

U.S. INDUSTRY'S INFLUENCE ON INTELLECTUAL PROPERTY NEGOTIATIONS AND SPECIAL 301 ACTIONS

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I. INTRODUCTION

International bilateral and multilateral trade negotiations and investigations under the so-called Special 301 provisions of the U.S. trade law¹ have become more serious and difficult for the international community to deal with in recent years. The sometimes bitter and heated disputes among the different parties involved have further ignited strong passions, nationalist sentiment, and international incidents.

Although government representatives are the ones who engage in the actual negotiations, an invisible strong hand, at least in the United States, has always played a major role in the process, from identifying issues to formulating strategies on the trade front. The influence of U.S. industries and industrial organizations is evident in recent legislative actions. Although Congress still accommodates different, and sometimes conflicting, interests in a given issue, industries have gained enough government recognition, if not sufficient protection, for their special interests. For example, congressional action was the direct result of industry lobbying in each of the following cases: the revision of the fair use doctrine under section 107 of the Copyright Act of 1976,² the expansion of the criminal penalties for copyright infringement,³ and the passage of the Omnibus Trade and Competitiveness Act of 1988⁴.

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1. 19 U.S.C. § 2242(a) (1993).
2. Pub. L. No. 102-492 (Oct. 24, 1992).
3. Pub. L. No. 102-561 (Oct. 28, 1992).
4. Pub. L. No. 100-418 (Oct. 3, 1988).

The economic recession and trade deficit, financial losses from acts of piracy, international trade barriers, inadequate legal structure for the protection of intellectual property ("IP") in other countries, and strong industrial lobbying are the main reasons the United States engages in international IP dispute negotiations and settlements. The United States engages in these dispute negotiations through four different channels: domestic IP statutes, trade and tariff regulations, international organizations, and bilateral and multilateral agreements.

First, the United States is continuously perfecting its domestic IP protection, thereby maintaining its leading position in the international community. Second, the United States has been successful in using its domestic market and other countries' dependence on this market as an effective leverage in negotiations. Meanwhile, the United States takes the leading role in raising questions and concerns and formulating consensus for universal standards of IP protection through international organizations and agreements, such as the General Agreement on Tariffs and Trade, the World Intellectual Property Organization ("WIPO"), and other international conventions. Finally, the exercise of Special 301 provisions, albeit the U.S. domestic law, has proven to be an effective tool in protecting IP.

The U.S. Department of Commerce, Department of State, Department of Treasury, and the Copyright Office all play a major role in the formulation of U.S. trade policy through inter-agency cooperation. Once a policy is determined, however, it is the United States Trade Representative ("USTR") who has the exclusive authority to engage in international negotiations on trade issues on behalf of the United States. At the same time, U.S. industries, under proper legal authority, can file petitions with the USTR. They can also supply information to the USTR. Under Section 301, industry representatives serve as advisors to the USTR and have direct input in U.S. international negotiation strategies.

On Capitol Hill, the influence from U.S. industries and industrial organizations can be seen clearly. Each year, testifying before congressional committees they make charges of foreign IP violations, providing estimates of losses, etc., in order to get their message across. Eventually these allegations are included in their petitions under the Special 301 provisions which will receive the USTR's attention.

Among the most active and influential industry participants in the Special 301 process are the International Intellectual Property Alliance ("IIPA"), Business Software Alliance ("BSA"), International Anti-Counterfeiting Coalition ("IACC"), Pharmaceutical Manufacturers Association ("PMA"), Interna-

tional Trademark Association ("INTA"), Microsoft Corporation, and Nintendo Corporation. While their purposes, appeals, and membership composition may not be the same, there is a significant overlap among these groups and companies, which has no doubt strengthened instead of weakened their influence.

There are many lessons to be learned from past bilateral and multilateral negotiations where the United States was a party. Through this empirical study, we hope to develop a better understanding of a very delicate mechanism and the way it actually operates. The purposes of this paper are to: (1) examine the role and influence of the U.S. industries and industrial organizations in the legislative process; (2) understand the U.S. negotiation strategies and how they are formulated; and (3) analyze how U.S. industries and industrial organizations interact with the government, engage in the Special 301 process, and effectively influence the outcome of international IP negotiations. In addition to the general comparisons of different negotiations, special attention is given to the United States-Taiwan bilateral trade negotiations to highlight this influential process.

II. THE INTERNATIONAL NEGOTIATION STRATEGIES OF THE UNITED STATES ON INTELLECTUAL PROPERTY ISSUES

The United States has experienced tremendous success in international negotiations on IP issues, especially with respect to the threat of applying Special 301 sanctions. Other countries have yet to develop any effective and complete strategy to counter the effects of Special 301 sanctions. U.S. negotiation strategies may be divided into six categories:

- (1) Launch a full scale assault on both legal and rational grounds. On the legal front, enact or revise IP laws to lead or meet the international standard. On the diplomatic front, with sound rationale, demand its trading partners improve on IP protection as well as curtail and prevent piracy;
- (2) Use the entire American marketplace as leverage, incorporating IP as part of the overall trade issue, thereby gaining concessions from those nations which enjoy a trade surplus with the United States and yet have insufficient IP protection;
- (3) Promote American positions through its influence in bilateral and multilateral negotiations, or by utilizing the related international organizations;
- (4) As a last resort, apply unilateral trade sanctions which, on the one hand, allow dialogue to take place and, on

- the other hand, provide a sense of urgency for concession by trading partners;
- (5) Delineate and consolidate the authority of trade negotiations in a clear manner and place such authority in the hands of the USTR; and
 - (6) Take a united stand against outside forces, by combining the forces and interests of government and industries, with industries spearheading the charge.

A. THE CAUSES OF INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES

There are many reasons the United States engages in IP negotiations with other countries, such as political, economic, diplomatic, trade, and legal concerns. The economic downturn, rising government budget deficit, and overseas piracy activities have all contributed to the gradual loss of the competitive edge of American products. In light of this situation, one natural reaction for industries is to appeal directly to the government for help. Industries believe that an appeal to the U.S. government helps because the United States, by wielding its enormous influence on the world market, will place enough pressure on other countries to implement and enforce tougher anti-piracy laws. According to these industries, many countries or places, such as Japan in the 1960s and 1970s and China, Hong Kong, Singapore, South Korea, Taiwan, and Thailand today, have taken advantage of U.S. products by copying the manufacturing process or disparaging their IP rights. Although such "unjust enrichment" was considered to be beneficial to the economic growth of those nations, it came at the expense of U.S. economy and industries and, in certain circumstances, has threatened the very survival of some manufacturing sectors.

(1) *The Decrease of U.S. Economic Power*

In recent years, the United States has suffered from a large trade deficit, an erosion of its manufacturing sector, and the decline of its competitiveness in the world market. Statistics show that since 1970 the United States has steadily increased its imports and decreased its exports. For example, in 1970 the U.S. share of imports constituted 12.9% of the world's imports; by 1986, however, that share had increased to 17.5%. In the same period, the U.S. share of exports declined from 13.8% to 10.3%.⁵ The real average hourly wage in the United States has also stead-

5. U.N. DEP'T. OF INT'L. AND SOCIAL AFFAIRS, 1985/86 STATISTICAL Y. B., 35th Issue, U.N. Sales No. 86.XVII.1H (1988).

ily declined from US\$9.5 in 1978 to US\$8.0 in 1990, lower than the real average hourly wage was in 1964.⁶ Additionally, the weekly salary in real dollars in the United States declined from US\$330 in 1969 to US\$320 in 1990.⁷

(2) *The Act of Piracy*

One of the most direct causes of international dispute in recent years has been piracy. Piracy also has led competing industries to seek a common strategy against outside infringers. According to an estimate by the IIPA, the total copyright losses incurred by U.S. industries due to piracy in twenty-six countries amounted to \$4.63 billion in 1992 alone.⁸ The largest loss is in computer software (\$2.2 billion), followed by sound recordings (\$1 billion), motion pictures/videos (\$938 million), and books (\$485 million). Of the countries that failed to adequately protect U.S. IP rights, IIPA believes Taiwan, Thailand, Italy, Republic of Korea, Poland, the Philippines, Turkey, the People's Republic of China, India, and Brazil were among the worst offenders.⁹

Regardless of the accuracy of these estimates and projections, the consensus among the U.S. government and industries is that piracies, particularly those taking place in the international market, have resulted in serious damages, not only to revenue, but also to the development of new ideas and technologies. As such, evidence of piracies has become one of the most useful lobbying tools used by industries in their efforts to get the United States to apply trade sanctions or other retaliatory measures against those countries where piracies are committed.

6. CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, *COMPETING ECONOMIES: AMERICA, EUROPE, AND THE PACIFIC RIM 5* (1991).

7. *Id.* at 4.

8. See SPECIAL 301 RECOMMENDATIONS AND ESTIMATED TRADE LOSSES DUE TO PIRACY (IIPA, Feb. 12, 1993) (submitted to the USTR). The 26 countries identified are: Taiwan, Thailand, Italy, Republic of Korea, Poland, the Philippines, Turkey, People's Republic of China, India, Brazil, Saudi Arabia, Venezuela, Egypt, Greece, Cyprus, El Salvador, Australia, Russia, Spain, Paraguay, United Arab Emirates, Indonesia, Bulgaria, Malaysia, Pakistan, Hungary, Israel, and Guatemala.

9. 1992 COPYRIGHT-BASED INDUSTRIES LOSSES DUE TO PIRACY:

<i>Industries</i>	<i>Losses (in billions of \$)</i>
Computer Software	2.178
Motion pictures	0.937
Music & Sound Recordings	1.034
Books	0.485
Total	4.634

SOURCE: *Id.*

(3) *International Trade Barriers*

After years of protest, many U.S. industries have been very frustrated by what they perceive to be impenetrable market barriers around the world.¹⁰ For example, the United States has been the largest servient market of Japanese automobiles, electronics, and information products, but U.S. products have hardly found reciprocity in the Japanese market. In addition, the European Union's heavy agricultural subsidies have been the focal point of disputes. It is hoped that such barriers to trade will be resolved by the conclusion of the Uruguay Round multilateral trade negotiations ("MTNs") under the General Agreement on Trade and Tariffs ("GATT").

(4) *Insufficient Intellectual Property Laws*

It is evident that there are major discrepancies among different countries' legal frameworks in the IP area. This can be attributed to different social, historical, and cultural backgrounds, the advancement of law and technology, the attitudes of the government and private sectors, and fundamentally different approaches to laws protecting intellectual properties.¹¹

Since many lesser-developed countries often lack the resources to create their own intellectual property, asking those countries to provide IP protection for foreign authors simply implies protecting foreign interests at the expense of their own producers. Even in those lesser-developed countries which do have the resources to create intellectual property, the laws are designed to protect domestic intellectual property, but provide little protection to foreign intellectual property since, again, to do so would be at the expense of their own markets. In developed countries, IP protection is considered a fundamental guarantee for technological development. With this dichotomized attitude and concept toward IP protection, it is no surprise that disputes and conflicts constantly and naturally erupt.

(5) *Strong Influences of the Industrial Organizations*

U.S. industries and their affiliated organizations have forged tremendous influence on IP legislation and international negotiations, both in a positive and a negative sense. In the latter, many foreign nations believe that U.S. industries tend to exaggerate the situation, or even distort the truth, to create something out of nothing. These foreign nations argue that industries' practices

10. There are counter arguments, *e.g.*, that U.S. products are not as competitive.

11. See PAUL C. LIU ET AL., *COMPARATIVE STUDIES ON THE LEGAL PROTECTION OF COMPUTER SOFTWARE RELATED INVENTIONS AMONG JAPAN, U.S. AND THE EUROPEAN COMMUNITY*, 6-7 (1992).

have misled government officials, legislators, and the general public, politicized the issues, as well as further complicated the situations without using a rational approach.

Through their members, industrial organizations have waged powerful lobbying efforts on Capitol Hill. They conduct various public relations campaigns in their favor. They also send delegates to testify before congressional hearings on every proposal affecting their interests. With regard to investigations under Section 301, they take all available routes to register their cases with the government, to remind the government and the public of the financial losses the United States has suffered. They even share their resources to ensure the full implementation of trade agreements and U.S. domestic laws.

Lobbying activities by the industrial organizations have been successful so far due to sufficient and stable funding, well organized structure, and professional knowledge and expertise. Their aggressive lobbying and campaigning have kept alive concerns about international IP protection. As a consequence, new issues are constantly developed and addressed.

B. THE INSTITUTIONAL FRAMEWORK OF INTERNATIONAL NEGOTIATIONS

Many U.S. governmental agencies are responsible, directly or indirectly, for international intellectual property negotiations. For example, in Special 301 negotiations, although the USTR has the primary responsibility, the Department of Agriculture, Department of Commerce (including the Patent and Trademark Office), Department of Labor, Department of State, International Trade Commission, and Copyright Office all play a role in the process. Many industries and industrial organizations, owing to the legislative authorization, are also involved in the process.¹²

The Congress, although normally not involved in direct negotiations, can certainly assert critical influence over the negotiation process. Industry representatives can relay their concerns to legislators who, in turn, can provide hearings and propose legislation to make necessary changes. Congress also has the constitutional "advice and consent" power, granting Congress the ability to ratify international negotiations as well as the power to enact any enabling legislation necessary to implement treaties and legislation resulting from negotiations.

12. See *infra* Table 2.1, U.S. Departments' Special 301 Responsibilities.

TABLE 2.1 - U.S. DEPARTMENTS' SPECIAL
301 RESPONSIBILITIES¹³

Department	Responsibilities
USTR	Coordinates the negotiation and monitors the enforcement of agreements.
Department of Commerce	Responsible (with USTR) for the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters and provides opinions for trade and IPR treaties.
Department of State	Provides information about foreign governments and their responses. Balances the considerations of trade and foreign policy.
Patent Office	Provides the expertise in patent, trademark, and chip protection.
Copyright Office	Provides expertise in copyright law.
Departments of Agriculture, Treasury, Labor, International Trade Commission	Participate in the interagency committee, review the industry submissions, plan negotiation strategies, propose Special 301 lists, and represent departmental positions.

Industries are primarily the accusers. Many laws permit industries to file petitions to trigger government investigations or

13. Summary of interviews in April 1993 with Gil Donahough, Acting Director for Intellectual Property, Office of the United States Trade Representative; Rick Ruzicka, Assistant USTR for Asia and the Pacific, Office of the United States Trade Representative; Sandra Kristoff, Special Assistant to the President for Asian Affairs, and former Assistant USTR for Asia and the Pacific, National Security Council; Robert Taylor, China Desk officer, Office for Chinese and Mongolian Affairs, Department of State; Irene Hills, International Trade Administration (IFACT); Jack McRae, Chief of Staff to United States Senator Slade Gorton of Washington State, and former Director of Governmental Relations for PACCAR, Inc.; Linda Garcia and Joan Winston, Senior Analysts, Telecommunication and Computing Technologies Program, Congressional Office of Technology Assessment; Dorothy Schrader, Associate Register for Legal Affairs/General Counsel, Library of Congress, Copyright Office; Larry Nelson, former Deputy Director, Office of Intellectual Property and Competition, Department of State; Eric Smith, Executive Director, IIPA; Maria Strong, Vice President, IIPA; Robert Halleman, President, Business Software Alliance; Thomas Bombelles, Vice President, Pharmaceutical Manufacturers Association; David Curtis, Corporate Attorney, Law and Corporate Affairs, Microsoft, Inc.; Ron Eckstrom, Corporate Attorney, Law and Corporate Affairs (Asia), Microsoft, Inc.; Kimberly Ellwanger, Director, Government Relations, Microsoft, Inc.; Lynn Hvalsoe, Corporate Attorney, Nintendo of America, Inc.; Harold Wagner, Professor of Patent Law, George Washington University School of Law; William B. Abnett, Principal, William B. Abnett and Associates, and former Executive Director, Washington State China Relations Council.

other actions which traditionally are not available due to sovereignty issues.¹⁴ Consequently, industry activism can be seen in recent years in such areas as antidumping, intellectual property infringement, and other unfair trade practices. In addition, as a practical matter, industries have been an important source of assistance in providing statistics and other information for governmental negotiations.¹⁵

C. THE NEGOTIATION PROCESS AND STRATEGIES UNDER SPECIAL 301 PROVISIONS

(1) Special 301 and the Negotiation Process

Section 182 of the Trade Act of 1974 (as added by section 1303 of the Omnibus Trade and Competitiveness Act of 1988, commonly known as Special 301) provides that the USTR must identify, within thirty days after submission of the annual National Trade Estimates (foreign trade barriers) report to the Congress, those foreign countries that (a) deny adequate and effective protection of IP rights or fair and equitable market access to U.S. persons that rely on IP protection, and (b) those countries under (a) determined by the USTR to be "priority foreign countries"—those countries which have the most onerous or egregious acts, policies, or practices that have an adverse impact on relevant U.S. products and are entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective IP right protection.¹⁶

In addition, the USTR has established a "Priority Watch List" of countries whose actions, policies, and practices meet some, but not all, of the criteria for priority foreign country identification. These actions, policies, or practices warrant active work for resolution and close monitoring to determine whether further Special 301 action is necessary. The USTR maintains a "Watch List" of countries warranting special attention because they maintain IP practices or barriers to market access that are of particular concern.

Section 302(b) of the Act requires the USTR to initiate a section 301 investigation within thirty days after identification of a priority foreign country with respect to any act, policy, or practice of that country that was the basis of the identification, unless

14. See, e.g., Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (1993) and Section 301 investigation procedure under the Trade Act of 1974, 19 U.S.C. § 2411 (1993).

15. See USTR, 1993 TRADE POLICY AGENDA AND 1992 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at 115-18 (1993).

16. 19 U.S.C. § 2242(a) (1993).

the USTR determines initiation of an investigation would be detrimental to U.S. economic interests and reports the detailed reasons to the Congress.¹⁷

The procedural requirements of section 301 apply to these cases, except that an investigation must be conducted and determinations made of whether the measures are actionable. Furthermore, an appropriate response is required within six months (which may be extended to nine months if certain statutory criteria are met).¹⁸

This process is designed to impose a strict time frame on the USTR so that the identified foreign countries are pressured to take positive steps in the consultation or negotiation process, or face potentially serious consequences.

This process has evolved into a year-round, full-time battle between the United States and many other countries—with the USTR and its staff standing right in the middle of the fight. To assist the USTR's investigation, the law allows industries to play a role in almost every step of the process. As it has turned out, the USTR often cites the industrial organizations' report (including their loss estimates) to back up its investigations.

(2) Negotiation Strategies and Results

Special 301 was designed to accomplish three goals:

- (a) That other countries adequately and effectively protect the IP rights of the United States;
- (b) That the world market be reasonably and fairly opened to Americans whose businesses depend on IP protection; and
- (c) That the United States identifies, investigates, and retaliates against those countries who committed the most onerous or egregious acts in violation of the trade agreement, including unsatisfactory IP protection.

In order to achieve these goals, Special 301 legislation contains a four element strategy:

- (a) Presenting a unified front in negotiations by having industries bring forth the petitions, so that the government, once it decides to go forward with the investigation, will almost certainly work on behalf of the complaining industries. Therefore, the two can forge a unified front for the best interest of the United States;

17. 19 U.S.C. § 2412(b)(2)(A)-(C) (1993).

18. Trade Act of 1974 § 304, 19 U.S.C. § 2414(a)(3)(A-B) (1993).

- (b) Maintaining high flexibility and maneuverability for the United States in dealing with its counterparts by allowing consulting with industry;
- (c) Establishing a strict timeframe and implementing it thoroughly, thus placing enormous pressure on other trading partners; and
- (d) Using a carrot and stick approach under which the entire U.S. market serves as the carrot, and possible trade sanctions as the stick, so that conditions can be imposed and strictly followed by other countries.

Based on the record from 1991 to 1993, the implementation of Special 301 proceedings against those countries with weak intellectual property protection or lax enforcement of existing laws has been very successful. Although not all those who were listed under the provision were sanctioned, all of the Priority Countries have been subjected to extensive investigation.¹⁹

TABLE 2.2 - 1991-93 PRIORITY COUNTRY AND PRIORITY WATCH LISTS²⁰

Special 301 Lists	1991	1992	1993
Priority Country	China India Thailand	Taiwan India Thailand	Brazil India Thailand
Priority Watch	Australia Brazil	Australia Brazil European Union Egypt Hungary Korea Turkey Poland Philippines	Australia Taiwan European Union Egypt Hungary Korea Turkey Saudi Arabia Argentina

III. THE OPERATION OF MAJOR U.S. INTEREST GROUPS AND INDUSTRIES

A. INTRODUCTION

The enthusiasm for public affairs demonstrated by industries, trade organizations, and even the general public in the United States is unsurpassed by any other nation. Through organized lobbying efforts and political contributions, the private sector has been able to wield tremendous influence on public

19. See *infra* Table 2.2, 1991-93 Priority Countries and Priority Watch Lists.

20. USTR, NEWS RELEASE (April 30, 1991); USTR NEWS RELEASE (April 30, 1992); USTR NEWS RELEASE (April 30, 1993).

policy. Section 301, Special 301, and their related provisions were the direct result of heavy industry lobbying efforts. They expressly permit anyone, including industries and industrial organizations, to file petitions and supply information for the government's investigation process. Five special interest groups, IIPA, BSA, IACC, PMA, and INTA, and two U.S. corporations, Nintendo and Microsoft, actively engage in the Special 301 process by submitting comments and recommendations to the USTR and testifying before Congress.

By the end of 1992, there had been ninety cases of Section 301 investigations. Of these, seventy-seven cases were instituted by industries. Thirty-seven out of the ninety were complaints against Asian countries with Japan (twelve cases), South Korea (eight cases), and Taiwan (seven cases) as the leading countries. Of those thirty-seven complaints, twenty-two were brought by industries.

Table 3.1 - Asian Countries Section 301 Cases²¹

<i>Country/Case No./Date</i>	<i>Complaint</i>
<i>JAPAN</i>	
1. Brazil, Korea & PRC Thrown Silk Agreement with Japan	George F. Fisher, Inc. Permitting imports of thrown silk effectively prevented such imports from United States.
2. Japan Leather (301-13). 1977.8.4	Tanners Council of America Violation of GATT Article XI in imposing quantitative restrictions on imports from the United States and excessively high tariffs.
3. Japan Cigars (301-17). 1979.3.14	Cigar Association of America Imposition of unreasonable import restrictions, internal taxes and discriminatory restrictions on marketing, etc.
4. Japan Pipe Tobacco (301-19). 1979.10.22	Association of Tobacco Manufacturers Unreasonable prices and restrictions on distribution and advertising.
5. Japan Non-Rubber Footwear Import Restriction (301-36). 1982.10.25	Footwear Industries of America Import restrictions deny U.S. access to markets and are inconsistent with the GATT.

21. USTR, SECTION 301 TABLE OF CASES (Oct. 2, 1992).

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| 6. Japan Semiconductors
(301-48). 1985.6.14 | Semiconductor Industry Association
Creation of protective structure that acts as a barrier to the sales of foreign semi-conductors. |
| 7. Japan Tobacco Products
(301-50). 1985.9.16 | U.S. President Practices (high tariffs, etc.) that act as a barrier to U.S. cigarette exports. |
| 8. Japan Citrus
(301-66). 1988.5.6 | Florida Citrus Mutual
Import quotas contravene GATT Articles XI and III:5. |
| 9. Japan Construction-Related Services
(301-69). 1988.8.23 | USTR
Government's acts, policies, and practices are barriers to the offering or performance by U.S. architectural, engineering, construction, and others. |
| 10. Japan Satellites
(301-74). 1989.6.16 | USTR
Ban on government procurement of foreign satellites, which is against Section 301. |
| 11. Japan Supercomputers
(301-75). 1989.6.16 | USTR
Procurement of supercomputers practices are against Section 301. |
| 12. Japan Forest Products
(301-76). 1989.6.16 | USTR
Policies and practices affecting imports of forest products, including technical barrier to trade. |

KOREA

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| 1. Korea Insurance
(301-20). 1979.11.5 | Discrimination against issuing license, not permitting joint venture. |
| 2. Korea Non-Rubber Footwear Import Restrictions
(301-37). 1982.10.25 | Same as Case 301-36 |
| 3. Korea Steel Wire Rope Subsidiaries and Trademark Infringement
(301-39). 1983.3.16 | Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers
Subsidizing steel wire rope and infringing U.S. trademarks. |
| 4. Korea Insurance
(301-51). 1985.9.16 | U.S. President
Practices that restrict the ability of U.S. insurers to provide insurance services. |

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| 5. Korea Intellectual Property Rights
(301-52). 1985.11.4 | Lack of effective protection of U.S. intellectual property rights. |
| 6. Korea Cigarettes
(301-64). 1988.1.22 | U.S. Cigarettes Export Association
Policies and practices of Korean government unreasonably deny access to market. |
| 7. Korea Beef
(301-65). 1988.2.16 | American Meat Association
Restrictive licensing system in violation of GATT Article XI. |
| 8. Korea Wine
(301-67). 1988.4.27 | Wine Institute and Association of American Vintners
Government's policies and practices unreasonably deny access to market. |

TAIWAN

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|---|---|
| 1. ROC Tariff on Major Home Appliance
(301-9). 1976.3.15 | Lai Fu Trading Co. Ltd.
Unfair trade practices in the form of confiscatory tariff levels on imports of major home appliances. |
| 2. Taiwan Non-Rubber Footwear Import Restrictions
(301-38). 1982.10.25 | Same as case 301-36 |
| 3. Taiwan Rice Export Subsidies
(301-43). 1983.7.13 | Rice Millers Association
Subsidize exports of rice that restrict U.S. imports. |
| 4. Taiwan Films
(301-45). 1983.12.19 | Motion Picture Exporters Association
Discriminate against foreign film distributors. |
| 5. Taiwan Customs Valuation
(301-56). 1986.8.1 | U.S. President
Duty payment system violated trade agreement and was unjustifiable and unreasonable. |
| 6. Taiwan Beer and Wine
(301-57). 1986.10.27 | U.S. President
Acts, policies, and practices regarding the distribution and sale of U.S. beer, wine, and tobacco are actionable. |
| 7. Taiwan Intellectual Property
(301-89). 1992.5.29 | Acts, policies, and practices deny adequate and effective protection of IP rights. |

CHINA

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| 1. PRC Intellectual Property Protection
(301-86). 1991.5.26 | Acts, policies, and practices deny adequate and effective protection of IP rights and fair and equitable market access. |
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2. PRC Market Access
(301-88). 1991.10.10

USTR
Acts, policies, and practices restrict or deny imports into Chinese market.

INDIA

1. India Almonds
(301-59). 1987.1.16
2. India Investment
(301-77). 1989.6.16
3. India Insurance
(301-78). 1989.6.16
4. India Intellectual Property
(301-85). 1991.5.26

California Almond Growers Exchange

Licensing requirements and steep tariffs on almonds are actionable.

USTR

Trade restriction measures are against Section 301.

USTR

Barriers to foreign insurance providers are against Section 301.

USTR

Acts, policies, and practices that deny adequate and effective protection of IP rights and fair and equitable market access.

INDONESIA

1. Indonesia Pencil Slats
(301-90). 1992.8.18

Paul M. Cedar Products, Inc.
Practices concerning pencil slats are unreasonable and burden or restrict U.S. commerce.

THAILAND

1. Thailand Cigarettes
(301-72). 1989.4.10
2. Thailand Copyright Enforcement
(301-82). 1990.11.15
3. Thailand Pharmaceutical
(301-84). 1991.1.30

U.S. Cigarette Export Association

Practices are unreasonable and discriminatory.

IIPA, Motion Picture Export Association of America, Inc.; and Recording Industry Association of America
Inadequately enforces its copyright laws.

Pharmaceutical Manufacturer Association

Does not provide adequate and effective protection of pharmaceutical products.

B. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE ("IIPA")

Established in 1984, IIPA represents copyright based industries in the United States. Its objective is to promote the improvement of international protection for copyrighted works. Comprised of industrial organizations, IIPA has eight members, with each representing an important segment of the copyright related industry. They are the Association of American Publishers, Business Software Alliance, Computer and Business Equipment Manufacturers Association, Information Technology Association of America, Motion Picture Association of America, National Music Publishers Association, and Recording Industry Association of America. In total, IIPA represents more than 1500 corporations whose annual output exceeds five percent of the U.S. Gross Domestic Product.

As the general spokesperson for these eight industrial organizations, IIPA was responsible for determining, from its members, various issues of common concern, bringing their positions before various government agencies and Congress, and maximizing their strength in influencing government policy on IP issues. With only three full-time working staff members, IIPA has been surprisingly effective and influential.

In addition, many of IIPA's officers serve on the different industry functional advisory committees to the USTR. The USTR plays an important role in the development of U.S. trade policies. IIPA also publishes reports of its studies, which provide a thorough documentation of the status of copyright infringement worldwide.

Since enactment of the 1988 trade law, IIPA has closely followed the enforcement of Special 301. Every year IIPA submits comments to the USTR with a list of suggested countries that ought to be designated as "priority," "priority watch," or "watch," along with detailed explanations for its designations. These suggestions bore a seventy percent resemblance to the USTR's final list in both 1992 and 1993.²² In addition, its allegations against, and requests for improvement in, the People's Republic of China, Taiwan, and Thailand are very similar to the USTR's investigations and final agreements.²³

22. See *infra* Table 3.5, Comparison of USTR, IIPA, PMA, INTA, and Nintendo Special 301 Lists.

23. According to a congressional estimate in 1989, small businesses employ half of the American labor force, and account for half of the annual gross domestic product (GDP), and two-thirds of the total employment of the entire 1980s. Currently more than two-thirds of the large corporations rely on small businesses for supply, manufacturing, and marketing services. On the other hand, more than three-quarters of American products are currently facing international competition. See

TABLE 3.2 - COMPARISON BETWEEN US/TAIWAN AGREEMENTS
& IIPA ACCUSATIONS²⁴

United States/Taiwan Memorandum of Understanding	IIPA Accusations
Adequate and effective enforcement of copyright, patent, and trademark laws.	Piracy trade losses amount to \$370 million in 1991 and \$669 million in 1992. No effective enforcement and light punishment. 86% of rental videos are pirated copies.
Amendment of those laws to consist with Trade-Related Aspects of IP standards.	The level of IP rights protection is not up to international standards.
Implementation of an effective export licensing system for computer software and compact discs (CDs).	Computer software losses amount to \$290 million in 1991. CD piracy is very serious, there are 7 pirate CD factories. Trade losses were \$24 million in 1992.
Efforts to obtain legislative approval of the 1989 Bilateral Copyright Agreement.	Taiwanese government failed to enforce the agreement to stop MTV piracy. Amendments of law are slow.
Administrative protection of pharmaceutical and agricultural chemicals.	
Drafting of new laws for semiconductor chip protection, industrial design, trade secrets, and cable TV.	"Channel 4's" caused \$15 million losses in 1991 and severely damaged the local video and theatrical market.

C. BUSINESS SOFTWARE ALLIANCE ("BSA")

Formed in 1988, BSA is a relatively new organization whose main purpose is to protect the continuous growth of the American software industry. It has formulated a global strategy to reduce and eventually eliminate software copyright infringement. As part of the implementation of this strategy, BSA has launched a worldwide campaign providing public awareness programs in more than thirty nations and has aggressively filed lawsuits. With this combination of public education, law enforcement, and wide-ranging mass communications, BSA hopes to ensure that software users abide by international copyright standards.

HOUSE COMM. ON SMALL BUSINESS, SUMMARY OF ACTIVITIES, H.R. REP. NO. 1128, 100th Cong., 2d Sess., at 30, 31 (1989).

24. USTR, 1993 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, at 250 (1993); SPECIAL 301 RECOMMENDATIONS AND ESTIMATED TRADE LOSSES DUE TO PIRACY (IIPA, Feb. 1992) (submitted to the USTR).

Through BSA, suits have been filed around the world against alleged violators, and educational and training programs have been created. In addition, BSA lobbies Congress jointly with IIPA.

As of 1993, BSA had ten members: Aldus Corporation, Apple Computer, Autodesk, Borland International, Computer Associates, Go Corporation, Lotus Corporation, Microsoft Corporation, Novell, and WordPerfect Corporation. Together these members provide about seventy-one percent of the packaged software products sold in the United States. In fact, software is now the sixth largest industry in the United States controlling seventy-five percent of the world's software market.²⁵

There are many similarities between the measures taken by BSA and IIPA. Both are actively involved in advocating the interests of their members through congressional lobbying and Special 301 comments. Although IIPA is largely responsible for conducting congressional lobbying and preparing Special 301 comments, BSA assists in the formation and implementation of IIPA's strategies.

BSA has been pursuing legal remedies against infringers, establishing hot-line services, and setting up monitoring and educational programs. By specifically focusing on the issue of computer software infringement, it has been successful in achieving its goals.

TABLE 3.3 - BSA'S MAJOR ANTI-PIRACY EFFORTS IN ASIA²⁶

<i>Country</i>	<i>Efforts & Results</i>
China	Helped to secure the first legal protection of software in PRC by working through the Special 301 provision of the U.S. Trade Act. PRC agreed to protect software as a "literary" work.
Korea	Brought the first anti-piracy action under the Computer Program Protection Law of 1987.
Taiwan	Strengthened its export regulations to stem its flow of counterfeit exports in response to active lobbying by BSA. Formed a national anti-piracy task force with a Taiwanese industry group and the Taiwanese government.
Thailand	Initiated the industry's first raids against software retailers in Thailand, where illegal copying had resulted in a 97% rate of piracy.

In the Special 301 area, BSA's comment has become an integral part of the IIPA report. According to BSA, there are at

25. *Growth in U.S. Software Industry Far Exceeds Increase in Other Sectors of Economy*, NEWS RELEASE, (BSA, Mar. 10, 1993).

26. *1993 Int'l. Priorities*, FACT SHEET, (BSA, 1993).

least thirty four countries whose IP protection requires further improvement. In addition, eight out of these thirty-four countries have the worst record of computer software protection.

TABLE 3.4 - BSA SPECIAL 301 PRIORITIES²⁷

<i>Country</i>	<i>Accusation & Recommendations</i>
Korea	Software piracy rate in 1991 was 88%, with U.S. software publishers losing more than \$315 million. Additional procedural remedies and significant increases in penalties are necessary.
Singapore	Counterfeit and pirated software are rampant, costing software publishers millions of dollars each year. Strong government intervention is needed. Government officials still refuse to take action, even against large-scale counterfeit operations.
Taiwan	Additional enforcement procedures are needed to combat the export of counterfeit products, organizational end-user and dealer piracy. Losses to the U.S. software industry are \$585 million annually.
Thailand	Explicit statutory protection for software still does not exist, so counterfeit and pirated products flourish. The piracy rate is 99%, and losses to U.S. companies were \$49 million.

D. INTERNATIONAL ANTI-COUNTERFEITING COALITION ("IACC")

IACC is an organization comprising some 120 industries which are victims of piracy and whose sales amount to approximately \$500 billion annually (or about ten percent of the U.S. Gross National Product). Frustrated by a lack of results in past efforts to curtail piracy, IACC has resolved to engage in all-out warfare against international piracy.²⁸

As a coalition of victims of IP infringement, IACC adopts a more aggressive and radical approach than other organizations. In recent years, IACC activities have included:

- (a) Promoting the October 1978 legislation on custom detention and confiscation of pirated goods;
- (b) Drafting the Trademark Counterfeiting Act of 1984;

27. *Id.*

28. Letter from Johannes von Schilcher, Executive Director, IACC, to United States Ambassador Michael Kantor, United States Trade Representative (Feb. 10, 1993) (on file with the author).

- (c) Proposing that IP protection be considered before the granting of preferential customs status to any country, a proposal Congress eventually included in the Trade and Tariff Act of 1984;
- (d) Completing a trademark implementation plan in Italy;
- (e) Establishing an office in Switzerland for the study of the European Community's customs system;
- (f) Promoting IP protection in Eastern Europe;
- (g) Cooperating and coordinating with AIM (Association Europeene des Industries de Produit de Marque) for the improvement of IP laws and exchange of GATT information;
- (h) Formulating different task forces to monitor the enforcement of customs and product safety regulations in such areas as Eastern Europe, Italy, Mexico, People's Republic of China, Taiwan, Thailand, and Korea;
- (i) Participating in the legislative process of the Omnibus Trade and Competitiveness Act of 1988;
- (j) Advocating heavy scrutiny of and sanctions against Korea and Taiwan; and
- (k) Being actively involved in the filing process under section 301, with particular attention given to Indonesia, Italy, Netherlands-Aruba, the Philippines, Poland, and Taiwan, countries whom the IACC considers to have the least protective IP rights.²⁹

These efforts have, by and large, been successful. Congress has favorably received IACC's legislative proposals.³⁰

E. PHARMACEUTICAL MANUFACTURERS ASSOCIATION ("PMA")

PMA represents more than 100 major research-based U.S. pharmaceutical manufacturers. PMA is comprised of "members," "associates," and "research affiliates." "Members" are those companies able to manufacture and market the finished-dosage form of drugs or vaccines under their own brand names and whose research, development, and marketing are being conducted in the United States. "Associates" provide PMA members with supplies and packaging materials or services. "Research affiliates" are independent, for-profit biological research firms. PMA, one of the best organized, sufficiently funded, and powerful associations, has a long history of promoting IP protection around the world, with a specific focus on pat-

29. IACC, SUBMISSION TO USTR: UNFAIR INTELL. PROP. TRADE PRAC., at 2 (Feb. 10, 1993).

30. *Id.*

ent, trademark, and trade secret laws.³¹ The pharmaceutical industry is one of the few sectors which enjoy a trade surplus.³²

In the areas of IP and international trade, PMA has established the following policies:

- (a) Promote private research and development for new drugs and support public policies that do the same;
- (b) Advocate free trade and fair competition;
- (c) Uphold the full protection of IP rights; and
- (d) Encourage an exchange of information and strengthen its cooperation with other industrial organizations, government agencies, the World Health Organization, and other groups.

In the past, the International Section of PMA worked closely with the International Pharmaceutical Manufacturers Association in defending the industry's marketing practices at the 1992 World Health Assembly. It did the same with the Office of Technology Assessment regarding its study of overseas labelling practices. It also worked on international regulatory issues, market access problems, trade and investment restrictions, local production requirements, licensing, price controls, international organization, and international trademark and patent issues.³³

PMA was one of the first advocates for a trade law that would allow private industries to bring complaints against a foreign sovereignty for violation of trade agreements. Congress eventually adopted this view and enacted Section 301 and Special 301 in its trade legislation. Currently, PMA is following the development of "pipeline protection" under the GATT Uruguay Round multinational trade negotiations. Interestingly, the USTR's request for patent extension and pipeline protection with Taiwan is highly similar to PMA's recommendations.³⁴

F. INTERNATIONAL TRADEMARK ASSOCIATION ("INTA")

Formed in 1878 as a non-profit organization, INTA³⁵ was originally composed of twelve New York corporations. Today, INTA is composed of more than 2600 corporations, ninety percent of which are American companies.

31. PMA, 1992 ANNUAL REPORT, at 22 (1993).

32. In 1992, its surplus was \$980 million. PMA, SUBMISSION TO USTR: IDENTIFICATION OF PRIORITY COUNTRIES, at 1 (Feb. 5, 1993).

33. *Id.* at 23.

34. See *infra* Table 3.5, Comparison of USTR, IIPA, PMA, INTA, and Nintendo Special 301 Lists.

35. INTA was known as the United States Trademark Association until 1993 when, during its annual convention, it changed its name to INTA in order to reflect its current membership of multinational corporations and to avoid the occasional misunderstanding that it was part of a government agency.

Until recently, the issue of international trademark protection had not been the main concern of INTA. Instead, it devoted most of its efforts to domestic trademark issues like the passage of the Trademark Revision Act of 1988. However, with the rapid change of its membership profile, particularly the increasing number of multinational corporations and corporations whose major business is in the international area, INTA has been shifting its focus towards international trademark protection. Long perceived as the oldest, best organized, and most powerful organization representing the interests of trademark holders, it can and has affected the outcome of international trademark protection.³⁶ For example, in the Special 301 area, several nations on INTA's list were also designated as "priority" or "priority watch" by the USTR in 1993.³⁷

G. MICROSOFT AND NINTENDO CORPORATIONS

As the crown princes of the electronics industries, these two companies have enjoyed tremendous success with American consumers as well as the rest of the world for their cutting-edge products. Understandably, their success has brought about large-scale imitation. As a result, the two companies invest significant resources toward the prevention of infringement of their IP rights and the punishment of those who have so infringed.

(1) *Microsoft*

As the leader of the worldwide software market, Microsoft is the leading power in BSA. Microsoft's individual strategies for protecting its IP rights are threefold. (1) For cases that infringe upon Microsoft's product only, it will initiate actions *pro se* with its in-house counsel. This includes coordination with its outside counsel and its own Washington lobby group: (2) Under most circumstances, however, Microsoft joins with other companies in lawsuits filed by BSA. Multi-party lawsuits are not only more cost effective, but they also allow Microsoft to avoid being the sole target of potential counter-claims: (3) For Special 301 related cases, Microsoft, again through BSA, joins with IIPA in a coordinated and unified effort to file petitions or statements representing the best interests of the industries.

Although there are occasional glitches within this coalition, for example, where the interests of one company may not be the same as the interests of other companies or industrial organiza-

36. See JEROME GILSON, HIGHLIGHTS OF THE TRADEMARK LAW REVISION OF 1988 (1989).

37. See *infra* Table 3.5, Comparison of USTR, IIPA, PMA, INTA, and Nintendo Special 301 Lists.

tions, it has worked out quite smoothly and has in fact wielded enormous influence over presidential administrations and Congress. For example, as previously shown, the lists under Special 301 provided by BSA and IIPA significantly resemble the final list generated by the USTR.

(2) *Nintendo*

Unlike Microsoft, which puts most of its anti-piracy emphasis on group efforts, Nintendo tends to focus on its own anti-piracy efforts. Due to the specialty of its products, video electronic entertainment units, it feels that the existing industrial organizations cannot fully represent its interests.

In its 1993 comments on video game piracy filed with the USTR,³⁸ Nintendo not only represented itself, but also sixty-three of its authorized agents and four other film and image owners—about eighty percent of the entire Nintendo distribution network in the United States. Nintendo also uses its distribution network in lobbying efforts before Congress and the USTR.

Nintendo's primary target is Taiwan. In its immensely detailed report, Nintendo asserted that of the \$2 billion total loss in the video game market due to piracy in 1991, Taiwan is responsible for approximately \$1 billion. The total loss remained the same for 1992, with Taiwan's share decreasing somewhat due to an increase in piracy in other parts of the world. Of the seventeen countries in which Nintendo and its affiliates have undertaken legal actions, almost all the counterfeited units were manufactured in, and transported from, Taiwan. Nintendo further cited three reasons for the USTR to take immediate action: (1) that Taiwan does not accept the registration of Nintendo USA's video game products; (2) that the flaws in Taiwan's current import inspection system are beyond repair; and (3) that Taiwan has failed to abide by its 1989 agreement with the United States.³⁹

38. The document filed was approximately one-half inch thick.

39. ARTER & HADDEN, SPECIAL 301 COMMENTS ON VIDEO GAME PIRACY IN ASIA AND LATIN AM. (Feb. 12, 1993) (written on behalf of Nintendo Corp.).

TABLE 3.5 - COMPARISON OF USTR, IIPA, PMA, INTA, AND NINTENDO SPECIAL 301 LISTS⁴⁰

Special 301 Lists	USTR	IIPA	PMA	INTA	Nintendo
Priority Country	Brazil India Thailand	Taiwan Italy Thailand Korea Poland Philippines Turkey	Brazil India Thailand Korea Poland Venezuela Turkey Argentina Colombia Hungary	Taiwan China Thailand	Brazil India Thailand
Priority Watch	Australia Hungary Taiwan Argentina Egypt Korea Poland Turkey EU	Australia China India Brazil Egypt Greece Cyprus El Salvador Venezuela	Indonesia Russia Spain Egypt Poland	Indonesia Spain Brazil Korea	Korea
Watch	Cyprus Italy Pakistan Spain Venezuela Chile	Russia Hungary	EU China Philippines Taiwan	Mexico	Venezuela Mexico Hungary Argentina Egypt Korea Poland Turkey Australia EU

IV. CASES OF U.S. INDUSTRIAL INFLUENCE ON INTERNATIONAL NEGOTIATIONS

A. THE U.S.-KOREA INTELLECTUAL PROPERTY RIGHTS NEGOTIATIONS

Between 1988 and 1992, the average annual U.S. trade deficit with the Republic of Korea was \$4.6 billion, and this gap was decreasing at a rate of thirty percent per year during the same

40. IIPA, *supra* note 8; PMA, SUBMISSION OF PMA UNDER SPECIAL 301 (Feb. 1993); INTA, Int'l. Market Barriers to Trademark Protection, (Feb. 1993) (1993 Report to USTR); Arter & Hadden, *supra* note 39.

period.⁴¹ Although the issue of IP is not the primary cause of the trade deficit, it is nevertheless a major factor in the U.S.-Korea trade negotiations.

From the outset, the U.S. strategy has been based on the premise that outside pressure (especially from the United States and EU) is the determinative factor for the improvement of Korea's IP protection. While Korea's IP protection rights have improved, significant problems remain. The chief complaints by U.S. industries concern the lack of effective implementation and enforcement of existing laws, and Korea's failure to upgrade its laws to reflect the evolution of global discipline in the IP area.

According to IIPA's studies, the major cause of computer software losses was a prevailing practice of "self-copying, self usage" by many Korean companies. This is different from the concept of "piracy for sale" in that its scope is much larger and more difficult to enforce, and in that individualized self-copying (not for commercial purpose) poses very difficult challenges in the enforcement of the law and the cost-effectiveness of such enforcement.

Below computer software losses are those from sound recording infringement, which are three times greater than U.S. sound recording losses in Taiwan. Data indicates that there are currently nine compact disc ("CD") manufacturing facilities in South Korea with a total production capacity of forty million CDs per year. However, estimates show that the total domestic consumption is only twenty million CDs per year. Thus, it is very suspicious where the remaining twenty million CDs are to be sold. Based on IIPA's studies, many pirated Korean-made CDs are distributed in other parts of Asia. It is, therefore, likely that

41.

<i>U.S./Korea Trade</i>	<i>1988</i>	<i>1989</i>	<i>1990</i>	<i>1991</i>	<i>1992</i>
U.S. Export	11.3	13.5	14.4	15.5	14.6
U.S. Import	20.1	19.7	18.5	17.0	17.0
U.S. Surplus/Deficit	-8.9	-6.3	-4.1	-1.5	-2.1

SOURCE: USTR, 1993 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (1993).

the installation of an export CD inspection system will be a major issue in the future.⁴²

Besides the recent legislative efforts to make IP protection more comprehensive in Korea, the USTR is still pressing for the imposition of a negligible penalty on violators by bringing the standards of protection to the level of GATT/TRIPs. IIPA has also pushed very hard for the revision of Korea's copyright and computer software protection laws, issues are likely to be on the agenda of future U.S.-Korea negotiations.

B. U.S.-CHINA INTELLECTUAL PROPERTY RIGHTS NEGOTIATIONS

The 1979 U.S.-China Trade Agreement calls for both nations to offer copyright, patent, and trademark protection equal to the protection accorded other countries. For several years, the United States and China have discussed in detail methods for improving China's protection of IP.⁴³

After the United States believed that China had made some progress, the USTR, pursuant to the Special 301 provisions, identified China as a Priority Foreign Country in 1991. After six rounds of negotiations, the Special 301 investigation was resolved on January 17, 1992, when both sides reached an agreement by signing a memorandum of understanding ("MOU") on IP rights. In the MOU, China has committed to providing improved protection for U.S. inventions and copyrighted works, including computer software, sound recordings, and trade secrets. The Chinese government has since made significant progress in implementing the MOU.

In addition, ever since China began its "open door" policy in 1978, a whole host of laws in the IP area were enacted. China has joined various international organizations and conventions such as WIPO, the Berne Convention, Universal Copyright Convention, Paris Convention, and Madrid Protocol. China im-

42.

1992 Copyright-based Industry Losses Due to Korean Piracy

<i>Industries</i>	<i>Losses (\$ million)</i>
Computer Software	315
Motion Pictures	20
Music & Sound Recordings	66
Books	15
Total:	416

SOURCE: IIPA, *supra* note 8.

43. According to the USTR's estimate, U.S. businesses lost about \$400 million on IP related products. See USTR, PRESS RELEASE (Jan. 16, 1992).

proved its IP protection in a relatively short period due to the pressures of the U.S. Special 301 investigation.

C. U.S.-TAIWAN INTELLECTUAL PROPERTY RIGHTS NEGOTIATIONS

Since 1982, the authorities of Taiwan and the United States have conducted numerous negotiations or consultations for the protection of IP rights. At first, the emphasis was on the enactment of laws and the institutionalization of the IP protection regime; focus has now shifted to the effective enforcement of those laws.

In 1989, the first year the Omnibus Trade and Competitiveness Act of 1988 became effective, the USTR placed Taiwan on its "Priority Watch List." On July 13, 1989, an agreement for the protection of copyright was reached. Subsequently, the USTR moved Taiwan from "Priority Watch" to "Watch" in November because of the progress made by Taiwan during the previous months. Taiwan remained on the "Watch" list until 1992.

In April 1992, Taiwan was identified under Special 301 as a "Priority Country." The USTR investigation began thereafter. Taiwan immediately responded by promulgating a "Protecting the Intellectual Property Rights Action Plan" and negotiated with the USTR for resolution. In June 1992, an agreement was reached. The agreement requires the adequate and effective enforcement of current copyright, patent, and trademark laws, the further amendment of these laws to make them consistent with the Uruguay Round TRIPs standards, the implementation of an effective export licensing system for computer software and CDs, efforts to obtain legislative approval of the 1989 bilateral Copyright Agreement, the negotiation of administrative protection for pharmaceutical and agricultural chemicals (such as pipeline protection for new drugs under research and development), and the drafting of new laws in areas such as semiconductor chip protection, industrial design, trade secrets, and cable television, where protection does not currently exist.

In early April 1993, Taiwan undertook a last minute, frenetic legislative session in the hope that some of the commitments made pursuant to the agreement would be enacted so that a new round of Special 301 investigations could be avoided. When the USTR released its determination later that month, however, Taiwan was nevertheless identified and placed on the "Priority Watch" list. Additionally, the USTR implemented a new policy by dividing the Priority Watch countries into two categories: "Immediate Action Plans" and "Out-of-Cycle Reviews." Immediate Action Plans are more serious, requiring immediate action to

make progress in specific areas. This policy is designed to impose deadlines and benchmarks for evaluating a country's performance and to ensure that countries do not take up permanent residence on the Special 301 lists.⁴⁴ In the case of Taiwan, the USTR imposed a three-month deadline before re-evaluation took place.

Thereafter, Taiwan proposed "Guidelines on the Full Administration of Intellectual Property Protection" ("Guidelines") and began negotiation with the USTR. In June, a MOU for the protection of IP rights was signed in Washington, D.C. In July, Taiwan began implementing the Guidelines. Another round of negotiations occurred in order to seek Taiwan's removal from the list. Although the USTR acknowledged that Taiwan had made progress, it remained on the "Priority Watch" list.

Based on various estimates, U.S. industries have more IP losses in Taiwan than in any other country. It follows that Taiwan became the prime target of Special 301 identification and investigation. Under IIPA's figures, for example, Taiwan's piracy of software, movies, records, and books cost U.S. companies \$370 million in 1991; the losses almost doubled in 1992 to \$669 million.

On the other hand, most of Taiwan's trade surplus has been the result of trading with the United States.⁴⁵ Since Taiwan relies heavily on the U.S. market in its trade, Taiwan is particularly sensitive to U.S. pressure, particularly to the threat of retaliatory measures. The USTR has been able to make significant headway in its dealings with Taiwan by utilizing this fact.

By comparing bilateral negotiations between the United States and other countries with the U.S.-Taiwan negotiations, one can see the following:

44. USTR, PRESS RELEASE 93-30 (Apr. 30, 1993). Prior to this new policy, many countries tended to wait until practically the last moment to take positive actions in the hope that they could avoid being the subject of investigation or retaliation. This has not only created a periodic frenzy which overwhelmed the USTR's workload, but also left the remainder of the year more or less idle to see any progress.

45.

Table 5.7 U.S./Taiwan Trade Volume (\$ billion)

<i>U.S./Taiwan Import/Export</i>	1988	1989	1990	1991	1992
U.S. Export	12.1	11.3	11.5	13.2	15.2
U.S. Import	24.7	24.3	22.6	23.0	24.6
U.S. Surplus/Deficit	-12.6	-13.0	-11.1	-9.8	-9.4

SOURCE: USTR, *supra* note 41.

- (a) The United States has charged Taiwan with a wider range of violations than other countries, for example, the problems of "MTV" (on-site video renting/mini-theater), piracy of CDs, parallel importation (gray market products), and underground cable channel violations. Most of these violations are not on the negotiation agenda between the United States and other countries.
- (b) Most of the U.S. allegations directed at other countries are also applicable to Taiwan, *e.g.*, market access barrier, inadequate patent and trademark protection, ineffective law enforcement, negligible sentencing of convicted violators, snail-paced legislative processes, and a lack of protection on semiconductor chips as well as trade secrets.
- (c) There is a significant resemblance between the U.S. problems with China and Taiwan, with a focus on acts of piracy and inadequate IP legal protection.
- (d) Special 301 legislation has been most successful thus far in U.S. dealings with Taiwan due to the latter's heavy dependency on U.S. markets.
- (e) Neither a member of the GATT nor of any other IP-related organizations, Taiwan lacks different levels of protection and has to rely on bilateral negotiations to resolve any dispute in the international community.
- (f) Many issues negotiated were based on unresolved legal disputes. Difficulties arise, and sometimes jeopardize the negotiation process, when the issue is without precedent or a settled theoretical basis.
- (g) Special 301 issues have become a major story in Taiwan's local press and have almost reached critical status. Each year the government invests countless resources in year-round negotiations and consultations.
- (h) Special 301 issues have also been politicized. Nationalist sentiments have flared up in such a way that political stability was endangered.⁴⁶
- (i) On the positive side, publicity served as an educational tool for the better protection of IP rights. U.S. pressure will help Taiwan improve its IP protection more rapidly, a beneficial result for both U.S. and local companies.

46. For example, anti-American sentiments and the threat of resignation by government officials for the ensuing trade sanctions or failure of negotiations.

V. CONCLUSION

U.S. trade policy development is a cooperative effort involving close consultation between the President, Congress, and the private sector. The USTR functions as the coordinator in this effort. It manages the private sector advisory system, consults regularly with Congress, and chairs the interagency committees which develop trade policy within the Executive Branch. As a result of these efforts, the United States is able to display a united front when it negotiates multilateral and bilateral agreements with other nations.⁴⁷

Effective lobbying by U.S. industries has resulted in the enactment of congressional trade statutes which permit industries to participate in shaping U.S. trade policy. As this paper's analysis shows, industry involvement has become an integral and indispensable part of America's international negotiations on trade related matters.

In the legislative process, private lobbying is highly professionalized and requires sophisticated knowledge, skill, and adherence to both written and unwritten rules. Being one of the political organs of the Constitution, Congress has to conduct its business with due process, and to do its best at harmonizing different interests with openness and fairness. In the IP area, Congress subtly merged it as part of the trade regime and allowed industries to exercise more influence in concert with the Executive Branch, so that the United States was able to set international standards and exert maximum influence in bilateral or multilateral negotiations.

Under the Executive Branch, the authority to negotiate is in the exclusive hands of the USTR who has the complete backing and assistance of the administration to conduct bilateral and multilateral international negotiations. At the same time, industry representatives serve as advisors to and cooperate fully with the USTR to shape the latter's negotiation strategies so that industrial interests are embodied in U.S. policies.

With statutory authorization and clear delineation of their duties, American industries have thus far coordinated quite well with the government. The formation of various organizations or coalitions helps combine industrial resources to win government trust as well as wield significant influence in the political process. By uniformly portraying themselves as victims of a rampant worldwide piracy, industries have effectively unified their interests with those of the government, thereby pursuing their goals effectively.

47. USTR, 1993 TRADE POLICY AGENDA (1993).

With a well-organized structure and a group of well-trained professionals, the United States was able to conclude successfully many rounds of negotiations, including the landmark North American Free Trade Agreement and the Final Act of the GATT Uruguay Round. While the USTR has generally had the support of the entire U.S. domestic market and the full backing of Congress and industries, its ultimate goal is not to carry the stick and police the world according to its terms; rather, it is to settle disputes and level the playing field so that all participants may conduct their businesses on mutual terms. As such, despite the successes in multilateral negotiations, the carrot and stick approach is likely to continue on the bilateral negotiations front and the United States will continue to provide enough flexibility so that the Executive Branch and industries will work closely to fight against future challenges.