Attorney-General, Statement at the Symposium of the Americas: *Protecting Intellectual Property in the Digital Age* (Sept. 12, 2000), available at [http://www.usdoj.gov/criminal/cybercrime/ip\\_symposium.htm](http://www.usdoj.gov/criminal/cybercrime/ip_symposium.htm) (noting the history of a lack of cooperation between the Department of Commerce and the Department of Justice over IP matters). [hereinafter Statement at the Symposium of the Americas].

<sup>133</sup> See Interorganizational Coordination, *supra* note 103, at 129.

<sup>134</sup> See Fel V. Maragay, *Where Revamp is Afoot*, MANILA STANDARD, July 7, 2007, available at [http://www.manilastandardtoday.com/?page=felMaragay\\_july7\\_2007](http://www.manilastandardtoday.com/?page=felMaragay_july7_2007); Sammy Martin, *Slighted Senators Suggest 'Zero Budget' for OMB*, Dec. 12, 2007, available at [http://www.manilatimes.net/national/2007/dec/12/yehey/top\\_stories/20071212top5.html](http://www.manilatimes.net/national/2007/dec/12/yehey/top_stories/20071212top5.html).

<sup>135</sup> See *Asia-Pacific Copyright Enforcer*, MANILA BULLETIN, Dec. 13, 2006, available at <http://www.mb.com.ph/issues/2006/12/13/BSNS2006121382214.html#>.

<sup>136</sup> See Maragay, *Where Revamp is Afoot*, *supra* note 134.

<sup>137</sup> The Chairman has come under fire from journalists, as well as politicians including President Gloria Macapagal-Arroyo, for his duties as the host of more than one regular television show in addition to his responsibilities at the OMB. See, e.g., *id.* (“[The Chairman’s television hosting] smacks of his sheer insensitivity to the worsening piracy problem and low regard for his mandate”); Fel V. Maragay, *Edu, Do More!*, MANILA STANDARD, Mar. 10, 2005 (describing a presidential spokesperson’s comments that the Chairman’s television appearances were a conflict of interest). Furthermore, the Chairman’s “repeated failure . . . to attend [the Senate Finance Committee’s] hearings on its budget” led the head of the Senate

bles are leaks about the time and location of raids and seizures originating from within the agency.<sup>138</sup>

OMB raids, while responsible for the seizure of large amounts of IPR infringing goods,<sup>139</sup> remain only minimally effective in deterring IPR violators. A number of factors reduce the element of surprise necessary to catch vendors red-handed. If leaks within the agency do not provide pirated optical media vendors with information about a potential raid, then a public OMB announcement about its next targets might.<sup>140</sup> Even if the vendors receive no prior warning, OMB members walk through the main entrances of malls wearing t-shirts reading "OMB" in large yellow letters. This often gives vendors enough time to close up shop or hide their IPR-infringing goods, especially if they receive warnings from sympathetic mall security guards.

Moreover, whether surprised or not, vendors are often back in business the day after raids.<sup>141</sup> Leaders of the OMB and PNP have both admitted that raiding malls provide little deterrence to IPR violators.<sup>142</sup> Yet these agencies continue to conduct the raids, probably to bolster their enforcement data.<sup>143</sup> To be more effective, IPR enforcement agencies need to arrest and

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Finance Committee to recommend a one-peso budget for the OMB in protest. Martin, *supra* note 134.

<sup>138</sup> Leaks, however, are not unique to the OMB. See *Selective Anti-Piracy Drive*, *supra* note 58 (noting the Washington-based International Anti-Counterfeiting Coalition's comments that occasional leaks compromise raids and seizures of IPR-infringing goods involving the PNP and NBI); IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 296.

<sup>139</sup> See discussion *supra* Part III.C.

<sup>140</sup> See *OMB Changes Tack*, *supra* note 115.

<sup>141</sup> *Id.*; *Authorities Entrust Malls with Anti-Piracy Measures*, BUS. WORLD (Phil.), Nov. 28, 2007.

<sup>142</sup> *OMB Changes Tack*, *supra* note 115 ("The government executive [OMB Executive Director Meneses] admitted that conducting raids of malls has become an embarrassment for OMB. He said that during raids, the retail stall owners would abandon their pirated goods. The next day, would (sic) go back to normal operations"); *Authorities Entrust Malls with Anti-Piracy Measures*, *supra* note 141 ("[Head of the PNP and Commercial Crimes Division Rene Ong] admitted . . . that the repeated raids 'are not working anymore' since visited establishment (sic) easily rebound after the operations"); see also *Technology, Weak Institutions*, *supra* note 2 ("Despite the high number of raids . . . most of the pirates just move to other locations and continue with their illegal activities.").

<sup>143</sup> The Philippine government likes to use the number of raids and the amount of counterfeit goods seized as a measurement of its IPR enforcement success.

prosecute individuals involved in optical disc production, and hold mall owners accountable for vendors selling IPR infringing goods on their premises, rather than raid small-time vendors.<sup>144</sup>

Furthermore, the OMB, still a relatively new agency, has experienced some growing pains. The agency's primary focus is on raids and seizures that end up having only a minimal deterrent effect rather than building up its capacity as the regulator of the optical media industry.<sup>145</sup> This one-track mindset has been holding back the agency's IPR enforcement potential.<sup>146</sup> According to the IP Coalition, "[t]hough the OMB has retained the same, if not greater, enthusiasm and vigor [from 2006 to 2007] to seize and confiscate violating optical media, there is little or no improvement in its institutional capacities to address the bigger mandates of its charter."<sup>147</sup> These bigger mandates include the resolution of administrative cases arising from its inspections and the filing of criminal complaints.<sup>148</sup> The OMB took a step in the right direction when it published administrative rules in 2007, but the effectiveness of these rules remains to be seen.<sup>149</sup>

#### 4. *Problems with the Legal System*

##### a. *Overview*

In addition to its administrative problems, the Philippines suffers from an overburdened, inefficient legal system that ultimately provides little deterrence to IPR infringers.<sup>150</sup> The IIPA

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<sup>144</sup> For more information on mall-owner liability for IPR-infringing goods, see *infra* Part IV.B.2.b.

<sup>145</sup> See IP COALITION 2007 SUBMISSION, *supra* note 2, at 15-16; IP COALITION 2008 SUBMISSION, *supra* note 22, at 10-11.

<sup>146</sup> For instance, in early 2008 an OMB task force recovered six master copies of films entered in the Metro Manila Film Festival (MMFF) in a bag after a botched payoff between suspected pirates. Marlon Ramos, *OMB Thwarts Alleged Plan to 'Pirate' MMFF Entries*, PHILIPPINE DAILY INQUIRER, Jan. 10, 2008, available at [http://newsinfo.inquirer.net/inquirerheadlines/metro/view\\_article.php?article\\_id=111421](http://newsinfo.inquirer.net/inquirerheadlines/metro/view_article.php?article_id=111421). However, the OMB task force, whose presence caused the suspects to flee the incomplete transaction, failed to make any arrests. *Id.* Instead, in what is a good example of the OMB's attitude towards IPR enforcement, the agency was content with merely obtaining the films rather than holding anyone accountable.

<sup>147</sup> IP COALITION 2008 SUBMISSION, *supra* note 22, at 11.

<sup>148</sup> *Id.* at 10.

<sup>149</sup> See *id.*

<sup>150</sup> See MACLAREN, *supra* note 17.

goes as far as calling the judicial system a “near-total failure[,]” the effect of which “cannot be overstated.”<sup>151</sup> The legal system, like other branches of government, is plagued by a lack of resources<sup>152</sup> and corruption.<sup>153</sup> Political pressure also constantly threatens the integrity of court employees, prosecutors and judges.<sup>154</sup> Large case backlogs and long delays stifle prosecutorial will to pursue both IPR and non-IPR cases and put justice even more out of reach.

*b. Backlogs and Delays*

Backlogs and long delays are the norm in the Philippine legal system. While the court case disposition rate improved from 2004 to 2006, meaning the number of cases resolved surpassed the inflow of new cases,<sup>155</sup> the disposition rate was still only 79% for the regional trial courts in 2005.<sup>156</sup> This came after the regional court disposition rate dropped eight percentage points, from 72% to 64%, from 2001 to 2003,<sup>157</sup> raising questions about the legal system’s ability to maintain its gains in

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<sup>151</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 304. One report documenting human rights abuses in the Philippines describes the country’s criminal justice system as “rotten.” Basil Fernando, *Foreword in The Criminal Justice System of the Philippines is Rotten*, ARTICLE 2 OF THE INT’L COVENANT ON CIVIL & POL. RIGHTS 2 (vol. 6) (2007).

<sup>152</sup> See INVESTMENT CLIMATE STATEMENT, *supra* note 21; Ma. Lourdes A. Sereno, Emmanuel S. de Dios, & Joseph J. Capuno, *Justice and the Cost of Doing Business: The Philippines* 35 (2007) (Univ. of the Philippines School of Economics, Discussion Paper No. 0711) [hereinafter *Justice and the Cost of Doing Business*]. Philippine Supreme Court Chief Justice Reynato S. Puno has suggested that the private sector can help make up for the judiciary’s lack of budget and manpower and accelerate the disposition of cases by monitoring and identifying cases especially important to the business community. See Katrina Mennen A. Valdez, *Supreme Court Seeks Support of Big Business*, MANILA TIMES, Nov. 22, 2007, available at <http://www.manilatimes.net/national/2007/nov/22/yehey/metro/20071122met2.html>.

<sup>153</sup> For example, the Philippine Supreme Court dismissed seven court officials and personnel, including four Clerks of Court and a sheriff, for various administrative offenses in 2007. Anna Katrina M. Martinez, *The Cleansing Continues: SC Dismisses Seven Court Employees*, BENCHMARK ONLINE (Phil.), Oct. 2007, <http://www.supremecourt.gov.ph/publications/benchmark/2007/10/100704.php>.

<sup>154</sup> See *Justice and the Cost of Doing Business*, *supra* note 153, at 35.

<sup>155</sup> National Statistics Coordination Board, *Statistical Indicators on Philippine Development 2006: Chapter on Rule of Law*, [http://www.nscb.gov.ph/stats/statdev/2006/ruleoflaw/Chapter\\_Rule\\_of\\_Law.asp](http://www.nscb.gov.ph/stats/statdev/2006/ruleoflaw/Chapter_Rule_of_Law.asp).

<sup>156</sup> Supreme Court of the Philippines, *Court Case Disposition Rate by Type of Court 1997-2005*, [http://www.nscb.gov.ph/secstat/d\\_safety.asp](http://www.nscb.gov.ph/secstat/d_safety.asp).

<sup>157</sup> *Id.*

efficiency. Another troubling statistic is the drop in the disposition rate of cases investigated from 2004 to 2006, which means that more cases continue to linger in the system.<sup>158</sup>

Philippine Court of Appeals Justice Myrna Dimaranan Vidal commented on some of the causes of backlogs and delays in the court system in 2005:

As far back as in 1967, a survey disclosed the problem of judicial delay in the Philippines as due to such factors as the misuse of the due process and the abuse of legal technicalities; the intervention of political pressure in court cases; the sheer weight of court litigations arising from development and growth; the dilatory tactics of lawyers; and neglect and laxity on the part of judges.<sup>159</sup>

How much each of these factors contributes to the backlogs and delays is hard to determine. A judge's lack of knowledge and training can slow down the disposition of her IPR cases, which are often technically complex.<sup>160</sup> Robert W. Blume of the American Chamber of Commerce in the Philippines suggests another reason for backlogs may be that "[s]ociety tends to be litigious[,] throwing matters to the courts and lawyers for decision, so as to avoid face to face direct confrontation by parties involved."<sup>161</sup> Dilatory tactics by lawyers may be significant, or there may simply be too many cases in a system that has too few judges.<sup>162</sup> Or, as discussed below, there may be a judicial lack of urgency.<sup>163</sup>

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<sup>158</sup> National Statistics Coordination Board, *supra* note 155. On the bright side, the prosecutor to case ratio improved from 2004 to 2006. *Id.*

<sup>159</sup> Justice Myrna Dimaranan Vidal, *Effective Tool in Settlement of Business Disputes*, Lecture at the Chamber-to-Chamber II-Dialogues with the Business Sector and Integration of Mediation in Business (Mar. 29, 2005), [http://ca.supremecourt.gov.ph/index.php?action=mnuactual\\_contents&ap=dispute](http://ca.supremecourt.gov.ph/index.php?action=mnuactual_contents&ap=dispute). Overburdened courts are a problem for regional neighbor Malaysia, too. *See* Antons, *supra* note 11, at 3.

<sup>160</sup> *See* Arthur Wineburg, *Jurisprudence in Asia: Enforcing Intellectual Property Rights*, 5 U. BAL. INTELL. PROP. L.J. 25 (1997). For example, even an experienced judge may have trouble adjudicating copyright issues in an increasingly digital environment. *See* Op-Ed, Adrian Cristobal Jr., *The Wisdom of the Judges?*, BUS. MIRROR (Phil.), Sept. 28, 2006.

<sup>161</sup> Robert W. Blume, *American Investment: Philippines Prospects and Opportunities*, <http://www.dot.com.ph/amcham/amboi.html> (last visited Feb. 28, 2009).

<sup>162</sup> *See Justice and the Cost of Doing Business*, *supra* note 153, at 4.

<sup>163</sup> *See* discussion *infra* Part III.D.4.c.



One thing is certain: judicial vacancies are causing cases to pile up. Currently, around 20% of courts do not have judges.<sup>164</sup> Philippine Supreme Court Chief Justice Reynado S. Puno said that “[t]he ideal judiciary system is one judge for every 10,000 inhabitants, while in the Philippines, one judge serves 45,000 people, this means, for every 1-million population, there are only 22 judges[.]”<sup>165</sup> Lack of incentives and traditionally low salaries have made it difficult to attract top legal talent to the judiciary.<sup>166</sup>

Previous efforts to streamline the disposition of IPR cases (there were 511 pending cases of IPR violations as of October 2007)<sup>167</sup> have been largely ineffective due to resource constraints, the heavy non-IPR caseloads of judges and prosecutors, and the low precedence IPR cases take compared to others.<sup>168</sup> At one time the Philippine Supreme Court designated 34 special IP courts, but these courts received no additional funding and continued to maintain a significant non-IP caseload.<sup>169</sup> Since 2003, Special Commercial Courts have handled IPR cases in addition to cases formerly heard by the Securities and Exchange Commission.<sup>170</sup> Additionally, the Philippine Supreme Court “designated a team of judges and prosecutors to handle IPR cases exclusively, but in practice IPR cases represent only about 10% of the workload of taskforce mem-

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<sup>164</sup> Compare INVESTMENT CLIMATE STATEMENT, *supra* note 21 (quoting the judicial vacancy rate at 29% in 2006) with Valdez, *Supreme Court Seeks Support of Big Business*, *supra* note 153 (quoting the judicial vacancy rate at 21% in 2007).

<sup>165</sup> Valdez, *Supreme Court Seeks Support of Big Business*, *supra* note 153.

<sup>166</sup> See Press Release, SC Administrator Dialogs with Samar Island Judges, Philippine Information Agency (Sept. 29, 2008), <http://www.pia.gov.ph/tacloban.htm>. See also Ava Kashima K. Austria, *Increased Salaries for Judiciary Members Sought*, BUS. WORLD (Phil.), Mar. 1, 2008, available at <http://www.bworldonline.com/BW030108/content.php?id=078> (discussing a House Bill that would increase judges' salaries); Op-Ed, Artemio V. Panganiban, *Solving the Judicial Vacancy Problem*, PHILIPPINE DAILY INQUIRER, Sept. 23, 2007 (discussing ways to solve the judicial vacancy problem), available at [http://opinion.inquirer.net/inquireropinion/columns/view\\_article.php?article\\_id=90144](http://opinion.inquirer.net/inquireropinion/columns/view_article.php?article_id=90144).

<sup>167</sup> Max V. de Leon, *Slow Prosecution Gives RP Slim Chance of Getting Removed from List of Countries with IPR Problems*, BUS. MIRROR (Phil.), Oct. 16, 2007.

<sup>168</sup> See INVESTMENT CLIMATE STATEMENT, *supra* note 21; MACLAREN, *supra* note 17.

<sup>169</sup> MACLAREN, *supra* note 17.

<sup>170</sup> *Id.*



bers.”<sup>171</sup> Despite these efforts, substantial backlogs and delays persist.

*c. A Lack of Judicial Urgency*

A final reason for the delays and backlogs in the legal system may be what the IP Coalition labels as the need to “cultivat[e] a judicial sense of urgency.”<sup>172</sup> Under this view, attorneys are merely doing their jobs—acting as advocates on behalf of their clients—when they use dilatory tactics.<sup>173</sup> The appeals processes and procedural rules are not the evil, per se; instead, the problem is that judges are not under pressure to dispose of their cases in a timely manner or to reach a proper outcome.<sup>174</sup> It is the judge’s responsibility in her role as gatekeeper to deny any frivolous motions.<sup>175</sup> The IP Coalition elaborates:

The trial judge has control over the disposition. . . of cases before him. By nurturing a healthy sense of urgency, a judge may gain a keener sense to see through an attempt to slow down, halt or derail the proceedings. When facing a judge who has a reputation for being a stickler to the Rules, a lawyer is encouraged, if not compelled, to come to court more prepared than usual. He thinks twice, even thrice, before submitting ‘canned’ or ‘ready-to-file’ motions. He will not risk taking any delaying tactic unless he himself believes that he has a substantial cause that will stand close scrutiny. Under this realizable scenario, unjustified delay can, hopefully, be minimized.<sup>176</sup>

As one court administrator said, judges are responsible for controlling the pace of litigation and disposing of their cases in a timely manner.<sup>177</sup> They have a duty to keep the public’s faith in the judicial system.<sup>178</sup> Judges must be prepared to hear cases

<sup>171</sup> INVESTMENT CLIMATE STATEMENT, *supra* note 21.

<sup>172</sup> IP COALITION 2007 SUBMISSION, *supra* note 2, at 10.

<sup>173</sup> *Id.* But cf. *US Reiterates Call for Stronger Enforcement of Antipiracy Law*, BUS. WORLD (Phil.), Sept. 30, 2005 (noting that IPR violators have been successful in exploiting the system to obstruct prosecution).

<sup>174</sup> IP COALITION 2007 SUBMISSION, *supra* note 2, at 10-12.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 11.

<sup>177</sup> Nimfa Cuesta Vilches, *No-Nonsense Court Management*, BENCHMARK ONLINE (Phil.), Dec. 2007, <http://www.supremecourt.gov.ph/publications/benchmark/2007/12/120723.php>.

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

on the scheduled days and diligently go about their business.<sup>179</sup> Justice, after all, is in their hands.<sup>180</sup>

Perhaps the way to cultivate a judicial sense of urgency is by inspiring judges to want to do their job well. Philippine Supreme Court Senior Associate Justice Josue N. Bellosillo captures this idea eloquently in a speech on the judiciary and IPR:

[IPR protection] will only be successful if the judges will have the integrity and honesty, industry and dedication, as well as the knowledge and wisdom to dissect the issues in the field of science, technology, and commerce. I therefore encourage my co-workers in the Judiciary to study well, know our laws, and strive hard to give justice where it is due.<sup>181</sup>

True, modest salaries and political pressure create problems for judges.<sup>182</sup> With little to no security in the courtrooms, the job can be dangerous as well.<sup>183</sup> Dispensing justice is a critical job, and Filipinos, rich or poor, deserve a fair shake. Whether judges are stirred to do their job well through the satisfaction they derive from dispensing justice or because they are in some way held accountable for the disposition of their cases, the legal system as a whole will benefit.<sup>184</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *See id.*

<sup>181</sup> Josue N. Bellosillo, *The Judiciary and the Protection of Intellectual Property Rights*, *LAWYER'S REVIEW* (Phil.), July 31, 2002, at 78, available at <http://www.articlearchives.com/law-legal-system/international-law/62792-1.html>.

<sup>182</sup> *See* Arcie M. Sercado, *SC Justice Tinga Speaks on Declining Judicial Pay, Calls for Judicial Budget Increase*, Supreme Court News Flash, Apr. 4, 2007, <http://www.supremecourt.gov.ph/news/courtnews%20flash/2007/04/04040703.php>; INVESTMENT CLIMATE STATEMENT, *supra* note 21.

<sup>183</sup> *See* Tetch Torres, *Chief Justice Puno: Secure Our Courtrooms*, *INQUIRER.NET*, Jan. 29, 2008, <http://newsinfo.inquirer.net/breakingnews/metro/view/20080129-115478/Pimentel-hits-Misamis-Occidental-mayors-killing>.

<sup>184</sup> Lawyers, too, have a duty to refrain from abusing the legal system, as well as to be zealous advocates for their clients. Op-Ed, Rita Linda V. Jimeno, Op-Ed, *A Breath of Fresh Air*, *MANILA STANDARD*, Mar. 5, 2007, available at [http://www.manilastandardtoday.com/?page=ritaLindaJimeno\\_mar5\\_2007](http://www.manilastandardtoday.com/?page=ritaLindaJimeno_mar5_2007). The IIPA points out that “[c]ases sent into the public prosecution system languish for years, with little hope of any resolution or any progress. Prosecutors do not move cases through the system, and are indeed careless in their approaches to cases. IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 304.

d. *No Deterrence for IPR Violators*

The Philippine legal system's failure to deter IPR violators is another significant problem. According to Trotter Hardy,

the concepts of punishment and deterrence [can be expressed] in terms of costs, benefits, and probabilities: Potential wrongdoing defendants will, in general, be deterred from wrongdoing if the contemplated wrong "costs" more than it is worth.<sup>185</sup>

This "cost" is the probability that the wrongdoing defendant will be apprehended, prosecuted, and convicted.<sup>186</sup>

In the Philippines, the reality is that very few people are ever arrested, prosecuted, or convicted of IPR crimes, and even if they are convicted, it is doubtful they will ever pay fines or actually serve jail time. A quote from the U.S. National Trade Estimate Report (NTE Report) explains the lack of deterrence for IPR infringers in the country:

Among those cases that have made it to court, there have been relatively few successful prosecutions. While companies have invested significant resources in investigations and litigation, some cases remain unresolved as long as two decades after the initial complaint. The Philippines has failed to establish punitive sanctions sufficient enough to serve as a deterrent to IPR violators. The nominal damages awarded by the Philippine courts in IPR cases add little to the cost of doing business for IP pirates, and thus far there has been no risk of imprisonment for offenders.<sup>187</sup>

The NTE Report highlights two important points about the lack of IPR crime deterrence in the Philippines. First, the low number of arrests and successful prosecutions, along with the inadequate punitive sanctions, fail to deter IPR violators.<sup>188</sup> IP Philippines Director-General Adrian Cristobal Jr. admitted that despite the successful enforcement actions resulting in the seizure of large numbers of fake goods, "the big challenge is now

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<sup>185</sup> Hardy, *supra* note 47, at 312.

<sup>186</sup> Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 233 (2002).

<sup>187</sup> 2007 NTE REPORT, *supra* note 2, at 479.

<sup>188</sup> See Press Release, *US Holds IPR Dialogue*, Philippine Information Agency, (May 16, 2006), <http://www.pia.gov.ph/default.asp?m=12&sec=reader&rp=5&fi=p060516.htm&no=41&date=>

moving these cases in the courts.”<sup>189</sup> From 2001 to 2007, there were only sixty-four convictions in the country.<sup>190</sup> While the number of convictions could be seen as somewhat encouraging at first glance, the figure is hollow and misleading. Convicted IPR violators rarely, if ever, spend time jail<sup>191</sup> or pay their fines.<sup>192</sup> The USTR highlighted this shortcoming in its 2007 Special 301 report when it encouraged the Philippines to “ensure that courts impose deterrent sentences against criminal IPR infringers (such as) significant fines or prison sentences that are actually served.”<sup>193</sup> Thus, even if IPR violators are actually arrested and convicted, they will most likely avoid any serious punishment because they will not pay their fines or serve any jail time.

This culture of impunity for IPR infringers extends to all types of violators, big and small. When a business is raided for

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<sup>189</sup> Bernardette S. Sto. Domingo, *Intellectual Property Office Reports Anti-Piracy Gains*, BUS. WORLD (Phil.), Jan. 29, 2008.

<sup>190</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 29. In comparison, 287 defendants were sentenced for IP crimes in the United States in 2007 alone. K.C. Jones, *IP Crime Convictions Nearly Doubled in 2007*, INFORMATION WEEK, Feb. 11, 2008, <http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=206401978>.

<sup>191</sup> Finding any accurate, detailed information about IPR violators' sentences served and fines paid proved difficult for the author. The Philippine government does not keep track of this information. IP Philippines admits that the “[a]bsence of retrievable data and information about IPR matters, particularly on enforcement and prosecution” is one of its major challenges that “result[s] in lack of transparency in operations, weak follow through and inadequate facts to guide strategic and tactical operations and policy making.” STRENGTHENING THE IP SYSTEM, *supra* note 24, at 5.

<sup>192</sup> See INVESTMENT CLIMATE STATEMENT, *supra* note 21. “[T]he six year penalty enables [IPR violators] to apply for probation immediately under Philippine law.” *Id.* See also, *Technology, Weak Institutions*, *supra* note 2. (“Despite the high number of raids, no one has been charged, no one held in pre-trial detention, not one convicted.”). In a telling example, the IIPA noted the sentencing of two DVD pirates to six months in prison in its 2008 Special 301 Submission to the USTR, but could not say whether there was a fine or if any of the sentences were served. IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 299 n. 14.

<sup>193</sup> Intellectual Property Coalition, Inc., *2007: Issues and Challenges in the Protection and Advancement of Intellectual Property Rights in the Philippines*, at 3, [http://www.ustr.gov/assets/Trade\\_Sectors/Intellectual\\_Property/Special\\_301\\_Public\\_Submissions\\_2008/asset\\_upload\\_file63\\_14489.pdf](http://www.ustr.gov/assets/Trade_Sectors/Intellectual_Property/Special_301_Public_Submissions_2008/asset_upload_file63_14489.pdf) (last visited Feb. 28, 2009). One notorious example of a convicted IPR violator failing to serve any part of her sentence is medical book pirate Catherine Marquez. IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 295, 303. After her conviction, Marquez absconded. *Id.* at 303. She remains on the loose and is rumored to be engaging in her pirate activities in the country once again. *Id.*

selling IPR infringing goods, the owners or operators view the penalties simply as a cost of doing business.<sup>194</sup> Knowing it is unlikely that they will be arrested, these vendors are back in business again the next day.<sup>195</sup> When it comes to camcording movies in theaters, an increasing problem in the Philippines,<sup>196</sup> perpetrators can get off with little more than a slap on the wrist.<sup>197</sup> For example, when nine individuals were caught illegally recording “Transformers” at the film’s premiere in July 2007, police failed to charge the perpetrators and instead gave them a chance to apologize.<sup>198</sup> The perpetrator’s letters of apology “had to be signed by the perpetrator’s immediate family, spiritual adviser, school dean or employer, and the theater manager.”<sup>199</sup> One IPR advocate praised this way of dealing with violators,<sup>200</sup> but whether effective or not, the message it sends is that a person need not worry too much about the consequences of camcording if he gets caught.

Second, as touched upon earlier, case backlogs and delays often leave cases unresolved after many years.<sup>201</sup> The prospect that court action will be lengthy puts pressure on IPR holders to settle out of court rather than see their cases through to trial.<sup>202</sup> In this way, justice delayed is justice denied. Unless IPR holders want to invest the time and money involved in years of litigation, the sluggishness of the legal system puts them at a disadvantage because they lose one of their bargaining chips—the threat of taking the defendant to trial.

#### e. *The Lack of Quality Convictions*

Another problem that contributes to the lack of deterrence in the country is the quality of convictions. Going after the pro-

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<sup>194</sup> See Coonan, *supra* note 52.

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

<sup>196</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT 43 (2008) [hereinafter 2008 SPECIAL 301 REPORT].

<sup>197</sup> See *Transformers’ Breaking Records*, MANILA TIMES, July 12, 2007.

<sup>198</sup> See *id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* Movie Industry Anti-Film Piracy Organization president Engr. Roesholm Camaligan said, “This proven [sic] to be a far more effective way of ensuring that the person would not do it again. The public needs a reminder that bringing recording devices into theaters is strictly prohibited.” *Id.*

<sup>201</sup> See discussion *supra* Part III.E.4.b.

<sup>202</sup> See INVESTMENT CLIMATE STATEMENT, *supra* note 21, at 11.

ducers and suppliers of pirated optical media and counterfeit goods is more effective than targeting the street vendors who ultimately sell the goods to the public.<sup>203</sup> Also, when major IPR violators get arrested, convicted, and end up serving prison sentences, other IPR criminals are likely to take note.<sup>204</sup> Yet the IPR violators being arrested and convicted in the Philippines are not the “big fish.”<sup>205</sup> The IIPA notes that no pirate manufacturer of optical discs has ever been convicted.<sup>206</sup> The USTR also raised this point in 2007 when it encouraged the Philippines to increase the number of convictions “arising out of the optical disc plant inspections.”<sup>207</sup>

And the big fish are out there. For example, organized crime syndicates play a role in optical disc piracy in the country. The Motion Picture Association (MPA) lists a large number of organized crime groups involved with counterfeit DVDs in Asian countries, including the Philippines.<sup>208</sup> In Metro Manila, Muslim-Filipino gangs dominate the retail market in areas such as Quiapo, while Filipino-Chinese gangs working for inter-

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<sup>203</sup> See Focus on Intellectual Property Rights: Roundtable: Enforcement, A Priority for All Countries (Jan. 2006), available at <http://www.america.gov/st/econ-english/2008/April/20080429224837myleen0.7652354.html> [hereinafter Focus on IPR]. The apprehension and conviction of Huang Jer-sheng and three of his associates in Taiwan illustrates the importance of stopping the producers and distributors of pirated optical media. Press Release, Microsoft, Prison Sentences for Ringleaders of Global Software Counterfeit Syndicate (Feb. 8, 2008), <http://www.microsoft.com/presspass/press/2008/feb08/02-04TaiwanConvictionsPR.msp>. Huang was part of an international piracy ring that was responsible for “the production and distribution of *more than 90 percent* of the high-quality counterfeit Microsoft software products either seized by law enforcement or test-purchased around the world.” *Id.* (emphasis added). Huang received four years imprisonment, the longest sentence ever handed down by a Taiwanese court for this type of crime. *Id.*

<sup>204</sup> See Statement at the Symposium of the Americas, *supra* note 132; David Hechler, *Fast Footwork: Hunting for Fakes*, IP LAW & BUS., June 2007 (“When a guy is arrested and put in prison . . . [e]veryone hears about it. So it’s a great threat”).

<sup>205</sup> See Coonan, *supra* note 52; Martin, *supra* note 134.

<sup>206</sup> IIPA 2008 SPECIAL 301 REPORT SUBMISSION, *supra* note 28, at 304.

<sup>207</sup> Intellectual Property Coalition, Inc., 2007: *Issues and Challenges in the Protection and Advancement of Intellectual Property Rights in the Philippines*, at 3, [http://www.ustr.gov/assets/Trade\\_Sectors/Intellectual\\_Property/Special\\_301\\_Public\\_Submissions\\_2008/asset\\_upload\\_file63\\_14489.pdf](http://www.ustr.gov/assets/Trade_Sectors/Intellectual_Property/Special_301_Public_Submissions_2008/asset_upload_file63_14489.pdf) (last visited Feb. 28, 2009).

<sup>208</sup> See MOTION PICTURE ASS’N OF AMERICA, ORGANIZED CRIME INVOLVEMENT IN MOTION PICTURE PIRACY, ASIA-PACIFIC REGION (2007) (on file with author) [hereinafter ORGANIZED CRIME].

national criminal syndicates manufacture the goods.<sup>209</sup> Organized crime groups from countries such as Malaysia, Singapore, and Thailand provide money, “management, technical assistance, and the production of stampers and other equipment” to pirate production plants that would otherwise be unviable.<sup>210</sup> Even politicians dabble in counterfeit goods production in order to help fund their campaigns, one senior law enforcement official admitted to the author.<sup>211</sup> In the end, though, very few, if any, of these big fish are arrested, prosecuted, and convicted.

Overall, the legal system suffers from a number of problems that contribute to the country’s rampant IPR infringement: backlogs and delays, a judicial lack of urgency, and the lack of deterrence that results from IPR violators either failing to be caught, prosecuted, and convicted or failing to pay their fines or serve their prison sentences. IP Philippines recognizes these issues, noting that “[i]mproving prosecution and adjudication is one of the most challenging tasks faced by the [Philippine government].”<sup>212</sup> If the country is going to make significant strides against IPR infringement, it needs not only to overhaul the legal system, but also to address its administrative shortcomings by devoting more resources to agencies such as the OMB and by installing leadership that will push that same agency more towards institutionalization. However, there are other, more fundamental, reasons that prevent these things from happening and cause IPR infringement to remain entrenched in the country.

#### IV. A CLOSER LOOK AT WHY IPR INFRINGEMENT REMAINS ENTRENCHED IN THE PHILIPPINES

So far this Article has provided an overview of the IPR protection and enforcement situation in the Philippines; it has identified the laws, international agreements, and government agencies dealing with IPR; discussed the scope and types of infringement; and analyzed some of the positive steps the country has taken and also the persisting problems it faces in combating IPR infringement. Next, it analyzes how Filipinos’ ignorance of

<sup>209</sup> *See id.*

<sup>210</sup> *Loose Rules*, *supra* note 69.

<sup>211</sup> The official revealed this information under the guarantee of anonymity.

<sup>212</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 29.



and indifference towards IPR perpetuates IPR infringement in the country. The general lack of respect for IPR, which comes from the minimal awareness or understanding, or both, of IPR among Filipinos, along with an acceptance of the current IPR protection and enforcement status quo and a desire to stand up to the developed world while making or saving money through IPR infringement, are the driving forces behind the continued rampant IPR violations in the Philippines.

### A. Ignorance of IPR

Getting people to respect and protect IPR is difficult if those people lack an adequate understanding of IPR and the consequences of violating them.<sup>213</sup> In the Philippines, most people, whether they are small business owners or consumers, know very little, if anything, about IPR.<sup>214</sup> Small and medium-sized enterprises may be run by people who do not understand the concept of IPR or that their IP is an asset that can be protected.<sup>215</sup> Similarly, consumers who are incapable of distinguishing between legitimate and illegitimate products will usually opt for the cheapest goods, which are the counterfeit versions.<sup>216</sup>

This IPR ignorance is not due simply to the limited number of IPR programs and awareness campaigns throughout the country, but is also the result of the dire state of education in general in the Philippines.<sup>217</sup> Nearly twelve million people,

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<sup>213</sup> See Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People's Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 221 (2007).

<sup>214</sup> See STRENGTHENING THE IP SYSTEM, *supra* note 24, at 5; *Intellectual Piracy*, *supra* note 70. Cf. Chen, *supra* note 213, at 220 (“[Consumers in developing countries] are often simply unaware of or insensitive to the consequences of purchasing or using infringing products.”).

<sup>215</sup> See Maricris C. Carlos, *In Search of a Clear National IP Strategy*, BUS. WORLD (Phil.), Sept. 14, 2006.

<sup>216</sup> See Chen, *supra* note 213, at 220; Danilo V. Adorador III, *Microsoft Partners with Local IT Sector vs. Piracy*, SUN STAR (Cagayan de Oro, Phil.), Feb. 12, 2008 (noting that consumers who buy computers may be unaware that the computers are loaded with pirated software), available at <http://www.sunstar.com.ph/static/cag/2008/02/12/bus/microsoft.partners.with.local.it.sector.vs.piracy.html>.

<sup>217</sup> See Contreras & Ubac, *supra* note 4 (discussing some of the problems the Philippines faces with its education system); see also Press Release, U.S. Agency Int'l Div., United States Delegation Statement 2006 Philippines Development Forum Consultative Group and Other Stakeholder Meeting for the Philippines, (Mar.

roughly 13 percent of the population, have not attended school.<sup>218</sup> Classrooms remain overcrowded despite the Department of Education's attempt to limit class sizes to 45 students per classroom.<sup>219</sup> Add to this poor facilities<sup>220</sup> and incompetent teachers, especially in rural areas,<sup>221</sup> and it is no wonder that most Filipinos lack a basic understanding of IPR. These problems stem from the "[w]eak fiscal position of the country[.]"<sup>222</sup> Basic education does not receive enough money, leaving administrators unable to effectively address the deficiencies.<sup>223</sup> The Philippines allocates only 2.5% of its GDP for education when UNESCO suggests 6%.<sup>224</sup> Also, while the World Bank recommends countries spend at least 20% of their national budget on education, the Philippines spends only 12%.<sup>225</sup> Even those Filipinos who are educated may not have sufficient IPR training or, as the next section examines, may have little regard for IPR.

### B. *Indifference towards IPR*

There are a large number of individuals dedicated to improving IPR protection and enforcement in the Philippines. Despite these advocates' efforts, IPR is not a Philippine priority—neither for the average citizen nor the average politician.<sup>226</sup> The vast majority of the population remains indifferent towards IPR protection for a number of reasons. As discussed above, ig-

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31, 2006), [http://www.pdf.ph/downloads/Summary%20Report%20of%20the%20Chairman%27s%20Proceedings\\_Final%20Jun6\\_2006.pdf](http://www.pdf.ph/downloads/Summary%20Report%20of%20the%20Chairman%27s%20Proceedings_Final%20Jun6_2006.pdf) (emphasizing that the Philippine education system has deteriorated significantly over the past three decades) [hereinafter U.S. Delegation Statement].

<sup>218</sup> Contreras & Ubac, *supra* note 4.

<sup>219</sup> *Id.*

<sup>220</sup> See Ongpin, *supra* note 4.

<sup>221</sup> See Ordinario, *supra* note 4 (discussing the U.N.'s "2007 World Youth Report").

<sup>222</sup> Contreras & Ubac, *supra* note 4.

<sup>223</sup> See Contreras & Ubac, *supra* note 4. Resources alone, however, are not enough; they need to be spent in an efficient manner. See Ordinario, *supra* note 4.

<sup>224</sup> Contreras & Ubac, *supra* note 4.

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

<sup>226</sup> See, e.g., Cleofe Maceda, *Officials Lack Motivation to Fight Counterfeiting*, GULF NEWS (U.A.E.), Feb. 4, 2008 ("We haven't motivated our leaders to take the steps that must be taken . . . Policymakers must stand up and make intellectual property (IP) enforcement a priority.").

norance may be one.<sup>227</sup> Yet even when Filipinos understand IPR, many still violate them. The next section takes a closer look at some of the reasons for their indifference, including their assumption that the benefits of strong IPR protection do not outweigh the costs and the culture of acceptance of IPR violations that is fed, in part, by the backlash against pressure from the more dominant developed world and the money to be made or saved through IPR infringement.

### 1. *What is in the Philippines' Best Interest?*

Every country has different goals and priorities “due to the variations in the level of wealth, economic structure, technological capability, political system, and cultural tradition. . . .”<sup>228</sup> For example, examine the United States. According to one U.S. government official, “[i]ntellectual property is America’s competitive advantage in the global economy of the 21st century. . . . Theft of intellectual property threatens America’s economic prosperity and the health, safety, and security of its citizens.”<sup>229</sup> After all, the United States is a major producer and exporter of IP in the world.<sup>230</sup> IPR protection is thus one of the United States’ priorities, both at home and abroad, that receives a great deal of attention and resources.

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<sup>227</sup> See *supra* Part IV.A.

<sup>228</sup> Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 239 (2001).

<sup>229</sup> D. Kyle Sampson, *Message from the Chairman* in U.S. DEP’T OF JUSTICE, PROGRESS REPORT OF THE DEPARTMENT OF JUSTICE’S TASK FORCE ON INTELLECTUAL PROPERTY iii (2006). The IIPA estimates that “core” copyright industries (copyright-related industries whose primary purpose is to produce and distribute or both copyright materials) in the U.S. accounted for 6.56% of GDP, or \$819.06 billion, in 2005. INT’L INTELL. PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2006 REPORT (2007), <http://www.ifpi.org/content/library/20070130-highlights.pdf>. “Total” copyright industries in the U.S., which include core, partial, non-dedicated support, and interdependent copyright industries, accounted for 11.2% of GDP, or \$1.3 trillion, in 2005. *Id.*

<sup>230</sup> See Michael Geist, Op-Ed, *Ignore the U.S. Copyright Bullies*, BBC NEWS, Apr. 25, 2007, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/6592133.stm>. Also, in the United Kingdom, for example, copyright and related industries accounted for 7.1% of GDP in 2000. See INT’L INTELL. PROP. ALLIANCE, INITIAL SURVEY OF THE CONTRIBUTION OF THE COPYRIGHT INDUSTRIES TO ECONOMIC DEVELOPMENT 7 n. 44 (2005) [hereinafter IIPA SURVEY].

The Philippines, on the other hand, is primarily a consumer and net importer of IP.<sup>231</sup> Its economy is made up of mostly non-IP intensive commerce such as light industry and agriculture.<sup>232</sup> In the entertainment industry, foreign movies and music make up a majority of the market.<sup>233</sup> Devoting time and resources to IPR protection may be a high priority for the United States, but not for the Philippines. As a developing country with both limited technological and industrial development capabilities and copyright industries and marketing, it has a different optimal level of IPR protection than a developed country.<sup>234</sup> Spending a significant amount of its already scarce resources on IPR protection would not “maximize social welfare.”<sup>235</sup> Instead, letting IPR enforcement slide can be attractive to a developing country such as the Philippines because IPR-infringing industries provide jobs and keep consumers content with low prices, all while costing the government little, if anything.<sup>236</sup>

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<sup>231</sup> See CHARMAINE NUGUID-ANDEN, *Enhancing Business-Community Relations: Sun Microsystems Case Study 5* (2003), [http://www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2003/031201\\_EBCR\\_PHL\\_sun.pdf](http://www.worldvolunteerweb.org/fileadmin/docs/old/pdf/2003/031201_EBCR_PHL_sun.pdf) (noting that the Philippines is a net importer of IT products and services); cf. COMMISSION ON INTELL. PROP. RIGHTS, *INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 17* (2002), available at [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm) (“[M]ost developing countries are net importers of copyrighted material, just as they are net importers of technologies.”) [hereinafter “IPR Commission Report”].

<sup>232</sup> See Van V. Mejia, *The Modern Foreign Investment Laws of the Philippines*, 17 TEMP. INT’L & COMP. L.J. 467, 470 (2003).

<sup>233</sup> See, e.g., IP COALITION REPORT, *supra* note 13, at 16-17 (noting that from 1995-2000, foreign music sales shares accounted for more than half of the Philippine market).

<sup>234</sup> Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 IDEA 607, 619 (2003).

<sup>235</sup> *Id.*; WALDEN BELLO, *MULTILATERAL PUNISHMENT: THE PHILIPPINES IN THE WTO, 1995-2003*, 13-14 (2003), <http://www.apl.org.ph/ps/multilateral-punishment.pdf> (discussing the costs that come with making domestic legislation consistent with WTO obligations). IPR protection and enforcement can be expensive, with substantial costs for “developing a system adequate for handling mere counterfeit cases, let alone complicated patent disputes.” Maskus, *supra* note 8, at 466. Therefore, “the demand for IPRs must be large to permit a country to achieve administrative economics of scale.” *Id.* at 467.

<sup>236</sup> See Assafa Endeshaw, *Intellectual Property Enforcement in Asia: A Reality Check*, 13 INT’L J.L. & INFO. TECH. 378, 381 (2005); Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J.L. & ARTS 277, 291 (2004) (“LDCs will not be able to justify their share of the costs to comply with TRIPs unless they seek to

One reason that IPR infringement remains entrenched in the Philippines is that Filipinos are generally content with the IPR protection and enforcement status quo. As IP Philippines Director-General Cristobal notes, “[t]he value of an effective IP regime and its contribution to the economy in developing countries have yet to be felt, articulated and appreciated by its (sic) citizens.”<sup>237</sup> There are serious questions whether those in power believe that improving IPR protection and enforcement is worth the effort. President Arroyo may have said that “we must not lose sight of the fact that protection of IPR is first and foremost in the interest of the Filipino people” after the USTR moved the country from the Priority Watch List to the Watch List in 2006.<sup>238</sup> IP Philippines Director-General Cristobal may have stated that “there was no doubt that IPR protection is a national priority. . . and [that] the campaign against piracy shall and will be sustained” in a 2005-06 report.<sup>239</sup> But the president and IP Philippines have legitimate reasons for making those statements, whether they truly support those beliefs or not. It is in a country’s best interest to put on an air of devotion to strong IPR protection because there are international repercussions for doing otherwise: trade sanctions,<sup>240</sup> loss of current and prospective foreign investment<sup>241</sup> and damage to global reputation.<sup>242</sup>

Saying IPR protection and enforcement is a Philippine priority is one thing; backing up that statement with action is another. In the battle for government attention and resources, IPR protection ultimately takes a back seat<sup>243</sup> to bigger priori-

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obtain a greater economic return from such compliance.”). Note the Philippines is now considered a middle-income developing country, not an LDC. See Op-Ed, Edgardo B. Espiritu, *The ‘Middle-Income Trap’*, MANILA TIMES, Apr. 26, 2007.

<sup>237</sup> Adrian Cristobal Jr., Op-Ed, “*In Support of Copyright*,” BUS. MIRROR (Phil.), Mar. 29, 2007.

<sup>238</sup> Adrian Cristobal Jr., Op-Ed, *The Watch List (Part 3)*, BUS. MIRROR (Phil.), May 3, 2007 [hereinafter *Watch List Part 3*].

<sup>239</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 4.

<sup>240</sup> See 2007 SPECIAL 301 REPORT, *supra* note 34, at 311, n. 59.

<sup>241</sup> See Homere, *supra* note 236, at 286-87.

<sup>242</sup> See *An Open Letter to Buyers and Users of Pirated and Counterfeit Products*, E-MAIL NEWSBITS (Intell. Prop. Coalition, Manila, Philippines) Jan. 2007 (on file with the Intellectual Property Coalition and author).

<sup>243</sup> Former U.S. Attorney General Janet Reno stated, “Counterfeiting and piracy crimes have historically been a low enforcement priority for several reasons. Law enforcement officials too often perceive intellectual property enforce-

ties such as eradicating poverty,<sup>244</sup> improving education, building infrastructure, and ensuring murderers are brought to justice.<sup>245</sup> Assafa Endeshaw, an outspoken critic of the developed world's IPR policies, suggests:

[M]ost [non-industrialized countries] cannot afford to pay even normal infrastructure development costs. Education, roads, health and policing (keeping the peace) take such a huge chunk of the annual state budget (even without considering the toll of external debt repayments) that it would be idealistic to expect them to protect foreign IP interests. Nine times out of ten, the choices available to them would be the same regardless of the rewards they might reap or the punishments they might face for any success or default in enforcement.<sup>246</sup>

It would make sense for the Philippines to put its limited resources towards enforcing IPR if the benefits outweighed the costs.<sup>247</sup> Regardless of whether the benefits of enforcing IPR do in fact outweigh the costs, the perception of the Philippines—and other developing countries—is that IPR protection serves mostly foreign IPR holders.<sup>248</sup> Some ask why public funds should be used to enforce private rights, especially when law enforcement will confiscate IPR-infringing goods, only to have the rights holder fail to cooperate with authorities or file charges.<sup>249</sup>

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ment as advancing purely private, commercial interests, or interests that can be adequately vindicated by administrative or civil courts.” Statement at the Symposium of the Americas, *supra* note 132.

<sup>244</sup> See generally Cal U. Ordinario, *High GDP Growth Not Enough to Lick Poverty in RP*, BUS. MIRROR (Phil.), Feb. 1, 2008 (discussing the challenges the Philippines faces when it comes to eradicating poverty).

<sup>245</sup> See Leila Salaverria, *After Murder Victims, SC Will Focus on the Poor*, PHILIPPINE DAILY INQUIRER, Feb. 4, 2008.

<sup>246</sup> See Endeshaw, *supra* note 236, at 398. Accord Paul Engel & Sophie Houée, Capacities for a Global Management of Intellectual Property: Mapping Out Global Initiatives and Opportunities for Improvement 2 (April 2005), available at [http://www.gpgtaskforce.org/show\\_file.aspx?file\\_id=95](http://www.gpgtaskforce.org/show_file.aspx?file_id=95) (unpublished paper prepared for the Int. Task Force on Global Public Goods).

<sup>247</sup> See Jishnu Guha, Note, *Time for India's Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT'L & COMP. L. 225, 241 (2005).

<sup>248</sup> See Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Enforcement Pyramid*, 5 CASE W. RES. J. INT'L L. 53, 62 (2004).

<sup>249</sup> See *Technology, Weak Institutions*, *supra* note 2.



As it is, the benefits of strong IPR protection and enforcement do not outweigh the costs. The Philippines does not yet have enough of a stake in IPR protection and enforcement to justify devoting the resources required to address the problem adequately. IPR industries remain insignificant to the country's economy.<sup>250</sup> This is not to say that the Philippines receives no benefits from IPR protection and enforcement—it does. The president was right when she said that IPR protection was in the country's best interest, and the reasons why will be examined later.<sup>251</sup> The tougher sell—the part that most Filipinos are not buying yet—is that IPR protection is “*first and foremost* in the interest of the Filipino people.”<sup>252</sup> Politicians are reluctant to make IPR a priority,<sup>253</sup> especially whenever an election looms on the horizon, and the police—who often lack training and education—would rather tackle other, more straightforward, problems.<sup>254</sup> This translates into inadequate funding for enforcement agencies such as the OMB and sloppy investigations of IPR cases. Were it not for pressure from the U.S., a close ally of the Philippines, IPR infringement would likely be even more widespread.

### C. *The Culture of Acceptance of IPR Infringement*

Another reason IPR protection and enforcement are such a tough sell in the Philippines is the culture of acceptance of IPR infringement.<sup>255</sup> Throughout Asia, laws criminalizing certain types of IPR infringement seem to be only minimally effective in influencing the masses because people tend to “develop personal codes of conduct through interactions with people in their fam-

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<sup>250</sup> See e.g. discussion *infra* Part V.C.2.

<sup>251</sup> See discussion *infra* Part V.C.1.

<sup>252</sup> See *Watch List Part 3*, *supra* note 99.

<sup>253</sup> Cf. Guha, *supra* note 247, at 246 (noting that support for IPR protection can be a political liability).

<sup>254</sup> One IP expert (Numeriano Rodriguez of the IP Coalition), talking to the author, lamented that the police were mostly indifferent towards IPR, which ended up hurting the quality of investigations.

<sup>255</sup> See generally IP COALITION REPORT, *supra* note 13, at 39 (noting the general acceptance of IPR infringement in the Philippines); *Intellectual Piracy*, *supra* note 70 (discussing Filipino attitudes towards IPR protection and enforcement). For a discussion of the lack of respect for IPR in another developing Asian country, see Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 822, 829-30 (China).



ily and social circles, not from external sources such as law.<sup>256</sup> Many people who have a general understanding of copyrights and trademarks buy or sell counterfeit goods anyway. These people know that purchasing a pirated copy of the movie “Iron Man” for the equivalent of \$1.50 is illegal, but that does not stop them. Legitimate goods are too expensive for the majority of Filipinos, so when these people are faced with either getting the movie or going away empty-handed, they will buy the pirated copy. Moreover, a person may view illegally downloading a song from the internet as a victimless crime or something other than stealing.<sup>257</sup> Or that person may simply be greedy, impatient, or both. IPR-infringing goods, tangible or not, are just so cheap (or free) and easy for consumers to come by; they are also a low-risk, high-profit venture for manufacturers, distributors, and sellers.

Additionally, in the Philippines and other developing countries, IPR protection can be a symbol of the developed world’s desire to impose its will on poorer, less powerful countries. Rather than seeing IPR protection as in their own best interest, developing countries view it as a threat to their sovereignty. Furthermore, weaker IPR protection and enforcement has benefits for many Filipinos, rich or modestly poor: it earns, or saves, them money.

*a. Nobody Likes Being Told What to Do*

Developing countries such as the Philippines often feel bullied by the developed world.<sup>258</sup> With constant pressure from governments such as the United States to improve their IPR regimes, these developing countries may feel rushed into devot-

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<sup>256</sup> Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 775-76 (2003) (discussing copyright infringement as a crime). See generally Wineburg, *supra* note 160, at 26-29 (discussing the role Asian culture plays in IPR enforcement).

<sup>257</sup> See Laura H. Parsky, Deputy Assistant Att’y General, U.S. Dept. of Justice, Statement before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia Committee on Homeland Security and Governmental Affairs, United States Senate (June 14, 2006), available at <http://www.usdoj.gov/criminal/cybercrime/ParskyIPtestimony061405.htm>.

<sup>258</sup> See Mary Kopczynski, Comment, *Robin Hood Versus the Bullies: Software Piracy and Developing Countries*, 33 RUTGERS COMPUTER & TECH. L.J. 299, 328 (2007) (discussing software piracy in developing countries).

ing attention and resources to IPR protection and enforcement when the developed world, not the developing countries, are receiving the bulk of the benefits.<sup>259</sup> This leads to a resentment of the developed world that manifests itself in a number of ways, including a disregard for IP coming from wealthy countries.<sup>260</sup> One example is the “Robin Hood” mentality—take from the rich and give to the poor—that India’s patent regime,<sup>261</sup> and now it seems the Philippines’ system as well,<sup>262</sup> exemplify. In the same vein is the idea, not unique to citizens of developing countries, that the IPR holder—whether a multinational drug company, a Hollywood film studio, or a famous musician—is rich enough as it is.<sup>263</sup>

Nobody likes being told what to do, and developing countries such as the Philippines are no exception.<sup>264</sup> With their history of colonization (first the Spanish for roughly 330 years, then the Americans for close to a half century),<sup>265</sup> Filipinos grapple with complex emotions over giving in to demands from other countries. “Few things touch the delicate nerve of national sovereignty more than the autonomous capacity of states to administer their domestic laws in conformity with their own legal philosophies.”<sup>266</sup> Filipinos cannot help but remain somewhat

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<sup>259</sup> See *id.* at 328.

<sup>260</sup> See, e.g., *id.* (developing countries stealing software from developed countries).

<sup>261</sup> Guha, *supra* note 247, at 248-50. India’s patent regime includes doctrines such as “compulsory licensing” and “working requirements” that have led to “a rapid, almost overnight, evolution of a domestic industry that would normally have had to invent its way up or buy its way in.” *Id.*

<sup>262</sup> See Barbara Mae Dacanay, *Philippine Cheap Medicine Bill Approved*, GULF NEWS (U.A.E.), Apr. 29, 2008 available at <http://www.gulfnews.com/world/Philippines/10209407.html>. The bill will allow the Philippine government to set price ceilings on drugs and to import drugs from countries such as India. *Id.*

<sup>263</sup> See Vaillancourt, *supra* note 62. This attitude ignores the jobs and tax revenue IPR industries create for others, including those in developing countries. See *id.*

<sup>264</sup> See Assafa Endeshaw, *Do Asian Nations Take Intellectual Property Rights Seriously?* 4 SCRIPT-ED 167, 175 (2007) [hereinafter *Asian Nations*]; Yu, *supra* note 28, at 133-34 (China).

<sup>265</sup> JOSE S. ARCILLA, AN INTRODUCTION TO PHILIPPINE HISTORY 14, 101, 123 (4th ed. 1998).

<sup>266</sup> Jackson, *supra* note 234, at 640 (quoting J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 Va. J. Intl. L. 335, 339-40 (1997)).

skeptical about sacrificing national autonomy, especially when a former colonizer such as the United States is involved.<sup>267</sup>

This is the case with IPR.<sup>268</sup> The Philippines and the United States are close allies, but that relationship does not keep Filipinos from harboring doubts over U.S. demands for stronger IPR protection and enforcement. After all, developing countries tend to view IPR protection as a tool developed countries use to keep poorer countries technologically dependent on them.<sup>269</sup> U.S. pressure to devote scarce resources to IPR protection may keep the Philippines from addressing what it sees as more pressing policy concerns such as poverty or education.<sup>270</sup> One Filipino commentator captured the tension underlying the Philippine-U.S. relationship when he described what seems to be a Filipino preference for protectionism:

Protectionist sentiment may be only one expression of our inward-looking nationalism. In our country—as in Latin America—nationalism has been shaped by the overpowering presence of the United States. Resentment of the Americans—coupled with a recognition of our utter dependence on them—had produced self-doubt and turned nationalism inward, toward cultural authenticity and economic preferences for nationals.<sup>271</sup>

This turn toward cultural authenticity and economic preferences for nationals works on at least two levels with IPR. First, at the government level, the Philippines may be reluctant to do what the United States says, such as devote more resources to IPR enforcement, because it sees foreign IPR holders, and not Filipinos, reaping most of the benefits.<sup>272</sup> Second, at the consumer level, Filipinos may buy IPR-infringing goods because they believe doing so is not really hurting Filipinos, again because foreign IPR holders dominate the market.<sup>273</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> See Pulmano, *supra* note 3, at 255.

<sup>270</sup> Jackson, *supra* note 234, at 640.

<sup>271</sup> Juan T. Gatbonton, Op-Ed, 'Hospitable' Filipinos Like their Economy Closed, MANILA TIMES, Feb. 4, 2008, available at [http://www.manilatimes.net/national/2008/feb/04/yehey/top\\_stories/20080204top4.html](http://www.manilatimes.net/national/2008/feb/04/yehey/top_stories/20080204top4.html).

<sup>272</sup> For example, local businesses could suffer from stronger IPR protection because foreign companies may be more likely to enter the market and compete. See *Asian Nations*, *supra* note 264, at 176.

<sup>273</sup> This, of course, is not true because even foreign IPR industries create jobs and tax revenue in the Philippines. See *infra* Part V.C.1.

Overall, the culture of acceptance of IPR infringement in the Philippines can be seen as a backlash against developed countries (the United States in particular) and an effort on the Philippines' part to retain national autonomy. But there is something else at work here, too.

#### D. *Money Earned or Saved through IPR Infringement*

The absence of a culture of respect for IPR in the Philippines can also be attributed to the root of all evil: money. IPR infringement is a low risk, high profit enterprise that means more money in the pockets of sellers and buyers alike.<sup>274</sup>

For vendors of pirated optical media or fake bags, shoes, and watches, IPR infringement may simply be a means of survival. For example, as Matt Jackson points out, in China:

[E]conomic reforms . . . have left tens of millions of unemployed workers scrambling for a living. Selling pirated films and music is an easy and fairly safe method of getting by. According to one recent story, even a man jailed three times for a total of nine months continues to sell pirated goods as a way to make a living.<sup>275</sup>

The same holds true, albeit on a much smaller scale, in the Philippines. Continued efforts to crack down on sellers of IPR-infringing goods such as President Arroyo's offer of an alternative source of income to pirated optical media vendors in the notorious Quiapo market area have met with little, if any, success.<sup>276</sup> These are among the same vendors who supposedly "committed to stop distribution of Filipino movies as well as pornographic. . . materials" back in early 2005.<sup>277</sup> But as anyone who has walked around the Quiapo market area as late as the middle of 2008 can attest, both Filipino movies and pornographic DVDs continue to be widely available.<sup>278</sup> Vendors keep selling

<sup>274</sup> See DuBose, *supra* note 51, at 484.

<sup>275</sup> See Jackson, *supra* note 234, at 638.

<sup>276</sup> See STRENGTHENING THE IP SYSTEM, *supra* note 24, at 56.

<sup>277</sup> Rommer M. Balaba et al., *DVD Pirates Request for Arrest Moratorium*, BUS. WORLD (Phil.), Feb. 10, 2005. The spokesperson for the Quiapo building owners also said, "We . . . would advise our tenants to stop selling pirated music CDs, particularly those that feature Filipino artists." *Id.* This is an example of the "Robin Hood" mentality discussed earlier. See *supra* Part IV.B.2.a.

<sup>278</sup> Foreign movies tend to be easier to find than Filipino movies.

the illicit items because it provides them with income that would otherwise be out of reach.<sup>279</sup>

While some vendors remain in the for-profit IPR infringement business out of economic necessity, others do so in order to make more money than they could with legitimate jobs. Yet vendors are only part of the for-profit IPR infringement story. Someone has to produce, distribute, and in some cases facilitate the sale of the goods, and that person will do so because, just like selling the goods, it is profitable. Organized crime syndicates are involved in the business.<sup>280</sup> But so are politicians and mall owners.<sup>281</sup> According to the IIPA, key mall owners, who often collect rent and then turn a blind eye to the sale of IPR-infringing goods on their premises, are members of Congress.<sup>282</sup> Holding mall owners criminally liable for the sale of IPR-infringing goods on their premises is an established practice in countries such as the United States, but not so in the Philippines, where even though such a provision exists, it has never been enforced.<sup>283</sup> Instead, in an attempt to hold mall owners more accountable for the items being sold on their premises, the OMB has tried to convince mall owners to agree to require vendors selling optical media to secure clearance from the NBI and the OMB before the vendors would be allowed to continue operating.<sup>284</sup> With people in high places profiting from IPR infringement, improving IPR enforcement becomes all that much more difficult.<sup>285</sup>

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<sup>279</sup> See *Intellectual Property Challenges*, *supra* note 8, at 467 (“In most developing economies there is significant employment in producing counterfeit goods and pirated copies of music and videos. These workers must find alternative employment as stronger standards are enforced.”). However, a reduction in piracy could translate into higher paying jobs for counterfeit optical media vendors, as legitimate firms, which pay better than pirate outlets, would hire workers as they expand to meet the new consumer demand for legitimate goods. *See id.*

<sup>280</sup> See ORGANIZED CRIME, *supra* note 208.

<sup>281</sup> See *Authorities Entrust Malls with Anti-Piracy Measures*, *supra* note 141.

<sup>282</sup> See Salvosa, *supra* note 58.

<sup>283</sup> Elaine Ruzul S. Ramos, *Govt Pursues Drive Against Fake Products*, MANILA STANDARD, Jan. 19, 2007.

<sup>284</sup> See *Authorities Entrust Malls with Anti-Piracy Measures*, *supra* note 141. Only one entity, SM Malls, had given a definite response. *Id.*

<sup>285</sup> Cf. Robert M. Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 IDEA 491, 538 (1997) (noting that self-interest among a country's elite is one motive preventing judicial system reform in developing countries).

Finally, most Filipinos remain indifferent toward IPR infringement because, as consumers, they benefit financially from piracy and counterfeiting.<sup>286</sup> IPR infringers act as an “economic leveler,” making goods that would otherwise be out of reach affordable.<sup>287</sup> For a country with as sharp class distinctions as the Philippines,<sup>288</sup> pirated DVDs and fake watches help narrow the gap between the rich and the poor.<sup>289</sup> Moreover, for the minority of Filipinos who can afford legitimate goods, counterfeit products simply save them money.<sup>290</sup> The often significantly higher price of legitimate goods versus their much cheaper illegitimate counterparts makes the decision to buy pirated copies of software easy for many consumers.<sup>291</sup> Legitimate operating system software may cost over the equivalent of \$300, while the illegitimate version may go for as little as \$4 or \$5 in the country.<sup>292</sup> Likewise, consumers can buy single DVDs containing twelve or even sixteen movies from pirated optical media vendors for one-tenth the cost of a legitimate DVD.<sup>293</sup>

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<sup>286</sup> BELLO, *supra* note 81, at 13-14 (quoting *Earning from Others' Intellectual Creations*, PHILIPPINE DAILY INQUIRER, Feb. 17, 2003, at C7).

<sup>287</sup> *Id.*

<sup>288</sup> See *Survey: Rich-Poor Gap Widens*, PHILIPPINE DAILY INQUIRER, Jan. 13, 2008 available at [http://newsinfo.inquirer.net/inquirerheadlines/nation/view\\_article.php?article\\_id=111995](http://newsinfo.inquirer.net/inquirerheadlines/nation/view_article.php?article_id=111995).

<sup>289</sup> Jonas Baes, Paper read at the Conference on “Media Practice and Performances Across Cultures” at the University of Wisconsin-Madison, *Towards a Political Economy of the “Real”: Music Piracy and the Philippine Cultural Imaginary*, (Mar. 14-17, 2002), available at <http://polyglot.lss.wisc.edu/mp/Activities/Media%20Practice%20Spring%202002/Baes.htm>

<sup>290</sup> See IP COALITION REPORT, *supra* note 13, at 38; Chen, *supra* note 213, at 216.

<sup>291</sup> See *Authorities Entrust Malls with Anti-Piracy Measures*, *supra* note 141.

<sup>292</sup> *Id.* Microsoft, realizing that the majority of people in developing countries are priced out of the market, finds ways to make some of its products more affordable, such as selling heavily discounted software designed for students to governments. See Lawrence Casiraya, *Microsoft to Offer \$3 Software for Students*, INQUIRER.NET, Apr. 21, 2007, available at [http://technology.inquirer.net/infotech/infotech/view\\_article.php?article\\_id=61714](http://technology.inquirer.net/infotech/infotech/view_article.php?article_id=61714).

<sup>293</sup> One of these 12-in-1 DVDs may cost as little as PHP50 (\$1.20) after bargaining. A legitimate DVD, on the other hand, can cost PHP500 (\$12) or more. Video compact discs (VCDs) are also popular in the Philippines. VCDs are similar to DVDs, but they hold less information. See Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998 at D1. They are also priced much more competitively than DVDs. New releases in VCD format usually sell for around PHP250 (\$6), while older ones may be as cheap as PHP50 or PHP100 (\$1.20 to 2.40). However, pirated DVDs will almost always be cheaper than legitimate VCDs or DVDs. A camcorderd version of a movie still in the theaters costs around PHP70

In summary, under one view, the Philippines may be doing what it can to protect IPR considering its limited resources.<sup>294</sup> The country has an adequate legislative framework with the appropriate regulatory agencies in place to protect IPR. Yet, despite this, IPR infringement remains entrenched in the country. The blame lies in a number of areas. First, the lack of resources, administrative capacity, and interagency cooperation all limit the effectiveness of enforcement efforts. The OMB, in particular, suffers from insufficient funding and lackluster leadership that keeps the agency from focusing more on building up its institutional capacities rather than conducting its largely ineffective raids. Moreover, the Philippine legal system provides little deterrence to IPR violators, as it is plagued by backlogs and delays and fails to ensure penalties—whether fines or jail time—are served. Finally, IPR is low on the Philippines' list of priorities. Many Filipinos are either not aware or do not understand IPR, thanks in part to a poor education system. And even if they do have a basic grasp of IPR, the assumption is that devoting scarce resources to their protection and enforcement is not in the country's best interest. IPR industries in the Philippines are too insignificant to justify the expenses that come with strong IPR protection and enforcement because the country already has its hands full with major developmental issues such as poverty eradication and a lack of infrastructure. Filipinos—especially those who belong to the economic and political elite—are content with the IPR protection and enforcement status quo because a culture of acceptance of IPR infringement has taken a hold that stems from the country's desire to assert its sovereignty in the face of pressure from the developed world, and also the money that Filipinos make or save from violating copyright and trademark laws. This Article will now examine what it will take for there to be a significant reduction in IPR infringement in the Philippines.

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(\$1.70). The quality of the pirated DVDs is a bit of a wild card, but the more savvy vendors will usually allow a potential customer to view parts of the DVD before purchase.

<sup>294</sup> See IP COALITION 2007 SUBMISSION, *supra* note 2, at 19.



## V. KEYS TO SIGNIFICANTLY REDUCING IPR INFRINGEMENT IN THE PHILIPPINES

### A. Overview

There is no easy solution to eliminating IPR infringement in the Philippines (or in any other country for that matter). Doing so will take time and will involve everyone from the average consumer to senior government officials.<sup>295</sup> Citizens need to be educated and violators need to be punished.<sup>296</sup> The International Chamber of Commerce lists three goals to help curb piracy counterfeiting:

- 1) increase public and political awareness of the economic and social harm associated with counterfeiting and piracy activities, 2) encourage government action and the allocation of resources toward improved IPR enforcement, and 3) create an environment in which intellectual property is respected and protected.<sup>297</sup>

This well-rounded approach aims to instill an understanding of and respect for IPR in people that will translate into more responsible consumer behavior and increased funding for IPR enforcement agencies.

If the Philippines is going to make significant strides in reducing IPR infringement, its citizens have to understand IPR protection and enforcement and believe that they are in their best interest. Education and training are an important part of the solution, but ultimately Filipinos must have a stake in strong IPR protection and enforcement so that they make them a priority. As a middle-income developing country, the Philippines focuses on more pressing issues such as poverty rather than IPR protection and enforcement, which require adequate funding to be effective. In order to make IPR protection and enforcement priorities, Filipinos have to realize the damage IPR

<sup>295</sup> See Coonan, *supra* note 52.

<sup>296</sup> Mike Ellis, Senior Vice President and Regional Director for the MPA in Asia-Pacific stated, "It's a difficult task to stamp out piracy overnight, as the problem needs to be addressed on many levels — from educating consumers about the problem and how it impacts them to enforcing tougher penalties that make pirating activities less attractive[.]" *Id.*

<sup>297</sup> INT'L CHAMBER OF COMMERCE, INTELLECTUAL PROPERTY: SOURCE OF INNOVATION, CREATIVITY, GROWTH, AND PROGRESS 4 (2005), [http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual\\_property/Statements/BASCAP\\_IP\\_pub.pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/Statements/BASCAP_IP_pub.pdf) [hereinafter INTELLECTUAL PROPERTY].

infringement does to the country, and also the potential strong protection and enforcement hold for increasing economic development and global competitiveness. But, right now, strong IPR protection and enforcement alone will not necessarily translate into sustained economic growth and technological innovation in the Philippines. This is because other, institutional, factors, such as an the openness of a country's economy, political stability, and the quality of its legal system affect the likelihood that strong IPR protection and enforcement will lead to long-term growth.

### B. *Education and Training*

One way to get people to understand and respect IPR is through education and training. An individual—whether a judge, a customs official, a politician, or a private citizen—needs at least a basic understanding of IPR before he can develop a respect for IPR protection and a desire to enforce or abide by these rights. But education and training alone are not enough. Even when people understand IPR, some will still violate them in order to make or save money. Thus, in order to effectively instill the merits of a strong IPR protection regime, deterrence is also needed.

Improving IPR protection in the Philippines depends in large part on public support. Passing IPR laws and then hoping for compliance is not enough.<sup>298</sup> If Filipinos are going to respect and abide by IPR laws, they need to understand what IPR represent and how they can benefit from protecting these rights.<sup>299</sup> After all, their consumer demand fuels the production, distribution, and sale of pirated optical media and counterfeit goods.<sup>300</sup> Eliminating the people's willingness or desire to own pirated or counterfeit goods will mean eliminating the supply of those goods. Moreover, if Filipinos support strong IPR protection, then the police will be more willing to shut down vendors, prosecutors will more vigorously pursue IPR cases, and judges will be more likely to hand down deterrent sentences.<sup>301</sup>

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<sup>298</sup> See Green, *supra* note 186, at 239.

<sup>299</sup> See IP COALITION REPORT, *supra* note 13, at 37.

<sup>300</sup> See BLAKENEY, *supra* note 37, at 42.

<sup>301</sup> See Focus on IPR, *supra* note 203.

Building IPR awareness and understanding is a challenge. What is the best way to instill the benefits of strong IPR protection in the masses effectively? Governments, organizations, and individuals can all play a role in IPR, doing so through education and training. For instance, public awareness campaigns, whether sponsored by the government or pro-IPR businesses or organizations, help foster a basic understanding of IPR.<sup>302</sup> Also, seminars for small and medium-sized businesses, such as those put on by IP Philippines, highlight IP as a potential asset and provide information on how to protect it.<sup>303</sup>

Governments also need to provide adequate training for civil servants who deal with IPR.<sup>304</sup> For example, effective IPR enforcement will be limited without knowledgeable customs personnel. As Michael Smith, an attorney adviser in the Office of Enforcement at the U.S. Patent and Trademark Office (USPTO), said, "You need customs officials at the border who are good consumers, familiar with the trademarks that have been recorded, and who have an interest in enforcing the rights of trademark holders."<sup>305</sup>

Ideally, parents and other family members would have a part in instilling a respect for IPR in children, just like they do with such things as personal property and other basic values. The problem is that a lot of parents either do not understand or do not respect IPR. So without role models at home, younger Filipinos may need to learn about IPR in school. IP Philippines recognizes the need to target younger Filipinos, so it suggests developing an IP conscious culture through the education system.<sup>306</sup> Coordinating efforts with the Department of Education to include IPO awareness in the curriculum,<sup>307</sup> while a good idea, may be more of a dream than reality for now. The education system is in a poor state.<sup>308</sup> While some kind of IPR

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<sup>302</sup> See STRENGTHENING THE IP SYSTEM, *supra* note 24, at 13, 38-40.

<sup>303</sup> See *id.* at 38-39.

<sup>304</sup> See Sherwood, *supra* note 285, at 543 ("A major obstacle to upgrading intellectual property systems is the lack of trained people qualified to conduct an effective public administration.").

<sup>305</sup> Focus on IPR, *supra* note 203.

<sup>306</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 54.

<sup>307</sup> See Iris Cecilia C. Gonzales, *Philippines Targets Delisting from US List Intellectual Property*, BUS. WORLD (Phil.), Mar. 7, 2006.

<sup>308</sup> See U.S. Delegation Statement, *supra* note 217, ¶¶ 21, 35, 36.

curriculum may be possible in well-funded private schools, it is not likely to take hold in other schools that may not even have enough desks for their students. And major investment in primary and secondary education is critical not just for any kind of IPR curriculum to have a chance; it is also essential for an increasingly knowledge-based economy “because adequate supplies of labor skills promote innovation and technology adoption.”<sup>309</sup> Even at the university level, IP garners only minimal attention. Most Philippine universities—the hotbeds of innovation in the country—have yet to adopt IP policies.<sup>310</sup>

Overall, education and training are essential components in the fight against piracy and counterfeiting, as they help encourage a culture of respect for IPR. Yet even with education and training, consumers and politicians often remain indifferent. There is no guarantee that an individual will think twice about purchasing counterfeit goods or go around beating the IPR drum afterwards. The key to overcoming this indifference towards IPR depends on the benefits people derive from strong IPR protection and enforcement.

### C. *Political Will*

With solid IPR legislation and enforcement mechanisms in place, as well as an understanding that public IPR education and awareness remains an integral part in combating IPR infringement, the Philippines needs a true commitment to vigorous IPR protection and enforcement from its leaders, especially those in the executive and legislative branches, that goes beyond the usual U.S.-mollifying rhetoric.<sup>311</sup> Strong political will at the top of the government is necessary for IPR enforcement to receive enough funding and attention to be effective.<sup>312</sup> Andy Y. Sun, discussing lessons learned from Taiwan’s experience re-

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<sup>309</sup> *Intellectual Property Challenges*, *supra* note 8, at 472; accord Op-Ed, Sin-Ming Shaw, *Thaksin Can Help Reawaken the Thai Tiger*, S. CHINA MORNING POST, Mar. 8, 2008 (“Without quality education, there can be no quality workforce, without which no country can hope to compete.”).

<sup>310</sup> See Veronica S. Cusi, *IP Policy Finalized by Gov’t*, BUS. WORLD (Phil.), Nov. 8, 2007.

<sup>311</sup> For example, the Philippines “continues to lack aggressive prosecution of intellectual property rights (IPR) violators.” INVESTMENT CLIMATE STATEMENT, *supra* note 21.

<sup>312</sup> See Focus on IPR, *supra* note 203. Some of the large malls in Manila provide an example of strong will (albeit business rather than political) that leads to a

forming its IP regime, writes, “[a]n unequivocal commitment from the political leadership is perhaps the single most critical element to further momentum for reform.”<sup>313</sup> The Philippines has to be willing to make IPR enforcement a priority and commit more of its scarce resources to addressing the problem.<sup>314</sup> And those resources have to be used efficiently and effectively. As mentioned above, IPR is not yet a Philippine priority.<sup>315</sup>

So what needs to happen for the political leadership in the Philippines to make IPR a priority, and how will the leadership gain the general public’s support for this goal? The answer is that, ultimately, Filipinos need to see, believe, and act on the idea that they have a stake in strong IPR protection and enforcement. They need to realize that they can benefit from strong IPR protection and enforcement and that it is, in fact, in their long-term national interest.<sup>316</sup> However, at the moment, this is not happening on the scale necessary to significantly reduce IPR infringement in the country. As one Filipino copyright insider, speaking about book piracy, said, “[w]e lack the teeth, funds and the willpower in implementing the Copyright Law and the Intellectual Property Code. . . .”<sup>317</sup> Filipinos have trouble justifying the cost of strong IPR protection and enforcement because they are net consumers and importers of IP rather than producers and exporters.<sup>318</sup> They believe a high level of IPR protection and enforcement is not yet in the country’s best economic interest,<sup>319</sup> especially the economic and po-

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lack of counterfeit goods. These malls are virtually free of counterfeit goods because their owners want to maintain the malls’ reputations. *Id.*

<sup>313</sup> Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan’s Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 168 (1998).

<sup>314</sup> See INTELLECTUAL PROPERTY, *supra* note 297, at 4; Press Release, Bus. Software Alliance, New Study Projects Significant Economic Benefits from Reducing Software Piracy (March 10, 2008), <http://w3.bsa.org/india/press/newsreleases/india-pr-2008-03-10.cfm> (noting that one of the steps a government can take to reduce software piracy is to devote significant resources to the problem).

<sup>315</sup> See *supra* Part IV.B.

<sup>316</sup> See Reichman, *supra* note 110, at 469 (“Once the developing countries see that they, too, have a big stake in the global intellectual property system, the long-term prospects for that system would become bright, indeed.”).

<sup>317</sup> *Before You Photocopy that Book. . .*, *supra* note 87.

<sup>318</sup> See IPR Commission Report, *supra* note 231, at 11.

<sup>319</sup> Cf. Endeshaw, *supra* note 236, at 378 (“The fundamental reason for the impasse in enforcement of IP in Asia, as elsewhere in the non-industrial world, lies in the huge economic and technological gap between them and those of the indus-

litical oligarchs that do quite well with the status quo.<sup>320</sup> The Philippines has to embrace an IPR system that translates into significant benefits for its citizens, and not just foreign IPR holders from developed countries, in order to justify its expense on such a system.<sup>321</sup>

Domestic IPR industries have a role to play in pushing for better IPR protection and enforcement. Their support sends a signal to the government that local industries have a stake in strong IPR protection and enforcement. According to Sun,

[t]he most effective tool to convince that nation's leadership of the need for better Intellectual Property protection is the pressure from within, [i.e.], a self-initiated urge that stronger Intellectual Property protection is more to the benefit of that nation than to foreign states.<sup>322</sup>

For example, in Taiwan, the government "did not capitulate to U.S. demands for better IPR enforcement but rather voluntarily adopted a stricter regime upon evolving to a state where doing so was in its economic interest."<sup>323</sup> Only when the domestic copyright industry in Taiwan evolved did the government crack down on copyright piracy.<sup>324</sup> As domestic IPR industries grow and local businesses recognize that they can benefit from IP, they will be more likely to put more pressure on the government to commit to IPR protection and enforcement.<sup>325</sup> Yes, pressure

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trial nations"); Priest, *supra* note 255, at 820 ("[The Chinese government is not] obligated or inclined to protect the interest of private parties (many of whom, in the case of copyright owners, are foreigners) with the same urgency with which it protects its own interests.").

<sup>320</sup> See *supra* Part V.A-B (a further discussion of the Philippines' economic and political oligarchy).

<sup>321</sup> Cf. Reichman, *supra* note 110, at 466 ("In the end, of course, the developing countries' greatest need is to make the worldwide intellectual property system work for them and not just for coalitions of powerful rights holders operating from the developed countries."); Sherwood, *supra* note 285, at 493 ("A great deal will depend on the political willingness of countries to make their intellectual property systems work well to benefit their nations.").

<sup>322</sup> Sun, *supra* note 313, at 168.

<sup>323</sup> Guha, *supra* note 247, at 242.

<sup>324</sup> See *id.* at 245.

<sup>325</sup> Cf. Horacio Teran, *Intellectual Property Protection and Offshore Software Development An Analysis of the U.S. Software Industry*, 2 MINN. INTELL. PROP. REV. 1, 9-10 (2001) ("[L]ocal suppliers can play a role in overcoming nationalist and administrative barriers to improvements in public enforcement of intellectual property rights. With adequate organizational and financial resources, they can put pressure on local authorities to commit to public enforcement of intellectual

from foreign players such as the U.S. government has an impact on the strength of IPR protection and enforcement. And these foreign players play an important role in assisting developing countries with their IPR regimes.<sup>326</sup> But a true commitment to IPR protection and enforcement from the political leadership in the Philippines—one that results in adequate attention and funding—will come only when the domestic IPR industries have a strong enough voice to make it known that IPR protection and enforcement is in the country's best interest.<sup>327</sup>

### 1. *How Strong IPR Protection and Enforcement can Help the Philippines*

Regardless of the size or significance of a country's IPR industries, a solid IPR system can lead to a number of benefits.<sup>328</sup> It can spur economic development and increase global competitiveness by encouraging innovation and inviting FDI, which facilitates technology transfer and creates jobs and a source of tax revenue for the government.<sup>329</sup> When it comes to FDI, Jean Raymond Homere notes:

[D]eveloping countries with stronger IPR regimes are in a better position to attract knowledge-related foreign direct investments (FDI) flows. . . . Studies have shown a positive correlation between stronger IPR protection, FDI and the transfer of technology from developed countries to developing countries. . . . This is due to the

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property rights.”); Shiu, *supra* note 50, at 631 (“As a developing industrialized nation [Taiwan] with much economic power, local development may provide an internal push to increase IPR protection.”); Joseph A. Massey, *The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006*, 7 CHI. J. INT'L L. 231, 237 (2006) (noting that domestic businesses in China benefit from IPR enforcement).

<sup>326</sup> For example, through training and technical assistance.

<sup>327</sup> Cf. Sun, *supra* note 313, at 167-69 (citing domestic pressure as one of the keys to better IPR protection and enforcement).

<sup>328</sup> See IIPA SURVEY, *supra* note 230, at 1; Homere, *supra* note 236, at 277. *But see* Yu, *supra* note 228, at 234 (claiming that the idea that stronger IPR protection benefits developing countries has yet to be demonstrated); Endeshaw, *supra* note 236, at 380 (asserting that stronger IPR protection can have negative economic impacts on developing countries).

<sup>329</sup> See Homere, *supra* note 236, at 283; Simon Helm, *Intellectual Property in Transition Economies: Assessing the Latvian Experience*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 119, 130 (2003); INTELLECTUAL PROPERTY, *supra* note 297, at 10.



fact that foreign investors are more willing to invest in countries that provide adequate legal protection for intellectual property.<sup>330</sup>

Weak IP regimes can stunt the growth of a country's economy, as FDI in those cases "tends to be more limited and directed toward sales and distribution rather than manufacturing."<sup>331</sup>

Strong IPR protection can also help address one of the Philippines' most pressing concerns, eradicating poverty. As President Arroyo said, "[f]ighting piracy is fighting poverty because it enables Filipino excellence and enterprise to rise in the global arena, expanding opportunities and jobs along the way."<sup>332</sup> Countries with strong copyright protection, for instance, tend to experience a greater contribution to their GDP from copyright sectors.<sup>333</sup>

## 2. *The Philippines' Survival in the Global Economy*

The Philippines has to face the realities of an increasingly knowledge-based, global economy if it wants to improve the plight of its citizens.<sup>334</sup> As IP Philippines Director-General Cristobal said, "IP and innovation are essential to [the] country's survival and continued competitiveness" in the new econ-

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<sup>330</sup> Homere, *supra* note 236, at 286-87 (citations omitted).

<sup>331</sup> Helm, *supra* note 329, at 130.

<sup>332</sup> IP COALITION 2007 SUBMISSION, *supra* note 2, at 4 (quoting a speech by President Arroyo). Accord BLAKENEY, *supra* note 37, at 4 ("For developing countries, the nurturing of indigenous technological capacity through the intellectual property system has also proved to be a key determinant of economic growth and poverty reduction."); INTELLECTUAL PROPERTY, *supra* note 297, at 5 ("Intellectual property protection contributes to economic growth in both developed and developing countries by stimulating innovation, cultural diversity and technical development as part of a larger policy framework. Properly used, intellectual property rights can also be key tools for the alleviation of poverty through trade.")

<sup>333</sup> See IIPA SURVEY, *supra* note 230, at 1.

<sup>334</sup> Cf. Ongpin, *supra* note 4 (stating that high value work that depends on knowledge and innovation is a key to improved living conditions for the citizens of a country such as the Philippines); B. Zorina Khan, *Intellectual Property and Economic Development: Lessons from American and European History* 47 (Commission on Intell. Prop. Rights & Nat'l Bureau of Econ. Research, Study Paper No. 1a) ("Knowledge intensive industries account for an increasing fraction of national output in the developed countries and have led to claims of a 'new economy.'"), available at [http://www.iprcommission.org/papers/pdfs/study\\_papers/sp1a\\_khan\\_study.pdf](http://www.iprcommission.org/papers/pdfs/study_papers/sp1a_khan_study.pdf).

omy.<sup>335</sup> The country “should not be contented as a nation importing technologies. Neither should [it] be satisfied with being mere users of other nation’s technology.”<sup>336</sup> Instead, the Philippines “needs to be the creator, the inventor, the supplier of new technologies in the world market.”<sup>337</sup>

The country is home to a great deal of innovative and creative talent, but its domestic IPR industries suffer from the lack of effective IPR protection and enforcement.<sup>338</sup> This deficiency prevents these industries from reaching their full potential.<sup>339</sup> Because developing countries have limited capital and labor, they must depend on technical progress if they hope to someday grow their economies to the level of developed countries.<sup>340</sup> Promoting domestic IPR industries and IPR protection is a key component in a country’s economic development strategy.<sup>341</sup> It also helps support and enrich a country’s cultural heritage.<sup>342</sup>

One area where the Philippines can excel is the copyright sector.<sup>343</sup> Through vigorous IPR protection and enforcement, the country can help harness its creative talent in a number of copyright-related industries.<sup>344</sup> Copyright-related industries

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<sup>335</sup> Bernadette S. Sto. Domingo, *Strategy Grounded on Eight Areas*, BUS. WORLD (Phil.), Nov. 27, 2007. *Accord* STRENGTHENING THE IP SYSTEM, *supra* note 24, at 4.

<sup>336</sup> Sto. Domingo, *supra* note 335.

<sup>337</sup> Max V. de Leon, *IP Plan May Turn RP Into Global Player*, BUS. MIRROR (Phil.), Nov. 27, 2007.

<sup>338</sup> *Cf. U.S. Embassy Hosts IPR Roundtable Discussion Between U.S. Embassy, Industry Representatives*, U.S. FED. NEWS, June 8, 2005 (noting the downsides to weak IPR protection that hinder Philippine economic development) [hereinafter *U.S. Embassy Hosts IPR Roundtable*].

<sup>339</sup> See Marian Grace S. Ramos, *Investors Discouraged By Rampant Software Piracy, Says Group*, BUS. WORLD (Phil.), Oct. 23, 2007; Kerlyn G. Bautista, *IT Investments Fall As Piracy Rises*, BUS. WORLD (Phil.), Feb. 25, 2005.

<sup>340</sup> See Homere, *supra* note 236, at 283 (commenting on the work of developmental economist Robert Solow).

<sup>341</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 4; see *U.S. Embassy Hosts IPR Roundtable*. One of the aims of an IPR system is to “promot[e] . . . investment in knowledge creation and business innovation.” Homere, *supra* note 236, at 280.

<sup>342</sup> See *IP Philippine Confab Tackles Piracy*, BUS. WORLD (Phil.), May 3, 2007.

<sup>343</sup> See Carlos, *supra* note 215.

<sup>344</sup> See Bernadette S. Sto. Domingo, *Competitiveness Boost Seen From Creative Sectors*, BUS. WORLD (Phil.), July 20, 2006; *Focus on IPR*, *supra* note 203 (noting the link between effective IPR enforcement and growth in local music industries, especially in Asia). According to Maskus,

make up an estimated 5% of the Philippines' GDP,<sup>345</sup> but much of this comes from industries such as business process outsourcing (BPO), the fastest growing sector in the country, where Filipinos are working in an IP industry but not necessarily creating the IP.<sup>346</sup> Core copyright industries—those responsible for the creation of IP or high-value IP work such as the software, movie, or book publishing industry—account for much less of the 5% figure.<sup>347</sup> Many of these industries have only started to develop,<sup>348</sup> and have the potential to be a significant source of jobs and wealth in the country.<sup>349</sup>

For example, the information technology (IT) sector has been the source of a lot of government attention in recent years.<sup>350</sup> Yet the industry still lags behind its regional neighbors when it comes to IT competitiveness.<sup>351</sup> Piracy has hurt investments in the sector, which, for instance, dropped from 2002 to 2003 when the piracy rate increased.<sup>352</sup> On the bright side, industries such as software development and animation

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[c]opyrights also may materially promote business development. In the presence of weak and poorly enforced protection, copyright industries, such as publishing, entertainment, and software, are likely to be dominated by foreign enterprises (which can absorb temporary losses and afford to deter infringement) and pirate firms. Thus, imitative copies are cheaply available but the economy's domestic cultural and technological development is discouraged.

*Intellectual Property Challenges*, *supra* note 8, at 461-62.

<sup>345</sup> Press Release, Philippine Information Agency, Creative Sector Contribute 5% to Country's GDP – IP Philippines (Jan. 22, 2008), available at <http://www.pia.gov.ph/?m=12&r=&y=&mo=&fi=p080122.htm&no=18>.

Another estimate puts that number as high as 10%, although that figure is for the broad category of copyright-applicable industries. Kristine L. Alave, *Policy Makers Press for Updates to Copyright Law*, BUS. WORLD (Phil.), Sept. 14, 2006.

<sup>346</sup> *Id.* For instance, basic call center and transcription services generate over \$2 billion a year. Federico C. Gonzalez, *EntrepreNEWS*, BUS. WORLD (Phil.), July 19, 2007.

<sup>347</sup> Higher-end content such as software, engineering design, and animation services generate around \$300 million a year. *Id.*

<sup>348</sup> See Sto. Domingo, *Competitiveness Boost Seen From Creative Sectors*, *supra* note 344.

<sup>349</sup> See Alave, *supra* note 345.

<sup>350</sup> See Mejia, *supra* note 232, at 470-71.

<sup>351</sup> Press Release, Bus. Software Alliance, Philippines Ranks 11th in Asia Pacific in IT Competitiveness (Sept. 12, 2007), available at <http://www.bsa.org/country/News%20and%20Events/News%20Archives/enPH/2007/enPH-09122007-itcompetitiveness.aspx>. The Philippines ranked 11th in the Asia Pacific region, and 47th out of 64 countries. *Id.*

<sup>352</sup> See Ho, *supra* note 49.

possess great potential. "Philippine software houses now have a foothold in the global market," with sales of \$359 million in 2007 and a projected 30% growth in 2008.<sup>353</sup> These sales account for only a sliver of the world market.<sup>354</sup> The animation industry, which made \$105 million in 2007, is growing, and it aims to increase its number of animators from 7,500 to 25,000 by 2010.<sup>355</sup>

Also, the film industry in the Philippines could benefit from improved IPR protection and enforcement. The industry, whose rich history includes the works of such great directors as Gerardo de Leon and Lino Brocka, has been struggling.<sup>356</sup> Today it produces less than half the number of movies that it did only twenty years ago.<sup>357</sup> While the industry suffers from steep production costs, high taxes,<sup>358</sup> and strong competition from big budget foreign films and television, piracy remains its biggest problem.<sup>359</sup> The recent proliferation of digital films<sup>360</sup> and bump in local production revenue<sup>361</sup> are encouraging, but more effective IPR enforcement efforts will be needed if the industry is going to return to its past glory.<sup>362</sup>

#### D. IPR Protection and Economic Development

Strong IPR protection and enforcement have the potential to help a nation's economy grow, especially in a country with a promising copyright sector such as the Philippines. But the no-

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<sup>353</sup> Ike Suarez, *Pay Dirt Finally For Software Houses*, MANILA TIMES, Feb. 18, 2008.

<sup>354</sup> *See id.*

<sup>355</sup> Erwin Oliva, *RP Animators Producing More Original Content*, INQUIRER.NET, Feb. 18, 2008, <http://technology.inquirer.net/infotech/infotech/view/20080218-119545/RP-animators-producing-more-original-content.u>.

<sup>356</sup> *See Antipiracy Drive Brings Higher Earnings for Local Films*, MANILA TIMES, July 10, 2007.

<sup>357</sup> *Id.*

<sup>358</sup> *See* Jeffrey O. Valisno, *Stakeholders Push Reduction of Amusement Tax*, BUS. WORLD (Phil.), May 9, 2008.

<sup>359</sup> *See* Cuevas, *supra* note 47.

<sup>360</sup> *See* Nestor Torre, *Signs of Recovery and Renewal on Local Film Scene*, PHILIPPINE DAILY INQUIRER, Feb. 8, 2008; *Antipiracy Drive Brings Higher Earnings for Local Films*, *supra* note 356.

<sup>361</sup> *See id.* From £1.025 billion in 2005, receipts from local productions rose to £1.437 billion in 2006, or an increase of £.412 million or 40 percent." *Id.*

<sup>362</sup> Anti-piracy efforts may be a factor contributing to the increased local film revenue. *See id.*

tion that a developing country will see significant benefits from IPR enforcement is no slam-dunk. Players with vested interests in IPR enforcement, such as the IIPA, argue for stronger IPR protection in developing countries such as the Philippines by highlighting the economic advantages that will accrue to that particular country.<sup>363</sup> And the leaders of these developing countries, such as the president of the Philippines, often subscribe to this view, at least publicly.<sup>364</sup> But make no mistake: players such as the U.S. government ultimately push for stronger IPR protection because they themselves will benefit from it.<sup>365</sup> More objective observers do not necessarily buy into the idea that stronger IPR protection alone will lead to economic development.<sup>366</sup> As the prominent IPR scholar Keith Maskus contends, stronger IPR protection, by itself, could produce economic benefits for a developing country, but only under certain circumstances.<sup>367</sup> Other complementary policies must exist for a country to realize the benefits that come with stronger IPR protection.<sup>368</sup> What follows is a closer look at the connection between IPR enforcement and economic development.

### 1. *Strong IPR Protection and Enforcement Alone are Not Enough*

The relationship between IPR protection and economic development is complex and unclear.<sup>369</sup> According to Maskus, serious questions surround the idea that strong IPR protection

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<sup>363</sup> See IIPA SURVEY, *supra* note 230, at 1.

<sup>364</sup> Watch List Part 3, *supra* note 238; STRENGTHENING THE IP SYSTEM, *supra* note 24, at 4.

<sup>365</sup> After all, IP is one of the U.S.'s "competitive advantages[.]" Sampson, *supra* note 229, at iii.

<sup>366</sup> See *Intellectual Property Challenges*, *supra* note 8, at 457; Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 738-39 (1996); Homere, *supra* note 236, at 277; Khan, *supra* note 334, at 4; S. Mohan, *New Values in Intellectual Properties*, HINDU MAGAZINE, Nov. 24, 2002, available at <http://www.hinduonnet.com/thehindu/mag/2002/11/24/stories/2002112400390400.htm>.

<sup>367</sup> Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 495-96 (2000).

<sup>368</sup> *Id.* at 496.

<sup>369</sup> *Intellectual Property Challenges*, *supra* note 8, at 457-58; Mohan, *supra* note 366.

increases economic growth.<sup>370</sup> “Economic evidence currently available is fragmented and somewhat contradictory,” he states, “in part because many of the concepts involved are not easily measured.”<sup>371</sup> Maskus submits two reasons for this uncertainty:

First, an array of other factors influences growth in ways that could be more important than tighter IPR. Such variables include openness to international trade and investment, encouragement of an adequate technology infrastructure, support for literacy and technical education, and macroeconomic stability. Second, IPR could have numerous and contradictory effects on development, the importance of which would depend on the economic and social situation in each country.<sup>372</sup>

Despite these doubts, Maskus claims that “a regime of expanded property right protection holds considerable promise for promoting long-term economic growth and technological innovation among developing nations.”<sup>373</sup> He argues that “if developing countries embed their intellectual property systems within a broad and coherent set of collateral policies and transparent regulation, the systems bear considerable promise for promoting growth in the long run.”<sup>374</sup>

Other scholars support Maskus’ belief that strong IPR protection can promote economic development, but only under the right circumstances.<sup>375</sup> Ruth Gana argues that IPR protection’s “transformative potential is freed only by the existence of legal, economic, and political structures associated with free market systems in which property rights play a pivotal role.”<sup>376</sup> B. Zorina Khan, analyzing American and European history, concludes that:

[T]he impact of intellectual property rights will depend on their institutional context. This implies that changes in IPR rules

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<sup>370</sup> *Intellectual Property Challenges*, *supra* note 8, at 457-58.

<sup>371</sup> *Id.* at 458.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 457

<sup>374</sup> *Id.* at 458.

<sup>375</sup> See, e.g., Gana, *supra* note 366, at 738-39; Homere, *supra* note 236, at 277 (noting that “[m]odern economists have been increasingly inclined to recognize IPRs as a tool capable of stimulating economic growth when tailored to the particular needs of a country); Khan, *supra* note 334, at 4; Mohan, *supra* note 366.

<sup>376</sup> Gana, *supra* note 366, at 738-39.

must occur in tandem with developments in the legal system, the market system, and cultural norms. . . . Developing countries that adopt strong IPR will find that the benefits are likely to be minimal unless these contextual institutions are also reformed.<sup>377</sup>

Thus, whether strong IPR protection and enforcement will lead to economic development likely depends on the institutional factors that surround it. A country with an open, competitive economy, a transparent democracy with political stability, and a sound legal system is likely to experience economic growth as the result of strong IPR protection and enforcement, while one with a more protected economy, more political instability, and a more problem-ridden legal system is more likely to miss out on the economic benefits that come with strong IPR protection and enforcement.

FDI inflows illustrate this point. Market size and potential, and not simply IPR protection, have a significant effect on a company's decision to invest in a country.<sup>378</sup> As Maskus notes:

[I]t must be emphasized that strong IPR alone do not sufficiently generate strong incentives for firms to invest in a country. If that were the case, recent FDI flows to developing economies would have gone largely to sub-Saharan Africa and Eastern Europe. In contrast, China, Brazil, and other high-growth, large-market developing economies with weak IPR would have attracted less FDI.<sup>379</sup>

A country with an open economy and adequate regulations and competition rules is in the best position to draw and benefit from FDI.<sup>380</sup> In contrast, a country prone to "expropriation,

<sup>377</sup> Khan, *supra* note 334, at 4.

<sup>378</sup> See Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 109 DUKE J. COMP. & INT'L L. 109, 128-29 (1998) [hereinafter *Role of Intellectual Property Rights*]; Teran, *supra* note 325, at 3 (discussing a study in which there was only a tenuous relationship between the level of IPR enforcement and the level of FDI in the software sector).

<sup>379</sup> *Role of Intellectual Property Rights*, *supra* note 378, at 128-29 (citations omitted). The market potential in China and India "presumably offsets the risk of loss from poor intellectual property enforcement." Teran, *supra* note 325, at 6.

<sup>380</sup> See *Role of Intellectual Property Rights*, *supra* note 379, at 150; *Intellectual Property Challenges*, *supra* note 8, at 471. "[M]arket liberalization, promotion of free entry, and the removal of distribution monopolies should encourage dynamic gains from IPRs." *Id.* at 472.



limited and variable profit repatriation rules, terrorism and violence, corruption, bureaucracy and red tape, ineffective legal systems, and considerable income inequality” is less likely to garner the investments of multinational corporations, regardless of the strength of IPR protection it provides.<sup>381</sup> Some investors may be able to look past these factors, depending on the type and duration of their investment; nevertheless, the risks can only scare off investors, not entice them.<sup>382</sup> Strong IPR protection and enforcement can be a factor that lures FDI, but it is only one aspect that influences a company’s decision.<sup>383</sup>

In addition to having an impact on FDI, a country’s economic, political, and legal institutions also affect the potential of domestic IPR industries to generate economic growth, even when the country has a functioning IPR regime in place. First, IPR protection can boost domestic innovation, but it is “economically useful only where innovations may be brought freely to the marketplace”—in other words, in an open economy without too many impediments.<sup>384</sup> Next, a broken, unstable political system can make it difficult to pass pro-IP reforms and adequately fund agencies dealing with IP.<sup>385</sup> Corruption within the government also results in unnecessary costs for anyone doing business, including those in IPR industries.<sup>386</sup> Finally, an inefficient legal system can prevent inventors and creators from fully profiting from their IP, as rights holders cannot depend on courts to resolve their disputes in a timely manner or on deterrence for IPR violators.<sup>387</sup>

Thus, IPR infringement will remain entrenched in the Philippines until wide-scale reforms in the economic, legal, and political sectors take place.<sup>388</sup> As Maskus and other scholars argue, IPR protection will likely lead to economic growth if a

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<sup>381</sup> *Role of Intellectual Property Rights*, *supra* note 378, at 143.

<sup>382</sup> *See id.*

<sup>383</sup> *See id.* at 152.

<sup>384</sup> *Intellectual Property Challenges*, *supra* note 8, at 459, 472.

<sup>385</sup> *See* Michael Elliot, *The Global Stall*, *TIME*, Sept. 3, 2001 (stating that political instability marred prospects for economic reforms in the Philippines following the Asian financial crisis in 1997-98).

<sup>386</sup> *See* Op-Ed, *Cost of Corruption*, *PHILIPPINE DAILY INQUIRER*, Feb. 12, 2008.

<sup>387</sup> *See* discussion *infra* Part III.E.4.

<sup>388</sup> *See* discussion *infra* Part V.

country has sound institutions in place.<sup>389</sup> Right now, the Philippines has a lot of work to do when it comes to institutional reforms. When the country makes significant progress towards breaking up its oligopolies, unlocking the political stranglehold exercised by family dynasties, curbing corruption, and cutting down on judicial backlogs and delays, the IPR situation will improve because Filipinos will start seeing the benefits that come with stronger IPR protection and enforcement.<sup>390</sup> Today, the Philippines is content with the IPR protection and enforcement status quo. It is primarily a consumer and importer of IP.<sup>391</sup> It has other, more pressing problems, such as poverty, education, and infrastructure that vie for its limited funds. However, as IPR industries become more important to the Philippine economy, Filipinos will be more inclined to support IPR protection and enforcement, including the politicians who dole out the resources. Filipinos have to want to protect IPR,<sup>392</sup> but the reality is that they are not there yet. International pressure to

<sup>389</sup> See, e.g., *Intellectual Property Challenges*, *supra* note 8, at 458; Gana, *supra* note 367, at 738-39; Homere, *supra* note 236, at 277; Khan, *supra* note 334, at 4; Mohan, *supra* note 366.

<sup>390</sup> IIPA SURVEY, *supra* note 230, at 2 (discussing Maskus' and other scholars' views that strengthened IPRs can increase economic growth); IP COALITION 2007 SUBMISSION, *supra* note 2, at 19 (noting that more effective IPR protection depends on institutional development and capacity-building); Khan, *supra* note 334, at 10 ("[T]he major lesson. . . from the economic history of Europe and America is that intellectual property institutions best promoted the progress of science and arts when they evolved in tandem with other institutions and in accordance with the needs and interests of social and economic development in each nation."). One study of the relationship between a country's culture and economic wealth and software piracy rates concluded:

Is this quote formatted correctly? It would appear that increased personal wealth has resulted in a natural decline in software piracy rates throughout the world. . . . [A]s people become richer, they become more individualistic, and the combination of these two effects result in the tendency to buy legal, rather than pirated copies of software, even in countries that traditionally have high software piracy rates.

Trevor T. Moores, *The Effect of National Culture and Economic Wealth on Global Software Piracy Rates*, 46 COMMUNICATIONS OF THE ACM 207, 213 (2003).

<sup>391</sup> See ORGANIZED CRIME, *supra* note 208.

<sup>392</sup> The difference between Taiwan and China illustrates the importance of a country's self-initiated desire to vigorously protect and enforce IPR. See Michael Yeh, Note, *Up Against A Great Wall: The Fight Against Intellectual Property Piracy in China*, 5 MINN J. GLOBAL TRADE 503, 516 (1996).

Taiwan established an effective IP regime because its 'explosive economic expansion, increasing awareness of the need for indigenous technology, ever-more-pluralistic political and intellectual life, growing commitment

improve IPR protection and enforcement can go only so far in provoking reforms. As mentioned above, the pressure most likely to effect change is domestic—Filipinos understanding and embracing IPR.<sup>393</sup>

Of course, this does not mean that the country should neglect IPR protection until these reforms take place. IPR protection and enforcement are important—and necessary—components of a country's economic development strategy.<sup>394</sup> As IPR protection and enforcement improves, so will economic development, and vice versa. Better IPR protection and enforcement can encourage FDI and domestic innovation, which create economic growth. Likewise, as the economy grows, IPR-intensive industries will become a more important source of the country's income, which will then warrant stronger legal protection for IP.<sup>395</sup>

The economic, political, and legal sectors are all interdependent, as reforms in one will benefit the others. An open economy leads to FDI, which results in money to hire more judges and prosecutors. Limiting political dynasties makes it easier to break up family economic monopolies and liberalize the market. Cutting down on corruption means more capital to invest in education and infrastructure, and a well-functioning legal system fosters investor confidence and deters corruption. The next section identifies and analyzes problems in the Philippine economic, political, and legal sectors that need to be addressed before the IPR infringement situation will improve significantly.

## VI. WHAT IS HOLDING THE ECONOMY BACK?

The Philippine economy is growing, but a long list of problems continues to restrict its potential.<sup>396</sup> It is still rela-

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to formal legal processes, and international aspirations . . . ' made the need for IP law evident.

*Id.* (quoting WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 108 (1995)). China, on the other hand, "remains a consumer of IP and is therefore unlikely to see gains from the vigorous protection of IP rights." *Id.*

<sup>393</sup> See discussion *supra* Part V.C.

<sup>394</sup> See discussion *supra* Part V.C.1.

<sup>395</sup> Cf. Yeh, *supra* note 392, at 516 (noting that Taiwan's economic growth was a factor in the country's establishment of a strong IPR regime).

<sup>396</sup> See U.S. Delegation Statement, *supra* note 217, at 1.

tively closed, enough so that the Heritage Foundation rates it as “mostly unfree.”<sup>397</sup> Inadequate revenue collection,<sup>398</sup> poor infrastructure,<sup>399</sup> a bloated bureaucracy,<sup>400</sup> red tape,<sup>401</sup> insufficient employment,<sup>402</sup> and a lack of quality education<sup>403</sup> all

<sup>397</sup> Darwin G. Amojelar, *RP Ups Ranks as a Free Economy, but Remains ‘Mostly Unfree’*, MANILA TIMES, Jan. 16, 2008.

<sup>398</sup> See Maricel V. Cruz, *House Urged to Probe P53.7-B Revenue Shortfall*, MANILA TIMES, Jan. 20, 2008 available at <http://www.manilatimes.net/national/2008/jan/20/yehey/metro/20080120met1.html>; Alessandro Magnoli Bocchi, *Rising Growth, Declining Investment: The Puzzle of the Philippines: Breaking the “Low-Capital-Stock” Equilibrium* 16 (World Bank Group, E. Asia & Pac. Region, Policy Research Working Paper No. 4472, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1082647](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082647). For example, in 2007, the Bureau of Internal Revenue (BIR) missed its 2007 collection target by 7%. Chino S. Leyco, *BIR Tax Collection Falls Short of Target*, MANILA TIMES, Jan. 31, 2008, available at <http://www.manilatimes.net/national/2008/jan/31/yehey/business/20080131bus2.html>. Eleven out of fifteen BOC districts also failed to meet their revenue goals that same year. Chino S. Leyco, *Majority of Customs Districts Miss Targets*, MANILA TIMES, Jan. 21, 2008, available at [http://www.manilatimes.net/national/2008/jan/21/yehey/top\\_stories/20080121top1.html](http://www.manilatimes.net/national/2008/jan/21/yehey/top_stories/20080121top1.html).

<sup>399</sup> See Darwin G. Amojelar, *ADB: Tight Finances, Weak Infra Brakes to RP Growth*, MANILA TIMES, Feb. 4, 2008, available at <http://www.manilatimes.net/national/2008/feb/04/yehey/business/20080204bus1.html> [hereinafter *ADB: Tight Finances, Weak Infra Brakes to RP Growth*]; Romer S. Sarmiento, *More Investments Needed for Growth*, BUS. WORLD (Phil.), Feb. 11, 2008, available at <http://afirm.org.ph/minda-news-page.php?nid=1908>. According to the ADB, this lack of infrastructure, which is the result of “low levels of public sector revenue mobilization, poor prioritization in public spending, weak institutions and regulatory failures,” hinders industrialization and job creation. Darwin G. Amojelar, *ADB: Infrastructure Gap Holding Back Industrialization, Job-Creation*, MANILA TIMES, Mar. 11, 2008.

<sup>400</sup> A major problem is the lack of professionalism in the civil service. See Fidel V. Ramos, Former President of the Republic of the Philippines, Good Governance Against Corruption, Keynote Address at the Fletcher School of Law and Diplomacy’s “Conference on Good Governance Against Corruption” (Apr. 26, 2001), in 25 FLETCHER FORUM OF WORLD AFFAIRS, Fletcher Forum of World Affairs, Summer 2001, at 15-16. The Philippine president appoints around 8,500 high officials, twice the number the U.S. president appoints, and over 8,000 more than the British prime minister. *Id.*

<sup>401</sup> For example, doing business the Philippines can be quite a chore. The country ranks 140 out of 181 in ease of business according the World Bank’s Doing Business Project. DOING BUSINESS PROJECT, WORLD BANK GROUP, DOING BUSINESS 2009 PHILIPPINES (2008), <http://www.doingbusiness.org/ExploreEconomies/?economyid=153>. It takes 52 days and 15 procedures to start a business. *Id.* In contrast, it takes 33 days and 8 procedures to open a business in Thailand. DOING BUSINESS PROJECT, WORLD BANK GROUP, DOING BUSINESS 2009 THAILAND (2008), <http://www.doingbusiness.org/ExploreEconomies/?economyid=186>.

<sup>402</sup> “Heavy labor rules and protections – enforced by large enforcement agencies (which employ some 20,000 labor inspectors) – hamper job growth in the formal labor market.” Bocchi, *supra* note 398, at 24. At nearly 8%, the

require long-term fixes.<sup>404</sup> And, as will be discussed, both public and private investment is declining, due in large part to oligopolies that limit economic entry and competitiveness in the country.<sup>405</sup> These oligopolies, combined with the political dynasties that run the country, make passing significant economic, political, and legal reforms that would negatively impact the families that control the majority of the country's wealth and power more difficult. Other major problems that limit economic growth include corruption, which results in lost tax revenue and scares away investment, and a dysfunctional legal system, which damages public and investor confidence in the enforceability of their rights. Ultimately, all these factors have an impact on the IPR situation in the country, as the key to stronger IPR protection and enforcement lies in a further developed Philippine economy that derives more wealth from its IPR industries.

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unemployment rate in the Philippines was higher than that of its neighboring countries in 2006. *Id.* The underemployment rate also grew five percentage points from 2004 to 2006, landing at 22.7%. *Id.* These problems drive many of the best and brightest workers overseas. *See id.* at 25. Having an army of workers abroad has its advantages, though, as Overseas Filipino Workers (OFWs) remitted \$14.4 billion—about 10% of GDP—in 2006. Chino S. Leyco, *Money Sent Home by Overseas Filipino Workers Hits New Record*, MANILA TIMES, Feb. 16, 2008. Overall, however, the exodus of skilled labor from the Philippines hurts the country, both socially and economically. Kristin Choo, *The Families Left Behind – For Better or Worse*, CHICAGO TRIBUNE, July 7, 1996.

<sup>403</sup> *See* discussion *supra* Part IV.A. World Bank Vice President of the East Asia & Pacific Region James W. Adams noted that “[e]ducation has long been a key ingredient in most Asian countries’ growth strategies. Giving education priority has paid off. Increasing levels of education have been estimated to account for well over one third growth in the highest performing Asian economies between 1960 and 1990.” James W. Adams, *Back to School: Education Pays Off for Asian Economies*, SINGAPORE BUS. TIMES, Dec. 6, 2007, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/MALAYSIAEXTN/0,,contentMDK:21576095~menuPK:50003484~pagePK:2865066~piPK:2865079~theSitePK:324488,00.html>. He also stated that in today’s global, knowledge-based economy, “a nation’s competitiveness has come to depend more and more on its ability to acquire, apply and produce knowledge.” *Id.*

<sup>404</sup> *See* Bernadette S. Sto. Domingo, *Investment Tally Has RP Behind Asian Neighbors*, BUS. WORLD (Phil.), Jan. 10, 2008, available at <http://www.gmanews.tv/story/75964/BusinessWorld-Investment-tally-has-RP-behind-Asian-neighbors>.

<sup>405</sup> *See* Bocchi, *supra* note 398, at 5; Cai U. Ordinario, *Inefficient Tax Collection, Corruption Worsen Poverty in RP, says ADB*, BUS. MIRROR (Phil.), Mar. 7, 2008, available at <http://www.businessmirror.com.ph/0307&082008/economy01.html>.

A. *Oligopolies*

Recently, the Philippines has experienced a period of relative prosperity. Since 2002, the country's economic growth has averaged 5.3%.<sup>406</sup> In 2007, the economy grew at 7.3%, its highest rate in decades.<sup>407</sup> The country is getting richer, but not all Filipinos are seeing the benefits. A small number of families control much of the country's wealth. The rich-poor gap, rather than decreasing with the country's economic growth, has widened.<sup>408</sup> Filipinos were on average poorer in 2006 than they were in 2004.<sup>409</sup> Poverty reduction in the Philippines lags behind the rest of East Asia.<sup>410</sup> Contemplating this failure to reduce poverty, a former School of Economics dean at one of the Philippines' top universities speculated that "[e]ither GDP growth is not as high as we think or that GDP growth only benefits the very affluent or the members of the elite."<sup>411</sup>

The concentration of wealth in the hands of a limited elite winds up hurting the economy. Despite economic growth, investments continue to decline.<sup>412</sup> The World Bank's working paper, "Rising Growth, Declining Investment: The Puzzle of the Philippines," addresses this dilemma, and reaches the following conclusions: "investment does not grow at the pace of GDP because the public sector cannot afford it, the capital-intensive private sector does not want to expand that fast, and the rest of the private sector does not need it."<sup>413</sup> The paper offers a com-

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<sup>406</sup> Bocchi, *supra* note 398, at 5.

<sup>407</sup> See Op-Ed, *Needed: Growth with Equity*, BUS. MIRROR (Phil.), Feb. 4, 2008, available at <http://www.businessmirror.com.ph/02042008/opinion01.html>; see also Ordinario, *Inefficient Tax Collection, Corruption Worsen Poverty in RP*, says ADB, *supra* note 405.

<sup>408</sup> See *Survey: Rich-Poor Gap Widens*, *supra* note 288; Ordinario, *Inefficient Tax Collection, Corruption Worsen Poverty in RP*, says ADB, *supra* note 406; Ordinario, *High GDP Growth Not Enough to Lick Poverty in RP*, *supra* note 244. The ADB cites low revenue collection, rampant corruption, and political instability among the main reasons for the lack of poverty reduction in times of substantial economic growth. Ordinario, *Inefficient Tax Collection, Corruption Worsen Poverty in RP*, says ADB, *supra* note 405 (discussing the ADB's report, "Philippines: Critical Development Constraints").

<sup>409</sup> See *id.* (noting that the percentage of families below the poverty threshold grew from 24.4% in 2004 to 26.9% in 2006).

<sup>410</sup> See Bocchi, *supra* note 398, at 34.

<sup>411</sup> *Needed: Growth with Equity*, *supra* note 407.

<sup>412</sup> See Bocchi, *supra* note 398, at 5.

<sup>413</sup> *Id.*



prehensive discussion of each of these points, but for the purposes of this Article, the focus will be on the unwillingness of much of the private sector (which is made up of large corporate conglomerates, many owned by the country's ultra-wealthy families) to change the status quo.

First, "there is a low productivity of capital" because "several rentseeking corporate conglomerates, controlled by the local *elite*[,] limit their competition."<sup>414</sup> The oligopolies:

[U]se their political connections to: a) hinder tax collection, hence hampering public capital spending (which is a necessary condition for private investment: for example, the availability of public infrastructure is essential to stimulate the private sector's willingness to invest); and b) limit economic entry, drive potential investors out, discourage smaller firms to grow bigger, produce expensive inputs, and enjoy market power and oligopolistic rents.<sup>415</sup>

Moreover, according to the World Bank paper, the oligopolies "reduce the investment appetite" in the Philippines.<sup>416</sup> "Operating as monopolies and oligopolies, the corporate conglomerates find [it] convenient to restrict production – and investment – below the competitive level. Also, their willingness to invest is inhibited by their concentrated ownership structure, and their uncertainties about the stability and duration of government favoritism."<sup>417</sup> Additionally, the country has trouble attracting FDI.<sup>418</sup> FDI barely grew in 2007,<sup>419</sup> and still lags behind other Asian countries.<sup>420</sup> Restrictions on foreign investment and land ownership,<sup>421</sup> a "highly-protected business envi-

<sup>414</sup> *Id.* at 17.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* (citations omitted)

<sup>418</sup> See Sarmiento, *supra* note 399; see also Gatbonton, 'Hospitable' Filipinos Like their Economy Closed, *supra* note 271 (discussing the Philippine proclivity for protectionism). See generally Mejia, *supra* note 232 (discussing Philippine foreign investment law).

<sup>419</sup> See Chino S. Leyco, *Slow Growth for Foreign Investments*, MANILA TIMES, Mar. 11, 2008 available at <http://www.manilatimes.net/national/2008/mar/11/yehey/business/20080311bus4.html>.

<sup>420</sup> See INVESTMENT CLIMATE STATEMENT, *supra* note 21.

<sup>421</sup> See *id.*; Epictetus E. Patalinghug, *Globalization and State Capacity: The Philippines* 38 (Phil. Inst. for Dev. Studies, Discussion Paper Series No. 2003-20, 2003) available at <http://dirp4.pids.gov.ph/ris/dps/pidsdps0320.pdf>. For example, "[t]he 1991 Foreign Investment Act (FIA) contains two 'negative lists' that outline



ronment” that features “regulatory inconsistency and a lack of transparency[,]” and the lack of a comprehensive competition policy keep many multinational corporations out of the country.<sup>422</sup> And political turmoil, which is common in the Philippines, does little to encourage investment.

The World Bank paper also states that the oligopolies limit the country’s competitiveness while at the same time paying their workers enough to keep them complacent.<sup>423</sup> The oligopolies hurt traditional sectors of the economy, raising food prices, inhibiting trade, deterring tourism, limiting access to bank loans, and increasing the cost of infrastructure developments.<sup>424</sup> Yet,

[b]y paying higher wages—relative to other Asian countries—to the salaried insiders, the politically-connected corporate conglomerates use the rents resulting from the government’s preferential treatment to stabilize the economic system, secure ‘national labor peace’, and perpetuate the status quo.<sup>425</sup>

For the Philippine economy to move forward, “[t]o break monopolies and increase competition in protected sectors,” the country needs “a clear vision, political will, and a coherent implementation strategy,” the World Bank paper states.<sup>426</sup> Unfortunately, none of these currently exists. There has traditionally been little, if any, political will to close the income inequality gap.<sup>427</sup> After all, as former president Fidel Ramos said, “the costs of reform must be paid largely by the rich and powerful families and social groups who have historically benefited from

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areas in which foreign investment is restricted or limited. These lists are normally updated every two years. The restrictions stem from a constitutional provision, Section 10 of Article XII, which permits Congress to reserve to Philippine citizens certain areas of investment.” INVESTMENT CLIMATE STATEMENT, *supra* note 21.

<sup>422</sup> Bocchi, *supra* note 398, at 29; INVESTMENT CLIMATE STATEMENT, *supra* note 21; see generally Emmanuel A. Cruz, The Development of a Philippine Competition Policy and Law (Difficulties Encountered) (2004), <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2003/Nazareth.pdf> (discussing Philippine economic policy and arguing for the enactment of a comprehensive competition policy) [hereinafter *Philippine Competition Policy*].

<sup>423</sup> Bocchi, *supra* note 398, at 25, 33.

<sup>424</sup> *Id.* at 33.

<sup>425</sup> *Id.* at 25.

<sup>426</sup> *Id.* at 42.

<sup>427</sup> See Tom Ashbrook, *In Philippines, It’s the Same Old Song as the Days of Marcos, the Rich Flaunt their Wealth and the Poor Stay Poor*, BOSTON GLOBE, Apr. 10, 1988, available at <http://www.highbeam.com/doc/1P2-8057036.html>.

their influence over the political and economic system, while its benefits are diffuse and the beneficiaries are largely the inarticulate and powerless masses of ordinary and poor people.”<sup>428</sup> These groups that oppose reform “are powerful, well-organized, and focused” while the groups pushing for change and the “potential beneficiaries are weak, scattered, and disorganized.”<sup>429</sup> The wealthy elite maintains its political clout through its families in office (the owners or majority shareholders of a number of powerful corporations are also members of Congress)<sup>430</sup> or through political donations (thanks to limited lobbying regulations)<sup>431</sup> or both.<sup>432</sup> Few “dare challenge the entrenched oligarchy[,]” whether political or economic.<sup>433</sup>

### B. *Political Dynasties*

As with the economy, a limited group of people exhibits too much control, this time over politics, in a culture that is more family-oriented than the individualistic West.<sup>434</sup> One of the major barriers to instituting the economic reforms necessary to open up the Philippine economy is the political system—and more specifically, the political dynasties.<sup>435</sup> The Philippines

<sup>428</sup> Ramos, *supra* note 400, at 14.

<sup>429</sup> *Id.*

<sup>430</sup> *Philippine Competition Policy*, *supra* note 422, at 9 (discussing sources of opposition to any kind of comprehensive competition policy in the country).

<sup>431</sup> See Malou Mangahas, *Government Splurges Millions on Multiple, Secret Lobby Contracts*, PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM, Sept. 20, 2005, available at <http://www.pcij.org/stories/2005/lobbygate.html> (noting the lack of lobby firm disclosure and financial reporting laws in the Philippines).

<sup>432</sup> For instance, a discussion paper from the Philippine Institute for Development Studies notes the reality that family-owned monopolies in the telecommunications and power distribution sectors “would be difficult to break” in part because of the influence they have on regulatory bodies. Patalinghug, *supra* note 421, at 43.

<sup>433</sup> Ramos, *supra* note 400, at 14.

<sup>434</sup> See Cherry C. Bobadilla, *Special Feature: Philippine Business Icons*, BUS. WORLD (Phil.), Sept. 10, 2004.

<sup>435</sup> See, e.g., Alexis Douglas B. Romero, *Congress Bypasses Anew Anti-Political Dynasty Bill*, BUS. WORLD (Phil.), Feb. 7, 2007; Carlos H. Conde, *Family Ties Bind Philippine Government*, N.Y. TIMES, May 13, 2007, available at [http://www.nytimes.com/2007/05/13/world/asia/13filip.html?\\_r=1&scp=1&sq=family%20ties%20bind%20philippine%20government&st=cse](http://www.nytimes.com/2007/05/13/world/asia/13filip.html?_r=1&scp=1&sq=family%20ties%20bind%20philippine%20government&st=cse); *The Philippines: Limping Forwards*, ECONOMIST, Mar. 19, 2005, available at [http://www.alacrastore.com/storecontent/eiufxml/EN\\_EN\\_MAIN\\_20050319T000000\\_0006](http://www.alacrastore.com/storecontent/eiufxml/EN_EN_MAIN_20050319T000000_0006); William M. Esposito, Editorial, *Who is Stopping the Filipino?*, PHILIPPINE STAR, Mar. 9, 2008, available at <http://www.philstar.com/Article.aspx?articleId=49020&publicationSubCategoryId=64>.

has more of an oligarchy than a genuine democracy.<sup>436</sup> Families dominate the political scene, making it difficult for outsiders to run a credible campaign.<sup>437</sup> And these political clans tend to be the same families that are members of the country's economic elite,<sup>438</sup> a fact that hinders any efforts to break up the existing economic monopolies.<sup>439</sup>

Political dynasties in the Philippines, whose origins date back to the Spanish and subsequent American colonial periods, continue to grow in influence.<sup>440</sup> The reach of country's estimated 250 political families extends into all positions of the government and into every province.<sup>441</sup> One 2004 study found that two-thirds of the members of the House of Representatives were a part of political clans, with the majority being second or third-generation politicians.<sup>442</sup>

Despite the constitutional mandate guaranteeing equal access to public office and explicitly prohibiting political dynasties,<sup>443</sup> powerful families remain dominant in Philippine politics.<sup>444</sup> The political clans maintain their grip on power due to the "seemingly immutable and unequal socioeconomic structure[.]"<sup>445</sup> They use their money and influence to quash any effective political opposition.<sup>446</sup> And it works, largely because the costs of running a credible independent campaign are far too

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<sup>436</sup> See Esposito, *supra* note 435.

<sup>437</sup> See Conde, *supra* note 435.

<sup>438</sup> See *id.*

<sup>439</sup> *Personal Property*, PHILIPPINE DAILY INQUIRER, Jan. 23, 2007, available at [http://opinion.inquirer.net/inquireropinion/editorial/view\\_article.php?article\\_id=44973](http://opinion.inquirer.net/inquireropinion/editorial/view_article.php?article_id=44973); See Doris Dumlao, *Politics Seen Curbing Growth Momentum*, PHILIPPINE DAILY INQUIRER, Oct. 28, 2007, available at [http://archive.inquirer.net/view.php?db=1&story\\_id=97293](http://archive.inquirer.net/view.php?db=1&story_id=97293)

<sup>440</sup> See Conde, *supra* note 435. "Even after the country gained independence, in 1946, a largely feudal system persisted, as landed Filipino families [who were among the elite nurtured by the Spanish and Americans] sought to protect their interests by occupying public offices." *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> Alastair McIndoe, *It's All in the Family in Filipino Politics: Wealthy Families Build Political Dynasties and Control Government*, STRAIGHTS TIMES (Sing.), Jan. 29, 2007, available at [http://app.mfa.gov.sg/pr/read\\_content.asp?View,6383](http://app.mfa.gov.sg/pr/read_content.asp?View,6383).

<sup>443</sup> See SALIGANG BATAS NG PILIPINAS [Constitution] art. II (Phil.).

<sup>444</sup> See Romero, *supra* note 435. There are, of course, many fine politicians that come from political dynasties. The real problem lies in the absence of choice Filipinos have when dynasties continue to dominate politics.

<sup>445</sup> See Conde, *supra* note 435.

<sup>446</sup> See *id.*

high for the average person.<sup>447</sup> Violence is also common, with more than 100 persons murdered in the run up to the May 2007 elections.<sup>448</sup> Over the years the political clans have developed a sense of entitlement when it comes to public office, viewing a political position as “personal property” that can be transferred from one relative to another.<sup>449</sup>

Another reason for the persistence of political dynasties in the country stems from the lack of genuine democracy and the consistently uninspiring political leadership.<sup>450</sup> Political parties are personality-focused and organized around local political families and politicians, rather than being built around political issues and ideologies.<sup>451</sup> Voters may have little idea what a particular candidate stands for (something they may have in common with the candidate), so they cast their ballot for the most recognizable name or not at all. Or their general distrust of politicians<sup>452</sup> and feeling that all politicians are the same (i.e., ineffective or corrupt) fuel their apathy, keeping them from attempting to change the system.<sup>453</sup> Sadly, many Filipinos have simply accepted the current dysfunctional political situation as inevitable.<sup>454</sup>

### C. Corruption

Corruption is the elephant in the room whenever anyone discusses governance in the Philippines. It ranges from the

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<sup>447</sup> See *id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Personal Property*, *supra* note 439; accord *The Philippines: Limping Forwards*, *supra* note 435; McIndoe, *supra* note 442; Conde, *Family Ties Bind Philippine Government*, *supra* note 435.

<sup>450</sup> See Conde, *supra* note 435.

<sup>451</sup> AUSTRALIAN DEP'T OF FOREIGN AFFAIRS AND TRADE, REPUBLIC OF THE PHILIPPINES COUNTRY BRIEF (Feb. 2009), [http://www.dfat.gov.au/geo/philippines/philippines\\_brief.html](http://www.dfat.gov.au/geo/philippines/philippines_brief.html).

<sup>452</sup> One survey found that sixty-five percent of Filipino respondents considered their current political leaders to be dishonest. Darwin G. Amojelar, *Majority of Pinoys See Politicians as Dishonest*, MANILA TIMES, Jan. 18, 2008, available at [http://www.manilatimes.net/national/2008/jan/18/yehey/top\\_stories/20080118top2.html](http://www.manilatimes.net/national/2008/jan/18/yehey/top_stories/20080118top2.html) (quoting Gallup International's "Voice of the People" survey). Forty-nine percent said politicians behave unethically. *Id.*

<sup>453</sup> See Conde, *supra* note 435; Op-Ed, *Same Same*, PHILIPPINE DAILY INQUIRER, Jan. 21, 2008, available at <http://opinion.inquirer.net/inquireropinion/editorial/view/20080121-113667/Same-same>.

<sup>454</sup> See Conde, *supra* note 435.

small-time (traffic police soliciting bribes) to the more significant (transportation officials smuggling cars)<sup>455</sup> to the most serious (senior civil servants pocketing the equivalent of millions of U.S. dollars on overpriced government contracts).<sup>456</sup> The Philippines consistently ranks as one of the most corrupt countries in Asia.<sup>457</sup> According to a 2000 World Bank report and a Social Weather Stations (SWS) survey, it loses an astounding 20% of its capital spending each year to corruption.<sup>458</sup>

A number of institutional and cultural factors contribute to the corruption problem in the Philippines. For instance, often it “is simply that of badly underpaid officials possessing wide discretionary powers over the conduct of business, the amount of taxes you must pay, and even whether or not you are to go to jail for violating some law or other.”<sup>459</sup> Also, morale among civil servants is a problem, due in large part to the considerable number of political appointees in government that often leave the most qualified individuals behind.<sup>460</sup> On the cultural side,

<sup>455</sup> See Jolene Bulambot, ‘Grand Collusion’ Seen in Car Smuggling, PHILIPPINE DAILY INQUIRER, Jan. 13, 2008, available at [http://newsinfo.inquirer.net/inquirer-headlines/regions/view\\_article.php?article\\_id=112002](http://newsinfo.inquirer.net/inquirer-headlines/regions/view_article.php?article_id=112002).

<sup>456</sup> See Erwin Oliva, NBN Scandal Shows ‘Checks, Balances’ in RP – Research Group, PHILIPPINE DAILY INQUIRER, Feb. 15, 2008, available at <http://technology.inquirer.net/infotech/infotech/view/20080215-119131/NBN-scandal-shows-checks-balances-in-RP—research-group>.

<sup>457</sup> See, e.g., Press Release, Transparency International, Persistent Corruption in Low-Income Countries Requires Global Action (Sept. 26, 2007), [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases/2007/2007\\_09\\_26\\_cpi\\_2007\\_en](http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_09_26_cpi_2007_en) (follow link at bottom of page to CPI table and Sources) (stating that the Philippines is tied for 131 out of 180 in Transparency International’s 2007 Corruption Perceptions Index (degree of public sector corruption as perceived by businesspeople and country analysts)) [hereinafter Persistent Corruption]; *RP, Thailand Among Most Corrupt Asian Economies – Survey*, PHILIPPINE DAILY INQUIRER, Mar. 10, 2008, available at <http://globalnation.inquirer.net/news/breakingnews/view/20080310-123887/RP-Thailand-among-most-corrupt-Asian-economies-survey> (showing the Philippines scored 9.0 out of a possible 10 points under a grading system used by PERC under which zero is the best score and 10 the worst). Moreover, one survey reported that only 13% of businesses were untouched by corruption. World Bank Report, *Combating Corruption in the Philippines: An Update*, 23687-PH, (Sep. 30, 2001), available at <http://www1.worldbank.org/publicsector/anticorrupt/FlagshipCourse2003/PhiliCombatCorruptUpdate.pdf>.

<sup>458</sup> See Alex Douglas B. Romero, *P30-B Leakage to Graft Feared*, BUS. WORLD (Phil), Feb. 11, 2008.

<sup>459</sup> Ramos, *supra* note 400, at 10; accord Op-Ed, *Our Bureaucracy*, MANILA TIMES, Jan. 25, 2008, available at <http://www.manilatimes.net/national/2008/jan/25/yehey/opinion/20080125opi1.html>.

<sup>460</sup> See *id.*

“[g]raft and corruption has become so ingrained in the national life that it is considered ‘normal.’”<sup>461</sup> Indifference and a sense of helplessness have set in among many Filipinos: even if they report something such as bribery, the belief is that nothing will be done.<sup>462</sup>

Corruption is a serious problem that has curbed the country's economic growth. As U.S. Ambassador to the Philippines Kristie Kenney said, “[c]ompared to some of the fast-moving economies in Asia, the Philippines is not where it ought to be . . . [and] corruption plays a role in this.”<sup>463</sup> Economic and social development slow down when scarce government resources go into the pockets of crooked government officials rather than into programs and projects aimed at helping the average Filipino.<sup>464</sup> The quality and quantity of public resources and infrastructure suffers.<sup>465</sup> Goods and services become more expensive.<sup>466</sup> Investors think twice about putting money into the country.<sup>467</sup> In the end, it is the poor Filipinos who suffer most from the selfishness and greed of their fellow citizens who are in positions of power.<sup>468</sup>

Corruption, of course, remains a challenge all over the world, not just in the Philippines.<sup>469</sup> It is another complex problem without easy solutions.<sup>470</sup> Promoting ethical behavior is

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<sup>461</sup> Op-Ed, *Cost of Corruption*, PHILIPPINE DAILY INQUIRER, Feb. 12, 2008, available at <http://opinion.inquirer.net/inquireropinion/editorial/view/20080212-118232/Cost-of-corruption>.

<sup>462</sup> See *Social Weather Stations, Transparent Accountable Governance: The 2007 SWS Business Survey on Corruption, Presentation to the Philippine Cabinet*, Malacañang, Manila (Aug. 21, 2007), available at <http://www.sws.org.ph/TAG7%20for%20Cabinet%20Aug21-final.pdf>.

<sup>463</sup> *US Support vs. Graft*, BUS. WORLD (Phil.), Apr. 21, 2006.

<sup>464</sup> See *Cost of Corruption*, *supra* note 386; *NBN Deal Controversy Sparks Soul-Searching in Business Sector*, BUS. MIRROR (Phil.), Feb. 15, 2008, available at <http://www.businessmirror.com.ph/0215&162008/nation03.html>.

<sup>465</sup> See *Cost of Corruption*, *supra* note 387; Op-Ed, *Red Tape and Then Some*, INQUIRER NEWS SERVICE, June 9, 2003, available at 2003 WLNR 471915; *Persistent Corruption*, *supra* note 457.

<sup>466</sup> See *Cost of Corruption*, *supra* note 38.

<sup>467</sup> See INVESTMENT CLIMATE STATEMENT, *supra* note 21.

<sup>468</sup> See *Cost of Corruption*, *supra* note 387; *Red Tape and Then Some*, *supra* note 466; *Persistent Corruption*, *supra* note 457.

<sup>469</sup> The United States, for example, still grapples with issues such as the role of money in politics. See Ramos, *supra* note 400, at 16.

<sup>470</sup> *Id.*



one strategy.<sup>471</sup> Ultimately, though, government practices need to be transparent, and corrupt officials need to be held accountable.<sup>472</sup> The pardon of former president and convicted plunderer Joseph Estrada by President Arroyo, before he served any prison time, reinforced the wrong message to politicians and civil servants—that well-connected and powerful individuals are above the law.<sup>473</sup> Transparency International points out the strong correlation between poverty and corruption.<sup>474</sup> As the Philippines gets richer, corruption will likely become less significant. As former president Ramos notes, for a country such as the Philippines:

[T]he central task in the fight against corruption must be to build community and state capacity, because successful development needs an efficient state with transparent government, skilled and honest bureaucrats, stable policies, and an effective legal order.<sup>475</sup>

#### D. *The Dysfunctional Legal System*

Finally, a dysfunctional legal system likely constrains a country's economic growth, perhaps significantly.<sup>476</sup> It damages public and investor confidence “in the enforceability of contractual and property rights.”<sup>477</sup> Despite this knowledge, the Philippines, whose legal system is riddled with inefficiency and corruption,<sup>478</sup> has failed to implement reforms that would curb

<sup>471</sup> See *id.*

<sup>472</sup> *Needed: Growth with Equity*, BUS. MIRROR (Phil.), Feb. 4, 2008, available at <http://www.businessmirror.com.ph/02042008/opinion01.html>.

<sup>473</sup> See Carlos H. Conde, *Arroyo Pardons Former President Joseph Estrada*, INT'L HERALD TRIBUNE, Oct. 25, 2007, available at <http://www.iht.com/articles/2007/10/25/asia/manila.php>. Estrada was, however, under house arrest for six and a half years. *Id.*

<sup>474</sup> Persistent Corruption, *supra* note 457.

<sup>475</sup> Ramos, *supra* note 400, at 15.

<sup>476</sup> See Sherwood, *supra* note 285, at 538 (noting economic research that indicates institutions, including the judicial system, are important to a country's economic performance); Robert M. Sherwood, *Judicial Performance: Its Economic Impact in Seven Countries*, available at <http://www.isnie.org/ISNIE04/Papers/Sherwood.pdf> [hereinafter *Judicial Performance*].

<sup>477</sup> Helm, *supra* note 329, at 204; accord Persistent Corruption, *supra* note 457.

<sup>478</sup> See Patalinghug, *supra* note 421, at 13-14. The report describes corruption as “entrenched” in the country and states that two agencies responsible for interpreting and implementing laws, the DOJ and the Office of the Ombudsman, have a history “littered with corruption and ineptness, which [has] fostered skepticism



corruption and cut down on the backlogs and delays that slow down the administration of justice. In order to correct these problems, resources must be devoted to, and used efficiently for, judicial prosecutorial capacity building. Judicial vacancies need to be filled, more prosecutors need to be hired, and both need to be trained, especially those who deal with IPR.<sup>479</sup> Judges also should be held accountable in some way for the timely disposition of their cases, whether through the cultivation of a judicial sense of urgency, or monitoring, or both.<sup>480</sup>

There may be a straightforward answer, besides the country's general lack of resources, for the Philippines' continued legal system woes: reform is not a priority for those who exercise power and influence in the country, the political and economic elite.<sup>481</sup> According to a report by Robert M. Sherwood, which looked at the link between judicial performance and economic growth in seven countries, including the Philippines:

[T]he research shows that poor judicial performance costs a country dearly. Would this news not prompt citizens to press for improved judicial performance? Logic would suggest so, but even where the results have been well disseminated, reaction has instead been interested but mild. The reason may be simple. People in many countries, including particularly people in economically and politically powerful elite groups, prefer an alternative to judicial system recourse. They transact business largely within their social networks and thus have limited need for a judicial system that works well.<sup>482</sup>

Sherwood states in another, earlier, article that significant legal system reform "is essentially a matter of political will" that can be achieved "[o]nce it is more widely understood that a national economy suffers substantially for lack of an effective judiciary[.]"<sup>483</sup> But the leaders in the Philippines, even with this understanding, lack the political will for reform because it would do little to advance their interests, a phenomenon that

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and ridicule among the general public with regard to the rule of law in the Philippines." *Id.*

<sup>479</sup> See discussion *supra* Part III.D.4.b.

<sup>480</sup> See IP COALITION 2007 SUBMISSION, *supra* note 2, at 10-12; see also discussion *supra* Part III.D.4.c.

<sup>481</sup> See Judicial Performance, *supra* note 476, at 2.

<sup>482</sup> *Id.*

<sup>483</sup> Sherwood, *supra* note 285, at 542.

Sherwood notes above. Just like with the current oligopolies and political dynasties, the economic and political elite is content with the legal system status quo.

Establishing specialized IPR courts, a long term goal of IP Philippines,<sup>484</sup> may be one way to cut down on IPR case backlogs and delays and build a group of judges better equipped to handle complex IPR issues.<sup>485</sup> Thailand's specialized IPR court, which also hears international trade matters, has met with success since its creation in 1996,<sup>486</sup> and Taiwan is now following Thailand's lead by establishing its own specialized court and prosecutor's office to deal with IPR cases.<sup>487</sup> Despite their potential to shorten the disposition of IPR cases from a range of two to ten years to something more like six months to one year, IPR courts may be more dream than reality for the time being in the Philippines.<sup>488</sup> One previous attempt to form two specialized IPR courts failed in 2005,<sup>489</sup> and "there is nothing [on] the horizon that indicates the creation of [an] IPR Court or IP-dedicated Court is going to happen anytime soon[.]" according to the IP Coalition.<sup>490</sup> IPR courts, unlike specialized environmental courts, of which the Supreme Court created 117 "for improved environmental adjudication" at the beginning of 2008, do not seem to be a priority.<sup>491</sup>

Overall economic growth and a greater contribution to the country's wealth from its IPR industries are the keys to improved IPR protection and enforcement in the Philippines. Currently, however, institutional problems in the economic, political, and legal sectors stand in the way of these goals. Oli-

<sup>484</sup> STRENGTHENING THE IP SYSTEM, *supra* note 24, at 35.

<sup>485</sup> See Sherwood, *supra* note 285, at 539.

<sup>486</sup> See Antons, *supra* note 11, at 4.

<sup>487</sup> See Dan Nystedt, *Taiwan Gets Serious About Intellectual Property*, Mar. 6, 2007, <http://www.pcworld.com/article/id,129642-c,legalissues/article.html>.

<sup>488</sup> See IP COALITION 2008 SUBMISSION, *supra* note 22, at 11.

<sup>489</sup> See Ronnel W. Domingo, *2 IPR Courts to Be Formed*, PHILIPPINE DAILY INQUIRER, Oct. 25, 2005.

<sup>490</sup> IP COALITION 2008 SUBMISSION, *supra* note 22, at 11. The IP Coalition notes that a specialized IPR court "need not be created by another special law; it can be some existing court made 'IP-dedicated' by an order issued by the Supreme Court." *Id.* The important part is that the court has "the flexibility to allocate the time needed to resolve its cases most expeditiously and a judge imbued with a judicial sense of urgency." *Id.*

<sup>491</sup> Leila Salaverria, *SC Designates 117 Environmental Courts*, PHILIPPINE DAILY INQUIRER, Jan. 14, 2008.

gopolies, political dynasties, rampant corruption, and an inefficient legal system are all holding back the country's economic potential. More specifically, they are preventing the country from fully realizing the benefits that come with strong IPR protection and enforcement, as whether strong IPR protection and enforcement translates into economic development likely depends on the soundness of a country's economic, political, and legal institutions.

## VII. CONCLUSION

Significantly reducing IPR infringement in the Philippines, whether the counterfeiting of physical goods or the growing problem of digital piracy, will take time.<sup>492</sup> Outside pressure from the United States and other developed countries may help speed things up, but ultimately Filipinos have to understand and have a stake in strong IPR protection and enforcement. That IPR infringement remains entrenched in the Philippines is a reflection of the plight of a developing country. IPR advocates—from police to politicians to business owners—can effect only so much change within the country's larger institutional framework. The Philippines is a poor nation, and just like other countries, developing or not, it has to prioritize how it uses its time and resources. IPR protection and enforcement—whose effectiveness suffer, in part, from a lack of funding and administrative capability as well as an overburdened, inefficient legal system—currently take a back seat to more pressing issues such as alleviating the suffering of the 27 million Filipinos who live in poverty,<sup>493</sup> improving the country's dire education system, and limiting terrorism and violent crime. Those in power, whether politicians or members of the economic elite (often the same people), are content with the IPR protection and enforcement status quo because IPR industries remain an insignificant source of the country's wealth and because they want to protect their status and influence. While developed countries such as the United States tout the economic benefits that come with strong IPR protection and enforcement, Maskus and other scholars point out that strong IPR protection and enforcement

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<sup>492</sup> Cf. Coonan, *supra* note 52 (noting the difficulty in eliminating piracy in any country).

<sup>493</sup> Poverty Worsens, *supra* note 5.

alone will not likely lead to long-term economic growth and technological innovation. A country also needs sound institutions such as an open economy, political stability, and a well-functioning legal system in order to realize the lasting benefits that come with strong IPR protection and enforcement. These areas are where the Philippines need major improvements. Once the country pushes through institutional reforms, no easy feat considering the grip oligarchs have on money and politics, its economy will grow. In turn, IPR industries will become more important to its sustained economic growth and global competitiveness. Only after these changes are in place will the Philippines vigorously protect and enforce IPR, and that is when IPR infringement will no longer remain entrenched in the Philippines.