

INTELLECTUAL PROPERTY PROTECTION: A UNITED STATES PRIORITY

*Richard A. Morford**

Intellectual property currently occupies a prominent place in the domestic and international economic policy agenda of the United States. To a lesser extent, this has always been true. After all, Madison made sure that the concept of protection for inventors and authors was enshrined in our Constitution. In the subsequent history of our country, however, the amount of attention given to patents, trademarks, copyrights and other forms of intellectual property has never been as high as it is now.

I. WHY THE CURRENT PUSH ON INTELLECTUAL PROPERTY?

What explains the current prominence of intellectual property issues? The increasing importance of foreign competition and markets to U.S. firms is one factor. Tremendous growth in overseas markets and stiffened international competition at home have convinced major U.S. firms that success in the U.S. market alone is not enough. We live in a world market. Infringement anywhere can blunt export opportunities, disturb third country markets and even show up in our domestic market. The United States is the largest producer of copyrighted works and the heaviest investor in basic research and development in the world. Clearly we have an interest in better protection of intellectual property both at home and abroad.

The cost and incidence of infringement are also rising. The rapid spread of technology to more and more countries around the world has shortened the lag time between innovation and copy. New technologies have not only inspired new infringements but have also made copying easier and more profitable. Where previous piracy centered on the unauthorized copying of books, films and musical works, it now includes the unauthorized copying of computer software and of semi-conductor chips. Where earlier counterfeiting schemes focused on copies of brand name consumer goods, we now confront the counterfeiting of pharmaceuticals, agrichemicals and even spare parts for aircraft.

* Deputy Director for Economic Section, Office of Japanese Affairs, Department of State.

The International Trade Commission estimated that in 1986 U.S. companies may have lost between \$43 and \$61 billion because of foreign infringement of intellectual property rights. While the figure is admittedly imprecise, it leaves no doubt that increasing the protection afforded to U.S. holders of intellectual property rights both at home and abroad must be an economic priority of the United States.

II. WHERE THE UNITED STATES GOVERNMENT STANDS

The U.S. government has long been active in encouraging improved intellectual property protection. The U.S. pressed for new international conventions, such as the Brussels Statellite Convention and the Budapest Treaty for Deposit of Microorganisms, to augment the major intellectual property conventions (the Paris Convention for Protection of Industrial Property and the Berne Convention for Literary and Artistic Works). In the past, the U.S. government also held bilateral consultations, largely to resolve business problems on a case-by-case basis.

By the mid-1970s, however, the problem of trade in counterfeit goods had grown to the point that business groups were demanding greater action. The United States therefore sought to include an anti-counterfeiting agreement in the results of the Tokyo Round of the General Agreement on Trade and Tariffs. The proposal attracted significant support, particularly in the United States and Europe, but because of its late introduction and opposition from some developing countries, it was not included in the final agreement produced by that Round.

In the Trade and Tariff Act of 1984, Congress clearly linked trade and intellectual property. Intellectual property was a "new" trade issue, along with services and investment. The Trade Act made intellectual property infringement a subject of the National Trade Estimates Report on Foreign Trade Barriers, a cause of action under Section 301, and a consideration in the designation of countries for inclusion in the Generalized System of Preferences ("GSP") and the Caribbean Basin Initiative ("CBI").

The U.S. government policy since then was most fully enunciated in an Administration statement of April 7, 1986 which stressed the goal of improving multilateral conventions and domestic protection. Importantly, the statement also committed the United States to seek a GATT agreement on intellectual property, not limited to counterfeiting, and a vigorous program of bilateral consultations.

A. Multilateral Conventions

The United States is working in the World Intellectual Property Organization to strengthen current conventions and develop new ones. Negotiations on patent law harmonization and the protection of biotechnology are ongoing. Next month, we hope to conclude a treaty for the registration of audio-visual works. By verifying ownership, this should assist legal actions against film piracy.

The U.S. will host a diplomatic conference for the protection of semiconductor chips in Washington in May 1989. In bilateral discussions, we have encouraged other countries, especially developing countries, to join multilateral intellectual property conventions. Importantly in this regard, the President and Congress approved United States entry into the Berne Convention, bringing the United States into the mainstream of international copyright relations as of March 1, 1989.

B. GATT Multilateral Trade Negotiations

As part of the Uruguay Round, the United States has proposed a comprehensive agreement on intellectual property, including standards, internal and border enforcement, and GATT-type dispute settlement procedures, all instituted with a view to minimizing obstructions to legitimate trade. More on this later.

C. Domestic Legislation

By eliminating the injury test and expanding the definition of domestic industry, the Omnibus Trade Act makes it easier for firms to use Section 337 of the 1974 Trade Act, the provision of U.S. law that authorizes the International Trade Commission to bar the import of goods infringing U.S. intellectual property rights. The Trade Act also revises U.S. patent law to allow process patent holders to prevent the import of products produced by an infringing process.

D. Bilateral Consulations

The United States has held bilateral discussions with countries in Asia, Latin America, the Mideast and elsewhere to improve their intellectual property laws and enforcement. The GSP review process (the 1984 Trade Act mandated that intellectual property protection be a consideration in reviewing GSP access to the U.S. market) and Section 301 cases or threats thereof have called attention to our intellectual property concerns.

In the last two years, the United States has established bilateral copyrights relations with Singapore, and is near reaching bilateral agreements with Indonesia, Malaysia, and Taiwan. Korea has passed

a modern copyright law and joined the Universal Copyright Convention. Korea, Taiwan, and Malaysia have improved their patent laws to include protection for pharmaceutical products. Indonesia and Chile have drafted modern patent laws which are now under consideration for adoption in those countries.

After a lengthy process begun by an industry petition under Section 301 of the Trade Act, the United States retaliated against Brazil in 1988 for its failure to provide patent protection for pharmaceuticals. A similar Section 301 investigation is underway against Argentina.

III. WHY THE GATT?

The United States raised the intellectual property issue at the GATT for several reasons. First, current international intellectual property agreements do not include dispute settlement provisions other than a provision to take disputes concerning treaty interpretations to the International Court of Justice. The GATT offers the possibility of extending effective dispute settlement mechanisms to intellectual property issues. Second, some intellectual property standards, particularly those in the Paris Convention pertaining to patents, allow serious commercial and trade losses to occur because of the lack of specifics on levels of protection, fields of protection, and time periods for protection. Third, the GATT offers a different negotiating dynamic than does the World Intellectual Property Organization. Unlike the situation in WIPO, caucuses of developed, developing and other countries are not the practice in the GATT. Also, the many topics under discussion at the GATT (there are 15 negotiating groups in the Uruguay Round) provide potential for trade-offs not just within the area of intellectual property but also across the many subject areas under negotiation in the Round. A last consideration is time limitations. While GATT Rounds do not always end as scheduled, history has shown that they do end. The Uruguay Round is to be completed by the end of 1990.

Underlying all of these reasons for seeking a GATT solution is the U.S. preference for a multilateral rather than a bilateral solution to the trade problems caused by lack of adequate intellectual property protection.

IV. UNITED STATES GOALS IN THE GATT

What the United States seeks is a GATT agreement on patents, trademarks, copyrights, trade secrets, and the protection of integrated circuits that will raise existing intellectual property protection standards

where necessary, will provide effective enforcement measures at the border and internally, and will adapt GATT dispute settlement procedures to the intellectual property area.

Substantive standards are necessary simply because standards in existing agreements are inadequate to prevent intellectual property laws from establishing significant trade barriers. For example, the Paris Convention (patents and trademarks) does not include obligations regarding what subject matter must be patentable or the duration of patents. This leads to many Paris Convention signatories refusing to grant patent protection to a number of economically important sectors such as pharmaceutical and chemical products.

Another example of how intellectual property regulations can create trade barriers is the compulsory licensing requirement for failure to manufacture ("work" a patent). This can also deprive a patent holder of the right to trade in his invention. The economic inefficiency of promoting manufacturing of every product in every country is apparent. A GATT agreement should develop rules to minimize the negative trade effects of "working" requirements. While the Berne Convention provides a high level of copyrights protection standards, full protection for computer software and sound recordings needs to be clearly established. In the area of trade secrets (or proprietary business information), there is simply no international agreement.

The second essential element of a GATT agreement is enforcement. Countries would undertake an obligation to enforce agreed-upon standards. A copyright has little value if the owner has no way of enforcing its rights. The best law in the world will have little effect on video and audio tape pirates, if they know that the police never raid, the courts never issue injunctions, or that the penalties are easily absorbed as a cost of doing business. To be effective, standards must be enforced both in the internal market and at the border. Enforcement systems must be fair and open. Plaintiffs must be able to obtain the evidence necessary to enforce rights, whether under civil or criminal procedures. Remedies should be sufficient to help deter future violations.

Third, basic GATT concepts such as dispute settlement and transparency need to be adapted to the special requirements of intellectual property protection and should be included in a GATT agreement.

V. PROSPECTS FOR AGREEMENT

In Punta del Este at the beginning of the Uruguay Round, the United States had few allies in its efforts to add intellectual property to the agenda. Japan was the only other true believer. Since then, overcoming initial hesitancy on the part of some of its membership,

the European Community has also come to seek a comprehensive approach to negotiations. The Nordic countries, Australia, New Zealand, Canada, Switzerland and others now share this objective.

Developing countries, on the other hand, have been more reserved. Most have adopted a low-key approach to the negotiations. Some, led by Brazil and India, have questioned the mandate for any negotiations beyond those on a counterfeiting agreement.

At the Montreal mid-term review in December 1988, trade ministers reached agreement on instructions for eleven of the fifteen negotiating groups for the remainder of the Round. They were unable to agree on instructions for four groups: agriculture, intellectual property, textiles and safeguards. Negotiations in all groups are presently suspended pending resolution of how to proceed in these four areas. A meeting of senior trade officials during the week of April 3 will address these outstanding areas.

Personally, I am optimistic. There are no guarantees that the United States point of view will prevail on any particular item now under negotiation, but it seems highly unlikely that world economic leaders would lightly place the strain of a failed Uruguay Round on the international trading system. This inherent pressure for a successful Round should enhance the prospects for a comprehensive intellectual property agreement. Why is this the case?

In the United States and elsewhere, it is the strongest supporters of an open international trading system and the GATT who are the proponents of a comprehensive intellectual property agreement. The trading system can ill afford to have them as an opponent during the period of final negotiation and implementation of the Round.

There are economic benefits for developed and developing countries in providing adequate protection for intellectual property. While some countries have firms that derive short-term profit from the lack of protection, the long-term economic benefits to innovation and economic development that result from protecting intellectual property are significant. Local innovation is inspired if it is rewarded. Top-of-the-line technology is not transferred when it is not going to receive protection. Pirates do not invest in research and development. Markets for pirated and counterfeited goods are closing around the world.

Finally, the alternative to a comprehensive multilateral agreement in the GATT is more unilateral and bilateral pressure.

VI. CONCLUSION

Our goal in the GATT on intellectual property is ambitious. We have gained considerable support. We still need more to be able to

negotiate the type of agreement we seek. What is equally clear, however, is that the world trading system can no longer ignore the trade-related aspects of intellectual property rights. Intellectual property protection is a priority for the United States, even among the subjects under the discussion at Uruguay Round. Our success in achieving an effective agreement on intellectual property will be an important key to the ultimate success of the Uruguay Round.