

March 29, 1990

NEW THREATS TO INTELLECTUAL PROPERTY RIGHTS

INTRODUCTION

A key issue in international trade talks will be how nations should protect intellectual property – patents, copyrights, trademarks, and trade secrets. The so-called Uruguay Round of trade negotiations, named after the 1986 opening conference held in Punta del Este, Uruguay, by the General Agreement on Tariffs and Trade (GATT), are underway in Geneva and will end this year. They may produce an international agreement on protection of intellectual property rights, known by experts as IPRs. Done properly, a GATT-negotiated treaty protecting IPRs would boost trade and economic development not only in the Third World, but in the United States and other industrialized nations as well.

Protecting intellectual property is essential to technological and industrial innovation and fundamental to economic growth. Guarantees for patents, trademarks, and copyrights produce incentives for creative thinking. They protect innovators and enterprising companies from the theft of their ideas, and provide a financial return for the work that went into formulating and articulating those ideas.

Aiding Competition. Securing intellectual property rights also helps countries compete economically in the international market. Said Paolo Bifani, a consultant to the United Nations Conference on Trade and Development (UNCTAD), in 1989, “It is the development, rapid diffusion and mastery of technology that enables countries to create comparative advantage and to acquire competitiveness in international markets.”¹

1 Paolo Bifani, “Intellectual Property Rights and International Trade,” in *Uruguay Round: Papers on Selected Issues*, United Nations Conference on Trade and Development, UNCTAD/TTP/10, New York, 1989, p. 132.

Adequate and effective legal mechanisms for protecting such intellectual property as innovative products, books, computer chip designs, and computer programs are indispensable in fostering the international trade that developing countries need to compete globally.

Third World Dissent. The general consensus in the West that protecting intellectual property rights is good economically is not shared by many underdeveloped countries. These countries insist that knowledge and other intellectual products somehow are the "common heritage of mankind," and thus should be shared by all, rather than be subject to laws governing material property. This latter view is accompanied by the strong belief that government bureaucracies should determine who benefits from the efforts of others. Explains Gunda Schumann, Director of the Intellectual Property Project at the United Nations Center on Transnational Corporations (CTC): "In their [developing countries'] opinion, intellectual property rights give innovators a monopoly on information that is used to exact unreasonably high prices for their knowledge and to control the dissemination of knowledge-based products through unwarranted restrictions on its use."²

This attitude by very many Third World policy makers has led to the many national laws governing patents, copyrights, and trademarks. Known as the country's "intellectual property regime," these provide little protection of intellectual property. These ineffectual laws encourage piracy, counterfeiting, and the outright theft of ideas. At the same time, these laws discourage transfers of new ideas to Third World Nations and the nurturing of new ideas inside the Third World.

U.S. Leadership. The U.S. has been a champion of improving the international protection of intellectual property. Washington has promoted such multilateral negotiations as those associated with GATT and the World Intellectual Property Organization (WIPO), a specialized U.N. agency based in Geneva, which is supposed to enforce minimum standards for intellectual property protection. The U.S. also has sought to improve how other countries' laws protect intellectual property through unilateral action based on U.S. trade laws.

Neither of these U.S. actions alone will strengthen international protection of intellectual property rights sufficiently. What is needed is a well-coordinated set of policies involving multilateral negotiations and unilateral actions. These policies must be designed to correct widespread inadequacies in, and poor enforcement of, laws protecting intellectual property rights

2 Gunda Schumann, "Economic Development and Intellectual Property Protection in Asia: A Comparative Analysis," Paper presented at the Conference: Protection of Intellectual Property Rights in Science, Technology and Economic Performance: International Comparisons, May 8-9, 1989, Washington, D.C., p. 6.

To do this, the U.S. should:

- ◆ ◆ Seek an agreement on intellectual property in GATT's Uruguay Round that will commit member countries to introducing high levels of protection for patents, copyrights, trademarks, and trade secrets, and to effective measures for enforcing the measures.

- ◆ ◆ Defend the integrity of existing intellectual property agreements that are under attack from Third World countries in the U.N. World Intellectual Property Organization (WIPO).

- ◆ ◆ Threaten U.S. sanctions against countries unless they agree to support a GATT agreement on intellectual property that will benefit the U.S. and developing countries alike.

- ◆ ◆ Provide technical assistance, such as legal expertise and funding to establish effective patent offices, to countries willing to adopt tough intellectual property laws.

- ◆ ◆ End membership in, and financial support for, organizations that promote weak and ineffective intellectual property protection, as does the United Nations Conference on Trade and Development (UNCTAD).

WHAT IS INTELLECTUAL PROPERTY?

Ideas, innovative products and processes, new technologies, and other results of human creativity are called intellectual property. As with material property like land, governments set the rules for individuals' rights to own and benefit from intellectual property. In most nations, there are sets of laws governing intellectual property known as the country's intellectual property regime. Most industrial nations' inventors and innovators are granted exclusive rights to their creations for a given period of time during which they can earn a return on the time and money invested in developing their idea. This is done through the use of such mechanisms as copyrights, patents, trademarks, and trade secrets.

Copyright. Copyright laws protect the representation of ideas, namely literary and artistic works, from unauthorized distribution or publication. A copyright automatically exists upon authorship of works such as books, recordings, and more recently, computer programs. Copyrights are transferable and allow the owner to extract a fee, or royalty, for reproduction or performance of the copyrighted work. The duration of the protection is typically fifty years after the author's death or, in cases where there is no author, fifty years after original publication. Copyright protection is based on national law, as is all intellectual property protection, and is effective only in the country concerned.

Several international treaties protect copyrights. The oldest and most prominent is the 1866 Berne Convention for the Protection of Literary and Artistic Works. This treaty is administered by the World Intellectual Property Organization, a specialized agency of the U.N. It is supposed to enforce mini-

mum standards of intellectual property production. There are now 81 nations that adhere to the provisions of the Berne Convention. Prominent among these are the U.S., Britain, France, and West Germany.

Patents. A patent is a government's legal guarantee that the patented invention can be produced, sold, utilized, or imported only with the explicit authorization of the patent holder. Patents are granted for inventions that are new and commercially useful. The patent usually lasts fifteen to twenty years. International patent protection is provided by the Paris Convention for the Protection of Industrial Property, signed March 20, 1883. Some 99 nations are party to the Paris Convention; it too is administered by WIPO.

Trademarks. Trademarks are any sign, word, design, letter, number, color, or shape that distinguishes one product from another. The shape of a Coca-Cola bottle, as well as the name, is a trademark. Trademarks are registered in each country and can be renewed periodically. The 1891 Madrid Agreement Concerning the International Registration of Marks is the international treaty protecting trademarks and again is administered by WIPO. It has 27 states as contracting parties.

Trade Secrets. Private companies find it necessary to protect certain information that could benefit other companies.³ Trade secrets are usually protected by contractual agreements and are used largely for ideas or inventions too sensitive to be patented, since patents require disclosure of the creative product or idea to the government granting the patent. There is no international treaty covering trade secrets. However, the U.S. and other developed countries, including Britain and West Germany are pushing for the inclusion of provisions covering trade secrets in a GATT agreement on intellectual property.

BENEFITS FROM PROTECTING INTELLECTUAL PROPERTY

For developing countries, improved mechanisms and enforcement of intellectual property rights will promote innovative economic and business activity, increase direct foreign investment, accelerate technical transfers from developed countries, and generally advance the country's technological and industrial development. Many underdeveloped countries refuse to recognize that inadequate intellectual property protection limits their ability to obtain these benefits. Rather than having to bow to American pressure to improve their national laws protecting intellectual property, developing countries should be doing so themselves.

The benefits to the Third World from increased innovative capacity and the commensurate output are potentially enormous. Strong, effective patent protection boosts greatly the incentive for individuals and firms to create and

3 U.S. Chamber of Commerce Intellectual Property Task Force, "Guidelines for Standards for the Protection and Enforcement of Trade Secrets," Washington, D.C., March 11, 1987.

produce goods and services. Direct benefits include new jobs and new skills in the innovative firms. Government protection of intellectual property also increases the flow of foreign investment, including that for new research and development facilities and manufacturing plants.

Positive Influence. The innovative firm brings to Third World countries much more than its products and services. Explains Michael Hodin, a Vice President of the multinational pharmaceutical company Pfizer International, Inc.: "in the process of transferring the complete set of services and knowledge accompanying the innovative medicine, additional benefits go to the education and scientific systems in the country, that in turn positively influence economic progress."⁴

Even Gunda Schumann of the U.N. Center on Transnational Corporations agrees, admitting that "in light of the increasing importance of advanced technologies for the economic development of all countries, an intellectual property system may in terms of attracting valuable transfer of technology and fostering local innovation probably have advantages for a developing country in conjunction with other factors such as: pursuing an open market strategy; promoting technological collaboration between transnational corporations and local companies; training of the labor force for technologically high-skilled tasks; and promotion of local R&D."⁵

For the developed countries, including the U.S., benefits from improving international intellectual property regimes and enforcement include: easier entry into developing country markets resulting from standardization of intellectual property law; better recognition for U.S. products in the international marketplace by virtue of stronger trademark protection; and tougher protection of domestic markets from infringement by importers who violate intellectual property laws.

Attractive for Investment. Improved intellectual property protection by a developing country also will allow U.S. companies to sell more abroad since genuine American products, which are in high demand worldwide, would not have to compete with cheap counterfeits or pirated goods. Better protection also will make the developing countries more attractive for U.S. investment. The reason: strong intellectual property protection and enforcement will allow U.S. companies investing abroad to earn a return on their investment without fear of having their ideas or inventions stolen.

By using the GATT, WIPO, and such domestic laws as the U.S. Trademark Counterfeiting Act of 1984, and the U.S. Omnibus Trade and Competitiveness Act of 1988, Washington can use the threat of sanctions as leverage in persuading other countries to improve their intellectual property laws. This leverage can also be exerted in the GATT negotiations.

4 Michael Hodin, "The Role of Pharmaceutical Patents in Economic Development: A Mechanism for Lower Prices, High Quality Health Care and Assurances of Safety," unpublished monograph, 1989.

5 Schumann, *op. cit.*, p. 6.

Costs of Inadequate Intellectual Property Protection

The U.S. International Trade Commission (ITC), an official government agency that investigates and reports on international trade issues, estimated in 1986 that worldwide losses to U.S. industry that year as a result of inadequate foreign protection of intellectual property rights were between \$43 billion and \$61 billion.⁶

ITC estimates these losses as \$5 billion for the scientific and photographic industry; \$4.1 billion for computers and software; \$2.3 billion for electronics; \$2.2 billion for motor vehicles and parts; \$2.1 billion for the entertainment industry; \$1.9 billion for pharmaceuticals, and \$1.3 billion each for the chemical and petroleum refining industries.⁷

These losses to American businesses represent transfers from innovators and legitimate producers to those who have used their ideas illegally. Not only is this a problem for Americans, it also creates a disincentive for Americans to invest overseas.

The European Parliament estimates that counterfeiting patented products and copyrighted materials costs the European Community 100,000 jobs a year. According to a joint U.S., European, and Japanese industry panel, infringement of copyright and patent laws has cost Britain alone 100,000 jobs in 1987.⁸ And according to the *Financial Times*, the European Parliament "put the losses of British publishers from copyright infringements at £130 million [\$216 million] a year."⁹

Waste of Capital. The U.S. and other developed country firms are not the only ones injured by the inadequate intellectual property protection of developing countries. Intellectual property right infringement wastes capital that otherwise would be available for economic growth. According to the study by joint American, European, Japanese business group, increased infringement in those countries without adequate protection "reduces the willingness and ability of industry to commit to long-term planning and to develop the next generation of products, processes and services in, and specifically for, those country markets."¹⁰

This is especially the case in those industries requiring high research and development costs, such as pharmaceuticals, where an inadequate and inef-

6 United States International Trade Commission, "Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade," Report to the United States Trade Representative, Investigation No. 332-245, Under Section 332(g) of the *Tariff Act of 1930*, Washington, D.C., February 1988, p. H-3.

7 *Ibid*, p. 4-3.

8 The Intellectual Property Committee/Keidanren/UNICE, "Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities," June 1988, p. 14.

9 *Financial Times*, December 1, 1988, p. 5.

10 The Intellectual Property Committee/Keidanren/UNICE, *op. cit.*, p. 14.

fective intellectual property regime significantly inhibits development of firms in that sector. The joint U.S., European, Japanese industry report states: "The huge disparity between the inventor's cost and those of the imitator is a much more effective trade barrier than any tariff."¹¹

STRENGTHENING INTELLECTUAL PROPERTY RIGHTS

Because of the importance of intellectual property rights to economic development, America and most other industrial countries long have sought to increase the international protection of these rights. This has been difficult, largely because many less developed countries insist on keeping their laws that allow them to confiscate the ideas of innovators and inventors.

Intellectual Property Rights in GATT's Uruguay Round

Intellectual property is one of the most important issues in the Uruguay round of the GATT negotiations. GATT negotiators recognize that inadequate and ineffective protection of intellectual property rights seriously distort international trade. The "Ministerial Declaration on the Uruguay Round," signed in 1986 by the trade ministers of all GATT member-countries, authorizes a GATT committee to deal with intellectual property. It is called the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, (known as the Negotiating Group on TRIPS). The Declaration states that:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rule and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken

11 *Ibid.*

in the World Intellectual Property Organization and elsewhere to deal with these matters.¹²

The Battle Between Developed and Developing Countries

Third World countries long have regarded the GATT with suspicion, characterizing it as a place where wealthy developed countries advanced their interests. To counter GATT, Third World countries in 1964 created the U.N. Conference on Trade and Development or UNCTAD. Since then, UNCTAD has served as an advocate of the special interests of the developing countries. Generally, UNCTAD is very critical, even hostile, to GATT. This is the case with respect to the Uruguay Round.

In a publication released last year by UNCTAD, entitled *Uruguay Round: Papers on Selected Issues*, two reports on intellectual property make the developing countries' agreement.¹³ Written by UNCTAD consultants Abdulqawi A. Yusuf and Paolo Bifani, these reports oppose improving intellectual property protection in developing countries. They claim that stronger protection would inhibit technology transfer to those countries and would trigger huge price increases for products protected by strong patent, trademark, and copyright laws.

Given the developing countries' hostility toward the GATT, it is no surprise that they prefer to deal with the U.N.'s World Intellectual Property Organization (or WIPO) on intellectual property issues. In WIPO, as in other U.N. agencies, each country has one vote and decisions are by a simple majority. By contrast, GATT decisions typically are made by consensus. The Third World's overwhelming majority in WIPO thus obviously allows them to impose their views on the industrial world's minority bloc. Inside WIPO, in fact, the developing countries are organized formally into the Group of Developing Countries.

"Non-Voluntary License." This Group has pushed WIPO to demand changes to the Paris Convention that would weaken patent protection severely. The most contentious proposal would authorize a developing country to grant "exclusive compulsory licenses" if a patented product or process had not been produced, sold, imported, or "sufficiently worked," in that developing country by the patent owner.

Though riddled with bureaucratic jargon, this proposal would undermine patent protection seriously. The term "working" a patent refers to production, sale, or importation of the patented invention. A compulsory license,

12 Quoted in Abdulqawi A. Yusuf, "Developing Countries and Trade-Related Aspects of Intellectual Property Rights," *Uruguay Round: Papers on Selected Issues*, UNCTAD/ITP/10, United Nations Conference on Trade and Development, New York, 1989, p. 185.

13 See Abdulqawi A. Yusuf, "Developing Countries and Trade-Related Aspects of Intellectual Property Rights," and Paolo Bifani, "Intellectual Property Rights and International Trade," in *Uruguay Round: Papers on Selected Issues*, UNCTAD/ITP/10, United Nations Conference on Trade and Development, New York, 1989.

which the developing countries call a “non-voluntary license,” would allow individuals, or any other agent chosen by the developing country, to work a patented invention or process without authorization and with no compensation to the patent’s owner. In short, the Third World’s WIPO proposal specifically would permit pirating and counterfeiting products and processes patented elsewhere.

Restricting Global Firms. Backers of the WIPO proposal say that it would force global firms to market their products in the Third World or risk having them manufactured without their approval in the Third World.

The trouble is that determining when a patent is “sufficiently worked” would be left largely to the developing country’s government. Importing the patented product into a developing country apparently no longer would qualify as “working” the patent. The result: Third World governments would declare that the patent has not been “sufficiently worked.” The patent then would be revoked and production of the product assigned to a local firm. Ultimately, innovative firms would stop doing business in that country.

To emphasize its point, WIPO even disputes GATT’s right to deal with intellectual property issues. Stated WIPO Director General Arpad Bogsch of Hungary in an unpublished July 21, 1987, memorandum entitled “Role of WIPO in the Uruguay Round of Multilateral Trade Negotiations of GATT”: “Any such definition of new norms, in the Uruguay Round, would risk causing serious confusion at the international level. This is why, it is believed, if dealing with the trade-related aspects of intellectual property rights, such definition should take place within the framework of WIPO....”

The U.S. Proposal

Washington has been trying to push the Uruguay Round negotiations not only in the direction of firmer international protection for intellectual property, but also toward a firm commitment to enforcing intellectual property laws and settling disputes. The U.S. submitted formal suggestions in October 1987 for achieving the objective of the Negotiating Group on TRIPS. A revised set of American proposals was submitted on October 13, 1988. This declared: “The objective of these negotiations remains unchanged, i.e., a GATT intellectual property agreement to reduce distortions of and impediments to legitimate trade in goods and services caused by deficient levels of protection and enforcement of intellectual property rights.”¹⁴

The U.S. proposal has two parts. The first calls for negotiations to set high international standards to protect patents, trademarks, copyrights, trade secrets, and integrated circuit layout-design. While all countries would not have to have identical intellectual property laws, all would have to meet minimum standards.

14 “Suggestion by the United States for Achieving the Negotiating Objective,” Restricted distribution GATT Doc., MTN.GNG/NG11/W/14/Rev.1, 17 October 1988, p. 2.

To achieve the first goal of the U.S. proposal, American negotiators should:

◆ ◆ Insist that all inventions be patentable for no less than twenty years. Patents should provide the right to prevent others from making, using, or selling the protected invention, including products as well as processes, for at least twenty years from the date patent protection is sought.

◆ ◆ Insist that trademarks, which include service marks and certification marks, be registered for no less than ten years and be renewable indefinitely for ten-year terms. Systems for registration of trademarks and service marks should be provided on equal terms to both foreign and domestic firms, and at reasonable costs.

◆ ◆ Insist that the minimum term of copyright protection for all written or recorded works, should be for the life of the author plus fifty years. For anonymous and pseudonymous works, protection should be fifty years. Protection should be extended to all forms of creative expression, including such traditional forms as dramatic, literary, and musical works, such newer forms as computer software, and forms yet to be developed.

◆ ◆ Ensure that trade secrets be protected against unauthorized disclosure, including disclosure by governments. This should be guaranteed as long as the trade secret is not public knowledge or general knowledge within an industry.

◆ ◆ Urge that semiconductor chip layout and design for computers be protected for at least ten years from the date of first commercial exploitation or from the date of registration, whichever date is earlier.

The second part of the U.S. proposal calls for stronger measures at the international borders to stop trade in pirated recordings, counterfeit prescription drugs, and other goods violating intellectual property rights. This U.S. proposal also calls for a mechanism within the GATT to settle disputes. Penalties for infringement should include such civil remedies as fines and monetary restitution, and such criminal sanctions as prison sentences. Developing countries would receive no special treatment or exemption from the obligations under the code.

Developing Countries Counter

In an effort to counter the U.S. and developed country proposals, India submitted a report to the GATT Negotiating Group on Trade Related Aspects of Intellectual Property (TRIPS) on July 10, 1989. This Indian report states: "India would like to point out that the scope of this [Uruguay Round] agenda item is limited to 'trade-related intellectual property rights.' For the reasons

explained in the paper, India is of the view that it is only the restrictive and anti-competitive practices of the owners of intellectual property rights that can be considered to be trade-related because they alone distort or impede international trade.”¹⁵

To this India adds what is a core claim of the Third World: that intellectual property rights erect barriers to trade. Specifically, the Indian proposal declares that:

◆ ◆ Commercial “working” of (producing, selling, or importing) a patent in a host country should be considered a fundamental obligation of the patent holder;

◆ ◆ Compulsory licensing should be allowed for whatever the reasons the host country sees fit;

◆ ◆ Developing countries should be allowed to exclude patent rights for certain sectors such as pharmaceuticals and chemicals, or at least provide only patents for processes, or methods of production, rather than for products themselves;

◆ ◆ Developing countries should be able to grant patents with a shorter duration than those granted in developed countries; and

◆ ◆ No curtailment of developing countries’ freedom to regulate trademarks in their domestic markets should be contemplated.¹⁶

Brazil too has championed developing countries’ position in the Uruguay Round. It demands special treatment for underdeveloped countries. This is not surprising since Brazil, of course, is one of several developing countries that refuses to provide patent protection to foreign pharmaceutical and chemical companies. This erupted in a serious trade dispute between the U.S. and Brazil in 1988. After Brazil refused to alter its stand on pharmaceutical and chemical patents, the U.S. imposed 100 percent tariffs on imports of Brazilian drugs, some electronic products, and paper products. Brazil also refuses to provide adequate patent protection for computer software. The U.S. has yet to act on this.

U.S. UNILATERAL ACTIONS ON INTELLECTUAL PROPERTY RIGHTS

Given the hostility of developing countries toward protection of intellectual property, Washington should reinforce its multilateral efforts in GATT and WIPO with unilateral actions to protect intellectual property.

15 “Standards and Principles Concerning the Availability, Scope and Use of Trade Related Intellectual Property Rights: Communication from India” Restricted distribution GATT Doc., MTN.GNG/NG11/W/37, 10 July 1989, p. 2.

16 *Ibid.*

One unilateral action would be to stand firm against other nations' objections to Section 337 of the U.S. Omnibus Trade and Competitiveness Act of 1988. Section 337 originally was part of the Tariff Act of 1930. When first written, the provision required that a holder of a patent, copyright or trademark who wished to bring a suit against an alleged infringer of his or her intellectual property had to prove both the infringement and demonstrate real injury. Proof of injury was quite difficult, and often very costly for small firms. The revised Section 337 under the 1988 Trade Act requires no demonstration of injury. A petitioner under 337 now merely has to prove infringement in order to elicit a favorable ruling by the U.S. International Trade Commission (ITC).

Citing the revised Section 337, the U.S. took action against the Netherlands-based company Akzo. The ITC had ruled that Akzo had infringed on the patent covering high strength, aramid, fibers manufactured by the E.I. du Pont de Nemours and Company, headquartered Wilmington, Delaware.

European Protest. This U.S. action angered the European Community which asked GATT to convene a panel to investigate the matter. This panel on January 16, 1989 ruled against the U.S., saying that Akzo and other foreign companies charged under Section 337 of the U.S. trade law are denied the rights to court hearings available in similar cases involving domestic companies.

The U.S. blocked adoption of the panel's report on February 8, 1989, in the GATT Council and claimed that the panel's findings were too narrow an interpretation of the "general exception" provisions in the GATT.¹⁷

The U.S. feared that, if the report were adopted, it would set a bad precedent requiring GATT examination of a broad range of trade practices currently considered acceptable under GATT. After seven more attempts by the GATT Council to adopt the panel's finding, the U.S. finally agreed on November 7, 1989, to lift its objections. Yet U.S. Trade Representative Carla Hills emphasized at that time that the U.S. "didn't join that consensus or accept the report's findings."¹⁸

U.S. Leverage. The GATT Council ruling gives leverage to American delegates at the Uruguay Round. They can offer U.S. compliance with the GATT ruling in exchange for strengthened GATT protection of intellectual property. To maintain this leverage, the U.S. should not honor the GATT decision on Section 337 until the GATT produces an acceptable agreement on intellectual property. The Office of the U.S. Trade Representative can claim correctly that compliance will require changes to Section 337 that only Congress can enact and that a successful outcome in GATT's intellectual property negotiations is a near-certain precondition for congressional action

¹⁷ *Financial Times*, February 8, 1989, p. 2.

¹⁸ *Wall Street Journal*, November 8, 1989, p. A12.

on 337. In fact, Deputy U.S. Trade Representative Rufus Yerxa has stated, "the US was prepared to discuss appropriate changes in how it handled infringing imports against the backdrop of an emerging international consensus of greater protection for intellectual property."¹⁹

Using Super 301. Another unilateral action the U.S. can take has been created by Section 301 of the Trade Act of 1974. This authorizes the President to take direct action against countries engaging in unfair trade practices. The 1988 Trade Act broadened the scope of Section 301 and transferred the enforcement mechanism from the President to the U.S. Trade Representative. Thus was born what has become known as "Super 301."

In practice, Super 301 requires the Trade Representative to identify those countries, like Brazil and Japan, erecting the most serious barriers to the import of U.S. goods and services. Super 301 allows for direct retaliation against such countries if negotiations to lower the barriers make no progress within three years.

Inadequate protection of intellectual property rights is one of the most easily identifiable non-tariff trade barriers. As such, Super 301 offers powerful leverage to improve the intellectual property regimes of reluctant Third World countries.

RECOMMENDATIONS

The U.S. must use unilateral as well as multilateral mechanisms to promote the strengthened intellectual property rights protection worldwide. The U.S. should continue to work through the multilateral channels of the GATT and the U.N.'s World Intellectual Property Organization. It also should use Super 301, Section 337 of the U.S. trade law, and other unilateral measures.

To achieve better patent, trademark, and copyright protection and more effective mechanisms for enforcing the laws providing that protection, the U.S. should:

◆ ◆ **Withdraw from UNCTAD.** The regular U.N. budget gives some \$66 million annually to the U.N. Conference on Trade and Development. Of this, America pays approximately \$17 million. The U.S. should reduce the portion of its contribution to the U.N. that goes to UNCTAD and the U.S. should end all participation in UNCTAD. This U.N. body consistently has demonstrated that it is an enemy of world trade. It promotes policies that weaken and destroy intellectual property rights, thus harming American interests and, as important, the economic interests of developing countries.

◆ ◆ **Negotiate assertively at GATT.** The U.S. is pursuing a very sound policy regarding intellectual property in the Uruguay Round of GATT talks.

¹⁹ *Financial Times*, November 8, 1989, p. 8.

U.S. Trade Representative should continue to push for a comprehensive agreement on intellectual property rights with the minimum standards and enforcement provision set forth in its October 1988 recommendations. These standards include: twenty-year patents on all inventions, products as well as processes; ten-year trademark registration with indefinite renewals; copyright protection for the life of the author plus fifty years; protection from unauthorized disclosure of trade secrets; and ten-year copyright protection for semiconductor chip layouts and designs.

◆ ◆ **Continue existing efforts in WIPO.** U.S. efforts to maintain and strengthen standards of intellectual property protection at the World Intellectual Property Organization should not be abandoned. Continued vigilance against the attempts by the developing countries to weaken the already ineffectual Paris Convention will be a perennial task of U.S. diplomats in Geneva.

◆ ◆ **Use the leverage of Sections 337 and 301.** The U.S. should use unilateral pressure to extract concessions during bilateral and multilateral negotiations. Because of less developed countries' opposition to tougher intellectual property protection, the industrial nations at GATT may be tempted to yield on intellectual property during the Uruguay Round in return for concessions on such areas as agriculture and services. If so, the U.S. Trade Representative should oppose it by stressing that an intellectual property agreement is necessary to persuade Congress to change Section 337 of the U.S. trade law.

◆ ◆ **Give technical assistance to countries willing to improve protection.** The U.S. could offer funding to effect the changes necessary to protect intellectual property rights. The U.S., for instance, could help set up patent offices and enforcement agencies. The staffs of those new agencies, moreover, will need training in the technicalities of intellectual property law. The U.S. can provide this.

CONCLUSION

Protected intellectual property rights are essential for economic growth. A country's capacity for development and utilization of technology depends directly on its ability to provide its people with incentives for innovation and creativity. Writes economist Richard Rozek of the White Plains, New York-based National Economic Research Associates: "the degree of intellectual property protection directly affects the profitability of research and development projects, and thus the resources allocated to R&D. It determines the expected number of new products, processes, literary works and the like. Thus, the resulting policy initiatives will have a profound effect on the course of technological progress around the world."²⁰

²⁰ Richard P. Rozek, "Intellectual Property and Economic Growth," *Viewpoint*, Summer 1989, p. 24.

World Leader. Washington is on the right track in the GATT negotiations on intellectual property. If successful, the benefits to U.S. industry will be substantial. Even greater will be the benefits to the economies of developing countries that agree to high standards of intellectual property protection and effective enforcement. By a flexible strategy of both multilateral and unilateral tactics, including assertive negotiating at the GATT and WIPO and using the leverage contained in Sections 301 and 337 of the U.S. trade law, the U.S., as the world's largest importer (and exporter), is well positioned to lead the world toward an era of strong protection and effective enforcement of intellectual property rights.

With the ever-quickening pace of technological advancement, American competitiveness and the health of the international economy are dependent on the success of these efforts.

Mark A. Franz
Jay Kingham Fellow in
International Regulatory Affairs;
Director, United Nations Assessment Project

All Heritage Foundation papers are now available electronically to subscribers of the "NEXIS" on-line data retrieval service. The Heritage Foundation's Reports (HFRPTS) can be found in the OMNI, CURRNT, NWLTRS, and GVT group files of the NEXIS library and in the GOVT and OMNI group files of the GOVNWS library.

