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VIDEO GAME PIRACY IN THE PHILIPPINES: A NARROWLY TAILORED ANALYSIS OF THE VIDEO GAME INDUSTRY & SUBCULTURE

Jennifer Kim Vitale*

“In the Philippines, piracy isn’t a matter of right or wrong; it’s a matter of survival.”

- Ryan Sumo

INTRODUCTION

The video game industry is robust and continues to expand despite economic downturn.¹ Losses due to piracy, however, constitute a significant threat to the industry. In the Philippines, current legislation preventing piracy of video games has proven ineffective. The problem of piracy has been examined and discussed exhaustively of multiple countries including Japan, China² and Russia, but focusing on these countries alone is insufficient. Smaller, developing countries play a significant role in piracy and yet such countries are often underestimated. This oversight is detrimental to the protection of copyrighted materials

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¹ See Daisuke Wakabayashi, *Video Games Can Weather Poor Economy: Microsoft*, REUTERS, July 17, 2008, <http://www.reuters.com/article/technology/News/idUSN1628425020080716>. See also *Video-game Sales Overtaking Music*, REUTERS, June 26, 2007, <http://articles.moneycentral.msn.com/Investing/Extra/VideoGameSalesOvertakingMusic.aspx>.

² See generally Frank Lin, *Piracy in China: Identifying the Problem and Implementing Solutions*, 14 CURRENTS INT’L TRADE L.J. 83 (2005) (discussing piracy in China).

and to the global video game industry. As technology rapidly changes, methods of piracy also become more diverse. Today, a different approach should be utilized to analyze the factors that contribute to the proliferation of piracy. Such analysis must be narrowly tailored and focused to the specific industry and country it affects in order to effectively address the problem through its legislation. More comprehensive approaches to each industrial sector and individual country are essential in developing a country's intellectual property rights system³ since both of these factors have unique issues.

Piracy, which is the "unauthorized and illegal reproduction or distribution of materials protected by copyright,"⁴ has actually contributed to the growth of an underground economy in the Philippines.⁵ Entertainment from video games is commonplace and since most of the population cannot afford to buy the hardware, software or firmware at legitimate prices, individuals have no choice but to purchase the cheaper, illegal copies.⁶ Furthermore, since the sale of pirated games is present everywhere, for example, malls or on sidewalk displays, many individuals do not realize they are purchasing illegal copies until years later, if at all. As the video game industry evolves into a multi-billion dollar market in the United States and in other countries, the mass production and selling of pirated software and hardware will have a detrimental effect on the copyright holders as well as the entire industry worldwide as it precipitates massive monetary losses.

Many factors contribute to the rampant problem of piracy in the Philippines: the culture and its economy, the lack of resources for or lack of interest in addressing the problem, the lack of

³ See Carlos Primo Braga, *The Developing Country Case for and Against Intellectual Property Protection*, in STRENGTHENING PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES: A SURVEY OF THE LITERATURE 69, 73 (Wolfgang E. Siebeck et al. eds., 1990).

⁴ BLACK LAW'S DICTIONARY 1186 (Deluxe 8th ed. 2004).

⁵ See GRP COMMENT, STRENGTHENING THE IP SYSTEM: THE CAMPAIGN AGAINST PIRACY AND COUNTERFEITING IN THE PHILIPPINES (2005-2006) (COMMENT OF THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES SUBMITTED TO THE UNITED STATES TRADE REPRESENTATIVE'S OFFICE IN RELATION TO THE 2007 SPECIAL 301: PHILIPPINES) 56 (2007), http://www.ipophil.gov.ph/pdf_format/GRPComment2007.pdf [hereinafter GRP COMMENT].

⁶ See Ryan Sumo, *The Escapist: Piracy and the Underground Economy* (July 15, 2008), <http://www.escapistmagazine.com/articles/view/5045>.

education within the nation itself, and lax enforcement by authorities and the courts. A less obvious factor includes the video game subculture, which revolves around file sharing and distributing such software to others at no cost, thus fostering piracy. Analyzing other Asian countries, such as China, provides for a relevant starting point for comparison to the Philippines and raises interesting issues. For instance, China appears to have systems in place for the protection and enforcement of copyright law that are shown to be more effective, despite having similar challenges to the protection and enforcement of copyright law. The difference is that China's piracy issue has been closely scrutinized and analyzed throughout the literature and by legislative bodies, thus resulting in more laws "on the books," which is apparent throughout China's legislative history. Emulating the system in the Philippines would prove to be insufficient since it will not take into consideration the unique factors that foster piracy in the Philippines. It is important that it is addressed specifically in the Philippines as well since piracy negatively affects trade relations, having a "snowball" effect on the economy. This paper focuses on the Philippines' current legislation, its enforcement, and its shortcomings.

Despite massive efforts to enact extensive legislation to protect copyrighted video game software and hardware, cultural walls in the Philippines present a major obstacle to the copyright protection of video games. As previously stated, piracy puts trade relations between the Philippines and the United States at risk because losses caused by piracy could potentially impact the burgeoning video game industry. A comprehensive approach allows legislation to address the unique factors weakening the progression of intellectual property law in order to protect the future of this highly profitable industry, as well as the future of the trading relations of both countries and the developing economy of the Philippines.

In order to provide an adequate foundation to understand the issues in this paper, it has been broken down into parts. Part I, the background, discusses the importance and impact of the video game industry, provides a brief summary of copyright law affecting the video game industry, and describes an overlooked subculture within the video game industry. Part II discusses the detrimental effects of piracy. Part III focuses on the Philippines, discussing the

cultural, demographic, and other factors contributing to piracy. Part IV discusses the case law regarding the infringement of copyrights and the lack of enforcement of copyright law within the courts, analyzes the barriers that contribute to this lack of enforcement, and suggests solutions for a new approach to the legislative bodies in the Philippines.

I. BACKGROUND

A. Impact of the Video Game Industry

The production and sale of video games has evolved into a multi-billion dollar industry in the United States and is expected to surpass the music industry in terms of revenue within the next year.⁷ Notably, this rapidly growing business has added strength to the American economy. New hardware (consoles, hand-held devices and computers) and software (CDs, DVDs, Blu-ray), along with successfully produced and marketed popular accessories, contribute to the industry's trend of maintaining above average growth even during periods of poor economic growth.⁸

The Entertainment Software Association ("ESA") reported that the majority of American households play computer or video games.⁹ From 1996 to 2007, computer and video games sales nearly tripled, reported at \$9.5 billion in 2007. Sales in 2009 were predicted to be as high as \$15 billion.¹⁰ From a study performed by Stephen E. Siwek on the economic contributions of the video game industry, between the years of 2003 to 2006, the entertainment software industry's annual growth rate exceeded seventeen percent. Over the same period, the entire U.S. economy grew at less than a four percent rate.¹¹ Furthermore, unlike many other

⁷ *Video game Sales Overtaking Music*, *supra* note 1.

⁸ See generally *Video Games Can Weather Poor Economy: Microsoft*, *supra* note 1 (A historical trend is noted, despite recent economic changes.).

⁹ See ENTERTAINMENT SOFTWARE ASSOCIATION, ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY, SALES DEMOGRAPHIC AND USAGE DATA (2008), http://www.theesa.com/facts/pdfs/ESA_EF_2008.pdf [hereinafter ESSENTIAL FACTS].

¹⁰ ROBERT W. CRANDALL & J. GREGORY SIDAK, VIDEO GAMES: SERIOUS BUSINESS FOR AMERICA'S ECONOMY 4 (2008), <http://www.theesa.com/newsroom/seriousbusiness.pdf>.

¹¹ STEPHEN E. SIWEK, VIDEO GAMES IN THE 21ST CENTURY: ECONOMIC

industries, the U.S. entertainment software industry disproportionately adds to real growth in the U.S. economy.¹²

Along with revenue, Siwek's study states that employment growth within the industry has climbed at a compounded annual rate of 4.44% between 2002 and 2006.¹³ Siwek concedes that although employment trends derived in his analysis "may not directly confirm the employment trends," it does support the notion that "employment growth in the entertainment software industry has been vigorous since 2002."¹⁴ There are several possible factors contributing to the significant increase throughout these years which include but are not limited to the following: games targeted towards the entire family (rather than a single demographic); the rapid increases in technology with the development of handheld devices with the capabilities of playing video games; new consoles and upgrades; and the increasing popularity and widespread use of the Internet, allowing individuals to play with or against each other online.¹⁵ "Casual gaming,"¹⁶ defined as a segment of the market focused on short, accessible gaming experiences, has grown rapidly over the last ten years. It is becoming an important part of American culture, as this sector is growing faster than any other area of entertainment perhaps because "video games offer many more hours of entertainment than a two-hour movie, making it less expensive over time."¹⁷ Combined with prevalent companies adding network features allowing for a "media link" feature that allows media to stream from a personal computer to a home system, more individuals will be willing to invest their money in video games as recreation rather than other forms of entertainment.

CONTRIBUTIONS OF THE US ENTERTAINMENT SOFTWARE INDUSTRY 5 (2007), <http://www.theesa.com/facts/pdfs/VideoGames21stCentury.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 20.

¹⁵ *Video-game Sales Overtaking Music*, *supra* note 1.

¹⁶ OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at http://dictionary.oed.com/cgi/entry/50092187?query_type=word&queryword=game&first=1&max_to_show=10&single=1&sort_type=alpha; See Emma Boyes, *GDC '08: Are Casual Games the Future?*, GAMESPOT UK, Feb. 18, 2008, <http://uk.gamespot.com/news/6186207.html?tag=result;title;0>; see also Tim Surette, *Casual Gamer Gets Serious Prize*, GAMESPOT UK, Sept. 12, 2006, <http://uk.gamespot.com/news/6157427.html?tag=result;title;4>.

¹⁷ *Video Games Can Weather Poor Economy: Microsoft*, *supra* note 1.

B. Summary of Copyright Legislation Protecting the Video Game Industry

1. The United States

The video game industry in the United States has been protected from copyright infringement through copyright acts and amendments passed by Congress.¹⁸ These copyright acts are the sole authority for granting and regulating copyrights.¹⁹ The Copyright Act of 1976 was the “first comprehensive revision in more than 70 years” and “was the product of more than two decades of congressional investigation and hearings, culminating in voluminous reports.”²⁰ Further comprehensive protection was enabled by the enactment of the Computer Software Copyright Act of 1980,²¹ which provided copyright protection for computer programs,²² the Digital Millennium Copyright Act of 1998²³ (“DMCA”), which enacted anti-circumvention and anti-trafficking bans,²⁴ and the No Electronic Theft Act of 1997²⁵ (“NET”) which

¹⁸ From the first statute, the Copyright Act of 1790, to the present statutory structure of the Copyright Act of 1976 and its consecutive amendments. 17 U.S.C. §§101-810, 1001-1101 (2009). The constitution also has a clause that recognizes the protection of intellectual property law. *See generally* U.S. CONST. art I., § 8, cl. 8. “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” *Id.*

¹⁹ 7 DR. SHELDON W. HALPERN ET AL., UNITED STATES OF AMERICA, INTERNATIONAL ENCYCLOPEDIA OF LAWS: INTELLECTUAL PROPERTY 28-29 (H. Vanhees ed., 2005).

²⁰ *Id.* at 29.

²¹ *See* Computer Software Copyright Act of 1980, 94 Stat. 3015.

²² *See generally* ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN NEW TECHNOLOGICAL AGE 386-87 (4th ed. 2007).

²³ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, *available at* <http://www.copyright.gov/legislation/dmca.pdf>); *see also* U.S. COPYRIGHT OFFICE, U.S. COPYRIGHT OFFICE SUMMARY: THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (1998) (on file with author), *available at* <http://www.copyright.gov/legislation/dmca.pdf>. “The legislation implements two 1996 World Intellectual Property Organization (“WIPO”) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues.” *Id.*

²⁴ MERGES ET AL., *supra* note 22, at 585. *See generally* DMCA, *supra* note 23; 7 HALPERN, *supra* note 19, at 154. *See also* 17 U.S.C. § 1201(a)(3)(A) (2009) (“[T]o ‘circumvent a technological measure’ means ‘to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.’”);

“strengthen[ed] criminal prosecution and penalties against those who distribute copyrighted works without authorization.”²⁶

The DMCA was enacted to “implement certain provisions of the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty,” which was adopted by the World Intellectual Property Organization (“WIPO”) in December of 1996.²⁷ The “anti-piracy provisions” are directed to the following:

[T]he circumvention of the technological protection measures taken by copyright holders to limit access to copyright material, and the facilitation of such circumvention and of circumvention of technological measures that inhibit infringing activities; there are also provisions designed to protect the integrity of copyright management information.²⁸

Digital rights management (“DRM”), which is the “operation of a control system that can monitor, regulate, and price each subsequent use of a computer file that contains media content,” can be “complemented with encryption, digital signatures, watermarking, or hardware programming” to limit the access of a copyrighted work.²⁹ Scholars believe that the U.S. did more than meet “its treaty commitments . . . established under Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances Treaty,”³⁰ which is also considered to be controversial. Subsection (c) of this paper will briefly discuss the controversy that arises from DRM.

In addition, subsequent case law recognized the copyright

17 U.S.C. § 1201(a)(3)(A) (2000).

²⁵ No Electronic Theft Act, of 1997, 17 U.S.C. § 506, 18 U.S.C. § 2319 (2007). The NET Act was a response to the dismissal of *United States v. LaMaccia*, 871 F. Supp. 535 (Mass. App. Div. 1994). See Shelley M. Liberto, *Congress Patches a Loophole with the Anti-Piracy “NET Act,”* (1998), available at <http://www.libertolaw.com/7-98.html> (“The NET Act punishes software pirates who willfully copy, distribute, and traffic in protected software on the Web whether or not they enjoy a financial gain.”).

²⁶ MERGES ET AL., *supra* note 22, at 584; *see also* 17 U.S.C. § 506, *supra* note 25; 18 U.S.C. § 2319, *supra* note 25.

²⁷ 7 HALPERN, *supra* note 19, at 153.

²⁸ *Id.*; *accord* 17 U.S.C. §§ 1201-1205 (2007).

²⁹ Michael A. Einhorn, *Digital Rights Management and Access Protection: An Economic Analysis*, in ADJUNCTS AND ALTERNATIVES TO COPYRIGHT 82, 82 (Jane C. Ginsburg & June M. Besek eds., Isabelle Aleman et al. trans., 2001).

³⁰ *Id.* at 83-84.

protection of video games within the category of “audiovisual works”³¹ in *Stern Electronics v. Kaufman*.³² Violators or those who infringe upon the rights of the holder of the copyright are to be fined for damages, have an injunction placed on their activities, and may face criminal penalties.³³ Other major cases, such as *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, have given hallmark decisions regarding the violation of copyright law.³⁴ In *Atari*, the court held “infringement could be established by circumstantial evidence (1) that the defendant had access to the copyrighted work and (2) that there existed substantial similarities between the accused and the copyrighted works.”³⁵ This has been controlling law and was also seen in *Nintendo of America, Inc. v. Bay Coin Distributors*, which demonstrated that “a plaintiff ‘must show ownership of a valid copyright and copying by the defendant.’”³⁶ Associations and movements were also established to educate the public as well as curb piracy rates domestically and internationally.³⁷

³¹ See 17 U.S.C. § 101, *supra* note 21 (defining audio visual as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes in which the works are embodied.”).

³² See Jethro Dean Lord IV, *Comment: Would You Like To Play Again? Saving Classic Video Games from Virtual Extinction through Statutory Licensing*, 35 SW. U.L. REV. 405, 413-14 (2006); see also *Stern Electronics v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982).

³³ 17 U.S.C. §§ 501-504 (2002).

³⁴ *Atari, Inc. v. North American Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir. 1982), *overruled by* *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423 (7th Cir. 1985).

³⁵ *Id.*

³⁶ *Nintendo of America, Inc. v. Bay Coin Distribs.*, 1982 WL 1266 (E.D.N.Y. 1982) (quoting *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977)).

³⁷ The ESA is an association composed of many software companies in the video game industry which is “dedicated to serving the business and public affairs needs of companies publishing interactive games. . . .” ESSENTIAL FACTS, *supra* note 9, at 12. Services the association provides also includes “a global antipiracy program, owning the E3 Media & Business Summit, business and consumer research, federal and state government relations, First Amendment and intellectual property protection efforts.” *Id.*

Business Software Alliance (BSA) is a nonprofit trade association created to advance the goals of the software industry and its hardware partners. [The] organization [is] dedicated to promoting a safe and legal digital world. Headquartered in Washington, DC, BSA is active in more than 80 countries, with

2. International Agreements

Internationally, copyright treaties that have been established include the Berne Convention³⁸ and the Agreement on Trade-Related Aspects of Intellectual Property Rights³⁹ (“TRIPS”). The intellectual property laws of each of the signatories must conform to the treaties’ layout. Members of these particular agreements must afford intellectual property rights protection beyond the borders of their respective countries. For example, if a signatory country foreign to the U.S. distributes works within the U.S., the works are protected under U.S. copyright law.

The Berne Convention for the Protection of Literary and Artistic Works has two foundations:

- (1) National treatment – member nations must afford works of nationals of other Berne member nations the same protections as work of domestic authors (Art 5(1)); and
- (2) Minimum standards – the copyright laws of member nations must satisfy [a] minimum [set of] criteria.⁴⁰

The Convention covers “every production in the literary, scientific and artistic domain, whatever may be the mode of expression,” including “derivative works and collective works.”⁴¹ In addition, “recent developments such as the E.C. Software Directive, TRIPS, and the WIPO Copyright Treaty indicated that computer programs are to be protected as ‘literary works’ within the meaning of the Berne Convention.”⁴² Berne members are to

dedicated staff in 11 offices around the globe . . . BSA’s global mission is to promote a long-term legislative and legal environment in which the industry can prosper and to provide a unified voice for its members around the world. BSA’s programs foster innovation, growth, and a competitive marketplace for commercial software and related technologies.

Business Software Alliance (“BSA”), <http://www.bsa.org/country/BSA%20and%20Members.aspx> (last visited Feb. 9, 2008).

³⁸ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html [hereinafter Berne Convention].

³⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, 1869 U.N.T.S. 299, *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm [hereinafter TRIPS].

⁴⁰ MERGES ET AL., *supra* note 22, at 618-19.

⁴¹ *Id.* at 619.

⁴² *Id.*

also “include protection for no less than the life of the author plus 50 years” and the Berne Convention “requires member nations to afford exclusive rights to make and authorize translation, reproduction, public performance, and adaptation of their works” as well as the “means for redress for safeguarding the rights granted by [the Berne Convention]”⁴³

The TRIPS agreement expands upon the Berne Convention’s framework and incorporates some of the Berne Convention’s provisions.⁴⁴ Specifically, it expanded “works covered” to include “protection for computer programs as literary works” and “[o]riginal selection or arrangement of databases.”⁴⁵ The TRIPS agreement also allows copyrights to be granted automatically and does not require registration.⁴⁶ Furthermore, it “specifies more extensive civil and criminal enforcement obligations and incorporates the new WTO dispute-settlement process for resolving disputes among the member nations.”⁴⁷ The TRIPS treaty “goes beyond the Berne framework by requiring that members afford all foreign authors the same protections as those offered to authors from the ‘most favored nation.’”⁴⁸

3. The Philippines

The Philippines passed its own property laws incorporating provisions from the Berne Convention, U.S. intellectual property laws, and the TRIPS agreement in an effort to protect the copyrights and patents of creators and authors as found in the United States.⁴⁹ The Intellectual Property Code of the

⁴³ *Id.*

⁴⁴ MERGES ET AL., *supra* note 22, at 620.

⁴⁵ *Id.*

⁴⁶ *Id.* at 409; *see* TRIPS, *supra* note 39.

⁴⁷ MERGES ET AL., *supra* note 22, at 620.

⁴⁸ *Id.* *See generally* ILLIAS BANTEKAS ET AL., OIL AND GAS LAW IN KAZAKHSTAN: NATIONAL AND INTERNATIONAL PERSPECTIVES 179 (2004). The Most Favored Nation (“MFN”) “principle is established under particular multilateral or bilateral treaty regimes, meaning that every time a contracting party improves the benefits afforded to another party, it has to give the same best treatment to all other parties so that they remain equal.” *Id.*; *see also* TRIPS, *supra* note 39, art. 4.

⁴⁹ The Philippines adopted the TRIPS agreement in 1995 and became a member of the WIPO Copyright Treaty in 2002. *See generally* 5 JACINTO D. JIMINEZ, INTERNATIONAL ENCYCLOPEDIA OF LAWS: INTELLECTUAL PROPERTY, THE PHILIPPINES 31-32 (Prof. Dr. R. Blanpain & Prof. D. H. Vanhees eds., 2007) (introduction of brief history of the legislation of intellectual property in the

Philippines⁵⁰ was passed and enacted on June 6, 1997 and then modified on March 28, 2001. The Code created the Intellectual Property Office (“IPO”) and empowered this body to enforce provisions and penalize violators of the code.⁵¹ Legal action on copyright infringement is covered in Section 10 of the IPO, potentially strengthening its position to punish those who infringe copyrights. Examples of such provisions addressing violations include the following: addressing damages of no less than P200; issuing cease and desist orders; seizing products that have been subjected to infringement; authorizing the forfeiture of all property involved in the infringement (including real and personal property); imposing administrative fines no less than P5000, but no more than P150,000 (with a continued fine of P1000 for each day of a continued violation); and assessing damages.⁵² The seizures of infringing products were fruitful as they resulted in the confiscation of what is estimated to be millions of dollars in property.⁵³

The Code also recognizes that intellectual property rights of another country are to be protected when incorporating the TRIPS agreement into the Code:

Any person who is a national or who is domiciled or has a real and effective industrial establishment in a country which is a party to any convention, treaty or agreement relating to intellectual property rights or the repression of unfair competition, to which the Philippines is also a party, or extends reciprocal rights to nationals of the Philippines by law, shall be entitled to benefits to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of an intellectual property right is otherwise entitled by this Act.⁵⁴

Despite the legislative history of the Philippines, piracy of

Philippines).

⁵⁰ The Intellectual Property Code of the Philippines, Rep. Act No. 8293 (June 6, 1997) (Phil.), available at <http://www.chanrobles.com/legal7/intellectualpropertycodeofthephilippines.html>.

⁵¹ *Id.* pt. 1, § 5.

⁵² See Rep. Act No. 8293, *supra* note 50, pt. 1, § 10.

⁵³ See INTERNATIONAL PROPERTY ALLIANCE, 2008 SPECIAL 301: PHILIPPINES 295,302-03 (Feb. 11, 2008), <http://www.iipa.com/rbc/2008/2008SPEC301/PHILIPPINES.pdf> [hereinafter SPECIAL 301].

⁵⁴ Rep. Act No. 8293, *supra* note 50, pt.1, § 3.

video games remains rampant, threatening and depreciating this rapidly growing and lucrative industry. Seizures of such infringed property were impressive, despite the very few convictions.⁵⁵ Additionally, “[i]n the Philippines, optical media piracy has ‘exploded,’ and in 2002, . . . began exporting more pirated material than it imported.”⁵⁶ Therefore, an analysis of the legislative enforcement by authorities and the courts and the consequences of such will be discussed later in section V.

C. Gaming: A Complete Subculture

The demographics of this industry have spurred an underground subculture in our society: the “gamer” subculture.⁵⁷ Gamers exist not just in the United States, but internationally, as evidenced by the massive number of online forums, discussion groups and various websites that are dedicated to those who call themselves gamers.⁵⁸ There is no official definition, but it is a term traditionally used to refer to “someone who played role-playing games or war games.”⁵⁹ Presently, within a social context, its meaning has expanded to include players of video games in general.⁶⁰

Within this special subculture, there are many communities online that “take the form of web rings, discussion forums and

⁵⁵ SPECIAL 301, *supra* note 53, at 304. Furthermore, other bills have been considered for copyright-related issues by the Congress in the Philippines, such as the Senate Bill 1572, An Act Strengthening the Enforcement of the Copyright Protection of Intellectual Property Right Owners of Computer Programs Creating For This Purpose the Funds Therefor, and For Other Purposes. See JOHN GANTZ, PIRATES OF THE DIGITAL MILLENNIUM 220 (2005). This bill, if enacted, will further support and address the piracy issues burdening the video game industry.

⁵⁶ SPECIAL 301, *supra* note 53, at 304.

⁵⁷ See Stephanie A. Smith, *The Subculture of Video Games* (Sept. 13, 2007), http://www.associatedcontent.com/article/371817/the_subculture_of_videogames.html.

⁵⁸ See, e.g., The Escapist, www.escapistmagazine.com (last visited Jan. 28, 2010); see generally Anthony Faiola, *Geek Pride Blooms Into a Real-World Subculture* (July 15, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071401235.html> (providing further descriptions of the gamers’ subculture).

⁵⁹ OXFORD ENGLISH DICTIONARY, *supra* note 16; see also Pizza Killer’s Blog, <http://www.destructoid.com/blogs/Pizzakiller/what-is-a-gamer--94942.phtml> (last visited Feb. 2, 2008) and *What is a Gamer?*, http://www.epinions.com/content_3151863940 (last visited Feb. 2, 2008).

⁶⁰ See *id.* for unofficial definition of “gamer.”

other virtual communities, as well as college or university social clubs.”⁶¹ In these social groups, file sharing (through peer-to-peer networking)⁶² and copying of games are a social norm where individuals are expected to share knowledge, experience and software. Hackers who modify systems or crack games often do so because of a social whim and not so much as for a profit. Such activities provide a feeling of notoriety and prestige. In fact, when an individual (who was arrested) was questioned as to why he “risk[ed] so much for his illegal hobby,” he replied, “[B]ecause it made me feel important [I] wasn’t a jock or one of the cool kids, but suddenly, I was the go-to guy. I could do stuff the average Joe couldn’t.”⁶³ With access to the computer and Internet becoming more commonplace, the number of individuals who partake in these activities has increased, yet their motives are not necessarily pecuniary.

There is another prevailing explanation of why such groups may “crack” copyrights on certain software and hardware; it is a form of rebellion - a way for a particular group or “clan” to make an anti-corporate statement. Some of these individuals believe that the companies claim false estimations of profits since there cannot be a way to precisely calculate the loss.⁶⁴

These people do it for fun, because they want to. There is also a sort of Cloak and Dagger element where the Clans try to break and find ways around the newest security features, while avoiding the FBI and corporate lawyers. There is also competition and pride to see which Clan is able to crack and distribute the cracks first.⁶⁵

⁶¹ *Id.*

⁶² i-SAFE America Inc., *Understand Peer-to-Peer Networking*, <http://www.isafe.org/imgs/pdf/education/P2PNetworking.pdf> (last visited Jan. 31, 2010). Peer-to-peer (“P2P”) “networking allows computers to communicate directly with one another rather than through a central server like a website. [It] can allow anyone in the world to copy files directly from your computer. *Id.* “The search pulls from any computer currently connected to the internet running . . . P2P software.” *Id.*

⁶³ Kristin Kalning, *Game Piracy Runs Rampant on the Internet* (May 14, 2007), <http://www.msnbc.msn.com/id/18665162/>.

⁶⁴ Cracking, http://transcriptions.english.ucsb.edu/curriculum/lci/magazine/s_02/eric/Cracking_final.htm (last visited Sept. 6, 2008); see generally Rob Fahey, *Pirate Station* (Aug. 29, 2008), <http://www.gamesindustry.biz/articles/pirate-station> (emphasizing reported lost revenue controversial).

⁶⁵ *Id.*

Individuals who violate copyright laws with no other motivating purpose other than for social reasons present an interesting problem to the legislatures and to the authorities trying to prevent piracy. Subsequently, the subculture's rejection of digital rights management (DRM) presents a problem, which will be discussed.⁶⁶

DRM has been met with much criticism from legal scholars and ambivalence to the gamer culture. The central issue surrounds the principle that "[DRM] and the access control that it implicates is *legally different* from a copyright, which protects . . . work from unauthorized reproduction, distribution, derivation [C]opyright protection is principally limited by term duration, fair use" and other legal doctrines.⁶⁷ In contrast, DRM and its "access protection *entails technological procedures* that are designed to disallow the circumvention of the digital shield that encases a copyright work."⁶⁸ It is most criticized for being too restrictive, thus being contradictory to the purpose of intellectual property protection "to promote ideas and knowledge."⁶⁹ Furthermore, forms of rebellion against DRM may entail individuals engaging in circumvention with no financial incentive. The attitude and customs within the gamer subculture cannot be ignored and must be included among the considerations in the legislative efforts to enforce copyright protection.

II. THE EFFECTS OF PIRACY

The estimated amount of money lost from the piracy of video games varies and is controversial since it is difficult to ascertain with precision.⁷⁰ The Industry estimates dollar amount losses to be in the billions. For example, Nintendo claimed a loss of \$975 million last year.⁷¹ Microsoft claimed that in one month, \$91 million worth "of entertainment media and software was pirated

⁶⁶ See Welcome to the Anti-DMCA Website, <http://www.anti-dmca.org/> (last visited Feb. 2, 2009).

⁶⁷ Einhorn, *supra* note 29, at 82-83 (emphasis added).

⁶⁸ *Id.* at 83 (emphasis added).

⁶⁹ See U.S. CONST. art. 1, § 8, cl. 8.

⁷⁰ See Fahey, *supra* note 64.

⁷¹ Joe Martin, *Nintendo Lost 975 Million Dollars to Piracy Last Year*, BIT-TECH.NET, Feb. 15, 2008, http://www.bit-tech.net/news/2008/02/15/nintendo_lost_975_million_to_piracy_last_year/.

worldwide.”⁷² The Business Software Alliance (“BSA”) reported that in 2006, \$11.6 billion was lost due to software piracy.⁷³

Within the Philippines, the software piracy rate decreased from 71% to 69% in 2008 from 2005. However, losses to the industry went up from \$76 million to \$212 million during the same time period.⁷⁴ These figures are of great significance because reports of these distressing losses make companies ambivalent about opening and creating a market in the Philippines. Lack of intellectual property rights enforcement adversely affects international trade relationships between the Philippines and countries other than the United States and worsens their economic status. For example, from a fiscal perspective using the piracy rate in 2005, “[a] study of the Business Software Alliance and IDC estimates that for the Philippines, a 10 point reduction . . . [of the] 71% piracy rate would yield [an] additional US\$32 million (Php 1.3 billion) in tax revenues and US\$623 million (Php 25.3 billion) to the economy.”⁷⁵ This is a significant value. The Philippines is a developing country and needs strong relations with other nations for trade and economic benefits. Not only do the Philippines suffer economically but also sociologically and intellectually. The legal code of the Philippines asserts the following statement:

The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products. It shall protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual

⁷² Piracy and Microsoft, http://www.windows-vista-update.com/Piracy_and_Microsoft.html (last visited Nov. 7, 2008).

⁷³ Eileen Yu, *Revenue Loss from piracy in Asia Up*, ZDNET ASIA, May 15, 2007, <http://www.zdnetasia.com/news/software/0,39044164,62013101,00.htm>.

⁷⁴ Business Software Alliance, SIXTH ANNUAL BSA-IDC GLOBAL SOFTWARE PIRACY STUDY 2008 13 (May 2009), http://global.bsa.org/global_piracy2008/studies/globalpiracy2008.pdf.

⁷⁵ *Id.* The IDC is a subsidiary of the International Data Group (“IDG”). See <http://www.idc.com/about/about.jsp> (last visited Feb. 5, 2008). It is a “premier global provider of market intelligence, advisory services, and events for the information technology, telecommunications, and consumer technology markets.” *Id.* The IDC, providing more than 1000 analysts “to provide global, regional, and local expertise . . . helps “IT professionals, business executives, and the investment community make fact-based decisions on technology purchases and business strategy.” *Id.*

property and creations, particularly when beneficial to the people, for such periods as provided in this Act. The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good.⁷⁶

If trade agreements are tied off or suspended because of the fear of copyright infringement and other intellectual property rights violations, the Philippines will lose connections that could enhance its culture, resulting in ill effects that intellectual property laws are to protect from.⁷⁷ Other countries that potentially would trade and continue relations with the Philippines would also suffer a socioeconomic detriment. The TRIPS agreement recognizes this phenomenon as well.⁷⁸

Finally, copyright holders are not receiving the benefit of their creative work. Preserving the economic encouragement of the creator is one of the foundations of intellectual property law.⁷⁹ If the creator does not receive fair compensation for the work he puts into the public domain, production of new creative works will be greatly discouraged. Individuals will not want to invest their hard work and time into creating a game when they will not be adequately compensated.

If piracy begins to drive away those who create and produce games, the industry will not be as successful as it has been. Therefore, it is important to recognize that piracy is a great burden to the emerging, highly profitable video game industry. Great attention must be given to why piracy is occurring, how it is affecting both our domestic and international markets, along with proper analysis and enforcement of the of intellectual property laws within the Philippines.

⁷⁶ Rep. Act No. 8293, *supra* note 50, art.1, § 2.

⁷⁷ See MERGES ET AL., *supra* note 22, at 210.

⁷⁸ TRIPS, *supra* note 39, pt. 1, § 2.

⁷⁹ See MERGES ET AL., *supra* note 22, at 210.

III. THE PHILIPPINES: A DEVELOPING COUNTRY

A. History, Economy and Culture

Filipinos trace their origins to the Malaysia and many have Chinese and Spanish bloodlines.⁸⁰ The Philippines is a developing country with major socioeconomic gaps within its population. Agriculture and its associated industries are important sectors of the economy, such as “electronic and electrical equipment and components, processed food and beverages, mineral products, fruits and vegetables, sugar and sugar products and coconut products.”⁸¹ A brief discussion below illustrates how trade relations between the U.S. and the Philippines were established.

At the end of the Spanish-American War in 1898, the United States retained the Philippines as a colony to increase their foreign trade relations, however, war between the United States and the Philippines began shortly thereafter as the Philippines struggled for independence.⁸² In March of 1934, “the United States Congress approved the Tydings-McDuffie Law[,] . . . authoriz[ing] the Philippine Legislature to call a Constitutional Convention, [which] provided for the establishment of a ten-year transitory Commonwealth of the Philippines.”⁸³ Due to the “requirement for receiving war reconstruction assistance from the United States, the Philippine government agreed to a number of items that, in effect, kept the Philippines closely linked to the United States economy and protected American business interests in the Philippines.”⁸⁴ Even today, the United States is the country’s largest importer and exporter of goods.⁸⁵

Since the end of World War II, the economy of the Philippines has been volatile; its fall from one of the fastest growing, wealthiest countries in Asia was caused by the crippling recession during the politically unstable and corrupt regime of Ferdinand

⁸⁰ 5 JIMINEZ, *supra* note 49, at 18.

⁸¹ *Id.* at 17.

⁸² *Id.* at 25 (The war lasted from 1899-1904.).

⁸³ *Id.* (This act established an independent democracy.).

⁸⁴ PHILIPPINES: A COUNTRY STUDY (Ronald E. Dolan ed., 1991), *available at* <http://countrystudies.us/philippines/75.htm> (discussing International Trade).

⁸⁵ CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html#Intro> (last visited Dec. 5, 2008).

Marcos.⁸⁶ Since then, there have been further struggles with the economy and political power, compounded by several natural disasters devastating the Philippines.⁸⁷ Around 1984, the country suffered an economic recession, “reducing economic conditions as much as 10%.”⁸⁸

Under the administration of the current president Gloria Macapagal-Arroyo, the economy has begun to reemerge as a growing, developing country in Southeast Asia.⁸⁹ Even given its significant progress, the country still struggles to “generat[e] income internally, as it has the third-highest rate of remittances from overseas in the world.”⁹⁰ The CIA website recognizes its progress along with the challenges the country faces economically:

The Philippine economy grew at its fastest pace in three decades with real GDP growth exceeding 7% in 2007. . . .

. . . .

. . . [Nevertheless], the Philippines will need still higher, sustained growth to make progress in alleviating poverty, given its high population growth and unequal distribution of income. Macapagal-Arroyo averted a fiscal crisis by pushing for new revenue measures and, until recently, tightening expenditures. Declining fiscal deficits, tapering debt and debt service ratios, as well as recent efforts to increase spending on infrastructure and social services have heightened optimism over Philippine economic prospects. Although the general macroeconomic outlook has improved significantly, the Philippines continues to face important challenges and must maintain the reform momentum in order to catch up with regional competitors, improve employment opportunities, and alleviate poverty.⁹¹

Furthermore, there is a culture of corruption that still exists within the economy and society of the Philippines as evidenced by

⁸⁶ Philippine Economy, <http://www.gpcci.org/htmfile/economy.html> (last visited at Jan. 29, 2010).

⁸⁷ *Id.*

⁸⁸ Philippines Economic Profile, http://www.economywatch.com/world_economy/philippines (last visited Dec. 5, 2008).

⁸⁹ *See id.*

⁹⁰ Philippine Economy, *supra* note 86. (Remittances: transfers of money by foreign workers to their home countries).

⁹¹ CIA World Factbook, *supra* note 85.

its turbulent history and recently enacted laws, which hampers its ability to compete with stronger countries. These factors will be discussed in detail within the next section.

B. Factors Contributing to Piracy

The Comment of the Government of the Republic of the Philippines noted several challenges to overcoming the problem of piracy: (1) different mandates for strengthening the intellectual property system which results in a “lack of cohesiveness” in government actions; (2) an “absence of retrievable data and information . . . on enforcement and prosecution, resulting in lack of transparency in operations, weak follow-through and inadequate facts to guide strategic and tactical operations and policy making; (3) low public awareness and knowledge . . .” dealing with piracy; and (4) a “lack of institutional and personnel capacities of the IP [Intellectual Property] community (practitioners, enforcers, prosecutors, judges, etc.).”⁹²

In addition to the specter of governmental corruption and organized crime, several political factors are capable of contributing to such deficiencies.⁹³ An interview with an individual within the Philippines’ piracy industry revealed that the president “has been accused of manipulating the last election to her advantage” and that “allegations that were never properly investigated and that have never been discounted.”⁹⁴

Despite the existence of obvious socioeconomic gaps, it is relatively easy to overlook a key factor that many families rely on the profits of piracy to support themselves.⁹⁵ There is an extensive

⁹² GRP COMMENT, *supra* at note 5, at 5.

⁹³ See International Piracy: The Challenges of Protecting Intellectual Property in the 21st Century: Before the United States House of Representatives Subcomm. on Courts, the Internet, and Intellectual Property (statement of Eric H. Smith, International Intellectual Property Alliance) (Oct. 17, 2007) (on file with author), available at <http://www.iipa.com/pdf/IIPAEricSmithtestimonyOctober182007Testimony10172007.pdf>.

⁹⁴ TILMAN BAUMGÄRTEL, ASIAN CULTURE FORUM 2006 – WHITHER THE ORIENT: THE CULTURE OF PIRACY IN THE PHILIPPINES 394 (2006), <http://www.thing.de/tilman/piracy.pdf>.

⁹⁵ See Sumo, *supra* note 6; see also GRP COMMENT, *supra* note 5, at 56. “. . . [Q]uiapo traders who peddle pirated DVDs, VCDs and videogames got a lecture on intellectual property rights from President Gloria Macapagal-Arroyo, who also offered them alternative sources of income.” *Id.* She offered alternative means of livelihood for these individuals and families, recognizing that there are those who

underground economy that thrives on such business, and unless the legislature is ready to address this, any legislation against piracy will be futile. Also, there are families who rely on the prices of pirated software.⁹⁶ These individuals cannot afford video game software priced at \$60, as it would comprise a significant percentage of their annual income.⁹⁷ The average family income reported by the National Statistics Office of the Republic of the Philippines in 2006 was P173,000⁹⁸ which is approximately \$3700 when converted to U.S. currency. When compared to the United States' average family income ranging between \$50,000 and \$60,000, it becomes apparent that a game that would sell for \$60 in the United States would be unaffordable to individuals in the Philippines.⁹⁹ As a consequence, piracy presents a unique issue as it is part of the economic growth.¹⁰⁰ The problem can only increase under present legislative conditions since the entertainment provided through video games in the Philippines is very popular among families. Most of the population cannot afford to buy hardware (consoles) and software (disks) at legitimate prices and instead choose to purchase the cheaper, illegal copies.

As piracy has become prevalent throughout the Philippines, the underground culture developed within the piracy industry

sell pirated software to survive. *Id.*

⁹⁶ See Sumo, *supra* note 6. See also BAUMGÄRTEL, *supra* note 94, at 375. "The piracy market for DVDs, software and music is a boon to a number of very different groups of people. One group consists of producers, traders and distributors of bootlegged media that earn a reasonable income, important in a Third World country like the Philippines. One estimate is that more than 100[,]000 people in the Philippines earn a living by being part of the supply chain for pirated media" *Id.* (explaining that many of the Filipinos' livelihood depend on this type of living). There are no exact estimates of how many are involved.

⁹⁷ See Sumo, *supra* note 6.

⁹⁸ National Statistics Office of the Republic of the Philippines, <http://www.census.gov.ph/> (last visited Sept. 6, 2008).

⁹⁹ See Sumo, *supra* note 6.

¹⁰⁰ See *id.* In the Philippines, as in many other Asian countries, piracy isn't a matter of right or wrong; it's a matter of survival. To eradicate piracy means depriving people of jobs generated by this underground economy. It means eradicating the businesses that employ them and negating the taxes funneled to the Philippine government. Developers and publishers will claim a huge victory, but they'll soon notice that those billions of dollars in lost sales aren't exactly showing up on their bottom line. People still can't afford their games. Everyone loses. *Id.* (citing Sumo's argument of the role of piracy in the Philippines' underground economy).

among the individuals who distribute the illegal copies should not be overlooked. An “unwritten ‘code of honor’ exists within this ‘black market’” indicating “that deals and agreements are honored, that payments are made as agreed upon and in time, and that the various participants in the black market acknowledge their obligations towards each other.”¹⁰¹ This culture and the expectations it creates provide strength to the industry, ensuring its survival. It is further recognized that “the whole pirate market could not work without these commitments”¹⁰² and that the multiple sources of pirated goods are not solely from within the Philippines because much of it is smuggled into the country through established trade routes.¹⁰³

Ironically, the video game industry also has conflicting interests with regard to the protection of intellectual property.¹⁰⁴ The legitimate gaming industry “encourages them to test the game’s rules, find secret areas and other game secrets,” to encourage the sales of more games.¹⁰⁵ However, through this same “inquisitive nature,” the industry indirectly “encourag[es] gamers to hack their TPMS [technological protection measures].”¹⁰⁶ Furthermore, since it is apparent that bargaining and “negotiating [are] part of the culture, people develop the instincts to notice and take advantage of opportunities.”¹⁰⁷

Much of the population, who purchase illegal copies of the games, fail to realize that they are supporting piracy. In fact, many of them do not realize they are buying pirated games until years later, which exemplifies the lack of education regarding

¹⁰¹ BAUMGÄRTEL, *supra* note 94, at 393.

¹⁰² *Id.*

¹⁰³ *See id.* at 393. *See also* Email from Michael Schlesinger, Vice President and Associate General Counsel, International Intellectual Property Alliance (IIPA), to Sybia Harrison, Special Assistant to the Section 301 Committee (Dec. 2, 2005) (on file with the author), available at http://www.iipa.com/pdf/IIPA%20PHILIPPINES%20OCR%20Letter%20FINAL%20120205%20_3_.pdf.

¹⁰⁴ Corinne L. Miller, *The Video Game Industry and Video Game Culture Dichotomy: Reconciling the Gaming Culture Norms With the Anti-Circumvention Measures of the DMCA*, 16 TEX. INTELL. PROP. L.J. 453, 461(2008).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Matthew L. Goldberg, *The Viability of Stimulating Technology-Oriented Entrepreneurial Activity in China, Taiwan, Japan, and South Korea: How Regulations and Culture Encourage the Creation, Development, and Exploitation of Intellectual Property*, 1 INT’L L. & MGMT. REV. 1, 13 (2005).

copyright and piracy in the Philippines. When they do find out, there is little incentive to change since this is a tradition they grew up with that rarely resulted in retribution¹⁰⁸ and they are most likely unable to afford legitimate products.

A combination of the country's political instability, prevalent piracy culture, economic factors (i.e., the actual price of what a video game would cost) and the "open philosophy"¹⁰⁹ of the video game industry, make compliance and enforcement of copyright protection for the video game industry tenuous in the Philippines.

IV. ANALYSIS OF ENFORCEMENT

A. *Enforcement in Case Law*

As previously discussed, the Philippines has an Intellectual Property Code that mirrors the United States Code. Despite the legislative efforts, which enabled the raids and seizure of many copyright-infringed items, problems with piracy continue to persist. An analysis of its court system and the implementation of several strategies to enforce its laws reveal the reasons deterrence has failed.

There have been actual convictions within the court system of the Philippines,¹¹⁰ however, they are too few to provide a deterrent effect. It appears that the authorities are ambivalent about targeting major pirates within the industry.¹¹¹ Additionally, convicted parties are not punished to a degree that would provide a deterrent effect.¹¹² For example, in *People v. Macacuna Ganarosa Y Basheran and Alinor Pangcatan Y Abokar*,¹¹³ copyright violators were "sentenced to imprisonment for 90 days plus costs."¹¹⁴ Upon comparison with the United States for criminal penalties of such violations, the United States provides a

¹⁰⁸ See generally The Escapist, www.escapistmagazine.com (last visited Jan. 28, 2010); Anthony Faiola, *Geek Pride Blooms Into a Real-World Subculture*, WASH. POST, July 15, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071401235.html>.

¹⁰⁹ See Miller, *supra* note 104, at 461.

¹¹⁰ SPECIAL 301, *supra* note 53, at 303.

¹¹¹ *Id.* at 301.

¹¹² *Id.* at 303.

¹¹³ *Id.* at 304.

¹¹⁴ *Id.*

significantly harsher penalty.¹¹⁵ Therefore, in the Philippines, it can be deduced that the fines and time of confinement when punished for violation of the law do not outweigh the financial advantage that one may receive from the profits of piracy. An individual whose livelihood depends on this income may find it rational (and necessary) to partake in the illegal industry rather than to find a legitimate livelihood, despite the risk of a criminal conviction. Furthermore, the International Intellectual Property Alliance (“IIPA”) reported that repeat offenders remain free and continue their illegal activities. The IIPA “has long documented the problems . . . in the *Multilinks Book Supply Case*”¹¹⁶ Despite convictions, including “one year in jail and fines of P50,000 (1200 USD) per count for copyright piracy,” illegal activities continued, further illustrating the lack of deterrence by the legal system.¹¹⁷

Another problematic issue lies with the procedures leading up to the lawsuits. The actual time that elapses from arrest to conviction can be “years, with little hope of any resolution or even progress.”¹¹⁸ An alarming case the IIPA discussed was the *Solid Laguna* case.¹¹⁹ In *Solid Laguna*, the Court discussed its support for its conclusion:

To us it is not enough that the applicant and his witnesses testify that they saw stacks of several alleged infringing, pirated and unauthorized discs in the subject facility. The more decisive consideration determinative of whether or not a probable cause obtains to justify the issuance of a search warrant is that they had personal knowledge that the discs were actually infringing, pirated or unauthorized copies.¹²⁰

The problem with this standard is that it sets the burden of proof “impossibly high for obtaining a search warrant[] and probably implicate[s] the Philippines’ TRIPS obligations.”¹²¹ It is

¹¹⁵ See 17 U.S.C. § 1204.

¹¹⁶ SPECIAL 301, *supra* note 53, at 306.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 304.

¹¹⁹ Sony Music Entm’t (Phil.), Inc. v. Hon. Judge Dolores Espanol, G.R. No. 156804, (S.C. March 14, 2005), *available at* <http://sc.judiciary.gov.ph/jurisprudence/2005/mar2005/156804.htm> [hereinafter *Sony Music*].

¹²⁰ *Id.* See also SPECIAL 301, *supra* note 53, at 305.

¹²¹ SPECIAL 301, *supra* note 53, at 305. See also TRIPS, *supra* note 39, art.

further noted that this “standard falls well outside the mainstream of other countries with respect to grants of search warrants and seriously jeopardizes the expeditious availability of warrants.”¹²² This procedural obstacle greatly delays and impairs the enforcement of intellectual property laws because cases have been dismissed on procedural errors referring to the grant of search warrants despite the fact that the items seized with the said search warrant have led to the confiscation of obviously pirated items.

Interestingly, the Philippines’ courts previously identified a more “mainstream” and standardized rule in the *Columbia* case.¹²³ The Supreme Court described the procedure to obtain a search warrant:

[The procedure] does not rule out the use of testimonial or documentary evidence, depositions, admissions or other classes of evidence tending to prove the *factum probandum*, especially where the production in court of object evidence would result in delay, inconvenience or expenses out of proportion of its evidentiary value¹²⁴

The *Solid Laguna* case deviates from the *Columbia* case; *Columbia* provides a far less burdensome evidentiary standard for a search warrant than *Solid Laguna* and it has been recommended by the IIPA that the Filipino Congress “pass legislation codifying *Columbia* and overruling *Solid Laguna*”¹²⁵

As a result of the inconsistent enforcement and convictions by the court system, progress has significantly slowed in prosecuting offenders. Despite successful raids and confiscations of millions of dollars worth of pirated items, current efforts have failed to rectify the ongoing problem of piracy.

41.2. “Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.” *Id.*

¹²² SPECIAL 301, *supra* note 53, at 305-06.

¹²³ *Columbia Pictures Entm’t, Inc. v. Honorable Court of Appeals*, G.R. No. 111267, (S.C. Sept. 20, 1996) (en banc), *available at* <http://sc.judiciary.gov.ph/jurisprudence/1996/sept1996/111267.htm>.

¹²⁴ *Id.*

¹²⁵ SPECIAL 301, *supra* note 53, at 306.

B. Factors

Other barriers to copyright protection also exist within the social and political systems. “[P]iracy is funded by wealthy and well – connected Filipinos.”¹²⁶ The result is that “[s]tall-holders are well organized and are believed to have connections with enforcement authorities . . . and that pirate operators have also established an organized short message service warning system of impending raids.”¹²⁷ As with the authorities, police officers “cannot act *ex officio* but must always act in conjunction with the Optical Media board or on a rights holder complaint.”¹²⁸ Since the police force cannot act independently, it further hampers enforcement of the legislation. The government of the Philippines has established an “ideal” system to address the issue of piracy. However, the establishment of such systems and laws does not mean that the problem is solved.¹²⁹ Furthermore, other plans such as the “Strategic Plan” and the “Philippines Intellectual Property Policy Strategy” issued by the Intellectual Property Office of the Philippines have demonstrated that the country’s efforts are weak and “lack specificity,” and are “designed with a political aim in mind (i.e., to get off the Special 301 list) rather than to help . . . [the] creators.”¹³⁰

In general, corruption within the system is a significant issue. If the government itself is corrupt, it is hardly feasible for it to legislate and execute laws to correct piracy. For instance, the Filipino government does not always honor agreements or contracts.¹³¹ Referring back to the interview of the individual in the piracy industry discussed earlier in this paper, he stated that “[p]owerful people and especially politicians bend the law to their own advantage.”¹³² Combined with this fact is the idea that the “participants in the pirate market . . . appear more honest and fair,

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (emphasis added).

¹²⁹ See SPECIAL 301, *supra* note 53, at 295-96. The Philippines were lowered from the Watch List on the Special 301 Priority Watch List in February of 2006, however, the disappointment was expressed within the IIPA 2008 Special 301 Report (on the Philippines) when the focus appeared to politically motivated rather than protecting the objectives pertaining to the protection of copyright.

¹³⁰ *Id.* at 296.

¹³¹ BAUMGÄRTEL, *supra* note 94, at 394.

¹³² *Id.*

compared to a broader society that is perceived as unjust, uncontrolled and in the control of the elite.”¹³³ He further stated, “Most politicians and big-time business men are really crooks, while we are honest.”¹³⁴ The “code of honor” followed by those within the piracy industry also reduces the deterrent effects of the raids and seizures performed by the authorities as “distributors replace disks that were confiscated during police raids”¹³⁵

Lack of resources further adds to the inadequate enforcement of legislation aimed at protecting copyrighted material. For example, the establishment of an intellectual property court¹³⁶ within the affected country has the potential to provide real deterring results. On the other hand, there is a potential for a wasted corrective effort due to insufficient resources to train judges and prosecutors to be experts within this field. Until recently, strategies against piracy appeared clear in their goals but vague in strategy and execution.¹³⁷ In July 2008, the Intellectual Property Office of the Philippines along with the U.S. Department of Trade launched a “five point strategy” to improve the enforcement of intellectual property.¹³⁸ This announcement demonstrates that the Filipino government does recognize its lack of specialized courts and law enforcement policies, as well as the need to establish a program to train new officers for such enforcement.¹³⁹ The reason for the devolution of the intellectual property court system in the 1990s was a lack of resources as evidenced by these courts being forced to expand to include commercial cases. As a result of this expansion, the few resources this court system had to begin with were now spread beyond their limits, hampering efficient enforcement of legislation protecting copyrighted materials.

A quick analysis into the issue of movie piracy can provide a comparison to other enforcement legislation the Filipino government may establish, particularly bans on violent video

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 393.

¹³⁶ See SPECIAL 301, *supra* note 53, at 296.

¹³⁷ See *id.*

¹³⁸ Weekly News, *Philippines Announces IP Enforcement Strategy*, MANAGING INTELL. PROP., July 3, 2008, <http://www.managingip.com/Article/1967482/Philippines-announces-IP-enforcement-strategy.html>.

¹³⁹ *Id.*

games.¹⁴⁰ Recently, the Filipino Congress publicized a proposed bill that would “penaliz[e] any person who shall sell or rent a violent video game to a minor. Violators could suffer imprisonment of not more than one year or pay a fine not exceeding P100,000, or both.”¹⁴¹ To take an example from the movie industry, Orson Welles’ seminal work, *Citizen Kane*, remained unavailable to Filipinos because of legal obstacles.¹⁴² However, this did not stop film enthusiasts from obtaining a copy through the black market and piracy. The cliché, “Where there is a will, there is a way,” seems appropriate here and highlights an essential point: Piracy cannot be eliminated because it has been incorporated into the society and therefore there is no incentive to change. For Filipinos, the way they obtain entertainment software is a tradition, even if that tradition is piracy. Banning video games will simply further the practice of piracy.¹⁴³

Another factor that warrants discussion is the faultiness in the approach from an international standpoint to reduce piracy. The IIPA is a prominent association whose objectives are to reduce the prevalence of piracy on a global scale.¹⁴⁴ The Executive Summary from October 18, 2007, points out its successes but also recognizes its limitations by emphasizing that the “fight . . . protecting U.S. creators, their industries and U.S. jobs” cannot be achieved alone.¹⁴⁵ As it was stated by John Gantz, “For most

¹⁴⁰ Banning violent video games has been controversial internationally and will not be discussed here.

¹⁴¹ Rico, *Proposed Philippine Video Game Law Prescribes One-Year Jail Time* (July 17, 2008), <http://technogra.ph/20080717/sections/news/proposed-philippine-video-game-law-prescribes-one-year-jail-time.html>.

¹⁴² BAUMGÄRTEL, *supra* note 94, at 376; *see also* Sumo, *supra* note 6.

¹⁴³ *See id.*

¹⁴⁴ CHALLENGES, *supra* note 93. “The IIPA is a coalition of seven trade association[s] representing over 1900 U.S. companies that rely on strong global copyright protection and enforcement. IIPA has been representing the U.S. copyright industries before the .S. and foreign governments since 1984.” *Id.* “IIPA is comprised of: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), Independent Television and Film Alliance (IFTA), the Motion Picture Association (MPAA), the National Music Publishers Association (NMPA), and the Recording Industry of American (RIAA).” Letter from Michael Schlesinger, Vice President and General Counsel, IIPA to Sybia Harrison, Special Assistant to the Section 301 Committee (December 5, 2005), <http://www.iipa.com/pdf/IIPA%20INDONESIA%20OCR%20Letter%20FINAL%20120205.pdf>.

¹⁴⁵ *Id.*

governments, the immediate benefits of curtailing piracy come mostly from not being clubbed over the head by U.S. government and its multinationals.”¹⁴⁶ It appears that the IIPA’s focus is to protect U.S. interests rather than the interests and the economies of all countries with regard to their intellectual property rights. Although the companies within the association are primarily affiliated with the U.S., the focus should lean towards the attention of all countries, rather than a bias towards “U.S. creators.” There is little incentive for the Filipinos to protect U.S. copyrighted materials, especially when “the purported victims, whether Microsoft, Disney, . . . are viewed as rich monopolists who engender little sympathy from the public.”¹⁴⁷ However, would the intervention by companies establishing offices in the Philippines help deter piracy? This may be unrealistic since piracy rates are so high. Companies are likely to find that placing headquarters in the Philippines for the sole reason of decreasing (importing) costs to the Filipino market may be a risky investment. For a developing country such as the Philippines with huge socioeconomic gaps and a gross income that is considerably less than that of the average American, there is little incentive for a Filipino family to want to protect the fiscal interests of a wealthy foreign corporation. What about considering a new business model? As previously discussed, the average Filipino’s annual salary is significantly lower than an American’s annual salary. Therefore, it is unlikely that a Filipino is able to pay the same \$60 that an American would pay for a game. “Publishers need to create a new business model that is more attractive for locals to buy a homegrown version of the media than a pirated or counterfeit one.”¹⁴⁸

¹⁴⁶ GANTZ, *supra* note 55, at 225. Gantz uses an analogy that further supports his statement, pointing out the economic costs to piracy are more like “economic costs of littering than the economic costs of . . . alcoholism or drug abuse. There is little reward for any one individual not to litter – there is no personal price paid, as with drug or alcohol abuse – but there is a big reward for society at large not to be awash in trash. There is little to deter an individual from digital piracy; however, there is a big reward for society at large not to have to pay the costs of piracy.” *Id.* at 225-26.

¹⁴⁷ *Id.* at 225.

¹⁴⁸ *Id.* at 278. “Scale media pricing to the local economy, and then stimulate product development in the country.” *Id.* (explaining how software piracy in Ireland was big “until it got its own software industry going, which now ranks as second only to that of the U.S. as a software exporter.” *Id.*

Furthermore, it appears that established goals and objectives are ineffective against the problem of piracy to date. A new approach must be found because the current approach has been wasted effort, time and money. As Lester Thurow, an MIT economist, stated:

The prevailing wisdom among those who earn their living within our system of intellectual property protection is that some minor tweaking here and there will fix the problem. The prevailing wisdom is wrong. The time has come not for marginal changes but for wide-open thinking about designing a new system from the ground up.¹⁴⁹

Many countries are plagued with the issue of piracy. Despite advancements in intellectual property laws and the organizations and associations established to fight against the incidence of piracy, perhaps taking a uniform global approach is not the best solution. Focusing on just the major countries that contribute to the most economic loss is unproductive. Other countries will facilitate piracy within those countries (for example, through established trade routes) and it further ignores the effects of smaller countries that import and export illegally to other countries as well. Individual assessments, based on the studies of economics and how piracy affects its economy within the country, allow legislation to intervene with laws that are tailored to address that country's needs.

C. Possible Solution

For the Philippines, deterrence appears most effective at reducing piracy, yet it is severely lacking in the Philippines. Deterrence, a resounding objective within this paper, is one of the key solutions against the activities of digital pirates. "The existence of criminal remedies in copyright laws and the strict enforcement thereof is a very important aspect of effective copyright protection."¹⁵⁰ The fact that the Philippines lacks strict enforcement through criminal remedies is a major contributing

¹⁴⁹ *Id.* at 253 (citing Lester C. Thurow, *Needed: A New System of Intellectual Property Rights*, HARV. BUS. REV., Sept.-Oct. 1997).

¹⁵⁰ GILLIAN DAVIES & MICHELE E. HUNG, MUSIC AND VIDEO PRIVATE COPYING: AN INTERNATIONAL SURVEY OF THE PROBLEM AND THE LAW 233 (1993).

factor to its inability to reduce the incidence of video game piracy. The lack of specialized courts (although recently, the Philippines has publicized the reestablishment of such courts) is significant, but there must be a desire to use these courts for effective enforcement of anti-piracy measures. "Due to the special nature of the subject matter involved in intellectual property litigation," ordinary courts will not address the complex issues that arise in litigation. Moreover, the act of combining commercial cases¹⁵¹ was counterproductive to the original intent of establishing an intellectual property court; resources were inappropriately used and the purpose of the intellectual property court diminished. Although specialized courts are effective in the United States and Europe,¹⁵² it does not necessarily mean that this is the best course of action for a country like the Philippines since the specialized courts still fail to consider the previous factors addressed in this comment. Unless the country's culture towards piracy also changes, the establishment of specialized courts will amount to nothing but the construction of expensive buildings for aesthetic value, which will only temporarily appease associations such as the IIPA. Furthermore, the short-term economic benefits of piracy are hard to ignore for the Filipino gaming community. These considerations are important when determining the ultimate deterring efforts that may prove workable in the Philippines.

First, education appears to be an important component to intervention in the Philippines. Considering that a significant percentage of the population unknowingly supports piracy, it is best to institute conventions or symposiums to alert the public about the effects of piracy, such as the "stunting" of the economic growth as well as its negative effects on their individual socioeconomic statuses. Furthermore, the appropriate education should be focused on encouraging the population to ignore the short-term benefits of piracy.¹⁵³ It is imperative that individuals are made aware of the negative effects of piracy and its ability to make individuals "poorer" without ignoring one's need to earn a

¹⁵¹ *Id.*

¹⁵² ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 184 (1990).

¹⁵³ See GRP COMMENT, *supra* note 5, at 56. Education via lecture and an offer for alternative means of livelihood were offered as other sources of income from President Gloria Macapagal-Arroyo.

livelihood. Reinforcement of such knowledge may allow the Filipino population to realize that supporting piracy is counterproductive. In fact, a video game convention was scheduled recently “in hopes to encourage growth of the video game industry in Asia.”¹⁵⁴ This is an intervention by the video game industry itself to help show the gaming public the importance of competition within the industry. The industry’s intervention, as compared to the government’s efforts to stop piracy, is essential because the industry, which is comprised of gamers, is reaching out to the consumers by educating and letting Filipinos know that pirating games are detrimental on a large scale.

Second, acceptance of interventions (such as DRM) by the consumers is crucial because there are many individuals within the community who seek to hack such protective measures, thus contributing to piracy. Considering the political climate of the Philippines, this community may be more willing to listen to the organizations structured to prevent piracy as their peers rather than the government or an international association.

With regard to enforcement of laws and a court system to thwart piracy, the question remains as to whether the United States should step in to facilitate stricter enforcement, or if this would actually backfire and increase the incidence of piracy as a form of rebellion. The movie example discussed earlier within this comment is an example of a restriction that indirectly fostered piracy. Speculatively, the answer leans to the latter. It is vital to the prevention of software infringement that penalties become harsher, that cooperation among the Philippines’ judiciary improves to enforce the legislation with consistency, and that the international intellectual property agreements are followed. In the event the IIPA discovers that the Philippines’ enforcement of intellectual property laws is not in accordance with TRIPS, it is critical that this be remedied immediately. Strict remedies, including both civil and criminal nature, are crucial for effective enforcement of anti-piracy measures since strong copyright laws alone are not enough to reduce piracy.¹⁵⁵ This could also demonstrate to other developing countries that enforcement of

¹⁵⁴ Alexander Villfania, *Video Games Convention Want to Nurture Growth in Asia*, INQUIRER.NET, Aug. 29, 2008, <http://blogs.inquirer.net/hackenslash/2008/08/29/video-games-convention-wants-to-nurture-growth-in-asia>.

¹⁵⁵ *Id.*

such laws will be taken seriously and is important to the global economy.

Since much of the pirated materials come from outside sources rather than the country generating its own game industry, “increasing cross-border cooperation among police and other enforcement agencies to improve coordination of law enforcement”¹⁵⁶ is also essential for the protection of copyrighted materials.

Associations and organizations that focus their research and efforts solely on the “hot spots,” due to the quantitative economic nature of a country, are not taking best approach. The industry of piracy is a complex web, extending throughout larger countries and smaller developing countries. If piracy is to be reduced to any significant degree, then developing countries such as the Philippines warrant increased discussion and analyses, as well as an “individualized” plan to address piracy within each country.

CONCLUSION

A comprehensive approach to curtail piracy that is narrowly tailored to the unique piracy factors notable in the Philippines would be most effective, yet legislation must also focus on other “non-traditional” factors that contribute to the facilitation of piracy. Only through a focused, comprehensive assessment will effective legislation be enforced strongly. Legislation must be tailored to the various cultural aspects discussed because ignoring the presence of these cultures and subcultures contributes to the lack of efficacy of laws created to protect the industry. This culture, along with the presence of a less-than-optimal running government, wide socioeconomic gaps, and the lack of enforcement, support the argument that there is a long road ahead as far as reducing the incidence of video game piracy. If those who play the games do not want to protect the software and hardware they play, it is unlikely at this time that much can be done to prevent piracy. Furthermore, the government’s lack of willingness to enforce even existing laws and the economy’s significant reliance on the profits from such piracy continues to hamper any reduction efforts.

¹⁵⁶ BUSINESS SOFTWARE ALLIANCE (BSA), FIFTH ANNUAL BA AND IDC GLOBAL SOFTWARE PIRACY STUDY 9 (May 15, 2008), http://global.bsa.org/idcglobalstudy2007/studies/2007_global_piracy_study.pdf.

In order to implement a change in the Philippines, education is the first and foremost line of defense in the fight against piracy. With education conveying the detrimental effects of piracy on each person individually, it may begin to capture the attention of the Filipinos. The local video game industry¹⁵⁷ may be in the best position to provide the education that the Filipinos will accept. Comprehension of the ill effects of piracy, along with the acceptance of DRM within the industry, is crucial for the country's compliance of the laws enforced. Only when altruistic interests are present within these individuals to stop piracy and comply with copyright laws will there be true progress in the reduction of piracy. An incentive to reduce the incidence of piracy can be provided through the successful education of the detriments of piracy. Legislation will finally be enforced efficiently to deter illegal activities once the country finally has an incentive and the will to fight against piracy.

¹⁵⁷ Industry is defined as those individuals that are associated with the gaming demographic (for example, fan-based forums or organizations that are well known to the gaming community).