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INTERNATIONAL TRADE

Strengthening Worldwide Protection of Intellectual Property Rights

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The Honorable Spark Matsunaga
Chairman, Subcommittee on
International Trade
Committee on Finance
United States Senate

The Honorable Sam M. Gibbons
Chairman, Subcommittee on Trade
Committee on Ways and Means
House of Representatives

This report describes U S. government use of multilateral negotiations and bilateral consultations, which have involved training and the threat and use of unilateral trade actions, to strengthen protection of intellectual property rights in countries where inadequate protection presents a major problem for U.S. firms. It points out that, while limited progress may be attained through multilateral negotiations, the government has already attained positive results through bilateral consultations with "problem" countries

This is the third in a series of reports we have issued on government efforts to protect intellectual property rights. Our May 1986 report, International Trade: U.S. Firms' Views on Customs' Protection of Intellectual Property Rights (GAO/NSIAD-86-96), and our August 1986 report, International Trade: Strengthening Trade Law Protection of Intellectual Property Rights (GAO/NSIAD-86-150), discuss government efforts to stop counterfeit and infringing goods from entering the country.

Copies of this report are being sent to the Office of the U.S. Trade Representative, Secretary of Commerce, Secretary of State, various congressional committees, and other interested parties.

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Executive Summary

Purpose

Foreign piracy of intellectual property rights—generally the unauthorized use of U.S. patents, trademarks, and copyrights—has emerged in the 1980s as one of the more important international trade issues for the United States. This report reviews U.S. government efforts to reduce this activity by encouraging foreign governments to strengthen their protection of intellectual property rights.

Background

The recent increase in concern over inadequate protection of U.S. intellectual property rights is associated largely with the economic development of several newly industrialized countries. Many businesses in these countries have attained the capability for mass production and distribution but lack name brand recognition and find it difficult to compete with established products. Therefore, they often resort to reproducing products already well known in the world marketplace. This activity has also been spurred by recent technological advances, such as the development of audio- and videocassettes, which have greatly simplified the reproduction of protected products.

Information from U.S. industry indicates that the impact of foreign piracy on the United States is significant. In the short term, such piracy (1) limits the ability of firms and individuals to obtain returns on their investments of time and resources in developing patented innovations, trademarked products, and copyrighted works, (2) deprives legitimate businesses of sales, profits, and the ability to provide employment, and (3) can threaten public health and safety. In the long term, piracy undermines the patent and copyright systems as mechanisms for encouraging innovation and creativity and the trademark system as an indicator to consumers of quality products and services.

Legitimate businesses have devoted substantial resources to combating foreign piracy. However, lasting progress requires stronger foreign government laws and enforcement practices. The U.S. government is best able to effect such changes through intergovernmental negotiations. In response to business concerns, the U.S. government raised intellectual property protection to the status of a major trade issue and is using multilateral negotiations and bilateral consultations to strengthen foreign government protection of intellectual property rights.

Results in Brief

Recent progress toward strengthening national protection practices through the World Intellectual Property Organization has been limited. Consequently, the U S. government has

- focused its multilateral efforts on the General Agreement on Tariffs and Trade and
- undertaken bilateral consultations, which have also involved training and the threat and use of unilateral trade actions.

To date, the government has attained some positive results through bilateral consultations.

Principal Findings

Multilateral Negotiations

The World Intellectual Property Organization offers a wide range of legal-technical assistance, including expert advisory services and education and training programs, for improving developing country intellectual property laws and administrative systems. Such assistance has resulted in some significant accomplishments. However, due primarily to developing country opposition, this organization has been limited as a forum for strengthening worldwide protection of intellectual property rights through multilateral negotiations. Indeed, over the past decade, the U.S. government has opposed developing country efforts to weaken existing standards in this forum. Recognizing this, recent U S government efforts in the World Intellectual Property Organization have focused largely on supporting its legal-technical assistance efforts, possible U.S. adherence to an existing international copyright convention, and other more specialized matters where there may be less developing country opposition.

The U.S. government has turned to the General Agreement on Tariffs and Trade, the primary multilateral trade forum, in its attempts to significantly strengthen national protection of intellectual property rights It has outlined two proposals for consideration by this forum: (1) completion and implementation of an anticounterfeiting code that would require participating countries to interdict counterfeit imports and (2) establishment of an enforceable agreement against trade-distorting practices arising from inadequate protection of intellectual property rights Although the time required to negotiate these agreements will prevent them from having any immediate impact, they may have some long-term beneficial effect, depending on their membership and content.

Bilateral Consultations

The U.S. government has made progress in strengthening foreign governments' protection of intellectual property rights through bilateral consultations with "problem" countries. It has identified and examined practices of countries that provide inadequate protection, selected countries and particular practices for priority attention, and undertaken consultations to address practices most damaging to U.S. interests. Two primary principles guiding the allocation of resources are that the government can best address this matter by (1) controlling piratical activity at the source and (2) concentrating its efforts on the worst offenders (i.e., those countries whose piratical production has the greatest impact on U.S. firms). Application of these principles has led the government to concentrate its efforts on a relatively small number of countries.

The U.S. government's primary means for encouraging foreign governments to strengthen their intellectual property protection practices has been to demonstrate their economic self-interest in taking such action. U.S. representatives point out that protecting intellectual property encourages foreign direct investment and the development of domestic industries. While the available funds are very limited, the U.S. government also provides some training to help foreign nationals to prepare and administer adequate and effective laws, regulations, and administrative mechanisms.

When persuasion proves ineffective, the U.S. government can threaten or impose unilateral trade actions. The Trade and Tariff Act of 1984 (19 U.S. C. 2101 et seq.) amended section 301 of the Trade Act of 1974 to, among other things, clarify and emphasize the President's ability to take retaliatory actions, such as suspending trade agreements or imposing duties, against countries that inadequately protect U.S. intellectual property rights. The 1984 Trade Act also amended the statute governing the Generalized System of Preferences[1] to (1) include adequate intellectual property protection as a criteria for program eligibility and (2) allow the President to use program benefits as a means to induce beneficiaries to strengthen their intellectual property protection practices. The Caribbean Basin Economic Recovery Act (19 U.S.C. 2701) also predicates access to certain economic benefits on eligible countries providing, among other things, adequate protection for U.S. intellectual property rights.

[1]Through the Generalized System of Preferences, the U S government allows developing countries to export designated products to the United States duty free to further their economic development

The United States has achieved positive results through bilateral consultations The potential for unilateral trade actions has been a useful bargaining point in this process. Among other improvements, Taiwan has amended its copyright law to provide more stringent penalties for infringement, provide criteria for recognizing foreign firms' standing before the Taiwan judiciary in copyright cases, and extend protection to new media, including computer software. Taiwan also has enacted a new patent law and is working on an improved unfair competition law. Singapore adopted an improved copyright law in February 1987 and is working toward its implementation. Institution of an investigation under section 301 of the Trade Act of 1974, as amended, helped convince the Republic of Korea to make several improvements in its intellectual property protection practices Lack of substantial progress in this area was an important consideration in the recent decision to reduce benefits under the Generalized System of Preferences for certain problem countries, including Brazil and Mexico.

Recommendations

GAO's report contains no recommendations. GAO concluded that within present resource constraints, the government is pursuing all reasonable alternatives for obtaining stronger protection of intellectual property rights abroad.

Agency Comments

GAO received comments on a draft of its report from the Departments of Commerce and State and the World Intellectual Property Organization (see apps. I to III). The State Department commented that, in cooperation with Commerce's Patent and Trademark Office, it has pursued improved protection of intellectual property rights "for at least two decades." It also emphasized the need for realism in predicting the prospects for achieving results in multilateral trade negotiations, noting that there was more support for a code related to counterfeiting than for a general code on patent protection. The World Intellectual Property Organization characterized its progress toward strengthening intellectual property protection as "significant" rather than limited and viewed future prospects for attaining progress within the organization as more promising than described by GAO.

Contents

Abbreviations

GAO	General Accounting Office
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
TPSC	Trade Policy Staff Committee
UCC	Universal Copyright Convention
UNCTAD	United Nations Conference on Trade and Development
USTR	Office of the U.S. Trade Representative
WIPO	World Intellectual Property Organization

Foreign Piracy of Intellectual Property Rights: An Emerging Trade Concern

Foreign piracy of intellectual property rights, such as patents, trademarks, and copyrights (see fig. 1.1), has emerged in the 1980s as one of the more important international trade issues for the United States. Before this decade, the U.S. government regarded protection of such rights largely as a technical matter and not as a trade policy concern broadly affecting U.S. international competitiveness Because of increasing business concern, the government now recognizes that foreign piracy of intellectual property rights affects U.S. trade in the same manner as other activities more traditionally considered as unfair trade practices. The government has expanded its efforts to strengthen worldwide protection of intellectual property rights in multilateral forums. It has also undertaken bilateral consultations with problem countries and utilized recently strengthened trade law provisions to take unilateral trade actions when adequate progress has not been made.

Reasons for Recent Increase in Piracy

The recent increase in concern over inadequate protection of U.S. intellectual property rights abroad is associated largely with the economic development of several newly industrialized countries. Many businesses in these countries have attained the capability for mass production and distribution but lack name brand recognition and find it difficult to compete with established products. Therefore, they often resort to reproducing products already well known in the world marketplace. This economic development also created rising cash incomes, which greatly increased effective demand for consumer products. Rampant piracy and growing consumer demand, sometimes combined with import restrictions, have essentially reserved some major markets for pirated products. For example, all but a small percentage of the audiocassettes sold in Nigeria and several Middle East countries are pirated reproductions. Also, counterfeiters have monopolized the market for certain trademarked products in, among other countries, Brazil.

Figure 1.1: What Are Intellectual Property Rights?

Patents, trademarks, and copyrights are the three primary forms of intellectual property rights in worldwide use. They encourage the introduction of innovative products and creative works to the public by guaranteeing their originators a limited exclusive right, usually for a specified period of time, to whatever economic reward the market may provide for their creations. Other types of intellectual property rights include trade secrets, "mask works" (i.e., the pattern on the surface of a semiconductor chip), and industrial designs (i.e., the ornamental aspect of a useful article).

Patents
Patents protect inventions, giving inventors the right to exclude others for a specified period from making, using, or selling a new, useful, non-obvious invention. Patents give inventors the opportunity to obtain substantial economic benefits from exclusive exploitation of their discoveries for a limited time. In return, they must submit the details of their inventions for placement on the public record. This information can subsequently be used by others to further advance the "state of the art." Patent infringement generally refers to the unauthorized manufacture, use, or sale in the country of registration of all devices embodying the patented invention, whether copied from an authorized device or resulting from independent development.

Trademarks
Trademarks are words, names, symbols, devices, or a combination thereof, used by manufacturers or merchants to identify their goods and distinguish them from others. Service marks perform the same function for services. Trademarks, which are generally renewable for as long as their owners wish to retain them, help consumers to identify products known to be of a desired quality and thus enable producers to profit from their products' reputations. Trademark counterfeiting generally refers to the deliberate, unauthorized duplication of another's trademark, while trademark infringement refers to the unauthorized use of a trademark that is so similar to an existing trademark that, considering the products involved, consumers are likely to become confused.

Copyrights
Copyrights protect literary and artistic expression. They grant the exclusive right to reproduce, publish, display, perform, or sell copies of original expressions of an idea in "any tangible medium of expression." Copyrighted materials commonly include literary, musical, and artistic works (e.g., books, records, movies, posters) and, in a growing number of countries, computer programs. A copyright generally endures for the life of the author plus a specified period of years—in most cases 25 or 50 years. Copyright infringement generally refers to the unauthorized use or copying of a copyrighted product.

Intellectual property pirates are often in a better position than legitimate producers to satisfy demand in newly industrialized countries since they generally enjoy lower production costs. Because pirates merely copy products rather than developing their own, their design and/or research and development costs are often minimal. They pay no royalties to those who originally developed the intellectual property. Advertising and market development costs are not key concerns as their markets are largely created for them by the efforts and at the expense of companies selling authentic products. Moreover, because they copy only products with proven market success, pirates escape the cost of developing products that turn out to be market failures. These savings, when added to the already lower costs of production in developing countries, such as cheaper labor and materials, enable pirates to market

unauthorized copies with a considerable price advantage over legitimate products.

Also, recent technological advances have simplified and, therefore, encouraged the unauthorized reproduction of protected works. For example, the development of computer-controlled machine tools has facilitated the reproduction of expensive metal parts for automobiles and aircraft. Likewise, the advent of cassette tape technology has greatly simplified mass copying and marketing of music and films. Previously, the reproduction of records or films involved costly and complex procedures requiring trained technicians and substantial capital investment. This activity is now so easy that virtually any country is a potential location for music or video tape piracy.

Intellectual property pirates in newly industrialized countries often need not concern themselves about the legality of their activities Protection for intellectual property is a relatively new concept for many developing countries; they do not have important domestic constituencies of inventors, authors, etc. able to benefit from strong laws. Accordingly, they have not seen the need to develop strong laws or to devote already scarce government resources to their enforcement. Moreover, a number of these countries have resisted strengthening intellectual property protection. Developing countries' desire for economic development is perhaps the single most important reason for the persistence of inadequate protection, particularly for foreigners. Because domestic pirates can generate considerable economic activity, governments are reluctant to take measures against them Lacking product development and marketing expertise of their own, developing country governments find pirating established products an attractive means for generating manufacturing activity and employment. These governments justify maintaining weak protection by arguing that giving individuals ownership rights does not enhance development but retards it by limiting access to innovation. They express the belief that intellectual property should be considered the common property of mankind and relevant laws should facilitate access to intellectual property as a development tool rather than place restrictions on its use.

Executive branch studies show that inadequate protection manifests itself differently depending on the type of intellectual property involved. (See fig. 1.2.)

Patents. Many developing countries limit the patentability of certain products; for example, they may extend only process patent[1] protection to chemicals Other common problems include short patent terms and licensing restrictions.

Trademarks Foreign trademark practices create several types of problems for U.S. firms For example, some governments prohibit the importation of certain categories of trademarked goods, largely to preserve foreign exchange. At the same time, they may require holders of registered marks to use them in-country to preserve their legal rights Unless the trademark owner is willing to have the trademarked product manufactured in-country, this situation can lead to loss of trademark rights Also, some governments permit the use of foreign trademarks only in conjunction with domestic trademarks.

Copyrights: Several countries, particularly in the Middle East, have no copyright protection for either domestic or foreign works. Other countries, such as Indonesia and Malaysia, offer protection only to works that are first published in that country or published incountry very soon (e g., 30 days) after first published abroad. The laws of several countries also do not provide protection for new forms of expression, such as computer software.

[1]Process patents, as the term implies, protect only the process by which a product is made and not the resulting product They provide ineffective protection because there are typically many ways or processes by which a given product may be manufactured Slight changes in the manufacturing process can thus nullify protection

Figure 1.2: Countries Posing Greatest Problems for U.S. Firms in 1985

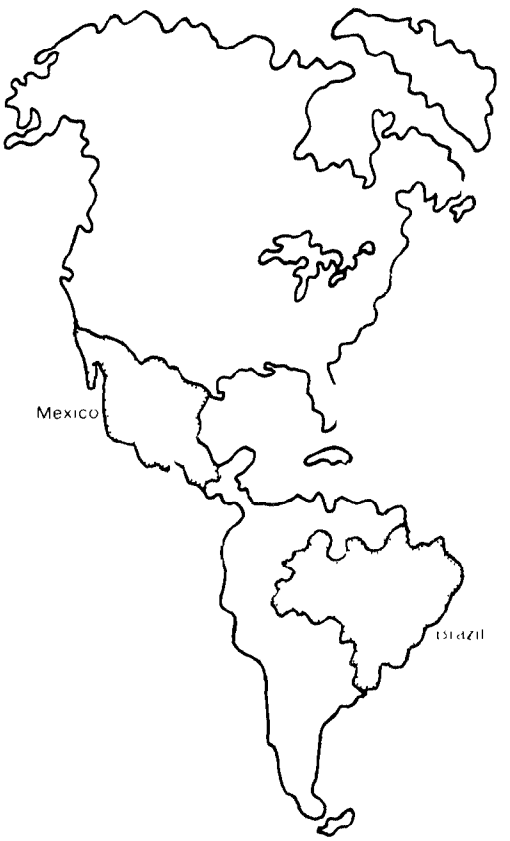
India - Copyright infringement, particularly of books. Trademark protection limited by domestic "use" requirements combined with severe import restrictions. Weak patent protection, particularly for chemicals and pharmaceuticals.

Thailand - Copyright infringement of audio- and videocassettes and computer software. Trademark counterfeiting of consumer goods and pharmaceuticals. Limited or no patent protection for pharmaceuticals, foodstuffs, agricultural chemicals, and machinery.

Malaysia - Copyright infringement of books, records, audio- and videocassettes and computer software. Trademark infringement of cosmetics and pharmaceuticals. Patent law lacks regulations to bring it into effect.

Mexico - No patent protection for agricultural chemicals, pharmaceuticals, and foodstuffs.

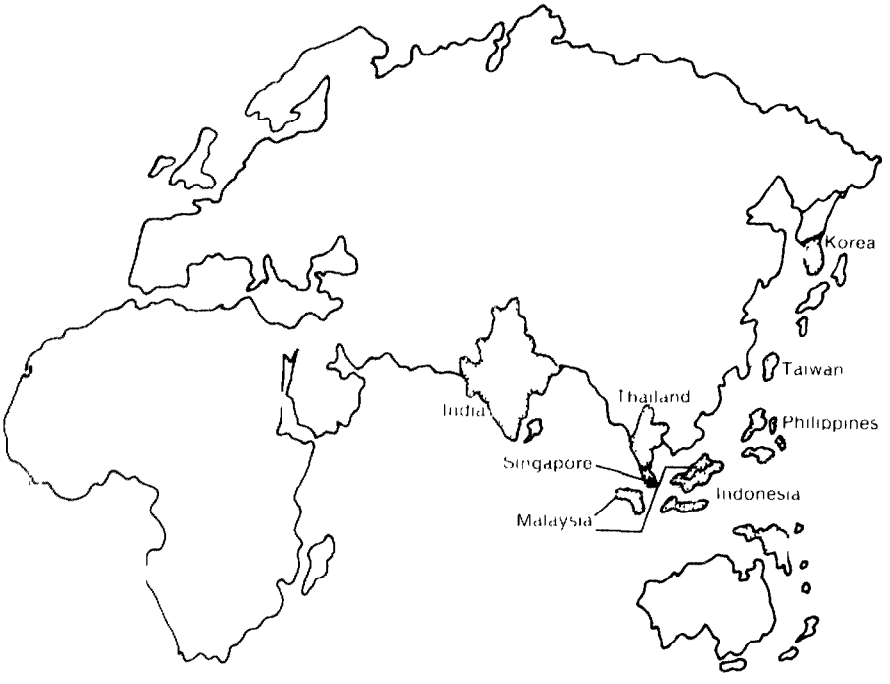
Brazil - Copyright infringement of motion pictures, records, videocassettes, and computer software. Trademark protection limited by domestic "use" requirements combined with severe import restrictions. No patent protection for metal alloys, chemical compounds, and food- and chemical-pharmaceuticals.



Countries identified by executive branch studies as posing substantial problems for U.S. firms

[a] Also contains information from The Effects of Foreign Product Counterfeiting on U.S. Industry, U.S. International Trade Commission Publication 1479, Jan. 1984 and Piracy of U.S. Copyrighted Works in Ten Selected Countries, International Intellectual Property Alliance, Aug. 1985.

Source: Based on information contained in U.S. Trade Representative Annual Report on National Trade Estimates, 1985, and Department of Commerce Papers on Protection of Intellectual Property Rights in 10 Problem Countries (unpublished), July/Aug. 1985. These studies are based largely on information drawn from private sector sources.



Korea[a] - Copyright infringement of books, technical journals, audio- and videocassettes, and computer software Widespread trademark counterfeiting of consumer goods No product patent protection for foodstuffs, chemicals, and pharmaceuticals

Taiwan[a] - Widespread copyright infringement of books, records, audio- and videocassettes, and computer software Widespread trademark counterfeiting of consumer goods, chemicals, and computer systems Product patent protection not available for chemicals, including microorganisms, and pharmaceuticals

Philippines - Copyright piracy of videocassettes and computer software Trademark counterfeiting of consumer goods Compulsory licensing of patents only 2 years after patent is granted

Singapore - Widespread copyright piracy of books, audio- and videocassettes, and computer software Trademark counterfeiting of computers, pharmaceuticals, attache cases, and luggage Patent infringement of computers and pharmaceuticals

Indonesia - Copyright piracy of books and audio- and videocassettes Trademark counterfeiting of clothing, accessories, and chemical products, including pharmaceuticals No patent protection

Even where laws against piracy are adequate, weak enforcement can render them ineffective. U.S. firms have had difficulty obtaining police cooperation in taking action against pirates, largely because the authorities have higher priorities and in some cases reportedly because of corruption. U.S. companies may also find that foreign court procedures hinder rather than help in prosecuting pirates. For example, discovery procedures may be inadequate, making it difficult to sustain a burden of proof against an alleged infringer. U.S. industry has also complained about the light penalties assessed against convicted pirates. Even where criminal charges, and not just civil actions, can be brought, jail terms sometimes can be waived by paying a fee and fines may be so small as to amount to no more than another business expense

Foreign Piracy's Effect on U.S. Business

Available information indicates that foreign piracy's impact on U.S. business is serious and growing. Targets of pirate operations range across the business spectrum from toys through consumer electronics to chemicals and high-technology goods. These products are sold in domestic and export markets, and according to U.S. industry, a large proportion reaches the United States.

While the short-term effects of intellectual property piracy are more tangible, the long-term effects may be even more damaging. In the short term, such piracy (1) limits the ability of firms and individuals to realize returns on their investments of time and resources in developing innovations and original creations, (2) deprives legitimate businesses of sales, profits, and the ability to provide employment, and (3) can threaten public health and safety. In the long term, piracy undermines the effectiveness of the patent and copyright systems as means for encouraging innovation and creativity. Businesses and individuals are less likely to patent new products or to create new works if they cannot obtain returns on their investments. Piracy also can undermine the effectiveness of the trademark system, since consumers, unaware that they are buying inferior counterfeit goods, may lose confidence in specific trademarks or in trademarks generally as indicators of quality.

Gathering comprehensive information on sales losses is difficult primarily because of the worldwide and clandestine nature of pirate operations. Estimating losses is further complicated by the reluctance of some legitimate manufacturers, fearing loss of consumer confidence, to acknowledge that their products are being counterfeited In addition, consumers sometimes knowingly purchase pirate goods because of their lower prices. Thus, even if the actual volume of pirate sales could be

determined, this figure would not be an accurate indication of the sales that would be gained by legitimate producers if piratical goods were not available.

Despite these difficulties, several studies have attempted to quantify the impact of piracy. An International Trade Commission report[2] on trademark counterfeiting found 82 firms with reported combined losses of almost $50 million in sales to "counterfeiting" (i.e., distribution of goods bearing unauthorized copies of U.S. trademarks) during 1982. This estimate did not include other types of piracy, such as patent and copyright infringement, but some idea of their magnitude can be obtained from partial estimates made by various private sector organizations. For example, the International Intellectual Property Alliance[3] estimated in August 1985 that piracy of copyrighted works in 10 selected countries costs U.S industry over $1 billion in lost sales annually The Pharmaceutical Manufacturers Association reported in June 1985 that one of its member companies lost $27 million in potential sales on just one patented product to unlicensed copiers in five developing countries.

Inferior copies of products embodying intellectual property can also pose significant threats to public health and safety, and may impair U.S military capability. Automobile, airplane, and helicopter parts; agricultural chemicals; and pharmaceuticals and other health care products have all been pirated in recent years The defective copies have caused considerable harm and, in several cases, death. In one widely cited case, the use of a bogus fungicide resulted in the loss of 15 percent of the Kenyan coffee crop. In other cases, the American Medical Association attributed deaths and cases of paralysis to counterfeit amphetamines and tranquilizers and the Food and Drug Administration found a counterfeit part in intra-aortic pumps used to keep hearts beating during open heart surgery. Counterfeit parts also have been found in some sensitive U.S. military weapons systems.

[2]The Effects of Foreign Product Counterfeiting on U S Industry (United States International Trade Commission Publication 1479, Jan 1984)

[3]An umbrella organization composed of the Computer Software and Services Industry Association, American Film Marketing Association, Association of American Publishers, Computer and Business Equipment Manufacturers Association, International Anticounterfeiting Coalition, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America

U.S. Government and Business Actions to Address Foreign Piracy

Legitimate businesses, alone and working in groups, have devoted substantial resources to combating foreign piracy. However, lasting progress requires stronger foreign government laws and enforcement practices. The U.S. government is best able to effect such changes through intergovernmental negotiations and, in response to business concerns, has assigned a high priority to this effort.

Business Community Efforts

The most direct remedy available to firms victimized by foreign piracy is to use existing legal procedures in the pirate business' home country. This can be an extremely expensive process, involving the use of investigative agencies to obtain evidence and attorneys to carry out litigation in foreign courts. While some firms conduct their own investigations and litigation, others use such organizations as the Counterfeiting Intelligence Bureau (affiliated with the International Chamber of Commerce), that provide assistance in conducting investigations and subsequent attempts to obtain foreign government action against pirates.

Trade associations also attempt to address this problem by performing a variety of functions for their members. Many U.S. businesses, particularly those new to the international market, do not realize that they need to take precautionary measures (e.g., registration) to preserve their rights in foreign countries nor do they know how to proceed if they discover that their rights have been violated. Trade associations that represent industries particularly hard-hit by piracy, such as recording and pharmaceuticals, and groups specifically formed to take action against piracy, such as the International Anticounterfeiting Coalition,[4] advise members on how to protect intellectual property in foreign countries and how to use the courts to secure protection. Some groups, on their own accord, have pressed for better enforcement of existing foreign laws and even for adoption of new laws. Many also gather information on the nature and extent of the problem to press the U.S. or other industrialized country governments to take diplomatic action on these matters and to enable members to more effectively protect their own interests.

Some U.S. firms have taken successful action to protect their intellectual property rights in foreign countries. For example, Apple Computer Corporation has obtained injunctions against several Singapore and Taiwan firms that were pirating its products. Frequently, however, U.S. businesses report that procedural obstacles and weak penalties render their efforts futile. For example, the Super K Sports Corporation reportedly

[4]Represents over 300 corporations, associations, and professional firms worldwide.

was unable to register its trademark in Brazil because it could not show use in that country because Brazil embargoes the importation of U.S. sporting goods. Meanwhile, a number of Brazilian companies have been manufacturing and selling "Super K" basketballs in that country.[5] Even if not successful, however, attempts to protect intellectual property rights from real infringement in foreign countries provide concrete evidence that a country's protection is inadequate, even though the laws appear sound on paper. This information gives U.S. negotiators arguing for improvement evidence to contradict the argument that U.S. firms simply have not taken advantage of existing remedies.

U.S. Government Efforts

In response to rising business concerns, the administration raised intellectual property protection to the status of a major trade issue, giving the Office of the U.S. Trade Representative (USTR) and Commerce's International Trade Administration major policymaking roles. Previously, U.S. government efforts to protect U.S. intellectual property rights were handled largely by the U.S. Customs Service and State Department. Customs attempted to stop counterfeit and infringing goods from entering the country.[6] The State Department, in conjunction with the Copyright Office and Commerce's Patent and Trademark Office, sought enhanced protection through negotiations sponsored by multilateral intellectual property forums and as part of ongoing discussions regarding U.S. bilateral economic relations. The Patent and Trademark and Copyright Offices also provided a limited amount of training in the intellectual property area for foreign officials. In its comments on a draft of this report, the State Department emphasized that, for at least two decades, it has sought improved protection for U S. intellectual property rights as a major foreign economic objective.

During 1983, the Cabinet Council on Commerce and Trade[7] established a Working Group on Intellectual Property,[8] to help the administration

[5]Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, Unfair Foreign Trade Practices StealingAmerican Intellectual Property. Imitation Is Not Flattery, (Committee Print 98-V), Feb 1984

[6]See our May 1986 report, International Trade. U S Firms' Views on Customs' Protection of Intellectual Property Rights (GAO/NSIAD-86-96), and our August 1986 report, International Trade: Strengthening Trade Law Protection of Intellectual Property Rights (GAO/NSIAD-86-150)

[7]The Council's functions have since been taken over by the Economic Policy Council

[8]This Group is chaired by a representative of the Patent and Trademark Office and has one other member from the Commerce Department as well as representatives from USTR, the Office of Management and Budget, Departments of Justice and State, Council of Economic Advisors, and President's Science Advisor

focus on the trade and commercial aspects of this problem. This working group has made periodic recommendations on actions to improve intellectual property rights protection. In 1983, the government also intensified bilateral efforts to obtain better protection practices with the dispatch of interagency negotiating parties to Taiwan and the Republic of Korea (South Korea). Subsequently, both the Commerce Department and USTR have explicitly established stronger worldwide protection for intellectual property as a major trade policy goal. During the summer of 1984, the Secretary of Commerce committed the International Trade Administration and the Patent and Trademark Office to a major effort. Commerce stated its intentions to, among other things, intensify bilateral and multilateral efforts and to continue to provide education and training for intellectual property officials from foreign countries. In September 1985, the President instructed the U.S. Trade Representative to "accelerate negotiations with any and all countries where the counterfeiting and piracy of U.S. goods has occurred to bring these practices to a quick end."

Congressional action has been a major impetus to this increased emphasis. Several recently enacted laws call for U.S. bilateral initiatives to address the harmful effects of inadequate foreign protection practices and strengthen the government's ability to take unilateral trade actions if persuasion proves ineffective. The most notable of these are titles III and V of the Trade and Tariff Act of 1984 (19 U.S.C. 2101 et seq.). Title III, among other things, amends section 301 of the Trade Act of 1974 and title V amends the law governing the Generalized System of Preferences (GSP).[9]

In April 1986, the administration issued an official "policy statement" on intellectual property protection. This document, which serves to confirm an ongoing process rather than to announce new initiatives, states that the United States will continue to (1) work through multilateral forums to strengthen worldwide protection practices, (2) pursue a vigorous program of bilateral consultations to obtain "adequate and effective" protection for all forms of intellectual property, and (3) work to ensure that U.S. domestic law provides a high standard of protection.

[9]Through GSP, the U.S. government allows developing countries to export designated products to the United States duty free to further their economic development

In addition to USTR and the International Trade Administration, the State Department, Copyright Office,[10] and Patent and Trademark Office play leading roles in interagency deliberations on foreign piracy of intellectual property rights. Policy is coordinated through informal contacts among agency representatives and through more formal interagency mechanisms.[11] Bilateral consultations and multilateral negotiations are conducted jointly by two or more agencies, with those involved being determined by the nature of the issue.

Objectives, Scope and Methodology

Our objective was to review U.S. government use of multilateral negotiations and bilateral consultations, training, and unilateral trade actions to strengthen protection of intellectual property rights in countries where inadequate protection presents a major problem for U S firms We did not review efforts to address domestic violations of intellectual property rights or efforts aimed specifically at improving protection in countries that the U.S. government views as already providing generally adequate protection.[12]

We analyzed U.S. efforts to maintain and improve the protection offered through multilateral agreements,[13] specifically U.S

- participation in the World Intellectual Property Organization (WIPO), including the ongoing renegotiation of the Paris Convention on Industrial Property, proposed U.S adherence to the Berne Convention for the

[10]The Copyright Office is part of the Library of Congress, which is a legislative branch agency As a result, the Copyright Office does not officially participate in executive branch councils, it does, however, provide informal advice and participate in negotiations

[11]One such mechanism is the Trade Policy Staff Committee's (TPSC) Subcommittee on Intellectual Property, formed to carry out the analytical and reporting requirements of Title III of the Trade and Tariff Act of 1984 Another is the TPSC Subcommittee on the Generalized System of Preferences The 1984 Trade Act amended Title V of the Trade Act of 1974, which governs this program, to include intellectual property protection practices among the criteria for deciding on eligible country participation A third is the cabinet-level Trade Strike Force, created by the President in September 1985 to identify unfair trade practices, including inadequate protection of intellectual property rights, and to devise strategies for dealing with them

[12]Thus, this report does not discuss, among other things, efforts to obtain change in several Canadian intellectual property protection practices, U S participation in deliberations of industrialized country groups, such as the Organization for Economic Cooperation and Development, and execution of the bilateral provisions of the Semiconductor Chip Protection Act

[13]We did not review U.S government participation in regional agreements (e g the general inter-American convention for trade-marks and commercial protection and the convention for the protection of inventions, patents, designs, and industrial models signed at Buenos Aires), since these agreements have not been the focus of U S efforts to strengthen intellectual property protection in countries that present significant problems for U S firms

Protection of Literary and Artistic Works, and development of new treaties on integrated circuits and trademark registration;
- participation in the U.N. Conference on Trade and Development (UNCTAD) negotiations on a proposed International Code of Conduct on Technology Transfer; and
- participation in negotiations on developing multilateral codes to strengthen protection of intellectual property in the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT).

We analyzed U.S. government use of bilateral consultations to encourage particular countries to strengthen their protection of intellectual property rights. Specifically, we examined U.S. government efforts to (1) obtain information on foreign protection practices, (2) identify the countries that pose the greatest problems, and (3) use negotiations, training, and, where needed, unilateral trade actions to encourage the governments of these countries to strengthen their protection practices.

We obtained information from U.S. and foreign business and government officials and from representatives of multilateral intellectual property and trade organizations. We interviewed officials and obtained studies and other pertinent documents from U.S. government agencies, including USTR, the Department of Commerce's Patent and Trademark Office and International Trade Administration, Department of State, Copyright Office, and U.S. Customs Service; and from multilateral intellectual property and trade organizations, including the World Intellectual Property Organization, U.N. Conference on Trade and Development, and Secretariat of the General Agreement on Tariffs and Trade. We also interviewed representatives and obtained pertinent documents from U.S. business, domestic and international trade associations, and other organizations that combat such piracy. We studied numerous multilateral intellectual property and trade agreements, most notably the Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works, Universal Copyright Convention, and General Agreement on Tariffs and Trade. We also reviewed several U.S. government and private sector studies on piracy of intellectual property rights. We did not attempt independent verification of the information contained in these studies, which, even when prepared by the government, generally reflect information from private sector sources. In addition, we reviewed pertinent laws, including the Trade Act of 1974, Trade and Tariff Act of 1984, and Caribbean Basin Economic Recovery Act.

We obtained comments on a draft of this report from the Departments of Commerce and State and the World Intellectual Property Organization, which we considered and incorporated as appropriate. We asked for, but did not receive, comments from USTR and the Copyright Office.

Our review was conducted in accordance with generally accepted government auditing standards.

Limited Progress Made Through Multilateral Forums

Due primarily to developing country opposition, the U.S. government has in recent years made only limited progress toward strengthening worldwide protection of intellectual property rights through WIPO, the foremost multilateral intellectual property forum. Indeed, over the past decade, the U.S. government has actively opposed developing-country initiatives to weaken existing international standards for national protection practices in WIPO as well as in UNCTAD. In light of this situation, U.S. efforts within WIPO have focused largely on supporting its legal-technical assistance, possible U.S. adherence to the Berne copyright convention, and other more specialized matters where there may be less developing country opposition. The government sees greater opportunity for broad substantive progress by addressing this problem as an unfair trade practice within the new "Uruguay" GATT round of multilateral trade negotiations.

Progress Attained Through WIPO

WIPO is a 116 member specialized agency of the U.N. system whose primary mission is to promote the protection of intellectual property rights and, thereby, encourage investment, industrialization, and international trade. WIPO pursues this objective in two primary ways.

1. Legal-technical assistance: WIPO provides expert advisory services and conducts extensive education and training activities to establish or improve developing-country intellectual property laws and administrative systems.

2. Agreements: WIPO administers 17 multilateral "unions" (see fig. 2.1), each composed of the countries that adhere to individual agreements on intellectual property protection, and provides a forum for revising these agreements and negotiating new ones.[1] The United States is a party to 7 of these 17 treaties administered by WIPO. Some of these agreements aim to establish minimum standards for national protection practices. The most important of these are the 97 member Paris Convention for the Protection of Industrial Property, which is the primary agreement on protecting patents, trademarks, and industrial designs and suppressing unfair competition; and the 76 member Berne Convention for the Protection of Literary and Artistic Works, which is the primary agreement on

[1]WIPO administers all major multilateral intellectual property treaties except for the Universal Copyright Convention, which is administered by the United Nations Educational, Scientific, and Cultural Organization.

protecting copyrights. Other WIPO agreements facilitate obtaining intellectual property rights in other countries. Some, such as the International Patent Classification Agreement, work toward this goal by instituting internationally recognized classification systems for discrete types of intellectual property. Others, such as the Patent Cooperation Treaty, establish administrative tasks for WIPO to perform on behalf of national governments. Excluding the Paris and Berne conventions, membership in WIPO conventions varies widely, with an average of about 23 countries per treaty.

Figure 2.1: Agreements Administered by WIPO

Industrial Property
1. Paris Convention for the Protection of Industrial Property (97 members)a

Patents
1 Patent Cooperation Treaty (39)a
2. International Patent Classification Agreement (27)a
3. Budapest Treaty on the International Recognition of the Deposit of Microorganisms For the Purposes of Patent Procedure (19)a

Trademarks
1 Madrid Agreement Concerning the International Registration of Marks (27)
2 Trademark Registration Treaty (5)
3. Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (33)a
4 The Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (5)

Copyrights
1 Berne Convention for the Protection of Literary and Artistic Works (76)
2 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (30)
3 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (39)a

Industrial Designs
1 The Hague Agreement Concerning the International Deposit of Industrial Designs (20)
2 Locarno Agreement Establishing an International Classification for Industrial Designs (15)

Origin of Goods
1 Madrid Agreement For the Repression of False or Deceptive Indications of Source on Goods (32)
2. Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration (16)

Satellite Transmissions
1. Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (11)a

Olympic Symbol
1. Nairobi Treaty on the Protection of the Olympic Symbol (32)

[a]Denotes U S adherence

Source World Intellectual Property Organization, November 1986

WIPO Legal-Technical Assistance Enhances Worldwide Protection

The WIPO Secretariat, through its expert advisory services and education and training efforts, aims to strengthen developing country intellectual property systems, thereby promoting their economic advancement. WIPO supports these programs with funding from its regular budget and with donations from the U.N. Development Program and from member countries, including the United States, that are used only with the donors' consent.

Some of these programs are undertaken by WIPO staff and others by experts from member countries under WIPO sponsorship. They are varied in nature, as shown in the following examples.

1. In April 1983, two WIPO officials and two consultants from the United States and Spain went to Argentina to help that government to, among other things, reduce a backlog of trademark applications.

2. In October 1984, WIPO, in conjunction with the U.N Development Program and a local bar association, organized an intellectual property colloquium in Sydney, Australia, for judges from a number of Asian countries.

3. In March 1985, two WIPO officials prepared a study regarding the Egyptian patent office as part of a U.N. Development Program modernization project.

4. In June 1986, WIPO with the cooperation of the governments of Kenya and Sweden organized a general introductory course on industrial property for the benefit of participants from 15 African countries.

WIPO pursues several objectives with these programs It aims to help developing country governments understand the importance of protecting intellectual property by pointing out that adequate laws promote foreign direct investment and inward transfer of technology as well as enhance domestic innovation. It seeks to assist these governments to prepare appropriate laws, regulations, and administrative mechanisms by (1) developing and distributing model laws and suggested guidelines for national practices, (2) consulting with individual countries, and (3) recommending adoption of measures and systems that are appropriate to their circumstances. WIPO also trains about 240 officials each year to manage and use protection systems by conducting training or arranging for member countries and other groups to do so. According to WIPO, over 70 developing countries have benefitted from such advice and training. These efforts have resulted in some significant accomplishments; for

example, WIPO has provided considerable assistance in the People's Republic of China's ongoing development of a Western-style intellectual property protection system. Among other efforts, WIPO organized 12 seminars during a 5-year period for Chinese patent and trademark officials in which some 4,000 individuals participated. The People's Republic became a member of WIPO in 1980 and a party to the Paris Convention in 1985.

Developing Countries Oppose Strengthening Protection in U.N. Forums

Attempts within WIPO to significantly strengthen general international standards in recent years have been unsuccessful due to developing country opposition. Indeed, the United States over the past decade has led industrialized country opposition to repeated attempts by the developing countries to weaken the existing standards. Lengthy negotiations have been held on modifying the Paris Convention and on developing a code of conduct on the transfer of technology within UNCTAD that would allow governments greater latitude to control the licensing of foreign technology to incountry corporations.

The U.S. government believes that existing multilateral intellectual property agreements, particularly the Paris Convention, need to be strengthened. These agreements often do not stipulate detailed protection practices for member countries; they only require adherents to grant national treatment to foreign concerns, with some minimum specified rights.[2] These agreements allow each country to maintain laws and administrative practices that vary considerably in strength and effectiveness. Executive branch studies (see ch. 3) show that many developing countries, although they adhere to the Paris and/or Berne agreements, maintain protection practices that the United States views as inadequate. Further, knowledgeable government officials agree that these agreements do not contain effective provisions for challenging countries that do not meet their obligations.

[2]For example, the Paris Convention stipulates an established "right of priority" for patents, trademarks, and industrial designs. That is, on the basis of a regular application filed in one of the contracting states, an applicant may apply for protection in any of the other contracting states within a specified time period with the assurance that the application will be regarded as having been filed at the same time as the original. This prevents interlopers from copying patents and trademarks applied for or issued in one country and claiming them as their own in another before the legitimate owner has time to file in his own right. It is particularly valuable for patents, because most countries' patent laws have novelty requirements providing that earlier publication of an invention anywhere in the world is a bar to patentability.

Renegotiation of the Paris Convention

The U.S. government, in negotiations initiated in 1974, has resisted developing country efforts to weaken the Paris Convention's required minimum protection standards, particularly for patents. After 5 years of preparatory meetings during 1975-79 and four sessions of a diplomatic conference on revision from 1980 to 1984, the participants have been unable to reach agreement. These negotiations have centered on a disagreement between the industrialized countries (known as Group B in the U.N. system of voting blocs) and the developing countries (known as the Group of 77 or G-77 countries) over amending the Convention's Article 5(A), which concerns the failure of foreign patent owners to "work" (i.e., use in manufacturing) patents incountry.

Under the Paris Convention, member governments may grant domestic companies "compulsory licenses" to exploit patents. That is, a government may require firms who are not "working" their patents incountry to license their patents to manufacturers to work locally for a royalty determined by the government. These domestic manufacturers can then produce and sell the products embodying the patents in competition with patent holders who are importing such products. The Convention confers this right in order to prevent "the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work." Member governments may also revoke patents in cases where compulsory licensing has been insufficient to correct patent "abuse."

The G-77 countries proposed amending the Paris Convention to confirm their authority to grant exclusive compulsory licenses. Such a revision would sanction effective removal of patents from their owners' control by developing country governments. It would condone their granting to domestic firms exclusive rights to patents within the country while prohibiting the original owners from using the patents incountry or importing competing goods. The G-77 countries also proposed amending the Convention to allow developing countries to require forfeiture of a patent without first granting a compulsory license and to allow shorter time periods before both compulsory licensing and forfeiture could be enacted. Leading G-77 countries stated that these changes were necessary to achieve a better balance of obligations in the Convention, which in their opinion presently protects only the rights of intellectual property producing states. They say that if the G-77 countries must respect the intellectual property rights held by Group B countries, then equivalent obligations should be imposed on Group B countries to enhance access to technology.

The United States has led Group B countries' opposition to these proposals, arguing that their adoption would substantially weaken accepted international standards for protecting patent rights, in effect legitimizing expropriation of private property. U.S. representatives also stated that revising the Paris Convention in this manner would be counterproductive to the developing countries' desire for accelerated transfer of technology. Rather than enhancing economic development, such changes would increase business hesitancy about transferring technology to countries ascribing to the practices permitted by the new language. In questioning the need for making these revisions, the United States pointed out that the G-77 countries could not identify a single situation where an exclusive license would have been warranted.

At the second session of the diplomatic conference, held in Nairobi during 1981, most of the participating countries reached an informal agreement that would have largely met the demands of the G-77 countries. Most of the Group B countries were willing to go along with the G-77 countries' proposals as a political accommodation. The United States, however, remained steadfastly opposed to any agreement condoning exclusive licensing and the session closed without officially adopting any new language. Between the Nairobi session and the one which followed in Geneva during the fall of 1982, U.S. negotiators clarified their position to the other leading members of the Group B and G-77 blocs They pointed out that any revision of the Convention undertaken without the participation of the United States could not be termed a success. Key Group B countries reaffirmed their support for achieving a compromise that the United States could support. At the Geneva session, both blocs committed themselves to seek agreement on new language through consensus of all parties. This session and the one which followed in 1984, however, did not achieve such a compromise. The Convention's governing body, the Paris Union, has been instructed to reconvene the diplomatic conference at such time as there appear to be "prospects for positive results." According to a knowledgeable U.S. government official, real progress is unlikely in the near future. Nonetheless, representatives of the major negotiating groups plan to meet under WIPO auspices to try to reactivate the negotiations during 1987.

Deliberations on a Code of Conduct for Technology Transfer

During this same period, the U.S. government has led opposition to similar G-77 countries' efforts in UNCTAD.[3] In 1975, these countries introduced for UNCTAD's consideration a proposed "code of conduct" regulating international technology transfer. This proposed code would have weakened protection for intellectual property rights by giving governments greater latitude to control the use of foreign technology licensed to incountry corporations. The G-77 countries were motivated by their belief that the revised standards would accelerate technology transfer and, consequently, economic development. In subsequent negotiations, the U.S. government successfully led Group B countries' opposition to this proposal and obtained substantial modifications to reflect their concerns. After six full negotiating sessions, compromise positions were reached on many aspects of a draft. However, continued disagreement on a few key issues has prevented actual adoption of a code.

The Group B and G-77 countries began negotiations with widely divergent positions on this matter. The G-77 bloc's original proposal would have barred corporations from engaging in some 40 specified practices and, as a result, would have limited licensor rights in technology transfer agreements. Several of the specified practices affected firms' ability to protect intellectual property rights. Among other things, the G-77 countries' proposal, which would have applied to parent-subsidiary relationships, would have prohibited restrictions on the use of technology after licensing agreements have expired. It also would have prohibited corporations from requiring licensees to "grant-back" to the licensor improvements derived from licensed technology, even when compensation was provided. Finally, the proposal stipulated that the law of the country receiving the technology would automatically apply whenever disputes arose between parties to an agreement, thus ensuring that cases would be tried under conditions most favorable to the licensee.

Led by the United States, the Group B countries submitted a counterproposal that eliminated about three quarters of the practices to be barred and changed the character of the proposed code to a set of voluntary guidelines to be applied only when the practices were deemed unduly restrictive. The Group B countries also proposed that the parties to a dispute be free to select the forum in which their case would be argued.

[3]UNCTAD's mission is to promote international trade with a view to accelerating economic growth in developing countries. To address this goal, UNCTAD works toward formulation and implementation of principles and policies on international trade and development, including negotiation of multilateral legal instruments.

U.S. representatives also countered the G-77 bloc's claims that the proposed code would accelerate economic development with the argument that its adoption would likely have the opposite effect. That is, by reducing the likelihood that a firm would be able to obtain a return on its investment, the proposed code would heighten potential investors' reluctance to transfer technology to developing countries, thus slowing development.

Despite the substantial degree of agreement obtained since 1975, a knowledgeable U.S. government official believes that successful resolution of the remaining differences between the Group B and G-77 negotiating positions is unlikely. Consultative sessions on the draft's language concerning business practices, applicable law, and dispute settlement are scheduled for May and September of 1987. These will not be full negotiating sessions but are intended to explore the prospects for further progress toward agreement.

Opportunities for Progress Through WIPO

The U.S. government can still make some progress through WIPO. In addition to supporting WIPO's legal-technical assistance efforts, the United States is (1) considering adhering to the Berne Convention, (2) participating in deliberations aimed at developing international standards for protecting integrated circuits (i.e., semiconductor chips), and (3) participating in deliberations aimed at developing a widely accepted international trademark registration system. U.S. adherence to Berne could assist government efforts to strengthen protection in developing countries whose practices are seen as presenting major problems for U.S. firms. The other efforts deal with more specialized matters and they are not seen as part of government attempts to strengthen protection in countries where there are major problems. Nonetheless, these efforts could improve U.S. firms' ability to obtain foreign protection.

U.S. Adherence to the Berne Convention

While there are many legal issues that need to be addressed, U.S. adherence to the Berne Convention could enhance foreign protection for American copyrighted materials. Specifically, U.S. government adherence to Berne would (1) make U.S. works automatically eligible for the relatively higher level of protection required under Berne, (2) enhance the standing of U.S. negotiators in multilateral deliberations on copyright protection, and (3) strengthen the position of U.S. negotiators in bilateral intellectual property consultations. In June 1986, the administration transmitted a request to the Senate to advise and consent on

adherence to the Berne Convention. As of February 1987, no action had been taken on this request.

Berne requires signatories to provide a higher level of protection for each others' works than does the Universal Copyright Convention (UCC), which the United States joined in 1955. The United States adhered to the UCC, which allowed retention of the American copyright system with little change, as a "stepping stone" toward adherence to Berne. The UCC requires only "adequate and effective" protection for "the basic rights ensuring the author's economic interests" and allows extensive exceptions provided that contracting states accord "a reasonable degree of effective protection" for each others' works. Berne, in contrast, explicitly requires protection of a specified list of authors' economic rights, plus "moral rights" (i.e., the right of authors to object to any distortion of their works considered prejudicial to their honor or reputation) with much less leeway for exceptions. Unlike the UCC, Berne also prohibits making copyright protection contingent upon compliance with any formalities; that is, conditions or administrative obligations that must be satisfied to obtain copyright protection. U.S. copyright holders have been able to obtain protection available through the Berne Convention by having their works simultaneously published in a Berne-member state, such as Canada, but U.S. adherence would eliminate the necessity for this device.

Membership in the Berne Convention would also improve U.S. ability to influence national protection practices in multilateral forums and bilateral consultations. It would allow full participation in the Berne Union, the primary international forum for deliberating copyright issues. The United States already has input into Berne Union activities because the UCC's Intergovernmental Committee and the Berne Union's Executive Committee hold joint meetings, establish common agenda, and appoint joint working groups on many issues. WIPO and U.S. government officials recall no instance of the United States being completely left out of deliberations on any major topic. Nevertheless, Berne membership would legitimize full U.S. participation, including a voice in controlling Berne expenditures. Adherence would also facilitate bilateral negotiations aimed at strengthening protection in problem countries (see ch. 3) and would regularize "unclear" or non-existent copyright relations with 21 of the 24 states that belong to Berne but not to the UCC.[4] Adherence also would obviate the need for U.S. negotiators to regularly contend with criticism from such countries as South Korea, Malaysia, and Singapore

[4]The United States has bilateral copyright agreements with the remaining three countries

that the United States is not serious about strengthening international copyright protection because it is not a member of Berne. These accusations divert attention from the real subject of the negotiations and place U.S. negotiators on the defensive.

The United States never adhered to the Berne Convention, which was originally concluded in 1886, because U.S. copyright practices differed in many key respects from the treaty's requirements. Much of this inconsistency was eliminated by the 1976 Copyright Act (17 U.S.C. 102 et seq.) but a number of differences remain. An ad-hoc working group of copyright experts assembled by the Authors League of America at State Department request found that certain features of the American copyright system were incompatible with Berne, at least to the extent that they apply to foreign works. Two of the more contentious areas of inconsistency between U.S. practices and Berne requirements involve compulsory licensing and formalities for obtaining copyright protection The ad hoc working group examined several U.S. compulsory licensing requirements and found most to be compatible with Berne, with the prominent exception of compulsory licensing of music for jukeboxes. This group also examined several U.S. copyright formalities. The Berne Convention specifies that copyright protection "shall not be subject to any formality." However, the United States makes the full exercise of copyright protection contingent upon compliance with several formalities, including mandatory notice of copyrighted status (e.g., placement of a "c" within a circle on the copyrighted work) and registration of protected works with the Copyright Office. One formality that had been considered a major obstacle to U.S. adherence—the "manufacturing clause," which required many printed materials to be manufactured in the United States or Canada to retain copyright protection—expired at the end of July 1986.

Deliberations on Protecting Semiconductor Chips

The U.S. government is participating in deliberations aimed at developing international standards for protecting semiconductor chips.[5] Since participation in new treaties is entirely voluntary, countries not wishing to abide by their terms need not join them. Consequently, the G-77 countries generally have not seen the need to block adoption of new treaties when they have not seen them as threatening to their interests or when the proposed agreements did not require changes in national practices. Several new WIPO treaties have been promulgated since 1970, including

[5]This is one of several efforts by WIPO to expand international standards to cover new forms of intellectual property, including biotechnology products

agreements regarding protection for phonograms and for satellite transmissions, both of which require certain actions to protect copyrighted materials.

The semiconductor chip deliberations, which have resulted in a draft treaty, grew out of WIPO's work on protection for computer software. Unlike software, for which copyright protection is becoming widespread, semiconductors do not fit within traditional copyright or patent parameters and no consensus on the appropriate form of protection has developed. Some governments have stated that semiconductor chips may be protected under existing copyright statutes. However, the United States and Japan, which account for about 80 percent of world production of semiconductor chips, have adopted "sui generis"[6] protection for chips. Since neither the copyright conventions nor the Paris Convention require mutual respect for rights established in this manner, there is no multilateral agreement guaranteeing that other countries will respect property rights awarded under sui generis laws or that countries with such laws will protect the works of other countries. While the U.S. Semiconductor Chip Protection Act of 1984 (17 U.S.C. 901 et seq.) contains language directed at assuring bilateral protection between the United States and its trading partners, a multilateral agreement would form a more stable, universal basis for such protection.

Although the draft treaty prepared by WIPO does not specify the exact form of protection to be given chips (e.g. copyright versus sui generis protection), it would require signatories to protect them for at least 10 years and lists minimum standards for this protection. The draft also prohibits reproducing a protected circuit, incorporating its design in another product, or importing unauthorized copies of protected chips for commercial purposes. The draft treaty also limits compulsory licensing and specifies that, at a minimum, adherents must address acts that violate the agreement by ordering firms to discontinue the proscribed practice and to pay damages or "reasonable" royalties.

Initially, it appeared that the commonality of interests among the relatively few countries capable of producing semiconductor chips would allow rapid conclusion of a treaty. At the request of the G-77 countries, however, the members agreed in November 1985 to postpone definitive action while a committee of experts considered the proposed treaty's effects on developing countries. WIPO plans to decide in September 1987

[6]"Sui Generis" literally means "of its own kind." It refers to a unique form of protection—neither patent nor copyright—created specifically for a particular purpose.

whether conditions merit convening a diplomatic conference on adoption of a treaty.

Deliberations on Multilateral Trademark Registration System

The United States is also participating in WIPO discussions aimed at establishing a widely acceptable multilateral trademark registration system. U.S. participation in such a system would facilitate obtaining widespread protection for American rights by making simultaneous application for registration in many countries cheaper and easier. The U.S. government has never adhered to either of WIPO's two existing trademark registration conventions—the Madrid Agreement Concerning the International Registration of Marks and the Trademark Registration Treaty—both of which provide for submission of a single application to WIPO which then distributes it for national action to designated member states. As a result, American trademark holders currently must register trademarks separately in each foreign country where legal protection is desired.

The United States has not adhered to the Madrid Agreement, negotiated in 1891, primarily because doing so would require changing the U.S. "common law" trademark system, which allocates rights based on first use,[7] to a system which allocates rights based on first registration. Further, this treaty specifies that an international application can be filed only after a valid national registration is granted. This provision places U.S. nationals at a disadvantage because, unlike most other countries which allow registration prior to use, the United States requires firms to demonstrate actual use of a trademark in commerce as a precondition for registration. Dependency on national registrations also gives rise to the possibility of "central attack;" that is, a successful challenge to a mark's validity in its home country within 5 years of an international registration means cancellation in all participating countries.

The Trademark Registration Treaty was developed during the early 1970s with a view to creating an international system that would permit the United States to participate while retaining its first use orientation. The Treaty retained the Madrid Agreement's basic procedure but made several concessions to the first use system. Most importantly, the agreement permits member countries to provide that no action for infringement can be brought by an international registrant until he has commenced actual use of a mark incountry and that no damages may be

[7]The Patent and Trademark Office registers trademarks, with certain attendant benefits However, U S trademark rights must be initially established through use under common law

recovered except for the period after such use has commenced. The Treaty also eliminated dependency on national registrations and the possibility of central attack. The United States signed but never ratified the Trademark Registration Treaty, largely because of divided opinion in the intellectual property law community and opposition from the Department of Justice. Among other things, opponents argued that the United States should not make major changes in its trademark practices simply to conform to a treaty.[8]

The inability of the Trademark Registration Treaty to attract broad membership, particularly that of the United States, and the prospect that successful negotiation of a common European Community trademark might vitiate the usefulness of the Madrid Agreement [9] prompted WIPO to initiate discussions for developing a third treaty. The Secretariat prepared a proposed treaty and presented it to an international committee of experts in early 1985. This proposal's primary difference from the existing systems would allow signatories to retain their existing requirements concerning use as a condition to obtaining and maintaining rights. This change would eliminate the main obstacle to U.S. membership. By the conclusion of the committee's second meeting in December 1985, the participants had not reached agreement on the content of a new treaty nor had they reached consensus that a treaty should even be concluded. Since the U.S. trademark community is similarly divided, the U.S. government has not assumed a leadership role in these negotiations, but the United States continues to participate. In November 1986, a revised draft of the treaty was presented to the committee, which recommended continuing work.

[8]A "Trademark Review Commission" sponsored by the U.S Trademark Association is examining U.S trademark law on the occasion of the 40th anniversary of the Trademark Act of 1946. Among other issues, this group is considering the desirability of adopting registration based on intended use

[9]Most activity under the Madrid agreement is generated by European Community member states

U.S. Government Focusing on GATT

The U.S. government has turned to GATT, the primary worldwide trade forum, to attempt to significantly strengthen worldwide protection of intellectual property rights.[10] In its April 1986 policy statement, the administration outlined two proposals for GATT action: (1) complete and implement an "anticounterfeiting" code aimed at eliminating market access for imported goods that counterfeit or infringe trademarks and (2) conclude an enforceable agreement against trade distorting practices arising from inadequate protection of intellectual property rights. The second proposal aims to add a greater element of obligation, including GATT dispute settlement provisions, to existing multilateral standards for national practices, such as those in the Paris and Berne Conventions, with some strengthening of key provisions. At the September 1986 GATT ministerial conference in Punta del Este, Uruguay, the conferees agreed to negotiations on intellectual property in the context of the new "Uruguay Round" of multilateral trade negotiations. The intellectual property negotiations will attempt to (1) finalize an anticounterfeiting code and (2) "clarify GATT provisions and elaborate . . . new rules and disciplines" to reduce distortions and impediments to international trade.

Origin of GATT Activity on Intellectual Property Rights

The United States initiated discussions within GATT regarding intellectual property protection at the end of the Tokyo Round of multilateral trade negotiations (1973-79). These discussions focused on a proposed code to discourage trade in counterfeit trademarked goods. The United States, with input from other industrialized countries, prepared a draft of such a code during the latter stages of this round but the draft was never officially submitted for GATT consideration. U.S. policymakers believed that existing arrangements had proven inadequate to effectively control international piracy and that stronger measures could be adopted more easily in GATT than in WIPO.

Existing international agreements authorize but do not require interdiction of counterfeit trademarked imports at national borders. Article 9 of

[10]The U S government is concurrently participating in deliberations on customs services' anticounterfeiting efforts in the Customs Cooperation Council The Council, a 96 member intergovernmental organization dedicated to facilitating international trade through harmonizing customs practices, decided in May 1984 to place a high priority on combating intellectual property piracy The Council published a study on customs services' roles in implementing intellectual property law in October 1984. Based on this study, which found widespread variation in national practices, the Council decided to work on model legislation to provide international standards for customs operations The Council could provide the specific guidelines needed for a GATT anticounterfeiting code There is precedent for such cooperation, as the Council provides technical advice to GATT's Customs Valuation Code Committee, which oversees operation of the code

the Paris Convention provides that counterfeit goods bearing trademarks legally protected in the receiving country must either be seized on importation or, alternatively, prohibited from entry or seized inside the country. However, the article subsequently specifies that if domestic law does not permit these actions, they shall be replaced by those available to the country's nationals under domestic law. Article XX of the GATT provides that, subject to certain conditions, contracting parties may take measures that might otherwise be deemed inconsistent with GATT to secure compliance with laws protecting patents, trademarks, and copyrights.

Consequently, as shown in a study by the Customs Cooperation Council (see footnote 10), national practices vary considerably. Some countries' customs services, including the U.S. Customs Service, will intercept suspicious shipments, rule on their legitimacy, and exclude counterfeit goods from the country or dispose of them. Others will detain shipments for a time while injured parties seek court orders for their final disposition. In some countries, however, intellectual property offenses are not part of the customs services' responsibility and parties injured by counterfeit imports must rely exclusively on remedies created for use against domestic pirates, such as the courts These remedies may be ineffective against foreign concerns; U.S. court orders cannot be directly enforced in foreign countries and action against the importing party is often ineffective, largely because exporters may ultimately find new distributors. An alternative approach is court action in the exporter's home country, but such action can be problematic. The injured party may have no legal rights in that country and procedures may be expensive and ineffectual.

Greater progress may be attainable in GATT than in WIPO for two reasons. First, GATT has a more fluid mechanism for adopting new measures; the members of GATT have not formed voting blocs, largely because of their varying economic interests in the many aspects of trade subject to GATT negotiation. Most GATT non-tariff barrier obligations are embodied in "codes" to which adherence is optional.[11] The wide-ranging bargaining that takes place during GATT rounds offers a better chance for obtaining general approval of and maximum participation in any code. We understand from knowledgeable government officials that individual countries in many cases do not wish to be perceived as preventing conclusion of new codes Second, GATT dispute settlement procedures, while viewed

[11]Amendment of the General Agreement itself, which is binding on all contracting parties, is not generally attempted because of the extreme difficulty of negotiating universally acceptable language. However, according to the Commerce Department, GATT members will consider amending certain aspects of the General Agreement during the Uruguay Round.

as needing considerable improvement, are generally considered better than those in WIPO conventions, which involve bringing disputes before the International Court of Justice.[12]

Long-Term Impact of GATT Action Depends Upon Membership and Content

GATT initiatives will have no immediate impact because any new codes are unlikely to come into effect before the early 1990s, when the Uruguay Round will most likely conclude. The last two rounds have taken an average of about 5 years to complete. Although the Uruguay Round Ministerial Declaration provides for provisional implementation of codes in case of early agreement, the countries involved are likely to follow the Tokyo Round's precedent of waiting for the round's conclusion before bringing any new codes into effect. In the long term, however, GATT initiatives may have significant beneficial effects. Any substantive GATT action would more firmly establish inadequate protection of intellectual property rights as an unfair trade practice, thus heightening the attention accorded this issue. Whether specific proposed codes will effectively reduce pirate activity depends largely on their eventual membership and content.

Mindful of the difficulties involved, U.S. government officials are optimistic that code(s) strengthening protection of intellectual property rights can be concluded. Significant support exists among industrialized countries for GATT action on intellectual property matters in the upcoming round. However, U.S. negotiators will need to generate support among developing countries, which to date have not shown much interest in deliberations on intellectual property protection. Since developing countries serve as major sources and markets for pirated goods, their participation is important to ensure the effectiveness of any GATT action. Key developing countries have expressed little interest for several reasons. They have their own agenda for GATT consideration, which most prominently involves increased access to industrial country markets, and fear that industrialized countries may use an anticounterfeiting code as a barrier to developing-country exports.[13] They also argue that, while GATT may be competent to consider the trade aspects of piracy, WIPO is a more appropriate forum for debate on any intellectual property issue. Therefore, they contend, any action to impede piratical trade should concentrate on improving national action

[12]Improvement of GATT's dispute settlement procedures is also on the agenda for the Uruguay Round.

[13]U.S. officials respond that adequate safeguards can be inserted in any instrument to forestall this eventuality

under the Paris Convention's Article 9 and other WIPO provisions.[14] Indeed, the G-77 countries have already taken steps in WIPO to consider action on counterfeit trade.[15]

U.S. negotiators will also need to ensure that the codes contain concrete requirements that would strengthen the protection available to foreign firms. The draft anticounterfeiting code proposed during the latter stages of the Tokyo Round would have obliged participants only to provide trademark owners with "the judicial or administrative means necessary to initiate procedures to protect their rights against imported counterfeit goods before they are released from the jurisdiction of the customs authorities." However, signatories would have had considerable leeway to decide what "means" would fulfill this obligation.

Conclusions

Due to opposition from developing countries, broadly effective gains in protecting intellectual property rights through WIPO do not appear attainable at this time. Indeed, the United States has spent the past decade opposing G-77 countries' initiatives in WIPO and UNCTAD to weaken general international protection standards. The U.S. government can still make some progress in strengthening worldwide protection through WIPO; it supports WIPO legal-technical assistance to strengthen national protection systems among G-77 countries, is considering U.S. adherence to the Berne Convention, and is pursuing available opportunities within WIPO for concluding new agreements in specialized areas. Hoping to make greater progress, the United States has also initiated discussions within GATT on proposals to strengthen protection of intellectual property rights. GATT initiatives will have no immediate impact because of the time needed to negotiate them. The extent to which new

[14]Knowledgeable officials also point out that, through bloc voting, the G-77 countries can more easily control deliberations in WIPO than in GATT and block substantive action. The history of the G-77 countries' position on revising the Paris Convention does not support the proposition that they would support strengthening Article 9. A more realistic expectation is that negotiations in WIPO will result in the promulgation of model laws for national action against piracy.

[15]In September 1985, the WIPO membership instructed the Director General to

"convene an intergovernmental group of experts to examine . . the relevant provisions of the Paris Convention in order to determine to what extent such provisions can adequately provide for the efficient protection of industrial property and to recommend appropriate provisions to be incorporated in national legislations of industrial property in order to strengthen the protection of industrial property titles "

A group of experts subsequently met to consider proposals on these matters Their next meeting is scheduled for May 1987

GATT codes reduce piratical trade in the long run depends to a large extent on their eventual membership and content.

Agency Comments and Our Evaluation

In its comments on a draft of this report, WIPO stated that the report provided a "very full account of [its] work." However, WIPO characterized its progress toward strengthening intellectual property protection as "significant" rather than limited and viewed future prospects for attaining progress within WIPO as more promising than we described them. Although we agree that WIPO has accomplished a great deal since it was established, we believe that recent progress has been limited and that the United States has been unable to attain broad improvements in international intellectual property protection standards through WIPO.

In commenting on the likely results of the GATT negotiations, the State Department noted that "membership in a GATT code is voluntary and although countries may not wish to prevent conclusion of new codes, that does not mean they will join." It added that "Greater membership is likely for a code related to counterfeiting, which is widely seen as a subject within GATT competence, for example, than to a general code on patent protection." State further commented that "Beyond the value of the code or codes that may result from the GATT negotiations on intellectual property, . . . p]rogress in the GATT could exert pressure on WIPO and the member countries of its numerous unions also to make progress toward improved intellectual property protection."

Greater Progress Attained Through Intensive Bilateral Consultations

The U.S. government has attained positive results in strengthening foreign protection of intellectual property rights by addressing this problem at the source through bilateral consultations[1] with "problem" countries. The administration has identified and examined practices of countries that provide inadequate protection, selected countries and particular practices for priority attention, and undertaken consultations to address practices most damaging to U.S. interests. Consultations, which sometimes involve offers of training for foreign officials and/or the threat or use of unilateral trade action against recalcitrant countries, enable U.S. negotiators to bypass the G-77 countries' collective resistance to stronger standards in multilateral forums. Positive results have been attained through these efforts but significant problems remain in many countries and consultations to resolve them are continuing.

Understanding the Problem and Assigning Priorities

The U.S. government has assembled the information needed to (1) become familiar with foreign intellectual property protection practices that adversely affect U.S. business and (2) select countries and particular practices for priority attention. Officials in USTR, the Commerce and State Departments, and the Copyright Office maintain contact with the business community. Through these contacts, which provide the basis for interagency understanding of industry problems, and other sources of information, the executive branch has completed two extensive reviews of foreign government intellectual property protection policies and practices.[2]

Efforts to Gather Information

In 1984, Commerce's International Trade Administration, working in conjunction with the Patent and Trademark Office, produced the first of a series of unpublished papers on intellectual property practices in 10 countries identified as causing the greatest problems for U.S. firms.[3] Much of the information in the papers on South Korea, Taiwan, and Singapore was obtained from individual business complaints submitted in preparation for consultations in 1983 and early 1984. To obtain similar

[1]As used in this report, consultations differ from negotiations Negotiations result in a settlement in which the United States as well as the other parties agree to take some action Through consultations, in contrast, the U S government encourages and assists the foreign government to take some action which is in both countries' interests

[2]To ensure continuing private sector cooperation, the administration is assembling an Industry Functional Advisory Committee on intellectual property The President's Advisory Committee on Trade Negotiations has also assembled a Task Force on Intellectual Property.

[3]Brazil, India, Indonesia, South Korea, Malaysia, Mexico, Philippines, Singapore, Taiwan, and Thailand.

information on the remaining countries, Commerce officials, among other things, consulted with the approximately 500 participants in Commerce's Industry Sector Advisory Committee system and sponsored a meeting on industry problems in May 1985 involving more than 60 business and government officials. Also, in October 1984 the Secretary of Commerce directed Foreign Commercial Service officers located in countries whose inadequate intellectual property practices create problems for U.S. business to submit updated information on the nature and effects of these practices.[4] In October 1985, USTR released the first Annual Report on National Trade Estimates required by section 303 of the Trade and Tariff Act of 1984. This report identifies and analyzes a broad range of foreign practices which constitute barriers to or distortions of U.S. trade, including inadequate intellectual property protection. The report identified problems with the intellectual property practices of 17 of the 34 countries discussed, including the 10 reviewed by Commerce. The TPSC Subcommittee on Intellectual Property (the interagency subcommittee chaired by USTR which prepared the intellectual property segments of the report) used the information collected by Commerce and reviewed a large volume of new material gathered from the business community.

The information collected for the National Trade Estimates report, as well as information from other sources, was also used in a general review of duty-free imports under the Generalized System of Preferences. GSP allows developing countries to export designated products to the United States duty free to further their economic development. The Trade Act of 1974, which initiated this program, predicated participation on, among other things, the adequacy of beneficiary country practices in several areas. The 1984 Trade Act added intellectual property practices to this list and required the executive branch to conduct a "general review of eligible articles" to re-evaluate each country's participation in the program. The 1984 Act stipulated that, in conducting this review, USTR must take into consideration beneficiary countries' competitiveness with regard to eligible articles, including their intellectual property protection practices.

Use of Information to Assign Priorities

With limited resources, the U.S. government has found it necessary to select some countries and particular practices for priority attention. Two primary principles have guided this allocation of priorities. First,

[4]Commerce officials stated that the regular submission of updated information on intellectual property problems abroad will be continued in the future

the adverse effects of piratical trade can best be addressed by controlling piracy at the source; that is, diplomatic initiatives should be directed more toward reducing production of piratical goods in their countries of origin than toward reducing pirates' access to foreign markets. Second, attention should be concentrated on the worst offenders; that is, those countries whose piratical production has the greatest adverse impact on U.S. firms. Not all observers can agree on which countries present the greatest problems. Many countries engage in a small number of practices which, while important to one or two affected industries, would not be cited by others as major problems. One additional factor the government considers is the opportunity for creating regional "role models." USTR officials commented that they will attempt to influence the protection practices of several countries in a region by obtaining improved practices in one of them. This strategy's effectiveness depends to a great extent on the country with better protection attracting a markedly higher rate of foreign direct investment. Such investment can be used to persuade nearby states to strengthen their own practices.

Application of these principles has resulted in concentration on about 15 countries, including the 10 featured in Commerce's study, and on specific practices within them. The government has devoted the greatest attention to those countries that have produced piratical copies of U.S. goods in large quantities. The most prominent examples, which include South Korea, Taiwan, and Singapore, have produced and exported large volumes of piratical reproductions of a wide range of U.S. products to markets throughout the world. Wholly inadequate protection practices in several areas allowed companies in these countries to inflict wide ranging damage upon U.S. industry. In the Western Hemisphere, the U.S. government has placed the greatest emphasis on Brazil and Mexico. Within each country, the U.S. government has targeted specific practices for particular attention. Some of these problems, such as inadequate protection for pharmaceuticals and other chemical products, are common to several countries.

The U.S. government has also encouraged several other developing countries, such as Malaysia, Thailand, and Indonesia, to adopt adequate protection before their rapidly advancing economies spawn pirate industries of a magnitude equivalent to those in, for example, South Korea or Taiwan. This effort is grounded in the hypothesis that, as one set of economies advances to a point where the economic importance of legitimate businesses based on intellectual property causes the government to

strengthen protection, they will be replaced by another group of countries prepared to take advantage of the easy profits to be made through piracy. Adoption of better protection by rapidly advancing economies is therefore likely to minimize future harm to U.S. interests.

Strategies for Obtaining Change

The U.S. government has pursued consultations with, among others, Taiwan, South Korea, Singapore, Malaysia, Indonesia, Mexico, and Brazil. Discussions have been held at both the staff and policy levels of government. Among other actions, President Reagan and other top administration officials have raised this issue in meetings with the prime ministers of Indonesia and Singapore. Persuasion has been the primary means used by the United States to improve foreign intellectual property protection practices. In these consultations, U.S. government officials have stressed to their foreign counterparts that improved intellectual property protection can encourage economic development. These efforts have sometimes been supported by education and training for foreign officials. When persuasion has proven ineffective, the United States has threatened and in some cases taken adverse unilateral trade actions.

Persuasion

U.S. officials pursue several avenues for strengthening foreign intellectual property protection practices. The U.S. government places primary emphasis on encouraging foreign governments to strengthen their intellectual property protection laws and enforcement mechanisms, including extending protection to foreign works. U.S. officials have attempted to formulate realistic objectives, taking into account economic and political conditions in the individual countries, and to use approaches that are appropriate to each country's situation. They aim to obtain good faith progress toward correcting particular practices that damage American interests. Better protection is also sought by persuading these countries to adhere to the extant multilateral intellectual property conventions and, for certain countries that already adhere, by convincing them to live up to their commitments, at least to the extent of providing national treatment to foreign nationals. In certain circumstances, U.S. officials also seek bilateral agreements insuring mutual protection of intellectual property rights.

In encouraging foreign governments to strengthen their protection practices, U.S. representatives emphasize the positive consequences of such actions for economic development. They stress that permitting piracy to continue discourages the development of domestic creative industries.

Legitimate businesses cannot compete with pirates, who enjoy lesser costs and exploit markets already established by others; they may find that their own products, as well as those from abroad, are subject to piratical copying. For example, the mass availability of pirated American and European music at bargain prices in some Southeast Asian and African markets has severely damaged local music businesses. U.S. negotiators point out that adequate protection, on the other hand, stimulates creativity and entrepreneurship and helps to encourage legitimate domestic producers. For example, protecting chemical products, rather than limiting protection to the processes used to make them, encourages domestic companies to devote their energies to developing their own products instead of "inventing around" patented processes. Adequate protection practices also help to create the investment climate necessary to attract and/or maintain foreign direct investment and the attendant technology transfers that developing countries need.

Clarifying the stake that developing countries have in encouraging legitimate creative industries can be particularly effective when such industries have already begun to develop or when government planners envision them as an important part of the country's economic future. In such circumstances, U.S. persuasion can accelerate adoption of policies that favor legitimate intellectual property holders. For example, Taiwan's recent adoption of improved laws is evidence of a shift in public policy from viewing intellectual property rights as benefitting only foreigners to understanding their role in promoting development of local industries, particularly in such high-technology fields as software development. Another good example is Malaysia, which is concerned about intellectual property infringement and, according to information provided by Commerce, is taking steps to correct the problem. The Malaysia government passed a new patent law in 1983 and adopted implementing regulations in August 1986. It has also been working on a new copyright law and has been responsive to U.S. government suggestions for improvements in the draft. The proposed law would provide stiffer penalties, protect computer software, and allow establishment of bilateral copyright relations with other countries. Upon passage of the new law, expected in Spring 1987, the United States and Malaysia expect to establish bilateral copyright relations, thereby protecting existing and new U.S. works. The United States has provided assistance in the form of training and patent documentation to help Malaysia develop these new laws and regulations. The Malaysia government also is considering membership in an international copyright convention.

Despite U.S. government efforts, some countries remain difficult to convince. Indonesia, for example, has been much less responsive to U.S. initiatives than neighboring Malaysia and Singapore. According to knowledgeable U.S. government officials, Indonesian protection for foreign intellectual property is minimal and enforcement of existing laws is inadequate. In past consultations, Indonesia government officials expressed reluctance to strengthen protection. In commenting on a draft of this report, however, the Commerce Department noted that recent developments are cause for some optimism According to Commerce, Indonesia's president named a commission to examine intellectual property questions following President Reagan's visit in May 1986. Revisions to the copyright law are under consideration and a draft patent law may be introduced in the Indonesian Parliament during 1987 To date, however, no substantive changes have been made.

Education and Training

In conjunction with consultations, the U.S. government provides a limited amount of training and education to foreign government officials to give them information and expertise for preparing and implementing adequate and effective laws, regulations, and administrative mechanisms. Some education programs have been held in foreign countries. For example, the Commerce Department, in conjunction with the Copyright Office, conducted seminars on copyright protection in Malaysia, Thailand, and Indonesia during early 1985. A second seminar was held in Indonesia in February 1986. According to government officials, these programs were intended to increase awareness of the advantages of copyright protection and, ultimately, to create an incountry constituency for stronger copyright protection. The United States has also provided practical assistance in organizing and/or improving national patent systems in, among other countries, South Korea, the People's Republic of China, Argentina, and Mexico.

The government also conducts a small training effort for foreign officials in the United States. During the last few years, the Patent and Trademark Office has averaged about 9 trainees per year and the Copyright Office about 3 per year. The U.S. government bears the cost of providing the instruction; i.e., Patent and Trademark Office and Copyright Office personnel conduct most of the training. However, WIPO supplies much of the trainees' transportation and living expenses, in some

cases using funds contributed for such purposes by the United States.[5] The trainees' home countries occasionally provide some support.[6]

Although the government has considerably increased the priority placed on strengthening worldwide protection for intellectual property rights, financial support for training has remained minimal. Neither the Patent and Trademark Office nor the Copyright Office budgets have funds dedicated specifically to this purpose. They rely on the availability of support from outside sources, particularly WIPO, to shape their training programs in any given year. Both agencies have handled training for foreign nationals on an ad hoc basis, with considerable variation in the duration and content of the instruction. In 1984, however, the Patent and Trademark Office instituted a periodic month-long training program with a set format. One session was held during each of the two fiscal years 1985 and 1986, with 14 and 7 trainees, respectively. Seventeen trainees participated in an additional session during October/November 1986.

Unilateral Trade Action

If persuasion proves ineffective, as may be the case when government responsiveness is limited by politically powerful domestic pirate industries, the U.S. government has the ability to threaten or impose adverse trade actions. Both Congress and the executive branch have taken action to make continued economic benefits granted to particular countries contingent upon their maintaining adequate protection practices. Foremost among these benefits is continued access to the U.S. market. Since the United States is a primary export market for many problem countries, restricting market access can be an effective bargaining tool for obtaining better protection. The U.S. government has made use of this authority to help convince some countries to make improvements in their intellectual property practices and has taken retaliatory action against some that have failed to make adequate progress.

The Trade and Tariff Act of 1984 strengthened and clarified executive branch authority to address piracy in countries unwilling to strengthen protection of intellectual property rights. The 1984 Trade Act amends

[5]During fiscal years 1980 to 1986, the U.S. government directly contributed $360,000 to WIPO's training fund. These direct contributions represented about 3.7 percent of the funds available for training during 1984 and 1985. However, the actual U.S. contribution was more than 20 percent of the total when funds it provided indirectly through the U.N. Development Program are included.

[6]Support for trainees has also been provided at times by, among others, the U.N. Education, Scientific and Cultural Organization, the U.N. Development Program, the U.S. Agency for International Development, U.S. corporations, and institutions of higher education.

title I of the Trade Act of 1974 to establish the pursuit of adequate foreign intellectual property protection practices as one of several major objectives in trade negotiations. It also strengthens section 301 of the Trade Act of 1974 as a tool for improving foreign government protection of intellectual property rights. Section 301, as amended, gives the President broad powers to take such action as he considers "appropriate and feasible" (i.e., suspension of trade agreements, imposition of duties, and other import restrictions) to enforce American rights under any trade agreement or to respond to any practice of another country that is "unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce." With particular reference to high technology products, it identifies as one objective of section 301 the "elimination or reduction of, or compensation for . . . measures which fail to provide adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property (including trademarks, patents and copyrights) . . ." Another major objective is to ensure that foreign countries "provide effective minimum safeguards for the acquisition and enforcement of intellectual property rights and the property value of proprietary data." The 1984 Act clarifies and emphasizes Presidential authority to take action against inadequate foreign intellectual property practices by specifically including intellectual property practices within the universe of "unjustifiable" or "unreasonable" trade practices. The amended law also gives USTR the authority to self-initiate investigations of foreign practices under section 301.

The executive branch has taken one action under section 301 dealing primarily with intellectual property concerns.[7] In October 1985, USTR initiated an investigation into the adequacy of South Korea's intellectual property laws, with specific reference to that country's limited patent protection, particularly for chemicals and pharmaceuticals, and to its nearly non-existent copyright protection for U.S. works. The U.S. government instituted this case because of South Korea's failure to make promised improvements in its practices in these areas. The action was recently settled through bilateral consultations.

The 1984 Trade Act also amended title V of the Trade Act of 1974, which governs operation of the GSP program, to add the objective of encouraging developing countries "to provide effective means under which foreign nationals may secure, exercise, and enforce exclusive

[7]A second section 301 investigation, concerning Brazil's "informatics" policies, addresses that country's copyright protection practices as a subsidiary concern

intellectual property rights." The trade act, as amended, provides mandatory and discretionary criteria to be used in making decisions about eligible countries' participation in the program. Section 503 amends section 502(b) of the 1974 Act, which lists mandatory standards that must be met to receive program benefits. Among other things, countries are prohibited from participating in the program if they have expropriated U.S. property without appropriate compensation. The 1984 Act confirmed that this prohibition includes expropriation of U.S. patents, trademarks, and copyrights. Section 503 also amends section 502(c) of the 1974 act, which lists "discretionary" criteria that the President must "take into account" when making decisions about beneficiary country participation. The 1984 amendments added to this list

> "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 amending legislation gives the President mechanisms to encourage eligible countries to strengthen their protection of intellectual property rights.

The President was required to complete by January 1987 (and periodically thereafter) a "general review"[8] of eligible articles based on the criteria in amended sections 502(c) or 501 (which provide general guidelines for making decisions on participation in the program).[9] The purpose of this review was to examine each individual import from each individual beneficiary country to determine whether lower "competitive need limitations"[10] should be applied. The 1984 Trade Act directs the President to cut the competitive need limitation in half (i.e., from 50 to 25 percent of total U.S. imports) if countries exhibit "a sufficient degree of competitiveness" relative to other beneficiary countries. Alternatively, under amended section 504(c)(3), the President may waive the competitive need limitation for particular articles from particular countries beginning in 1987 if he decides that such action is in the national

[8]This study is in addition to USTR's annual reviews of GSP participation, no annual review was conducted for 1985 so that resources could be devoted to the general review

[9]These include, among other things, the effects of participation in the program on the countries' economic development and the extent of their competitiveness with regard to eligible articles.

[10]Competitive need limitations are a statutory feature limiting the level of GSP benefits that beneficiary countries can enjoy per product. If a country's exports of an article exceed in a given calendar year either a certain dollar level or 50 percent of total U S imports of that article, it loses eligibility for that article the following July 1

interest. In making these decisions, the President is required to give "great weight" to intellectual property considerations.

According to information provided by USTR, bilateral consultations conducted pursuant to the general review were useful in obtaining progress in beneficiaries' ability to meet certain GSP eligibility criteria, including intellectual property protection. USTR cited improved intellectual property rights protection in, among other countries, Taiwan, Singapore, South Korea, and Malaysia. In recognition of this progress, as well as other mitigating factors, the U.S. government moderated reductions in GSP benefits for, among other countries, Taiwan and South Korea. On the other hand, recalcitrance in this area was an important consideration in making major cuts in the benefits accorded other countries, including Brazil and Mexico.

USTR is also applying the criteria in amended sections 502(c) and 501, and 502(b) (mandatory criteria) in its current annual review of the GSP program to be completed in April 1987. As part of the annual review process, U.S. businesses and foreign governments can petition the U.S. government for changes in the beneficiary status of certain products or countries. Among the petitions received in the context of the 1986 review was a request from the International Intellectual Property Alliance to withdraw beneficiary status from Indonesia because of continuing piracy problems in that country.

The President is required to report to Congress by January 1988 on the application of amended sections 502(c) and 501. This report must contain information on actions taken to withdraw, suspend, or limit duty-free treatment for any country failing to adequately take the actions described in amended section 502(c).

The Caribbean Basin Economic Recovery Act (19 U.S.C. 2701) also predicates access to benefits upon potential beneficiaries providing adequate protection to U.S. intellectual property rights. This Act implements the administration's Caribbean Basin Initiative, providing benefits, mainly duty-free access to the U.S. market, to enhance the economic development of certain Caribbean countries. Similar to GSP, the statute requires that before a country can be deemed eligible for benefits, it must meet certain mandatory and discretionary criteria, some of which involve protection of intellectual property rights. The Act requires the President to deny beneficiary status to any country that, among other things, "has taken steps to repudiate or nullify . . . any patent, trademark, or other intellectual property of a U.S. citizen." Before doing so, the Act requires

the President to determine that the foreign government action has the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned. Countries may be awarded beneficiary status despite contravention of this criterion if the President decides that such action is in the national interest. The discretionary criteria include "the extent to which [the] country provides under its laws adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property . . ."

While it is still too early to gauge the ultimate effectiveness of these measures in encouraging foreign governments to strengthen intellectual property protection, the existence of these tools has helped the U.S. government to obtain improvements in foreign countries' protection practices. The government has notified "problem" countries of the substance of the 1984 Trade Act and warned that continued unacceptable practices could result in adverse trade actions. The government thus far has initiated the one section 301 investigation dealing primarily with intellectual property practices against South Korea, which resulted in improvements in that country's practices. The United States also made progress through negotiations under the recent GSP general review and will continue to consider intellectual property practices in subsequent examinations of the GSP program, including the annual reviews. The administration has not placed great emphasis on the intellectual property provisions of the Caribbean Basin Economic Recovery Act, in part because that program's beneficiaries are not considered to pose major problems.

Accomplishments

Through bilateral consultations, the United States has attained positive results with some problem countries. U.S. representatives acknowledge that, in dealing with sovereign governments, they cannot expect immediate improvement. Foreign governments will alter their practices only when they are convinced that doing so is in their own best interests, if only to avoid retaliation. The following discussions briefly describe U.S. government efforts in Taiwan, Singapore, and South Korea. These three countries have generally been regarded as among the worst offenders and the highest level of effort to date has consequently been invested in obtaining improvement in their practices. Bilateral discussions continue with several other countries.

Taiwan

In March 1983, the U.S. government initiated consultations on intellectual property protection with Taiwan's Coordination Council for North

American Affairs through the American Institute in Taiwan.[11] Among the issues raised were the (1) inadequacy of process patent protection for chemical compounds, (2) lack of effective protection against infringement of U.S. copyrighted materials, and (3) lack of an unfair competition law, which makes it impossible to prosecute many piratical acts, such as theft of trade names, that cannot strictly be defined as patent or trademark infringement. The discussions also concerned U.S. firms' difficulties in enforcing their rights under Taiwan law.

These consultations helped to advance Taiwan's understanding that it should act to control piratical activity. Taiwan seemed particularly anxious to counteract the damage to its reputation created by pirate activity. Before the arrival of the first U.S. mission, Taiwan passed a revised trademark law which, among other things, provided that affixing a counterfeit trademark to exported goods constitutes infringement and increased penalties for infringers. Presentations of American concern and reminders of the Trade Act's provisions for retaliation against those that do not adequately protect U.S. intellectual property helped to convince Taiwan to take other actions more swiftly.

In July 1985, Taiwan amended its copyright law to strengthen penalties for piracy, provide criteria for recognizing foreign firms' standing before the Taiwanese judiciary in copyright cases, and extend protection specifically to new media, including software. Taiwan enacted a new patent law in December 1986 extending protection to chemical and pharmaceutical products. Taiwan has also made some efforts to educate the judiciary on the importance of stronger protection, to elevate the priority placed by the police on enforcing relevant laws, and to educate business and the general public on the harmful effects of piracy.

U.S. representatives continue to press for improvement in Taiwan's practices. In working group sessions during October 1985, for example, they commented on the implementing regulations for the revised copyright act and obtained assurances of Taiwan's intention to adopt an unfair competition law. U.S. representatives also continue to advance the need to improve enforcement procedures, including more cooperative attitudes on the part of the police and the judiciary, and improved judicial procedures (e.g , adequate means of discovery).

[11]The American Institute in Taiwan represents U S interests in Taiwan while the Coordination Council for North American Affairs represents Taiwan's interests in the United States

Singapore

Since 1984, when a U.S. government-industry delegation visited Singapore, the United States has actively sought improvement in Singapore's protection of intellectual property rights, particularly copyrights. Singapore has been commonly known as the tape piracy capital of the world, with estimated annual production of unauthorized records and tapes ranging as high as 70 million units, predominantly for export. Civil and criminal penalties were inadequate to deter infringement, enforcement practices were poor and protection was extended to foreign works only if they were first published in certain British Commonwealth countries. Even this limited extension of eligibility to foreign works was determined by judicial decision only in February 1985. However, the Singapore parliament passed an improved copyright law in February 1987 and is working toward its implementation. In connection with the GSP General Review, the U.S. government received Singapore's assurance that existing and new U.S. works will be protected through a bilateral agreement or Singapore's membership in the Universal Copyright Convention shortly after the new law comes into effect.

Among other actions, a U.S. interagency delegation visited Singapore in August 1985 to review a draft copyright law. The delegation told the Singapore government that the law, based on the Australian copyright protection system, was a significant step forward but made several suggestions for improvements, including stronger penalties, longer term of protection, and explicit protection for foreign works. According to Commerce officials, the Singapore government received these suggestions favorably but moved slowly toward final approval of a new copyright law because of opposition from domestic pirates and consumers who benefit from low pirate prices. Legitimate domestic producers, however, added their voices to foreign objections to piracy, assuring final approval of strengthened legal protection for copyrights. Although piratical reproduction of foreign intellectual property has become "big business" in Singapore, the government is committed to restructuring the national economy to emphasize high-technology industries, such as computer software. Inadequate intellectual property protection is detrimental to advancement in this area.

South Korea

After more than 2-1/2 years of consultations, the U.S. government in October 1985 instituted a section 301 investigation against South Korea because of its failure to substantially improve its protection of intellectual property rights. The government terminated this investigation in July 1986 without taking any adverse actions when the South Korean government agreed to improve its protection practices.

The U.S. government initiated bilateral discussions in March 1983 when a U.S. interagency delegation visited South Korea to express concern over inadequacies in South Korean patent, trademark, and unfair competition practices. Chief among them was the U.S. chemical companies' concern that process patent protection, the only type of patent protection extended to chemicals in South Korea, was easily circumvented and therefore inadequate. The South Koreans responded that they hoped to introduce legislation to extend product protection for chemical compounds by 1988, but consultations broke down when U.S. representatives were informed that such action could not be expected until the early 1990s.

Discussion of U.S. concern over inadequate copyright protection was postponed until November 1984 to allow completion of a new draft copyright act. At that time, U.S. officials raised numerous concerns about South Korean copyright practices, including lack of (1) protection for foreign works not first published in South Korea and (2) explicit protection for computer programs. U.S. officials noted that the draft law did not adequately resolve these problems or meet the minimum standards of international copyright conventions. The South Korean government withdrew the draft law from consideration at the time because it did not have enough support to pass the South Korean legislature, but it informed U.S. representatives in July 1985 that the government would introduce later in that year a new copyright law that would address U.S. concerns.

Consultations up to this point did have some positive results, particularly for trademarks. Under South Korean law a trademark owner must use its mark incountry to retain its rights to the mark. However, various import restrictions often prevented U.S. firms from marketing their products in South Korea. Under new guidelines established in 1984, the South Korean government cannot cancel a trademark for non-use if the firm did not use the trademark incountry because of an import ban or restriction.

Having met with little success using persuasion, the U.S government threatened unilateral action. South Korea's repeated postponement of patent law revisions, the discovery that draft copyright law revisions developed during the fall of 1985 did not correct problems identified by U.S. representatives in 1984, and lack of progress on several subsidiary issues convinced USTR to initiate a section 301 investigation against South Korea. After extended consultations, South Korea agreed to take several actions to improve its protection practices. In an exchange of

letters at the conclusion of these discussions, South Korean officials committed their government to work with the legislature to, among other things, (1) extend product patent protection to chemicals and pharmaceuticals, (2) adopt a comprehensive copyright law, (3) extend copyright protection to computer software, and (4) adhere to the Universal Copyright Convention, thereby automatically extending copyright protection to U.S. works. The GSP general review, concurrently in progress, was helpful in convincing the South Korean government to reach these decisions. Revised patent, copyright, and software legislation was subsequently passed during December 1986, to be effective July 1987. The government also committed itself to make best efforts to adhere to the Universal Copyright Convention by October 1987.

Conclusions

In response to business concerns, the U.S. government is working to obtain better foreign protection for intellectual property rights through bilateral consultations. In preparation for this effort, the government gathered information on practices of countries that provide inadequate protection and selected countries and particular practices for priority action. It has undertaken discussions with a number of countries and attained some positive results. The government has also provided a limited amount of training for foreign officials. In some cases where persuasion has proven ineffective, the United States has taken unilateral trade actions against "problem" countries. Consultations continue on those problems that have not yet been fully addressed.

Comments From the Department of Commerce

Note. GAO comments supplementing those in the report text appear at the end of this appendix

UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for International Trade
Washington, D C 20230

November 3, 1986

Dear Mr. Peach:

Thank you for the opportunity to comment on your draft report entitled "International Trade: Strengthening Worldwide Protection of Intellectual Property Rights". We are pleased with the generally favorable review of our handling of this problem.

Attached are our comments on the report that can help to correct or clarify certain statements. Please call if anything further is needed.

Sincerely,

Bruce Smart

Bruce Smart

See Comment 1

Attachment

Mr. J. Dexter Peach
Director
Resources, Community, and Economic
Development Division
United States General Accounting Office
Washington, D.C. 20548

The following are GAO's comments on the Commerce Department letter dated November 3, 1986.

GAO Comment

The technical comments referred to in this letter are not included; they were addressed as appropriate in the body of the report.

Comments From the Department of State

United States Department of State

Comptroller

Washington, D.C. 20520

November 19, 1986

Dear Mr. Conahan:

I am replying to your letter of October 6, 1986 to the Secretary which forwarded copies of the draft report entitled "International Trade - Strengthening Worldwide Protection of Intellectual Property Rights" under GAO assignment code 483402.

The enclosed comments on this report were prepared in the Bureau of Economic and Business Affairs.

We appreciate having had the opportunity to review and comment on the draft report.

Sincerely,

Roger B. Feldman

Enclosure:
As stated.

Mr. Frank C. Conahan,
Assistant Comptroller General,
National Security and
International Affairs Division,
U.S. General Accounting Office,
Washington, D.C. 20548

GAO DRAFT REPORT: INTERNATIONAL TRADE - STRENGTHENING WORLDWIDE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Now on p 3

1. We suggest deleting last phrase on page 4, "...where there is less developing country opposition." It is arguable that in specialized intellectual property issues such as the enhanced protection of computer software, semi-conductor chips and satellite broadcasts, there is developing country opposition.

Now on p 18

2. On page 22, suggest deleting or modifying the last sentence in the first full paragraph, "In 1983, the government also initiated bilateral efforts to obtain better protection practices in particular countries with the dispatch of interagency negotiating parties to Taiwan and Korea." The 1983 interagency teams were not the first interagency groups sent out to defend or enhance bilateral intellectual property rights.

Now on p 17

3. The first sentence of the second full paragraph on page 22, "Subsequently, both the Commerce Department and USTR have explicitly established strengthening of worldwide protection for intellectual property as a major trade policy goal," is misleading. For at least two decades, the Department of State has targeted improved protection for U.S. works abroad as one of its major foreign economic objectives, and, as a matter of fact worked closely with the Patent and Trademark Office and the Copyright Office to establish this objective. We would suggest that the following sentence be added after the first sentence in the second full paragraph, or be placed in a footnote; "It should be noted that the Department of State, for at least two decades, has had improved protection for U.S. intellectual property rights abroad as one of its major foreign economic objectives and has worked closely with the Patent and Trademark Office in the Commerce Department and the Copyright Office in the Library of Congress to implement this objective."

Now on pp 32 33

4. In the last paragraph on page 47, recommend adding these sentences at the end of the paragraph to update the situation: "An additional meeting of experts took place in June 1986 and a further meeting of experts will probably be scheduled in the spring of 1987 to further refine the treaty. WIPO may convene a diplomatic conference by the end of 1987."

Now on p 36

5. On page 54, the third and fourth complete sentences needs elaboration. They read: "The wide-ranging bargaining that takes place during GATT rounds offers a better chance for obtaining general approval of and maximum participation in any code. We understand from knowledgeable government officials that individual countries in many cases do not wish to be perceived as preventing conclusion of new codes." While we wholeheartedly support the effort to increase the protection given to intellectual property through negotiations in the GATT, we should be realistic about likely results. The ultimate number and composition of membership of any GATT code on intellectual property will depend mainly on the content of the agreement reached. Greater membership is likely for a code related to counterfeiting, which is widely seen as a subject within GATT competence, for example, than to a general code on patent protection. In the same vein, a code which limited itself to customs or border measures would likely gain greater adherence than one which dealt with domestic laws.

Regardless of the "wide-ranged bargaining" during a trade round, membership in a GATT code is voluntary and although countries may not wish to prevent conclusion of new codes, that does not mean they will join. The content of the code and the incentives we can offer in the bargaining process will determine their willingness to become members. Beyond the value of the code or codes which may result from the GATT negotiations on intellectual property, the negotiations may have another positive effect. Progress in the GATT could exert pressure on WIPO and the member countries of its numerous unions also to make progress toward improved intellectual property protection.

William B. Milam (Ru Hym)
Deputy Assistant Secretary
International Finance and
Development
Bureau of Economic and Business
Affairs

Comments From the World Intellectual Property Organization

Note GAO comments supplementing those in the report text appear at the end of this appendix

WORLD INTELLECTUAL PROPERTY ORGANIZATION

世界知识产权组织

ORGANIZACION MUNDIAL DE LA PROPIEDAD INTELECTUAL

ORGANISATION MONDIALE DE LA PROPRIETE INTELLECTUELLE

المنظمة العالمية للملكية الفكرية

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(1467)-20

November 11, 1986

Dear Mr. Conahan,

This is in reply to your letter of October 6, 1986, by which you kindly sent to me for review and comment a copy of the draft report entitled "International Trade: Strengthening Worldwide Protection of Intellectual Property Rights" (Code 483402).

I have specially noted the passages referring to the work of WIPO in carrying out its constitutional mandate to promote the protection of intellectual property throughout the world. I would like to congratulate you and your staff on the very full account of that work.

As invited by you, the draft report has been reviewed and the suggestions that I suggest you consider for possible incorporation are marked on the attached copy.

May I thank you for the opportunity to contribute to this report, one of a series of reports prepared by the Government Accounting Office on the efforts of the Government of the United States of America to protect intellectual property rights, not only through the discussions on the subject that were held between Mr. McAtee and Mr. Natalecchio of your staff and my staff in Geneva in July 1985 but also through the enclosed suggestions.

Sincerely yours,

Arpad Bogsch
Director General

Mr. Frank C. Conahan
Assistant Comptroller General
United States
General Accounting Office
Washington, D.C. 20548
United States of America

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The following are GAO's comments on the World Intellectual Property Organization letter dated November 11, 1986.

GAO Comment

The annotated copy of the draft report referred to in this letter is not included; the comments were addressed as appropriate in the body of the report.

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