

A GATT Intellectual Property Code

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Industry identifies problem, drafts solution, makes proposal in unprecedented effort

One of the Third World's high priests of development economics has recently complaining about what he called, "The Great Invention" or "The Great Theft(s)." All through the 1960s and 1970s they had carefully constructed a theology around magic ways to shorten the development process.

Worsening intellectual property protection was the key! Technology was the richest heritage of mankind. Creative industry in the developed world was a villain. All the governments of the Third World had to do was listen to the economic high priests, water down IP protection and invest government control into the technology transfer process. They could have it all for nothing.

Many developing country governments were taken by this idea. But there was a need that the development doctrine be blessed by the international community. And where else, but in the United Nations where high-flown rhetoric and untested ideas are taken seriously. Unfortunately, many in the developed world, especially well-meaning academics and liberal politicians, took this New World Economic Order stuff seriously, or at least solemnly acquiesced in it. The practitioners of economic realism had seized the agenda and were rewriting the rule book.

Not something began to happen in the early 1980s. Third World efforts to rewrite the rules in the UN's UNCTAD and WFPD splintered to a halt. The United States instead made talks begin to address piracy of intellectual property as an unfair trade practice, damaging to both the host country

and to trading partners. Time began to demonstrate that the socialist system did not spur economic development. The tide began to turn. And it is now in full flow in the current GATT negotiations on an international code of meaningful intellectual property standards.

You would think that seeing the golden idol of "Free Technology for All" begin to crumble the high priests might fall back and consider whether their doctrines were correct. But no, listen to the latest lament: "The new technological breakthroughs in electronics, materials and biotechnology are easier to copy, to imitate. They allow developing countries unparalleled opportunities of short-cutting the development process, of leap-frogging over several phases of technological evolution." This "windfall of golden opportunity" was being skimmed down and a GATT rule on intellectual property would be the end of Third World development.

"With this new development in the GATT, technology, the key to development, would be denied, or if access was obtained, "... it would be the wrong technology, at the wrong price and under the wrong terms and conditions." No, the price is wrong, weak IP protection and strict control of licensed key transfer are still the answers for LDCs.

← Real Key →

It shouldn't surprise you that some still fail to see that the free trade in technology in a safe and stable environment is the real key to development. High priests depend on believers for their status, and there are governments that will want to hear there is a magic, quick and cost-free key. Besides, it takes

real righteousness for a government, like that of India, to say, "We have seen the enemy and it is us."

I have inflicted this short history on you because it was in this pervasive global environment of reduced protection that business has sought to enter the arena for intellectual property and breathe some reality into it. Further, it demonstrates that, although we have made certain changes in world thinking about technology protection, the "something-is-something" crowd is still out there.

How this all came about is a fascinating story. Three articles in it for all of us in the business community. The process itself is important and the product, which is not yet delivered, offers new prospects for a safe and stable world environment for technology. I would like to outline both the process and the product for you.

THE PROCESS

If you is made too important a subject to leave up to generals, as Binns¹ said, the rules of international commerce are far too important to leave up to government bureaucrats and their academic advisers. But governments, not businessmen, make rules and they only listen when the chorus gets big enough and the singing loud enough. Further, activating business on a worldwide basis is no simple matter. How we overcome these problems and take control of the intellectual property issue is interesting.

¹Director, International Affairs, International Agricultural Company, St. Louis, Missouri; paper presented at ITC U.S.A./Canada Annual Meeting, October 1989.

The first steps started within companies. There is a tendency in company management to say that existing governments, especially Keight governments, is too big a task — it takes too long — the odds of success are small. Changing foreign IP laws was viewed by many as impossible. It took a few dedicated lawyers in some big companies to take on the impossible. And it took some thoughtful and patient corporate leaders to provide them the resources to try. There were some of these men in companies like my own, Plant, BMC, IBM and duPont and the like. We were believers and convinced our management that the impossible was doable.

The second step was the slow process of building coalitions. Like men groping in a dark room, we had to find other companies that were sufficiently afflicted by piracy that they were willing to really try to do something about it. Our first coalition was within our own industry in the late 1950s. Monsanto, FMC, and Stauffer took on the Hungarian patent pirates of agricultural chemicals and ended up improving Hungarian law.

From there we joined our patent interests with military allies in the International Anti-Counterfeiting Coalition. These companies were worried about trademarks in the high fashion and luxury goods area, but we had many common problems. We joined with companies from other industries in groups focused on IP in specific countries, like the Ad Hoc Group on Mexico.

In the early to mid-1960s the diversity of industries involved in the IP issue took a giant leap when the ICCC, the Copyright Alliance and others began to work with the U.S. Government to negotiate an end to rampant piracy and counterfeiting in Taiwan. This was underwritten by our coalition work on the intellectual property provisions of the Trade Act of 1964.

Government had begun to hear the singing. The message is clear and simple — business must build coalitions, across companies, across industries and across countries in order to build the critical mass

necessary to move governments.

This leads to the third point. You must set some achievable intermediate goals or steps along the way. You then begin to back away as the larger problem and your success encourages others to join the fray. The U.S. bilateral negotiations with Taiwan, Korea, Mexico and the like began to make believers out of a large segment of high-technology and creative industries in America. And it began to catch the interest of previously skeptical companies in Europe. Investing could actually be done about international piracy.

→ GATT Agenda →

Emerging the U.S. government to go after pirate countries was one thing, but moving into an international forum such as GATT was quite another and larger task. The General Agreement on Trade and Tariffs is a club of all the big trading countries and many of the smaller ones and is consequently ponderous and complex. The tentative agenda for another big Round of trade talks in the GATT was crowded with issues of great importance — agricultural trade, trade in services, investment. Why would they want to get into anything as complicated and technical as intellectual property? Besides, the U.N.'s WIPO was handling IP.

Which brings us to step 4 — the internationalization of our effort, which had been previously based on U.S. trade negotiating power. A GATT code of meaningful and enforceable minimum standards for protecting intellectual property would supplement and enhance our bilateral effort. The conditions were favorable. The major thrust of the new Round was making GATT relevant to India's trade.

Tariffs on goods had been largely dealt with and it was time to talk about non-tariff barriers, trade in services, investment impediments affecting trade — in other words, issues of the 1990s and beyond. Perhaps a GATT IP code was doable.

Two activist companies, Plant and IBM, had resolutions on the President's Advisory Committee

on Trade Negotiations. They convinced the high-level policy people in the U.S. Administration that this issue's time had come in GATT. However, to develop a code on intellectual property, more it along with the U.S. Government and develop support for the concept abroad, they needed a nucleus of committed U.S. companies with international connections — companies willing to spend time and effort.

So they convinced the CEOs of some 22 such companies to form the Intellectual Property Committee, the IPC. The CEOs devoted an adequately and dedicated some human resources to it. It is amazing what momentum can be created when a few committed CEOs personally contact their counterparts.

The IPC had to move fast, for we wanted it relatively small and hard hitting. We didn't want too many companies and we didn't want every manor staffed through five levels in each company. Representatives had to be able to contact their organizations.

Further, we operate as a committee of the whole — no prime director and no complex structure. Our companies are diverse enough to broadly represent U.S. industries — computers, drugs, heavy and consumer manufacturing, electronics, chemicals and the creative arts in disguise. Since no existing U.S. trade group or association really bill of the bill, we had to create one. In my view, such ad hoc, special-purpose coalitions are the wave of the future.

Once created, the first task for the IPC was to repeat the missionary work we did in the U.S. in the early days. This time with the industrial associations of Europe and Japan to convince them that a code was possible. We met with the Confederation of British Industries, the BDI in Germany and the French Patronat and through them, with UNICE, the pan-European association of national associations. We talked to the Keidanren in Japan and to other national associations and convinced them of our cause.

→ Interest Groups →

The next step was to sit down

with UNICE representing Europe and the Kodansho from Japan and devise a plan for a code. In doing this, we all made an extreme effort to honestly represent all forms of intellectual property and all industries concerned.

We consulted with many interest groups during the whole process. It was not an easy task, but our "Trilateral Group" was able to distill from the laws of the more advanced countries the fundamental principles for protecting all forms of intellectual property. This is reflected in our outline for a GATT code entitled, "Basic Framework of GATT Provisions on Intellectual Property — Statement of Views of the European, Japanese and United States Business Communities, June, 1986." Our plan is not a scholarly work, but a practical code outline written in the language of international business.

Once arrived at, the IFC, UNICE and the Kodansho had to go home and sell our Trilateral approach to other companies and industries. Being a consensus document there are some compromises in it that did not delight everyone. However, we have been able to gain very broad support in all three world areas. I am happy to say that LDC's U.S.A. - Canada has endorsed the document, along with close to 20 other U.S. organizations.

Before selling our concepts at home we went to Geneva where we presented the Trilateral document to the staff of the GATT Secretariat. We also took the opportunity to present it to the Geneva-based GATT representatives of a large number of countries. The relationships we established in Geneva will serve us well as the negotiations go forward.

The task remaining for the IFC is to continue to work with the U.S. Government as the GATT negotiations proceed. The substantive negotiations are just beginning, and will have to be completed in the next year and a half. During this time we will need to encourage and support our allies in UNICE and Japan as they work with their governments and the IFC.

Finally, we need to reach out to the business communities in other

countries and solicit their support for the Trilateral approach. We have done this, for example, with the high-technology business community at Korea, represented by the Korea-U.S. Business Council. Support is growing, and if we keep up our efforts the chances for a meaningful GATT IP code are excellent.

I think our success so far demonstrates that we in industry do have the means at our disposal to positively influence our international business environment — to shape national and international rules of commerce. And it is high time we take Lincoln's advice and exert control of the future of technological development and transfer from theoretical bureaucrats and their academic high priests. It's time for the people who actually make development happen to have an appropriate voice.

THE PRODUCT

So far I have spoken generally about a meaningful GATT IP code. You have been asked to accept that this is a desirable and worthy of the efforts I have enumerated. But the story would not be complete without outlining this proposed code for you and indicate how it would work.

The basic concept is a freestanding code similar to those that GATT has produced concerning product standards and subsidies. The code would include three basic sections:

1. FUNDAMENTAL PRINCIPLES FOR THE PROTECTION OF INTELLECTUAL PROPERTY.

These are, in effect, minimum standards of protection and are drawn from existing conventions, where they are adequate and from the laws of the major trading countries. The latter served particularly well where international conventions were judged to be wanting, for example in the patent area.

All of the major areas of intellectual property are covered by simple, basic principles of protection. These will serve as a broad mask to judge the law of a country. While I cannot cover them in detail, some of the basics are:

1. Patents: Recognizing the in-

applicability of some of the principles included:

—No discrimination as to subject matter. A country cannot exclude drugs, chemicals, biotechnology and the like from patentability.

—A reasonable term must be provided, with 20 years from filing suggested.

—Compulsory licenses are to be tightly limited. Local working by manufacturers can be required for legal, technical or economic reasons. No compulsory license can be exclusive in sale and full compensation must be paid the patent owner.

—Learning cannot be impeded by imposing unreasonable terms and conditions on the patent.

2. Trademarks: Along with basics, the following are included:

—Protection extended to three-dimensional objects.

—Service marks are included. —Tills can't be encumbered by use restrictions such as the requirement they be used in conjunction with local marks.

—A 10-year term is provided, renewable in 10-year periods.

3. Copyrights: These principles follow the Berne Convention, which is generally regarded as containing adequate standards. However, some elements are added, like coverage of computer programs and data bases.

4. Designs: Designs must be protected along conventional lines with no less than a 10-year term.

5. Semiconductor Chip Layouts: Layout designs are to be protected for at least 10 years and no compulsory licenses are allowed.

6. Proprietary Information: Important for LDC is the requirement that there be effective penalties for know-how and trade secrets. In particular, the important question of commercial use by a less-than-invented third party is clearly covered. Also important for drugs and chemicals, proprietary data disclosed to the government for purposes of product registration would be protected from use by third parties.

Providing an acceptable level of protection in national laws is meaningless without adequate enforce-

ment. As you know, law enforcement has been a significant problem; consequently, our proposal provides in part II for:

II. ESSENTIAL ELEMENTS OF ENFORCEMENT PROCEDURES

These provide for expeditious and fair procedures to determine validity and infringement and include preliminary relief. In-parte proceedings are also provided for where irreparable injury is involved. Broader enforcement by customs authorities must be provided for counterfeit or easily detectable infringement.

Finally, a GATT code needs to provide what has been missing in all of the previous IP conventions — some means of treaty enforcement. In the past, countries could sign a convention and then fail to live up to its provisions. However, a basic feature of GATT is the threat of trade sanctions where a country does not abide by the rules. Consequently, the last section of our recommendations includes:

III. CONSULTATION AND DISPUTE SETTLEMENT MECHANISMS

If a country believes that another country is not living up to its commitments under the code it will be able to take the matter to GATT consultants and dispute settlement. If the country is found at fault and refuses to change its

ways, the benefits of the treaty can be denied and, more important, trade sanctions could be taken. Duties could be raised, quotas imposed and the like.

Please remember, the code is directed at countries. Private parties cannot formally initiate anything. Moreover, this is not an "appeals procedure" if you lose an infringement case. You will have to convince your government that your management is part of a pattern of disregard of treaty provisions.

The code I have outlined would be open to all to sign and there would be significant benefits available to members such as expedited customs clearance (no more counterfeit and infringing products would not be likely to originate from a member country). Failure to live up to the code would have to be challenged under dispute settlement provisions. Unilateral trade actions could not be taken against other members, for example a 50% tariff trade practice action.

In addition, other instruments could be offered to get less developed countries to sign like technical assistance. Finally, and most important, nations are always asking countries like the U.S. for a wide variety of special trade and economic favors outside the GATT framework. They might be encouraged to join the code in part of these negotiations.

CONCLUSION

What I have described to you is absolutely unprecedented in GATT. Industry has identified a major problem in international trade. It crafted a solution, endorsed it in a concrete proposal and sold it to our own and other governments. Industry will be following this to a conclusion, working closely with governments, both friendly and so far uncommitted. We may even try to talk sense to unfriendly countries. This is indeed a first.

But is it really unprecedented? Listen to the lament of the high priest I find quoted. The GATT proposals are "based on statements of losses, observations, and imprecise reports by the companies." Governments have actually taken them seriously? Horowitz. Does the remedy proposed, he says, have been identified by the companies. You and I, the industries and leaders of world commerce, have "played simultaneously the role of the patients, the diagnosticians and the prescribing physicians."¹

My God! Can this be true? Practical business people with real, hands-on experience assessing the role of the goat, academic theoreticians, of deep-thinking government experts?

I hope so. And I hope it is not the last time.