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### Copyright and International TRIPS Compliance (Symposium: Fifth Annual Conference on International Intellectual Property Law and Policy)

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## DISCUSSION

# Copyright and International TRIPs Compliance

Shira Perlmutter\*

Additional Commentary:

Jerome H. Reichman\*\* Whitmore Gray\*\*\*

MS. PERLMUTTER: We have heard today about copyright in two different regions of the world, in Central and Eastern Europe<sup>1</sup> and in China.<sup>2</sup> In recent years there has been an increasing convergence in the substance of national laws in different regions of the world. One of the major factors has been the TRIPs Agreement.<sup>3</sup> I will focus on the current efforts toward implementing the TRIPs

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1. See Dr. Silke von Lewinski, *Copyright in Central & Eastern Europe: An Intellectual Property Metamorphosis*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 39 (1997) (paper presented on April 3, 1997, at the Fifth Annual Conference on Intellectual Property Law and Policy at Fordham University School of Law).

2. See Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies, and Practices*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63 (1997) (paper presented on April 3, 1997, at the Fifth Annual Conference on Intellectual Property Law and Policy at Fordham University School of Law).

3. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement]; see Michael I. Davis, *Uniformity Flows From IP Treaties and EU Law*, NAT'L L.J., May 12, 1997, at C13.

Agreement, and this will be a procedure-oriented talk.

As of January 1996, the obligations in the TRIPs Agreement dealing with copyright went into force for all developed countries.<sup>4</sup> Developing and least-developed countries, however, have additional transition periods available of four and ten years respectively.<sup>5</sup>

The United States and other developed countries have made it a priority to work with developing countries to accelerate their processes and to bring their laws into compliance sooner than the deadlines. But the time for accelerating TRIPs implementation is coming to a close for developing countries. At this point, even though the TRIPs Agreement seems to have been concluded very recently, there are only two and a half years left until the year 2000, when developing countries will be obligated to implement fully the copyright portions.<sup>6</sup> So the process of bringing laws into compliance needs to start now because changes in laws and practices cannot happen overnight.

The United States and other countries have provided technical assistance of various kinds to the developing countries. Also, new members acceding to the World Trade Organization ("WTO"),<sup>7</sup> in most cases, have agreed to implement the TRIPs Agreement fully upon accession, regardless of their level of development.<sup>8</sup> One piece of fairly hot breaking news: About two weeks ago in Hong Kong, newspapers reported that China would also agree to fully implement the TRIPs Agreement upon its accession to the WTO.<sup>9</sup>

One of the emerging issues recently has been the criteria for

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4. Martin D. H. Woodward, *TRIPs and NAFTA's Chapter 17: How Will Trade-Related Multilateral Agreements Affect International Copyright?*, 31 *TEX. INT'L L.J.* 269, 270 n.9 (1996).

5. See TRIPs Agreement, *supra* note 3, art. 65.

6. See *id.*

7. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Uruguay Round"), Apr. 15, 1994, 33 *I.L.M.* 1125 (1994) [hereinafter Final Act].

8. See Eric H. Smith, *Worldwide Copyright Protection Under the TRIPs Agreement*, 29 *VAND. J. TRANSNAT'L L.* 559, 575 (1996).

9. See *China Unveils "Breakthrough" Move in WTO Entry Bid*, *ASIAN POL. NEWS*, Mar. 10, 1997, available in 1997 WL 8241459 [hereinafter *China Unveils Breakthrough*].

taking developing country status.<sup>10</sup> Although the WTO Agreement provides that status as a developed or developing country is a matter of self-designation, the question has arisen whether the authority to self-designate is subject to a rule of reason. The problem is that several countries that have claimed developing country status do not have the conditions to support that status; for example, a country that is now a member of the Organization for Economic Cooperation and Development ("OECD") or a country with an extremely high per capita income.

The question is whether their claims are consistent with the letter or spirit of the WTO Agreements. Ultimately, this question may be resolved by a WTO panel as part of a dispute resolution proceeding.<sup>11</sup> Although the TRIPs transition periods are speeding by, a panel may address the issue before they close.

The TRIPs Agreement contains the following three related elements. First, there are substantive obligations, including important obligations to create effective civil, criminal, and border enforcement mechanisms.<sup>12</sup> Second, there is the application of the WTO dispute settlement procedure to alleged TRIPs violations, which is of critical importance.<sup>13</sup> Third is the concept of transparency.<sup>14</sup> That is really a code word for the availability of information about each other's legal systems. Transparency, of course, furthers the other goals by providing an opportunity to check the compliance of other countries.

One of the most important elements of the transparency part of the agreement is a requirement that each member country notify its main laws and regulations in the intellectual property field.<sup>15</sup> In order to satisfy this notification requirement, member countries must submit copies of their intellectual property laws to the TRIPs Council. Developed countries were required to do so by early 1996.

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10. See Smith, *supra* note 8, at 575 (noting failure of both TRIPs Agreement and WTO Agreement "to provide a firm legal definition of 'developing' country").

11. See *id.* at 576.

12. See TRIPs Agreement, *supra* note 3.

13. See *id.*, Annex 1C, art. 64.

14. See *id.*, Annex 1C, art. 63.

15. See *id.*

We—the United States—worked very hard to prepare our submission. We submitted not only a hard copy, but an electronic version, which included federal laws and some state laws. It was a fairly extensive process.

In addition to notifications—and there are other notification requirements besides the main laws and regulations—there was also a review process established for each other's laws. One week per group of issues had been set aside over the course of 1996 and 1997 to review copyright, neighboring rights, trademarks, patents, trade secrets, semiconductor layout design, and finally, enforcement.<sup>16</sup>

The copyright neighboring rights review was scheduled first. The review took place in July 1996. I will spend the rest of my time talking about the procedure that was followed and the issues that were addressed in that copyright review.

To start with procedure, what happened in July? There were about thirty countries scheduled to have their laws reviewed, and a question-and-answer procedure was established.<sup>17</sup> It is important to recognize that anyone was free to ask questions. Only those developed and newly acceding countries whose TRIPs obligations were fully in force had their laws reviewed, but everyone engaged in the review—developing as well as developed countries.

The questions were due by the end of May for the July meeting. Answers to these questions were supposed to be submitted prior to the meeting so that they could be translated and distributed and follow-up questions could be posed in the meeting itself.

It was an interesting process. One of the problems was that, even though all of the notifications were due in January 1996, a significant number were not submitted on time. As a result, we had only about two months to review the laws of thirty countries and prepare questions. We tried to coordinate the questions to make sure that they were consistent in tone and approach. So it was quite a process.

It was a tremendous volume of work, and also a highly educa-

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16. *See id.*, Annex 1C, arts. 41-62 (detailing enforcement measures).

17. *See id.*

tional process. When I had looked at various aspects of the laws of many countries before this, I had never read through so many at one time. It was especially interesting to compare the laws and see where the similarities and differences lie, and to get some ideas of different ways of doing things. These different approaches can be creative and helpful as we look at our own legal system and advise other countries on their own systems.

The United States asked questions not only of the thirty countries specifically identified as developed countries, but also of some countries that identified themselves as developing, who we thought fell into the developed category.<sup>18</sup> Those developing countries declined to answer the questions in July, but the point was made. And because they do have the questions, they know of areas where we are concerned with the TRIPs consistency of their laws. Many agreed to discuss their answers with us on a bilateral basis.

Before the meeting in Geneva, we had received questions only from the European Union. In Geneva we also received questions from Australia, Canada, India, Korea, New Zealand, and Switzerland, and then additional sets of questions from the European Commission. My memory—which may be faulty because it was an overwhelming process—is that by far the majority of the questions were asked by or of the United States.

Although we submitted our answers ahead of time, not everyone did. The result was that, during that week in Geneva, it was extraordinarily hectic because a lot of things were happening at once.

Now, everyone had brought their copyright experts with them from their capitals. Normally, copyright substantive experts do not attend the TRIPs Council meetings. One expert from another country said to me, “This is the knowledge coming to the power.”

Because we in the United States government saw the review

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18. See generally *World Trade Organization Meeting in Singapore: Hearings on TRIPs Implementation Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104th Cong. (1996) [hereinafter *TRIPs Hearings*] (statement of Eric H. Smith, President, International Intellectual Property Alliance) (discussing TRIPs implementation process), available in 1996 WL 10830708.

process as very important and very valuable, we decided to adopt a policy of answering every question on the spot. We did not say that we would get back to them, or that we would supply information later. Instead, we sat there and came up with answers. It made the meeting grueling and challenging, but I think it was worthwhile.

So we spent the week simultaneously delivering answers we had prepared in advance—which was the easy part—preparing answers to questions that we had just been given, preparing follow-up questions to answers that we had just heard, and then answering additional follow-up questions. Before, after, and in the lunch breaks of each day's meeting we were quite busy in our office. It felt a bit like being at a trial where you are cross-examining and being cross-examined simultaneously.

As a follow-up to the meeting, additional questions could be submitted. They were supposed to be submitted by the end of January of this year in preparation for discussion at a TRIPs Council meeting in February. We did not submit any follow-up questions. We were completely exhausted.

In the week before the meeting in February, we did receive additional sets of questions from Brazil, Korea, and the European Union. This time we did not answer on the spot. The experts were not there, so we did not think we would be speaking to the people who wanted to hear the answers. But we are working on the answers and will submit them in the next few weeks.

This is the end of the official copyright review process. It is worth stressing, however, that there are other opportunities for countries to ask questions. Article 63(3) of the TRIPs Agreement imposes on each member the obligation to supply information about its own laws to other members in response to any written request.<sup>19</sup> So it is a continuing obligation. Last July was just the week-long intensive review.

What is looming on the horizon is even more overwhelming. Theoretically, in the year 2000, we will review the laws of about 100 developing countries whose TRIPs obligations take effect at

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19. TRIPs Agreement, *supra* note 3, art. 63.

that time.<sup>20</sup> In an attempt to ameliorate that onerous task, it has been suggested and discussed at some length in the TRIPs Council that some developing countries may agree to an earlier review without prejudice to their claim of developing country status.<sup>21</sup> Hopefully, we will be able to proceed that way.

Now, I just wanted to say a little bit about the topics that were raised. It was interesting that there were distinct philosophies about what to ask and how to ask it. The American approach was to be extremely thorough, to check all of the obligations in the TRIPs Agreement generally—so we would ask questions whenever the answer was not completely obvious from looking at the law. We wanted to learn how the obligations were interpreted as well as how they were implemented. The result was a lot of questions, some of them broad, general questions that we directed at everyone. In fact, I heard our approach being called a “blunderbuss” approach.

The European approach was quite different. The questions that were asked were more pointed and more specific, addressing only areas where there seemed to be a particular concern.

Other countries used the questions for different reasons. Some asked questions just to understand the basics of our law because they were not familiar with how it worked. Some used questions to make points on issues of dispute between us. And some used questions as retaliation for specific questions that we had asked them; they essentially turned around our questions and asked them of us.

I did not distribute copies of the questions and answers today because they are restricted documents under the WTO procedures and rules. But I do think it is appropriate to describe the general subject matter to see what areas were discussed.

First, I will describe our questions to others. We asked everyone general questions about national eligibility and national treat-

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20. See generally *Status of FTAA: Hearings on TRIPs Implementation Before the Subcomm. On Trade of the House Comm. On Ways and Means*, 105th Cong. (1997) (statement of Jacques J. Gorlin, Director, Intellectual Property Comm.) (discussing year 2000 deadline for global TRIPs implementation), available in 1997 WL 11235872.

21. See TRIPs Hearings, *supra* note 18.



ment,<sup>22</sup> implementation of retroactive protection,<sup>23</sup> and how copyrights can be protected through TRIPs-consistent enforcement mechanisms.<sup>24</sup> I will note that the countries in the European Union declined to respond to any enforcement-related questions which they put off until the enforcement review in November 1997.

We also asked a number of specific questions to clarify the scope of protection for phonograms,<sup>25</sup> including questions about application of the rule of the shorter term, and protection against

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22. The TRIPs Agreement directly addresses the issue of National Treatment, stating that:

Each member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

TRIPs Agreement, *supra* note 3, art. 3. The United States considers National Treatment to be one of the most important issues in any agreement regarding intellectual property. See Shira Perlmutter, *Copyright Office, Congress and International Issues*, 441 PLI/PAT. 135, 181 (1996).

23. See generally TRIPs Hearings, *supra* note 18 (discussing the retroactivity of TRIPs and current United States law and policy).

24. TRIPs requires the adoption of enforcement measures to enable rightholders effectively to protect their rights mechanisms help protect copyrights. According to one commentator:

One major contribution made by TRIPs is in the area of enforcement. TRIPs sets minimum standards for enforcement provisions, namely enforcement procedures and sanctions. TRIPs requires member countries to provide civil and administrative procedures for enforcement, access to courts, and access to certain remedies including: preliminary relief; border control; [and] criminal penalties. It also establishes minimum procedural requirements including: notice to defendants; representation by counsel; opportunity to present evidence; [and] protection of confidential information.

Anne Bright Gundelfinger, *Protecting the Rights: Establishing Licensable Copyright and Trademark Rights and Compliance with Licensing Formalities*, 458 PLI/PAT. 299, 305 (1996).

25. Compare TRIPs Agreement, *supra* note 3, art. 14 (regarding phonograms), with Geneva Convention for the Protection of Producers of Phonograms Against the Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 888 U.N.T.S. 67 [hereinafter Geneva Convention] (discussing guidelines for the reproduction of phonograms), and World Intellectual Property Organization Performances and Phonograms Treaty, adopted by Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 76 (1997) [hereinafter WIPO Phonogram Treaty] (providing additional protection, but with less signatories, than the TRIPs Agreement). See also Shira Perlmutter, *Congress and International Issues*, 481 PLI/PAT. 345, 412-27 (1997).

both direct and indirect reproductions.<sup>26</sup> We asked most countries questions about the breadth of particular exceptions in their laws and their consistency with the limitations on exceptions to rights set out in article 13 of the TRIPs Agreement.<sup>27</sup> And then, of course, we asked questions about particular areas where we saw gaps or inconsistencies with particular obligations. We asked follow-up questions to clarify the answers we had received.

The questions to the United States tended to center on a number of issues. We had several questions about fair use, about both the doctrine generally and its application in particular cases. There were also a number of questions that focused primarily on the section 110 exceptions to the public performance right and on compulsory licenses.<sup>28</sup>

We had a number of questions about pending legislation in Congress last year and, in particular, about music and performance rights. We had questions about the scope of rights for performers, in particular, focusing on the bootlegging right in section 1101.<sup>29</sup> We also had questions about the scope of rental rights<sup>30</sup> and the

26. See *id.* art. 14, ¶ 2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. See Geneva Convention, *supra* note 25; WIPO Phonogram Treaty, *supra* note 25.

27. See TRIPs Agreement, *supra* note 3, art. 13. Article 13 states that: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." *Id.*

28. Section 110 provides for several limitations on exclusive rights as guaranteed under United States copyright law. 17 U.S.C.A. § 110 (West, WESTLAW through Pub. L. 105-158, Feb. 13, 1998). Specifically, this section exempts certain enumerated performances and/or displays described therein. *Id.* Compulsory licenses are used to provide "copyright holders remuneration for the use of their works." Fraser, *supra* note 24, at 814. Such licenses have been criticized as being a disincentive for market forces insofar as they confer a nearly equivalent value upon all works, even though some could, by virtue of greater popularity, command much higher license fees in an open market. See *id.* Cf. WIPO Moves on Berne Conference To Draft New Technology Protection, 13 Int'l Trade Rep. (BNA) 250, Feb. 14, 1996 (discussing issues involving compulsory licenses).

29. 17 U.S.C.A. § 1101 (West, WESTLAW through Pub. L. 105-158, Feb. 13, 1998) (protecting sounds and images of live musical performances, which do not receive copyright protection due to the lack of fixation, from unauthorized fixation, distribution, or transmission).

30. See *id.* § 109(b) (providing that a person in possession of a sound recording or a computer program may not rent, lease, or lend the program to anyone for direct

scope of protection for computer programs. Several questions related to our term of protection for pre-1978 works.<sup>31</sup> The bulk of the questions, I would say, dealt with the restoration of copyrights under the Uruguay Round Agreements Act,<sup>32</sup> including the criteria for restoration,<sup>33</sup> the terms upon which we restore copyrights,<sup>34</sup> and the treatment of reliance parties.<sup>35</sup>

So that is generally what came out of the meeting. Now, because this was the first review of four, it was a learning process and there were bugs to work out. I understand that the trademark review, which took place in November 1996, went very smoothly. Overall, the July meeting was an exhausting process, but very worthwhile. We learned a tremendous amount about the implementation of obligations—or lack of implementation—in different countries. Also, I believe it was helpful to provide an example to

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or indirect commercial advantage unless such transfer is authorized by the copyright owner).

31. *See id.* § 304 (providing terms for works under statutory copyright protection before January 1, 1978).

32. *Id.* § 104A.

33. *See id.* (setting out criteria for restoration); *see also* Hon. Marybeth Peters, *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 25, 31-38 (1996).

34. Restoration of certain foreign copyrights is provided for by the Uruguay Round Agreements Act, Pub. L. 103-465, § 514(a), 108 Stat. 4809, 4976 (Dec. 8, 1994) (codified as amended at 17 U.S.C.A. § 104A (West, WESTLAW through Pub. L. 105-158, Feb. 13, 1998)) (providing for automatic restoration of copyright in certain foreign works that were in public domain in United States and for foreign sound recordings fixed before February 15, 1972, if such works were protected in their source country on the effective date for restoration, January 1, 1996).

35. *See* 17 U.S.C.A. § 104(A)(h)(4); 37 C.F.R. § 201.33(b)(2) (1997). According to this regulation, a reliance party is defined as any person who:

(i) With respect to a particular work, engages in acts, before the source country of that work becomes an eligible country under the URAA [Uruguay Round Agreements Act], which would have violated 17 U.S.C. 106 if the restored work had been subject to a copyright protection and who, after the source country becomes an eligible country, continues to engage in such acts;

(ii) Before the source country of a particular work becomes an eligible country, makes or acquires one or more copies of phonorecords of that work; or

(iii) As the result of the sale or other disposition of a derivative work, covered under the new 17 U.S.C. 104(A)(d)(3), or of significant assets of a person, described in the new 17 U.S.C. 104(A)(d)(3)(A) or (B), is a successor, assignee, or licensee of that person.

37 C.F.R. § 201.33(b)(2); *see also* Peters, *supra* note 33, at 29-32.

other countries, whose obligations are not yet in effect, as to how seriously we take this process and to show how closely we are examining what we are doing and what other countries are doing.

MODERATOR: Thank you very much. On behalf of everybody, there is now an opportunity to ask questions. Comments or questions from the audience?

AUDIENCE MEMBER: On what basis was the information restricted, other than by the treaty?

MS. PERLMUTTER: That is a good question. I was just talking about that before we came in today. Under the general rules of the WTO, these documents are restricted unless they are declassified. I think there is work that has been done on the procedures for that, including with relation to these documents. It is my understanding of where we are today that these documents will eventually be declassified, but they are not yet.

PROFESSOR REICHMAN: I have a question and then a comment on the Chinese question. In a path-breaking paper on dispute resolution that was put forward in the Virginia conference and recently published,<sup>36</sup> the authors Rochelle Dreyfuss and Andreas Lowenfeld looked beyond transparency to dispute resolution. A question that came up was the apparent lack of control—that surprised me, at least in the paper—by the TRIPs Council over the dispute resolution process. That is, they find nothing in the documents themselves, which were separately drafted, that would allow the Council, which is pursuing the gradualist, steady pressure policy that you have outlined, nothing to prevent in-runs by eager beavers pursuing their own private interest policies that might be at odds with this. Now, I didn't really read the statute that way or interpret the TRIPs Council's activities that way, and neither, I think, did Dreyfuss and Lowenfeld, looking back at their article.

On the spot, having participated in that, what is your reaction? Could the TRIPs Council exercise an amelioratory role by issuing guidelines and dissuading private initiatives in the dispute resolution sector, if it thought that was getting in the way of progressive

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36. Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

development or not?

MS. PERLMUTTER: I have not seen their paper and am not sure I understand the question. What is it that you're suggesting people are racing to do?

PROFESSOR REICHMAN: No one is racing yet, but the prospects that Dreyfuss and Lowenfeld outline are that people can and will race to persuade their governments to file private actions. But the government could file a private dispute resolution that could be completely at odds with the slower policy of evolution going on in the TRIPs Council. The question that I'm asking is, has the TRIPs Council considered issuing guidelines to influence the process of dispute resolution so that it proceeds in tandem with its own policy? Are you still not clear?

MS. PERLMUTTER: Not entirely. I think I have an idea what you're talking about, but I would want to disclaim expertise in this area. My experience with the TRIPs Council has been generally in the area of copyright, dealing with particular disputes or the copyright review.

MODERATOR: You had a comment on China?

PROFESSOR REICHMAN: We hear two different perspectives here at this Conference, from Eric Smith, president of the International Intellectual Property Alliance,<sup>37</sup> and from Professor Whitmore Gray at Fordham Law School. There are two other perspectives that I have heard recently. One, at a symposium on Hong Kong, emphasized the very great need in China—a greater need than I imagined—for foreign investment capital. Another initiative, coming out of Duke University School of Law, under David Lange, executive director of the Center for Global Information Technologies, seems to find that Chinese officials are interested in private/public initiatives which deal directly with interested sectors and come to some accommodation in relation to commitments for greater foreign investment.

I put that on the table. There is going to be a conference on it in July, I gather, in Brussels. I think it will be of some interest. It

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37. See Smith *supra* note 8; TRIPs Hearings, *supra* note 18 (statement of Eric Smith).

might even be a testing ground to see how serious the Chinese really are in moving forward more rapidly in this direction.

PROFESSOR GRAY: Could I just comment on that? A very significant development, for example, is that Microsoft has signed an agreement with Legend, a major Chinese manufacturer, to install Windows 95 as the original equipment on all of those Chinese computers. This is the direction in which it is going to move. It is going to move on economic grounds.

I would just answer that—and this is based on our experience in lots of societies—it is very difficult to get prosecuting attorneys to prosecute white-collar crime in this country, in consumer protection fraud particularly. It is very difficult in China, I think, to expect public enforcement to solve what are basically economic problems.

I would just take the example of the bankruptcy laws, which we know make sense. Major countries know they make sense. It has been extremely difficult in China to get local enforcement, and particularly local judges, to put workers out of work. So they look for economic solutions to those problems.

I am not being an apologist for China, but simply putting things in a reasonable economic perspective. It is unreasonable to expect their system to reach the level of enforcement that we would like very quickly; after all, when were our antitrust laws enforced mostly through criminal actions? Never.<sup>38</sup> We have never found criminal sanctions to be a satisfactory way of enforcing economic policy.

MODERATOR: Thank you. Our time is about to run out, but perhaps we have time for a few more questions.

AUDIENCE MEMBER: I am Bradford Smith, the Chief International Counsel for Microsoft Corporation. I have just one comment. There have been some good steps in China. The Legend deal was a good step for our company.<sup>39</sup> The single judgment

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38. *But see* Robert C. Weinbaum, *Globalization and Innovation Shape Antitrust Policy*, NAT'L L.J., Aug. 4, 1997, at C4 (arguing that "[c]riminal antitrust enforcement is extremely active").

39. *See Microsoft Strengthens Ties with Chinese PC Industry*, ASIA PULSE, May 15, 1997 (stating that "Zhang Qi, an official of the Ministry of Electronics Industry,

that was cited earlier was a good step.<sup>40</sup> The training that is taking place by the motion picture industry, which I think all of the copy-right industries have been supporting and investing in, has been good.<sup>41</sup>

But at the end of the day, these are relatively modest steps, I think it is fair to say, against the backdrop of a huge, huge problem. On balance, the amount of progress that has been made in the last year has been much more limited than I think most American companies—and certainly the software companies—would like to have seen.

One of the things that is striking about China today is just how rapidly their personal computer economy is growing. China today, the People's Republic of China ("China"), is the sixth-largest personal computer economy in the world.<sup>42</sup> By this time next year it will surpass France and be the fifth-largest personal computer economy.<sup>43</sup> China is spending over \$5 billion a year purchasing personal computer hardware.<sup>44</sup>

But when it comes to software, we see levels at about one percent of that investment. Indeed, that is just the situation within the

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told Microsoft officials . . . that strengthening cooperation with China's personal computers industry guarantees the long-term profitability of Microsoft and other western producers").

40. See generally *China Unveils Breakthrough*, *supra* note 9 (noting that China is facilitating membership in the WTO by granting all of its national enterprises the right to import and export after a three year transition period).

41. See U.S.—*Sino Relations: Hearing Before the Subcomm. On East Asian and Pacific Affairs of the Senate Foreign Relations Comm. and the Subcomm. on Asia and the Pacific and Int'l Econ. Policy and Trade of the House Int'l Relations Comm.*, 104th Cong. (1996) (statement of United States Ambassador Michael Kantor), available in 1996 WL 7136510.

42. See Ian Johnson, *China Sensors its Internet; Police Monitor Net for Unpopular Ideas; Viewers Risk Prison*, *BALT. SUN*, Feb. 23, 1996, at 1A (stating that China will be the sixth-largest market).

43. See *Microsoft Sees Fast Growth in China Sales*, *ASIAN WALL ST. J.*, Jan. 8, 1997, at 10 (quoting a Microsoft executive as saying that "[a]s a region, China is now the fifth-largest market in the world"), available in 1997 WL 3794379.

44. See *Computer Market Sees More Rigorous Competition*, *XINHUA ENGLISH NEWSWIRE*, May 10, 1997 ("The Ministry of Electronic Industry said that the capacity of the domestic market for PCs [in China] will stand at six million to eight million machines in the year 2000, with the sales volume approximately 40 billion to 50 billion yuan."), available in 1997 WL 3760548.

country, where we are seeing very little progress in terms of the piracy. That is before you consider the fact that there is a massive exporting of counterfeit software from China to the rest of the world.

In one case, in Los Angeles last month, the police seized \$6.5 million of counterfeit Microsoft software that had originated in China and \$3.5 million in cash.<sup>45</sup> This one company, entirely organized out of China, was doing over \$60 million of business in the United States selling counterfeit copies of Microsoft software. To be honest, I do not think that the entire United States software industry, in terms of the personal computer industry, is doing that much business in China selling legitimate copies of our products.

While the cases that we have heard about today are all good news, I think the fact of the matter is that the single best case in the last year, leading to the arrest of Chinese nationals for the manufacturing of counterfeit software, was not in China, but in Los Angeles. Until we see a lot more progress in the future, it is going to be hard to be optimistic, even from the mid-term perspective, much less any kind of short-term time horizon.

MODERATOR: Unfortunately, we are out of time. Thank you all for participating in today's discussion.

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45. See Patrick McKenna, *Major Software Piracy Ring Busted, \$3.5 Million Seized*, NEWSBYTES, Mar. 6, 1997 ("Tips to Microsoft's piracy hotline led Los Angeles District Attorney's office to seize \$3.5 million in cash and \$6.2 million in counterfeit software."), available in 1997 WL 9491916; see also *\$9.8 Million in Software, Cash Seized in Counterfeiting Probe*, L.A. DAILY NEWS, Mar. 6, 1997, at N13 (detailing what Microsoft believes to be "one of the largest seizures of suspected counterfeit Microsoft software in the United States").