

Implementing the Trade-Tariff Act

1984 act is a start, but U.S. Government could make better use of information

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When the first human threw a rock to kill game or used a strip of an animal's hide to tie the rest of the hide around his body for warmth, technology was born. We humans have always used what we know of the world, our technology, to do things faster or with less effort or at less cost. Each time we find a way to do some one thing better, we create unforeseen side effects, some positive, some negative. As we "accentuate the positive and eliminate the negative," our technology grows and, as it grows, we try to balance the legal rights of creators and inventors with those of users.

For the first hundred years of its existence, the United States was a net importer of creative works and technology. Our treatment of foreigners under our intellectual property laws reflected an attitude similar to that of some developing countries today. From 1793 until 1836, for example, our patent law expressly prohibited granting a patent to a foreigner unless he had lived in the United States for at least two years and intended to become a citizen. When we amended the law in 1836, we established discriminatory fees. A U.S. citizen paid \$30 to apply for a patent; most foreign nationals were charged 10 times that amount; a British citizen had to pay \$500.

Foreign authors and artists fared no better. Our copyright law expressly denied protection to the works of foreigners. When we finally amended the law in 1891 to protect the works of nationals of countries with which we had bilateral agreements, we conditioned that protection on manufacture in the United States in order to protect our infant printing and publishing industry. The so-called "manufacturing clause" is still with us nearly a century later. In an odd sort of reverse discrimination, that clause now applies only to U.S. citizens and foreigners who live here.

Over the years the United States became a net exporter of creative works and technology. We amended our patent and copyright laws and enacted a federal trademark law to increase protection for U.S. citizens. We also began to protect the rights of foreign nationals on the basis of bilateral and multilateral treaties that required "national treatment." Lately, we have grown

dissatisfied with the protection we receive in some countries under the "national treatment" principle. We want more. Our position reminds me of the wish my mother expressed in moments of exasperation that, when I grew up, I would have a child just like me. The British may take some comfort in our frustration over the inadequate protection our inventors, creators, and trademark owners receive in developing countries.

Minor Harm

The economic harm we caused the British and other foreigners by copying without authorization was relatively minor, because of the level of technology at the time. Goods were literally manufactured — that is, made by hand — one at a time by skilled craftsmen. More often than not, they were one-of-a-kind items, designed to the requirements of a particular local customer. Goods moved from producer to consumer aboard sailing ships or in wagons pulled by oxen or horses. International trade, to the degree it existed, was under the control of trading consortia like the East India Company.

The economic harm done to our industries today by the lack of adequate intellectual property laws abroad is staggering. To add insult to injury, our investments abroad have helped establish the industrial base of many countries' economies. Our own technology has made it easy to mass-produce copies of many patented, copyrighted, and trademarked goods. Those goods can be shipped aboard planes and ships throughout the world in days rather than months. Our companies find they must compete with the unauthorized copies not only in the source country but in third countries as well.

Most countries have laws designed to protect works of authorship, inventions and trademarks. Generally speaking, the more economically developed the country, the more complex the law. From our point of view, however, there are significant gaps. Chemicals, pharmaceuticals, metal alloys, and food products are unpatentable in many countries. Short patent terms, working requirements, and compulsory licensing also harm U.S. commerce.

A number of developing countries do not have copyright relations with the United States, so the works of U.S. nationals are copied with impunity. Computer programs are not protected under copyright in some countries. Penalties for trademark infringement often are so low that infringers consider them a cost of doing business. Even if these problems did not exist, the transfer of technology laws and the investment laws of most developing countries, and some developed countries, would interfere with the free exercise of patent, copyright, and trademark rights in those countries.

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Until the fall of 1984, U.S. Government agencies had handled intellectual property problems on an ad hoc basis. U.S. embassies helped individual companies as problems arose. Beginning in 1982, combined U.S. Government-private sector delegations consulted with the governments of Hungary, Korea, Mexico, Singapore and Taiwan on their patent, copyright, and trademark laws. Hungary did solve the patent problem. Taiwan enacted a new trademark law and drafted a new copyright law that has been enacted. A draft patent amendment and an unfair competition law are in the works in Taiwan. Singapore introduced a draft copyright amendment into its legislature. It is expected to pass this year. Korea studied the situation. Mexico took a step backward with the pharmaceutical decree.

What the consultations made obvious to the U.S. Government and the private sector was that linking intellectual property to international trade could bring improvements. When U.S. trade officials participated in bilateral consultations on intellectual property, they talked to trade officials from the other government. In most developing countries, trade officials are high-ranking policy makers while intellectual property officials are administrators. Before laws are changed in those countries, the policy must change and intellectual property administrators seldom can change policy. Trade officials often can.

The lesson in the bilaterals was not lost on the U.S. Congress. With the Trade and Tariff Act of 1984, Congress attempted to end the U.S. Government's ad hoc approach to intellectual property problems and to strengthen the hand of U.S. delegations by adding intellectual property considerations to two important trade laws.

The first trade law amended was Section 301 of the Trade Act of 1974. Section 301 authorizes the President to take "all appropriate and feasible action within his power" to enforce U.S. rights under trade agreements or to eliminate any act, policy, or practice that is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce. U.S. industries, individual companies, trade associations, and the like, can petition the U.S. Trade Representative to investigate actions of foreign governments that they believe violate trade agreements or otherwise harm U.S. commerce. If he decides to investigate, the trade representative must consult with the foreign government to seek a solution to the problem. If no solution is reached within one year (seven or eight months in cases involving subsidies), the trade representative must recommend appropriate action to the President. "Appropriate action" means retaliation in the form of trade sanctions.

The act made several amendments to Section 301, two of which are important to the intellectual property community, including those responsible for licensing. First, the act gave the trade representative authority to initiate cases on his own motion. That is particularly important in circumstances in which a foreign government might retaliate against an industry or company that filed a 301 complaint. For example, government officials in some countries might use transfer of technology approval authority to punish a pharmaceutical company that complained to the U.S. Trade Representative about the lack of patent protection for chemical compounds.

Second, the act redefined "unjustifiable" and "unrea-

sonable" to include expressly acts, policies, and practices that result in inadequate protection of U.S. intellectual property rights. "Unreasonable" now includes acts, policies, or practices that deny "fair and equitable provision of adequate and effective protection of intellectual property rights" even though the act, policy, or practice does not violate "the international legal rights of the United States." "Unjustifiable" now includes any act, policy or practice that "is in violation of, or inconsistent with, the international legal rights of the United States" and denies protection of intellectual property rights.

First Investigation

In November 1985, the U.S. Trade Representative self-initiated a Section 301 investigation into Korea's copyright, patent, and trademark laws and practices. As of May 31, 1986, the case has not been resolved. There is a lesson to be learned, however, from this first intellectual property investigation. More could be accomplished faster by concentrating an investigation on one form of intellectual property rather than trying to solve all of the problems we have with a country. There are several reasons for this. Dealing with the lack of copyright protection for U.S. works, for example, would limit the number of government ministries the U.S. side would negotiate with and, more important, it would limit foreign industries opposing change. Our trade leverage, the threat of sanctions would be greater when applied to a single issue because the opposition would be limited.

The U.S. delegation could be better prepared if it were dealing with one form of intellectual property. Patent, copyright, and trademark rights differ significantly and a negotiator must understand substance in order to present the U.S. position. Only a knowledgeable negotiator can represent U.S. interests adequately. The negotiator could obtain information from U.S. private sector representatives and keep them informed more easily if the number of interested industries were limited.

As an aside, the U.S. Government has few true experts on international patent and trademark laws and on international copyright law. Budget restrictions make it nearly impossible to hire and train experts. In addition to Section 301 investigations, those few experts are essential for negotiations in the World Intellectual Property Organization and for the intellectual property discussions that might occur in the new round of multilateral trade negotiations under the General Agreement on Tariffs and Trade. Some U.S. businesses also must restrict expenditures not directly related to operations. For the above reasons, both U.S. government and private sector resources would be used more efficiently and effectively if investigations into intellectual property problems concentrated on one form of property at a time.

Section 301, however, would be an effective tool for an industry group that wants to solve a specific problem caused by a foreign government. The more specific the problem, the more effective Section 301 will be, particularly if there is economic evidence of the harm done to U.S. commerce. A country's transfer of technology law or the administration of it might be an appropriate

subject for a Section 301 investigation if, for example, the law does not permit protection for trade secrets to extend beyond the life of a license and licenses can have a maximum life of 10 years. Industry groups that fear retaliation for bringing a complaint could ask the trade representative to self-initiate an investigation, but they should supply the trade representative with the information needed to negotiate with the foreign government.

GSP Program

The second trade law amended by the act is the Generalized System of Preferences or GSP. The U.S. Trade Act of 1974 authorized the President to waive tariffs on many imported products from developing countries that he designates as beneficiaries. The underlying purpose of the program is to enable developing countries to earn more foreign exchange with which to service their debts and purchase U.S. exports. The President is not able to designate countries that, among other things, expropriated the property of U.S. citizens without compensation or that did not assist U.S. drug enforcement officials in preventing international drug trafficking. The GSP program was to expire on January 1, 1985.

The Trade and Tariff Act of 1984 renewed the program until July 4, 1993. The extension adds an elaborate statement of purposes. Item 9 on the list of purposes says GSP will encourage developing countries, among other things, "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive intellectual property rights."

The extension expressly adds patents, trademarks, and copyrights to the definition of "property" in the section that prevents the President from designating as a beneficiary a country that has expropriated the property of U.S. citizens. The President, prior to waiving duties for a country, now also must consider, among other things, "the extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights."

The GSP extension also requires that the President "give great weight" to intellectual property protection in making other decisions about the benefits a developing country receives under the program.

U.S. Government agencies have been consulting with developing countries since October 1984 to encourage more open markets for U.S. products; better protection for patents, copyrights, and trademarks; and improved worker rights. In October 1986, the President must determine the extent of GSP benefits the more competitive developing countries will receive. Next year, he must decide which developing country beneficiaries will continue to receive duty-free treatment. Those decisions must be reported to the House Ways and Means Committee and the Senate Finance Committee.

That leads to what I believe is the most important provision of the act from the point of view of intellectual property. That pivotal provision has been ignored by most people because no one gets excited about reports.

Section 303 of the act requires the trade representative to report once a year to the U.S. Congress on trade

barriers. The Trade Estimates report, as it was named, must include problems affecting U.S. exports of goods and services protected by patents, copyrights, and trademarks. The report must estimate the economic effect of each barrier and describe what the U.S. Government has done to eliminate the problem. The report must be updated each October.

The report is pivotal for intellectual property because, to compile it, the U.S. Government has had to review other countries' patent, copyright, trademark and transfer of technology laws, identify the inadequacies, analyze the economic effect on U.S. businesses, and do something to improve the situation. In other words, the report should have been used to establish a plan to improve intellectual property protection and licensing worldwide and to measure accomplishments annually. Unfortunately, intellectual property and licensing problems were simply included in country-by-country lists right along with all of the standard trade problems in the first such report.

U.S. Interests

That treatment is not in the best interest of the intellectual property and licensing community. Since intellectual property and licensing problems simply are lumped together with standard trade barriers, they are seen by the trade community as no different from traditional trade problems. The country-by-country listing also indicates to other governments that we regard intellectual property and licensing in the same light as tariffs, quotas, and subsidies and those governments are beginning to consider the issues "tradeable." For example, newspapers reported recently that the Canadian Government considered that, in retaliation for our dumping duties on cedar shakes and shingles, it might not extend the period of patent exclusivity for pharmaceuticals before compulsory licenses are issued. Fortunately, the Canadian Government decided instead to raise tariffs on several items of importance to the United States.

The U.S. Congress, however, apparently understands that intellectual property and licensing issues are different from customary trade barriers. In both the House and the Senate, legislation is pending that would require the trade representative to prepare a report identifying those countries where our most serious intellectual property and licensing problems exist and evaluating the effects of those problems. The trade representative would then have to establish priorities among the identified countries and set a timetable for negotiations. Finally, the President would direct the trade representative "to enter into consultations and negotiations with the priority countries, in accordance with the timetable . . . , in order to seek trade agreements which provide for the harmonization, reduction, elimination, or prohibition of restrictions, barriers, fees or other trade-distorting acts, policies, or practices in order that United States persons that rely upon intellectual property protection will obtain fair and equitable market access to such countries."

The provision is not necessary. The report required by the act should already have been used to develop a plan for bilateral negotiations on intellectual property, establish priorities, and measure results. It still could

be. LES members, and others interested in intellectual property and the licensing thereof should insist upon it.

The trade representative, in preparing the updated report due October 30, 1986, should treat the intellectual property problems separately from the country-by-country listing of trade barriers for a number of reasons. Intellectual property rights belong to persons, not to goods. The rights themselves, like goods, can be bought, sold, licensed, used as collateral, "leased," etc. Unlike goods, however, intellectual property cannot cross borders. Patent rights, copyrights, and trademark rights are created by the laws of individual countries. The rights those laws confer cease at the border. Whatever right exists in the neighboring country is created by the law of that country. As LES members know all too well, keeping track of what rights associated with a particular good exist where, and to whom they are licensed, is a full-time job.

The U.S. Government's objectives regarding intellectual property and the licensing thereof differ from its objectives regarding trade barriers. Where intellectual property is concerned, the United States wants other countries to enable persons to restrict the flow of goods. Where trade barriers are concerned, the United States wants other countries to enable persons to import and export goods more freely than they now can. Treating intellectual property problems and trade problems together ignores this fundamental difference.

The intellectual property problems that trouble U.S. businesses are not isolated. They fall into patterns that reflect different levels of development and different attitudes. A look back at our own history is instructive in that regard.

Course of Action

To develop an effective plan to eliminate licensing and intellectual property problems, the U.S. Government should analyze those problems generically first using the information in the Trade Estimates report. The economic consequences of each generic issue should be

evaluated on a worldwide basis. The U.S. Government, with the private sector, should establish priorities among the practices based upon the economic benefits to be gained in eliminating particular generic practices. We should concentrate on eliminating compulsory licensing, for example, if that would result in greater economic benefit to U.S. companies than extending patent terms. Such an approach most likely would show that the U.S. Government should be expending most of its energies on eliminating restrictions on the transfer of technology. That, at least, would enable U.S. businesses to control the terms of license agreements to minimize the effects of some of the other intellectual property practices until those problems can be solved.

Once generic practices are identified and priorities are established, individual country practices under each should be identified and evaluated. After that, deciding in what order to consult using GSP and Section 301 is easy. Efforts at the international level in WIPO and the GATT can be used to augment the bilateral efforts.

Treating intellectual property and licensing problems separately from trade barriers and considering those problems, first generically, then specifically, would enable the U.S. Government to act rather than react. Bilateral consultations would be aimed at improvements that would make a real economic difference to U.S. business within a relatively short time. Resources would be allocated more effectively.

If such a strategy had been followed beginning in October 1984, perhaps the Congress would not have felt the need to amend the law once more in a way that will result only in more reports, not in improvements in business conditions abroad. Those critical U.S. Government and private sector intellectual property experts can spend their time working on reports or they can use the one that they have already done to get on with the bilateral consultations and multilateral negotiations. Voicing your preference, as a member of LES, to the U.S. Executive Branch and the Congress will help those experts get on with the real work.