

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1991

Protecting United States Intellectual Property Abroad: Toward a New Multilateralism

Marshall A. Leaffer

Indiana University Maurer School of Law, mleaffer@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Intellectual Property Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Leaffer, Marshall A., "Protecting United States Intellectual Property Abroad: Toward a New Multilateralism" (1991). *Articles by Maurer Faculty*. 610.

<https://www.repository.law.indiana.edu/facpub/610>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Protecting United States Intellectual Property Abroad: Toward a New Multilateralism

*Marshall A. Leaffer**

Table of Contents

Introduction.....	273
I. Intellectual Property in General and the Worldwide Piracy Problem.....	279
A. What is Intellectual Property?.....	279
B. Intellectual Property Protection in Developing Countries .	281
1. In General	281
2. Trademarks.....	284
3. Patents	285
4. Copyrights	287
II. Current U.S. Approaches to International Piracy	288
A. Strengthening U.S. Intellectual Property Law.....	289
B. Policing the Borders: Section 337 of the Tariff Act.	291
C. The Multilateral Approach: International Treaties and the Role of the World Intellectual Property Organization....	292
D. The Bilateral Trade-Based Approach: Section 301 of the Trade Act.	295
III. The General Agreement on Tariffs and Trade (the Multilateral Trade-Based Approach).....	298
A. Background	298
B. Overview of the GATT	298
C. Intellectual Property in the Uruguay Round.	299
D. Strengths and Limitations of the GATT.....	300
1. Dispute Settlement Mechanisms.....	300
2. A Flexible Institutional Arrangement.....	302
E. Implementing a Trade Related Aspects of Intellectual Property (TRIPS) Agreement in the GATT	303
F. Substantive Standards and Differential Treatment	304
G. Conclusion: Toward a New Multilateralism.....	306

INTRODUCTION

In our information age, intellectual property is a fundamental business asset protected under three basic bodies of law: trademark, patent, and

*Professor of Law, University of Toledo. B.A., 1964, University of Texas; M.A., 1967, University of Illinois; J.D., 1971, University of Texas College of Law; LL.M, 1977, New York University.

copyright. Trademark law¹ prohibits product imitators from passing off their goods as those of another. Patent law² provides a limited monopoly for new and inventive products and processes. Copyright law³ protects a broad range of artistic, literary, and musical works of authorship. Other bodies of law protect forms of information that do not conveniently fit into the traditional domain of trademark, patent, and copyright law.⁴

In its progressive shift to an information-based economy, the United States has become increasingly vulnerable to piracy,⁵ expropriation, and otherwise inadequate protection of its intellectual property in certain foreign countries. These "problem" countries are found mostly in the Third World, where trademark, patent, and copyright protection is, from a U.S. standpoint, either inadequate or ignored.

Examples are plentiful. Pharmaceutical companies producing innovative drugs at great expense often find their new products imitated quickly and with impunity in certain developing countries; computer software firms have lost billions of dollars from the piracy of their programs in these same countries. Similarly, certain developing countries have not adequately enforced their trademark laws against those marketing counterfeit goods, many of which not only are sold in the pirate country, but also make their way into the U.S. market. The loss is large even if one takes into account the probability that the available economic data may magnify the injury to the U.S. economy.⁶ Recent government and industry studies have valued yearly losses from counterfeiters at billions of dollars,⁷ resulting in thousands of

1. For a discussion of trademark law, see *infra* text accompanying notes 47-56.

2. For a discussion of patent law, see *infra* text accompanying notes 57-63.

3. For a discussion of copyright law, see *infra* text accompanying notes 64-68.

4. The two principle bodies of law are trade secret law and the protection of semiconductor chips. Semiconductor Chip Act of 1984, 17 U.S.C. §§ 901-914. The term "intellectual property," as used in this article, refers to the broadest range of subject matter, including trade secrets and semiconductor chips. In the United States, trade secrets generally are protected under state law. See Uniform Trade Secrets Act §§ 1-12 (1979) (state trade secrets law adopted by fifteen states).

5. The term "piracy" has no settled meaning in international law. It is used here in its broadest sense to connote intentional and systematic misappropriation of intellectual property. The term "pirate nation" refers to a country where organized piracy occurs. These countries either tolerate or encourage piracy or do not enforce the law satisfactorily. I have used the term "problem nation" to connote those countries in which intellectual property laws do not confer an adequate level of protection. The term "counterfeiting," as in counterfeit goods, refers to the practice of passing off and false labeling. For a cogent discussion of this terminology, see Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 Vand. J. Transnat'l L. 747, 770-80 (1989).

6. Calculation of loss is a highly speculative undertaking and any statistics on this matter should be viewed with skepticism. The principle reason for the measurement difficulty is that losses to enterprises in industrialized countries take the form of lost revenue opportunities. The calculation of such losses, therefore, requires the assumption of unaffected revenues. See U.S. Trade Representative, 1989 National Trade Estimate Report on Foreign Trade Barriers 2-4 (1989) [hereinafter USTR Rep.]; see also Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiation in the GATT Multinational Framework*, 22 Vand. J. Transnat'l L. 689, 699 (1989).

7. Some estimates of loss to the U.S. economy are as high as \$23.8 billion. Losses constitute about five percent of the U.S. trade deficit. See United States Int'l Trade Comm'n Pub. No. 2065, *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Trade* 4-2 (Feb. 1985) [hereinafter United States Int'l Trade Comm'n, *Foreign Protection*].

lost jobs.⁸ From the U.S. perspective, international protection of intellectual property has become an important trade issue in an era when the United States has suffered balance of trade and budget deficits.⁹

The "piracy" problem has emerged because of changing patterns of trade and technology. Intellectual property has become a major component of international trade¹⁰ and U.S. competitiveness. Production of intellectual products has become increasingly expensive. Today's research and development costs require large-scale production, open international markets, and protection against free-riding imitators to recoup costs of production.¹¹ Unfortunately for the creators and proprietors of intellectual products, new reproductive technologies¹² have lowered copying costs while raising the costs of legal enforcement.

These changing patterns of trade and technology have produced a schism between the West and the developing world in their respective attitudes toward the protection of intellectual property. As consumers of intellectual property, certain Third World countries see little to gain from vigorously protecting intellectual property licensed to them from the West. Their interests in weak protection have a rational basis. The developing world needs maximum access to Western intellectual goods for its development and views stringent standards of protection as debilitating. From the standpoint of the West, Third World countries not only provide insufficient protection under the substantive law but often inadequately enforce whatever legal standards do exist. For the West, organized piracy, with the help of new reproductive technologies, threatens to undermine the incentive structure that trademark, patent, and copyright laws are designed to promote. Those incentives are eroded by a thriving parallel market of counterfeited and pirated goods.

U.S. companies traditionally have looked to basic international treaties as a remedy against the piracy of their intellectual property. To an owner of intellectual property, however, these treaties fall short of providing effective protection because they lack the power to enforce rights or to

8. One report estimated that 131,000 jobs in five industry sectors were lost in 1982 due to foreign product counterfeiting. See United States Int'l Trade Comm'n Pub. No. 1479, XVII Effects of Foreign Product Counterfeiting on U.S. Industry 4-13 (Jan. 1984). For an overview of the piracy issue, see Hoffman, Marcou & Murray, *Commercial Piracy of Intellectual Property*, 71 J. Pat. Trademark Off. Soc'y 556 (1989).

9. For key studies of the international dimension of intellectual property and U.S. policy in the face of organized piracy, see R. Benko, *Protecting Intellectual Property Rights: Issues and Controversies* (1987); *Intellectual Property Rights: Global Consensus, Global Conflict?* (R. Gadbow & T. Richards eds. 1988) [hereinafter R. Gadbow & T. Richards]; H. Stalson, *Intellectual Property Rights and U.S. Competitiveness in Trade* (1987); Council for International Business, *A New MTN: Priorities For Intellectual Property* (1985); U.S. General Accounting Office, *Strengthening World Protection of Intellectual Property Rights* (1987) [hereinafter GAO Report].

10. The internationalization of intellectual property is manifested by a constant increase in the number of foreign patent applications of intellectual property rights worldwide.

11. See G. Bertin & S. Wyatt, *Multinationals and Industrial Property: The Control of the World's Technology* 127 (1988).

12. Reproductive technologies are those that permit the copying, storing, and retrieving of information. New reproductive technologies encompass photocopy machines, VCRs, and computer systems. These technologies improve all the time.

settle disputes. The Berne Convention¹³ sets minimum levels of copyright protection that member nations must provide, but it has not proven to be effective against systematic large-scale piracy in Third World countries.¹⁴ Similarly, the Paris Convention for the Protection of Industrial Property, which protects trademarks and patents,¹⁵ does not specify minimum standards for acquiring and enforcing intellectual property rights and is thereby limited in its effectiveness.¹⁶ Worldwide protection of U.S. intellectual property will remain inadequate even though Congress recently has passed important trade-based legislation¹⁷ and has reformed U.S. law, enabling the United States to adhere to the Berne Convention.¹⁸ The general consensus in the United States is that an effective remedy against the vulnerability of its intellectual property must be sought through a new mechanism.

The new General Agreement on Tariffs and Trade ("GATT") round has been proposed as *the* innovative solution to remedy this perceived deficiency in the international protection of intellectual property.¹⁹ The GATT is an international arrangement that includes over ninety countries participating in multilateral trade negotiations involving ways to encourage

13. For a discussion of the Berne Convention, see *infra* text accompanying notes 94-98.

14. The Universal Copyright Convention has been even less effective and is administered by UNESCO, a UN agency from which the United States has withdrawn.

15. The Paris Convention came into being in 1883 to cover patents, trademarks, trade names, utility models, industrial designs, appellations of origin, and repression of unfair competition. For a discussion of international treaties, see *infra* text accompanying notes 89-102.

16. The international conventions are based on national treatment and impose certain minimum conditions for protection. See *infra* text accompanying note 97; see also International Treaties on Intellectual Property 1-14 (M. Leaffer ed. 1990).

17. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

18. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-538, 102 Stat. 2717 (1988).

19. See U.S., Japanese, European Groups Call for GATT Intellectual Property Code, 36 Pat. Trademark & Copyright J. (BNA) 209 (June 6, 1988) (three business groups from the United States, Japan and European Community ("EC") have offered a proposed code to deal with intellectual property); ITC Study on Intellectual Property Protection Supports U.S. GATT Position, 35 Pat. Trademark & Copyright J. (BNA) 347-48 (Mar. 3, 1988) (U.S. film industry suffers \$43-61 billion per year in losses due to piracy of intellectual property by foreign countries, which the U.S. intends to change through GATT negotiations at the Uruguay Round); U.S. Intellectual Property Proposal is Proposed to GATT Negotiating Group, 34 Pat. Trademark & Copyright J. (BNA) 655 (Oct. 29, 1987) (in an effort to standardize world intellectual property law, the GATT has identified several areas and recommends establishing a dispute settlement mechanism); Intellectual Property to be Included on GATT Agenda, 32 Pat. Trademark & Copyright J. (BNA) 571 (Sept. 25, 1986) (ministers from 74 GATT countries agreed to discuss intellectual property in the next round of talks). *But see* Developing Nations Insist That GATT Isn't Place to Discuss Counterfeiting, 30 Pat. Trademark & Copyright J. (BNA) 111 (May 30, 1988) (India and Brazil argue that counterfeiting should be addressed by the Paris Convention, while the United States, Japan, and the EC argue that the GATT should rule since the World Intellectual Property Organization ("WIPO") does not have the resources or countries to enforce regulations); GATT Delegates Receive Detailed EC Intellectual Property Proposal, 36 Pat. Trademark & Copyright J. (BNA) 278 (July 14, 1988) (under the EC proposal all GATT countries would adhere to the Paris and Berne Conventions).

free trade among nations.²⁰ The latest round of GATT negotiations, the Uruguay Round, has placed intellectual property prominently on the agenda.²¹

Why is the inadequate protection of intellectual property an important free trade issue? Inadequate protection of intellectual property undermines the goal of free trade because it leads to trade distortions.²² Absent sufficient protection, creators can no longer recover the cost of their investment in research and development, resulting in lower production, fewer trading opportunities, and higher costs to the consumer.²³ As a result, intellectual property protection has become a major trade issue, and the GATT appears to offer a practical structure that promotes quicker and more effective protection for U.S. intellectual property than is provided by the existing international conventions.

The current proposal, called "Trade Related Aspects of Intellectual Property" ("TRIPS"), incorporates minimum world standards for the protection of intellectual property as a part of the GATT.²⁴ The TRIPS proposals have been embraced enthusiastically by the United States and other developed countries but much less so, not surprisingly, by the Third World. So far, both groups have maintained irreconcilable positions on the subject.

20. GATT refers to both an international institution concerned with trade between nations and a legal document of the same name. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, reprinted in 4 General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents (1969); see also K. Simmonds & B. Hill, *Law and Practice Under the GATT* (1988); see generally K. Dam, *The GATT: Law and International Economic Organization* 3 (1970) (GATT as a legal international instrument that articulates rules and duties for its signatories); State Department Program Examines "GATT and Intellectual Property," 31 Pat. Trademark & Copyright J. (BNA) 497-98 (Apr. 10, 1986) (program focused on methods of improving foreign protection of U.S. intellectual property rights). For a general overview of the GATT, see J. Jackson, *World Trade and the Law of GATT* (1969).

21. Article XX(d) of the GATT has placed the protection of intellectual property among the exceptions to the agreement. See K. Simmonds & B. Hill, *supra* note 20, § I.A.

22. See *Intellectual Property and Trade: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 51-53. (1986) (statement of Harvey E. Bale, Jr., Asst. U.S. Trade Representative for Trade Policy and Analysis) [hereinafter *Hearings*].

23. See Keon, *TRIPS in the Current GATT Negotiations*, *Les Nouvelles* 203 (April 1988). For an economic model of the effects of counterfeit sales on output, total revenue, and profits of legitimate producers, see United States Int'l Trade Comm'n, *Foreign Protection*, *supra* note 7.

24. The TRIPS negotiating mandate reads:

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

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

Punta del Este Ministerial Declaration, in Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 *Stan. J. Int'l. L.* 57, 59 (1987).

This Article examines Third World attitudes toward the protection of industrial and artistic property and reviews the various methods by which private parties and governments have tried to curtail the growing incidence of piracy in the problem countries. My general thesis is that the ultimate goal of the United States—as well as all proprietor nations who sell intellectual property to consuming nations in the Third World—should be the adequate protection of intellectual property based on international standards. Further, these standards should be enforced with the aid of the GATT. This should be a long-term goal, however, and should take into account the countervailing interests of the developing nations whose exigent economic interests differ from those of the West.

A durable agreement must be based on mutual gain and cannot be imposed by the information-producing countries on the developing world. Unless the interests of the information-consuming nations (the developing countries) are considered seriously, a long-run solution to the problem will not occur. In sum, the major players in the GATT negotiations must begin to focus on an agreement that promises mutual gain.

Part I of this Article²⁵ examines the incidence of intellectual property piracy and reviews the results of inadequate intellectual property protection. It also considers the attitudes of the developing countries about intellectual property protection, showing that less stringent standards of legal protection in the developing world are based on a perfectly rational interest in economic development.

Part II²⁶ reviews the current state of the international treaties on trademarks, patents, and copyrights as a means of effectively protecting U.S. intellectual property interests. It examines other approaches to international protection such as relief against infringing importation under section 337 of the Tariff Act and the bilateral approach of section 301 of the Trade Act. Because relief under these two bodies of law suffers from various limitations, a multinational trade-based approach to the piracy question is proposed as the favored solution.

Part III²⁷ provides an overview of the GATT as it relates to the integration of intellectual property protection into the GATT framework. This part considers the debate taking place in the current Uruguay Round negotiations concerning the possibility of a TRIPS agreement²⁸ within the GATT system. This Article concludes that a “new multilateralism” must be incorporated into a TRIPS agreement. To be effective, a TRIPS agreement must reconcile the needs of both proprietor nations of the West and the consuming countries of the developing world. This will call for patience and flexibility on the part of the West, which will have to consider the special needs and different cultures of the developing world.

25. See *infra* text accompanying notes 29-68.

26. See *infra* text accompanying notes 69-123.

27. See *infra* text accompanying notes 124-63.

28. See U.S. Proposal for Negotiations on Trade-Related Aspects of Intellectual Property Rights, 34 Pat. Trademark & Copyright J. (BNA) 667 (Oct. 10, 1987).

I. INTELLECTUAL PROPERTY IN GENERAL AND THE WORLDWIDE PIRACY PROBLEM

A. *What is Intellectual Property?*

Intellectual property law confers property rights on certain forms of information.²⁹ In general, trademark law confers rights on symbolic information,³⁰ patent law on scientific information,³¹ and copyright law on expressive information.³² Because of its intangible nature, intellectual property differs from the more familiar tangible property. When we think of property, we usually think of land or our personal belongings, things that occupy space and can be consumed. By comparison, intangible property, for example a product of the mind such as a piece of music or a way of making steel, does not have a tangible existence.³³ The intangible nature of intellectual property leads to special difficulties of protection. Once information is created and published, it is difficult to prevent others from using it. Without effective enforcement of trademark, patent, and copyright laws, creators will not invest sufficiently in the production of new information.³⁴

29. See generally Ropski & Kline, *A Primer on Intellectual Property Rights: The Basics of Patents, Trademarks, Copyrights, Trade Secrets, and Related Rights*, 50 Alb. L. Rev. 405 (1986) (overview of intellectual property law).

30. Trademark law protects words, names, symbols, and devices that distinguish goods and services from other, similar goods and services. In the United States, trademark rights are acquired upon use of the mark. In many other countries, trademark rights are established by registration. Infringement of trademark occurs when a third party uses a mark on the same or similar goods or services when the consumer would be confused about the origin of these goods or services.

31. Patent law confers property rights on new, useful, and nonobvious processes and products. It excludes others from making, using, or selling the patented invention for seventeen years. Patent law provides a more exclusive monopoly than copyright law. Patent protection extends to functional features of products and encompasses ideas to the extent that the ideas are inextricably embodied in the product or process. Unlike a copyright or trademark, a patent is much more difficult to obtain. To be patented, an invention must not only be new and original, but it must also be an improvement over the prior art such that one with ordinary skill in that art could not consider the invention obvious. For the general requirements of patentability, see 35 U.S.C. §§ 101, 103 (1984).

32. Copyright law protects original expression. It does not extend to the ideas that the creator expresses. 17 U.S.C. § 102(b) (1976). Nor does copyright protect expression when the idea and expression have merged. See M. Leaffer, *Understanding Copyright Law* §§ 2.12-13 (1989). The Semiconductor Chip Act of 1984, 17 U.S.C. §§ 901-914, is a hybrid of patent and copyright law. The Act protects original mask works. See *infra* note 68. Under this Act, the functional aspects of the product are protected as in patent law, but, unlike patent law, the Act does not base protection on novelty.

33. Of course, the intellectual creation may be embodied in a variety of tangible media. A chemical process may be written on a piece of paper, a melody recorded on a cassette, or a trade symbol affixed to a good. One must always make the distinction between the information (the intellectual property) and the material object to which it is affixed. A book can be burned, but the information in it cannot be destroyed.

34. There are alternative ways to encourage production of intellectual property, such as direct governmental production or governmental subsidy. However, history suggests the superiority of a private market proprietary approach nurtured by intellectual property law. See generally D. Carlton & J. Perloff, *Modern Industrial Organization* 653-93 (1990) (concluding that a blend of competition and monopoly, created by patent law protection, is the best way to encourage continued technological innovation).

If protection is inadequate, the creator of information cannot compete with a third party user who has borne none of the investment costs in creating the information. On the international level, the damages to the owner are compounded when the pirated work is exported to other nations and sold for less than that of the original creator's work.

The incidence of piracy, both in the United States and abroad, has increased exponentially in the past decade.³⁵ This trend will continue in large part because reproductive technologies have improved and become cost efficient, and the gap between the creation costs and reproduction costs has increased. More than ever, the creator of information is placed at a severe disadvantage to the unlicensed user. A sophisticated computer program, for example, may cost thousands of dollars to produce, but can be copied at a fraction of the cost. A new family of integrated circuits may cost one hundred million dollars to design and less than one million dollars to copy.³⁶ As for computer software, one can find a sophisticated computer program selling for \$7.50 in the Far East that is sold in the United States for \$500. Unfortunately, it costs as much as ever to create an innovative pharmaceutical product, a piece of music, or to develop goodwill under a brand name. Thus, to encourage the continuing production of information, the law must provide an adequate level of protection for intellectual creations.³⁷

Intellectual property protection provides an example of a classic economic tradeoff. Trademark, patent, and copyright laws undermine consumer welfare because they impede the dissemination of information. Intellectual property laws grant limited monopolies on intellectual creations and, in the short run, a consumer must pay more for the use of information protected by the trademark, patent, and copyright laws. Because the owner of a trademark, patent, or copyright can charge a higher price for the use of an intellectual creation, access to this information is curtailed to the detriment of consumers.³⁸

35. See R. Benko, *supra* note 9, at 51.

36. See Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities, Joint Report by the Intellectual Property Committee, Washington D.C./Keidanren, Tokyo/Union of Industrial and Employers' Confederations of Europe, Brussels (June 1988) [hereinafter Basic Framework]. Of the two billion records and tapes sold in the world, 25% are counterfeit, with prices in some countries as low as 25% of the price of the genuine product. *Id.* at 25.

37. The magnitude of the loss is great. Losses are estimated for U.S. companies at \$20 billion a year, U.S. auto parts at \$3 billion, the motion picture industry at \$1 billion, and the apparel and shoe industry at \$1 billion. Approximately 131,000 U.S. jobs have been lost because of trademark infringement. In 1986, 750,000 jobs were lost due to infringement. Some 100,000 jobs were lost in Europe. Global job loss was estimated at 1,500,000. See *Concerted International Action Urged to Drive Counterfeiters Out of Business*, 33 *Pat. Trademark & Copyright J.* (BNA) 42 (Nov. 13, 1986); see also Gorlin, *Strategy and Considerations in Expanding The Markets Outside the United States: An Overview*, Albany Conference on Intellectual Property, § 3.02(1) (1989).

38. Despite the loss of consumer welfare, the economic literature tends to support the idea that a net positive welfare effect results from intellectual property protection. For a study of the patent system, see F. Machlup, *An Economic Review of the Patent System* Study No. 15 of the Senate Subcommittee on Patents, Trademarks, and Copyrights 21 (1958); for a model of the copyright system, see Novos & Waldman, *The Effects of Increased Copyright Protection: An Analytic Approach*, 92 *J. Pol. Econ.* 236 (1984).

Another significant cost that the protection of intellectual property imposes on the public is administrative. The patent system, which requires a body of technically trained personnel, is a prime example. Western countries, whose information industries are mature and whose foreign trade is heavily dependent on exporting information, can justify imposing these costs on the public. It is hardly surprising that Third World countries see little advantage in developing an elaborate and costly administrative mechanism to enforce the protection of intellectual property of foreign transnational companies.

As consumers of intellectual property produced in the West, developing countries do not perceive the need for strong protection to provide an incentive to create. The developing countries, however, desperately need access to these intellectual products for their economic development. This has led to a lukewarm attitude toward the enforcement of intellectual property law and has provided a fertile setting for the piracy of intellectual property.³⁹ The result is a collision course with the West. The developing world and the West have widely varying positions that must be reconciled, if possible, by an innovative multilateral solution that takes into account the pressing needs of the developing world.

B. Intellectual Property Protection in Developing Countries

1. In General

Transfer of technology by the licensing of information constitutes an ever growing part of world trade. Such commerce has become the lifeblood of the U.S. economy and a bright spot in an otherwise unfavorable balance of trade. Whether one considers movies, music, computer software, or chemical processes, the United States continues to be among the world's largest producers (if not the largest) of new and valuable information.⁴⁰ Indeed, all Western developed countries are information-rich and receive billions of dollars in foreign exchange from the information-poor developing countries. It is not surprising that certain developing countries have less of a protectionist attitude toward intellectual property, a resource to which they sorely need access.⁴¹

The inadequate protection of intellectual property in developing countries can be viewed at two levels: the meager or nonexistent governmental enforcement of the law and the deficient coverage of intellectual property in the law itself. Although some countries have satisfactory

39. For this argument, see Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970).

40. Accurate figures are impossible to locate. Some claim that the United States has been for some time the world's largest exporter of copyrighted works. The export value of U.S. motion pictures now exceeds the value of our steel imports. See U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 5 (1987) (statement of Senator Patrick J. Leahy).

41. Basic problem countries include Argentina, India, Thailand, Malaysia, Mexico, Brazil, Korea, Taiwan, Philippines, Singapore, and Indonesia. See USTR Rep., *supra* note 6, at viii-xiii; R. Gadbaw & T. Richards, *supra* note 9, at 14.

coverage in their substantive laws, the governments fall far short of adequately enforcing those laws. Weak enforcement can take the form of administrative delays which in effect discriminate against foreign litigants. Inadequate substantive protection can be seen in the following overview of trademark, patent, and copyright law in the developing countries.⁴²

A lax attitude in protecting intellectual property offers, at least in the short run, attractive benefits for pirates and consuming nations. Pirates of intellectual property enjoy lower production costs and are in a better position than legitimate producers to satisfy demands in developing countries. Pirates can do so because they merely copy products rather than develop their own and pay no royalties to the owner or creator. By copying only successful products, the pirate avoids the risk of market failure.

Barring effective regulation, the piracy of intellectual property pays off because it involves little risk and provides a healthy return on investment. Pirates enrich themselves and, in the short run, the countries in which they operate. Through piracy, developing countries can procure needed goods and services at little cost, while industries that specialize in producing counterfeit goods employ thousands of workers. When compared to these tangible gains, the threat that investment from Western countries might be withdrawn is secondary to immediate development needs.

In Third World countries, the piracy of intellectual property is justified by an ideology of development. Ready access to intellectual property is viewed as important to development, whereas the enforcement of intellectual property law is considered a burden on development. Thus, developing countries resist allocating scarce government resources to the enforcement of intellectual property rights.⁴³ As with the importation of capital, the importation of intellectual property often is viewed as a tool to dominate and exploit the economic potential of the importing countries. Paying for imports or making royalty payments imposes economic burdens and fosters a negative balance of trade.

In addition to this ideology, developing countries provide weak or nonexistent protection for, perhaps, a more basic reason. Intellectual property is simply too new of a concept to have developed a tradition of legal protection. Unlike Western countries, developing countries have few strong lobbies of inventors, authors, or companies that benefit from strong intellectual property laws.

Despite a pervasive hostility toward strong intellectual property protection, some developing countries are beginning to see the value of stronger protection.⁴⁴ A change in basic attitudes, however, will not occur

42. See *infra* text accompanying notes 47-68.

43. The prime example of developing countries' attitudes toward intellectual property is represented by the United Nations Conference on Trade and Development, known as UNCTAD. Created in 1964, UNCTAD has been primarily involved in intellectual property. Its various position papers reflect the developing countries' concern about access to innovative and creative works originating in developed countries. For a discussion of UNCTAD, see Spitals, *The UNCTAD Report on the Role of Trademarks in Developing Countries: An Analysis*, 3 N.Y.L. Sch. J. Int'l Comp. L. 369 (1981).

44. See Yamaguchi, *Remarks, Trade-Related Aspects of Intellectual Property*, 22 Vand. J.

quickly. The United States and other countries, as well as many business associations, have vigorously touted to developing countries the benefits of adopting Western standards for protecting intellectual property.⁴⁵ Their arguments have a hollow, self-serving ring to them, especially when developing countries have to pay the bill for protecting the rights of foreigners at the expense of the indigenous population. Although the benefits of strong protection may be apparent in the long run, to many in the developing world the benefits of weak protection appear to outweigh the costs. At best, the proposed benefits are unclear.⁴⁶

Nonetheless, one can perceive a change in perspective. The origin of this change can be traced to both local firms and consumers, themselves victimized by unrestrained piracy in two ways. First, some local companies are owners of indigenously developed intellectual property and suffer along with Western companies from inadequate legal protection. Piracy deprives these local businesses of sales and the ability to provide employment, and it discourages local companies from engaging in their own research and development. Second, absent adequate protection, Western firms will less readily transfer technology to local companies. Such direct foreign investment is vital to development because it disseminates state-of-the-art technology into the economy.

Consumers in developing countries also are directly victimized by counterfeit goods that threaten the public health and welfare in these countries. These inferior and sometimes dangerous products are sold widely to Third World consumers, who are vulnerable because of lax government enforcement.

Despite these persuasive arguments for vigorous enforcement of Western standards of intellectual property protection, the developing

Transnat'l L. 325, 326 (1989). Some newly industrialized nations have shown a readiness to change to Western standards, particularly in the face of bilateral pressure. South Korea, Taiwan, and Singapore are some prime examples.

45. See J. MacLaughlin, T. Richards & L. Kenny, *The Economic Significance of Piracy*, in R. Gadbaw & T. Richards, *supra* note 9, at 89 (in seven countries surveyed, merely infinitesimal increases in economic growth rates are required to offset any short-term loss in economic activity from establishing intellectual property rights); *Strong Intellectual Property Protection Benefits the Developing Countries*, Intellectual Property Committee (USA), Keidanren (Japan), UNICE (Europe) (Apr. 19, 1989) (strong intellectual property protection produces long-run benefits by stimulating innovation, providing lower cost methods of production and distribution, producing better and safer products, creating more jobs and a more skilled labor force, encouraging investment, and creating an infrastructure designed to reward creative talent, whereas free riding and imitation condemn a country to perpetual second-class status); G. Hoffman, *Curbing International Piracy of Intellectual Property* 14 (1989) ("By allowing technological piracy, developing countries do not provide the incentives for indigenous innovation but rather stifle it and foster the 'brain drain' of their most able innovators"); see also Burstein, *Diffusion of Knowledge-Based Products: Applications to Developing Economies*, 22 *Econ. Inquiry* 612-18 (1984) (enhanced patent protection encourages development).

46. See Braga, *The Economics of Intellectual Property*, 22 *Vand. J. Transnat'l L.* 243, 257-60 (1989). Professor Braga sums up possible costs and benefits of strong intellectual property protection in the Third World. He concludes that the impact of enhanced protection may vary greatly among different countries. "[T]here is no *a priori* strong evidence that these countries will necessarily benefit or lose from a reform of their intellectual property systems." *Id.* at 264.

world exists in a dramatically different cultural and economic environment. The following overview examines trademark, patent, and copyright protection in the developing world and the policies that have led to the tension between developing countries and the West.

2. Trademarks

Virtually every major producer of brand name clothing, shoes, jewelry, agricultural chemicals, and pharmaceuticals has been victimized by organized piracy and inadequate protection under trademark law in various Third World countries.⁴⁷ In many of those markets, trademarked goods are counterfeited overtly. Many of these counterfeit goods make their way into the United States and other foreign markets.

Some developing countries have displayed hostility toward trademark protection in their substantive law. This attitude is nurtured by a fear that foreign licensors of trademarks exploit both local businesses and vulnerable consumers. Foreign licensors are perceived as having superior bargaining power, permitting them to impose terms unfavorable to the local licensee.⁴⁸ In addition to potentially onerous terms in the licensing contract, local authorities believe that the increased use of trademarks will become an insurmountable obstacle to achieving economic self-sufficiency. According to this theory, the public's dependence on products identified by foreign trademarks makes it difficult for local producers to establish recognition for their own goods. This position is supported by the United Nations Conference on Trade and Development ("UNCTAD").⁴⁹

Some claim that consumers in developing countries are exploited by entrenched brand names. They argue that the foreign trademarks encourage irrational preferences among vulnerable, largely illiterate consumers in the developing countries. The foreign trademark functions as an insidious vehicle for persuasive advertising, which modifies healthy consumption patterns.⁵⁰

A proposed Mexican law provides a good example of an attempt to curtail the effect of foreign trademarks. In 1976, Mexico passed a law that required the local linking of trademarks.⁵¹ The Mexican "linking law,"

47. A notorious example is the Republic of Korea, which until recently had no effective body of law to protect intellectual property at all. Through pressure by the United States, Korea passed trademark, patent, and copyright laws in 1987 and 1988. In the area of trademark, a foreigner, in principle, is protected if registered in Korea. Foreign countries moved quickly to avail themselves of the law. But enforcement of the law is either lax or nonexistent. As a result, overt infringement is rife. See Darlin, *Where Trademarks Are Up for Grabs: U.S. Products Widely Copied in South Korea*, Wall St. J., Dec. 5, 1989, at B1, col. 3.

48. See Cornish & Phillips, *The Economic Function of Trade Marks: An Analysis With Special Reference to Developing Countries*, 13 Int'l Rev. Indus. Prop. Copyright L. (IIC) 41, 56 (1982).

49. Established in 1964 as a permanent organ of the General Assembly of the United Nations, UNCTAD was given the responsibility of establishing principles concerning trade between industrialized nations and developing countries. See Ball, *Attitudes of Developing Countries to Trademarks*, 74 Trade-mark Rep. 160, 162 n.8 (1983).

50. Spitals, *supra* note 43, at 380.

51. See Note, *Intellectual Property, Trade and Technology Transfer Law: The United States and Mexico*, 7 B.C. Third World L. Rev. 277 (1987).

which has never gone into effect (due in part to foreign outcry),⁵² would have forced the use of foreign trademarks in connection with domestic trademarks. It mandated that all foreign trademarks used in connection with goods produced in Mexico would have to be associated with a Mexican mark.⁵³ The linking law constituted a form of trademark expropriation, allowing the local licensee to enjoy a free ride on the reputation and goodwill embodied in the foreign mark. By this means, the local licensee hoped that the public would come to associate the particular goods involved with the licensee's trademark.⁵⁴ Thus, if the license were terminated, the local licensee would enjoy an autonomous goodwill acquired during the period of dual use. Although this postlicense goodwill could result in a degree of public deception, Mexico was willing to pay this price to subsidize local industry and to accept the risk that foreign trademark owners would hesitate in licensing their products to Mexican firms.

Linking laws are not the only practice hostile to trademark licensors. Other examples of the antitrade-mark attitude are found in countries that prohibit the importation of certain categories of trademark goods such as pharmaceutical products.⁵⁵ In addition, some countries have attempted confiscation of foreign trademarks.⁵⁶ Other laws have forced the trademark owner to manufacture the product on which the mark is affixed in the local country.

3. *Patents*

Patent owners perhaps have suffered the most in Third World countries. In addition to outright counterfeiting, a lack of substantive protection and an inadequate infrastructure to administer the patent system have produced a deficient system for the protection of patents in Third World countries. As a consequence, not only is there a disincentive to invest, but the welfare and safety of consumers is threatened by infringing products of substandard quality. Inferior quality pharmaceutical products which endanger the health of consumers are a common example.

By comparison with trademark laws, patent laws in developing countries are relatively uniform and seem to be less prejudicial to the rights of

52. The Mexican Government has granted one year extensions of the law since 1978. It is not the only linking law in existence, but it is perhaps the most drastic example. For a discussion of other linking laws in the Third World, see Ball, *supra* note 49, at 163.

53. A Mexican mark is one originally registered in Mexico by a Mexican citizen. Law on Inventions and Trademarks, Art. 127 (1976).

54. See Gabay, *The Role of Trademarks in Consumer Protection and Development in the Developing Countries*, 3 *Indus. Prop.* 102, 111 (1981). That trademarks may be used as a means of persuasive advertising is nothing new, and even if foreign marks were eliminated, local marks may serve the same purpose. It is hard to see how the public would gain by a virtual confiscation of foreign marks. Whatever gains may occur from less persuasive advertising could well be offset by a loss of foreign investment in the developing country. Trademark licensing encourages economic development in the Third World, as does licensing of all intellectual property. Only by licensing can the Third World gain the necessary technological know-how, marketing expertise, and international reputation of the licensor.

55. In the mid-1970s Pakistan banned the use of trademarks on pharmaceutical products. See Ball, *supra* note 49, at 166.

56. See Ball, *supra* note 49, at 166 (discussing the case of Argentina).

patent owners. On closer scrutiny, however, many countries fail to provide basic protection in fundamental ways. The requirement in some countries that the patentee "work" (use) the patented invention after a certain time of exclusive use is prejudicial to the rights of patent owners. Even more prejudicial is the pervasive tolerance of compulsory licensing laws.⁵⁷ Under the terms of a compulsory license, a third party can use the patent on payment of a statutory fee, often at below market prices. The compulsory license can result in a *de facto* expropriation of the patent.⁵⁸

The difference of opinion on compulsory licensing has constituted the most hostile debate between the West and the developing world. Developing countries want the ability to grant to firms of their choice (most often local companies) the right to use patents that have not otherwise been worked after a specified period of time, usually five years. This insistence by developing countries on compulsory licensing stems from the fear that multinational companies are exploiting local consumers in charging for full-priced goods made in foreign countries, while at the same time suppressing local production. Conversely, multinational companies argue that it is financially impossible to undertake any degree of investment without assurances from the local country that adequate safeguards in patent law will be maintained. The compulsory licensing debate provides a good example of the irreconcilable positions that exist between the West and the Third World.

In addition to requiring compulsory licensing, many developing countries display an antipatent attitude in the subject matter covered by a patent grant, the length of the patent term, and the lack of an adequate administrative system to properly examine and expedite patent applications. Some countries limit the patentability of certain products, such as chemicals or pharmaceuticals, and generally deny protection altogether as is the case with patents on processes. Extremely abbreviated patent terms also may prejudice the rights of patent owners.⁵⁹ In addition to these substantive law shortcomings, many developing countries expend few resources on maintaining a governmental agency to administer the patent system,⁶⁰ providing only a handful of examiners to handle thousands of

57. Compulsory licensing is not limited to developing countries. These laws are also found in such developed countries as France and, until 1988, Canada. See Oyen, *The Canadian Patent Law Amendments of 1987*, 4 *Intell. Prop. J.* 237, 243 (1988).

58. Compulsory licensing is an alien notion in U.S. patent law, which gives the U.S. patent owner a monopoly to make, use, and sell the patented invention. Negotiations between the parties will determine the price of a license to exploit the patented invention. By contrast, compulsory licensing laws allow third parties access to the patented invention if the prospective user complied with the terms of the compulsory license and pays the statutory fee. If the compulsory licensing fee is set too low, the patentee may not be able to recover its investment costs.

59. For example, India has a seven-year term from the filing date or five years from the patent grant, Egypt has ten years for pharmaceutical and food products, and Costa Rica has a one-year term for food, agricultural products and drugs. See generally J. Baxter, *World Patent Law & Practice* (1989) (summary of patent practices in various countries).

60. See generally Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 *Duke L.J.* 831 (1987) (the great expense incurred in running a patent system is not justifiable from a cost-benefit standpoint in a poor Third World country).

applications.⁶¹

In response to arguments in favor of a Western style patent system in which significant resources are expended, the developing world would argue that such a system is less justifiable when the returns do not inure to the country that adopted it. In other words, the patent system imposes certain costs on the developing country that cannot be justified by the gains provided by such a system. One cost is the administrative cost of operating a patent system that is not only substantial but whose benefits almost entirely inure to Western countries. One can easily understand the reluctance of some developing countries to institute an administrative system when the only reward is an uncertain degree of technology transfer to local companies.

The position taken by the developing countries on patent protection has led to widespread apprehension and resentment by multinational corporations and patent exporting countries. Some evidence exists that companies have curtailed both patenting activity and transfer of technology to the developing world. Statistics show a decline in the number of patents sought by the Western countries in certain key developing nations.⁶² Data also indicate a decline in the number of transfer agreements. The result is that the developing world will be endowed with less state-of-the-art technology, particularly those countries that offer only a relatively small, if not marginal, market.⁶³

4. Copyrights

Copyright owners also have suffered from organized piracy in the Third World. Certain developing countries systematically have ignored organized piracy in books, disks, films, tapes, cassettes, and computer software within their borders. In addition to governmental acquiescence, increasingly sophisticated copying techniques aid this piracy. For example, cassette tape technology has greatly simplified mass copying of music, films, and other forms of media.

Because copyright laws generally are uniform (with certain notable exceptions), the problem facing the copyright owner is inadequate enforcement rather than a lack of substantive protection.⁶⁴ Despite a relative

61. See Yamaguchi, *supra* note 44, at 326.

62. According to research, "the number of patent applications made in developing countries has decreased: 33,200 in 1967, of which 20,000 (60.8%) were made in the top four [countries] (Argentina, Brazil, Mexico, and India); but, only 29,700 in 1982, of which 17,500 (58.9%) were made by the top four countries (now Brazil, Korea, Mexico, Argentina)." On the whole, interest in securing patents in the developing world has tended to stagnate or decline. See G. Bertin & S. Wyatt, *supra* note 11, at 119; see also Desai, *India in the Uruguay Round*, 23 *J. World Trade L.* 33, 47-48 (1989). Desai reports that before the revisions of the Indian Patent Act, a number of foreign companies brought suit against local firms for breach of patent. In response, a revised Patent Act "was passed in 1970 which weakened patent protection. It introduced provisions for compulsory licenses, licenses of right and privileged access for the state." *Id.* at 47-48. As a result, patent applications of foreign firms sharply declined and the number of transfer of technology agreements in pharmaceuticals with Eastern European countries rose in proportion to those with the West.

63. G. Bertin & S. Wyatt, *supra* note 11, at 129.

64. See GAO Report, *supra* note 9, at 11.

uniformity in the law of copyright, a number of countries provide less protection to copyrightable subject matter and the exclusive rights of the copyright owner than is generally given in the West.⁶⁵ For example, a few countries in the Middle East provide no copyright protection at all. Other countries such as Malaysia and Indonesia provide works of foreign origin with protection only if they are published in their country thirty days after the date of first being published abroad.⁶⁶ Less dramatically, but just as serious to the copyright owner, other countries provide no protection for new forms of expression such as computer software and semiconductor chips.⁶⁷

As in the case of patent law, the developing countries have little to gain by the rigorous enforcement of copyright law. A copyrighted computer program can be copied with ease and with low visibility. Effectively impeding copyright piracy would require a major enforcement effort. Scarce resources are better spent elsewhere. Similarly, developing countries believe they are justified in not passing substantive laws in the areas of software or mask works.⁶⁸ Developing countries are consumers of these new technologies and need access to them for purposes of development.

Unrestrained piracy limits the ability of U.S. intellectual property owners to obtain returns on their investments of time and resources in developing trademarked products, patented innovations, and copyrighted works. Because the United States relies more and more on the sale and licensing of information in its international trade, it perceives its comparative advantage to be at stake. Ideal protection of U.S. intellectual property runs counter to the interests of developing countries. It is unrealistic for the United States and other proprietor countries to achieve, at least in the short run, the degree of protection they desire. What steps, then, should be taken to optimize intellectual property protection in a world of diverse nations? The solution will constitute an integrated strategy involving the continuing enhancement of U.S. law, the judicious application of bilateral negotiations, the use of current international institutions, and an innovative extension of the GATT to encompass intellectual property.

II. CURRENT U.S. APPROACHES TO INTERNATIONAL PIRACY

To protect their creations, intellectual property owners have looked to the many available remedies under domestic and international law. They have urged the enhancement of U.S. domestic law and have sought recourse under international conventions. In addition, Congress has given

65. See generally Teran, *International Copyright Developments—A Third World Perspective*, 30 J. Copyright Soc'y 129 (1982) (noting United States concern about copyright policy in developing nations that do not enforce intellectual property rights).

66. See GAO Report, *supra* note 9, at 11.

67. *Id.*

68. See E. Keet, *Preventing Piracy: A Business Guide to Software Protection* 129 (1985) (Third World countries assert that copyright laws restrict economic development). Mask works are the stencils (drawings) used in manufacturing semiconductor chips. Creation of these "masks" is a costly and critical element of microchip production. For a legal definition of mask works, see 17 U.S.C. § 901(a)(2) (1988). For a discussion of the Semiconductor Chip Act of 1984, which confers protection on mask works, see M. Leaffer, *supra* note 32, at § 3.09.

increased power to the U.S. Trade Representative ("USTR") to seek bilateral trade-based measures to persuade countries to adopt adequate laws. A general consensus has formed around the idea that the ultimate solution must lie in a multilateral trade-based approach under the auspices of the GATT. In developing this trade-based approach, the USTR, the U.S. International Trade Commission ("ITC"), the State Department, and the Copyright, Patent, and Trademark Office are playing a role in forging integrated policy.⁶⁹

The United States has tried to fight the problem of piracy through a three-pronged attack. First, a program of unilateral action has strengthened the protection afforded by U.S. law and curtailed the importation of counterfeit goods into the United States. Second, the United States has tried to place direct pressure on problem countries through bilateral negotiations that enforce compliance through trade sanctions. Third, the United States has sought relief through multilateral treaties administered through international agencies. Although the most promising new approach is perceived to be the protection of intellectual property rights through the GATT, both unilateral and bilateral efforts must continue, coordinating a uniform and consistent policy to discourage piracy.

A. Strengthening U.S. Intellectual Property Law

Congress has recently strengthened the protection afforded to U.S. intellectual property owners by passing major amendments to the trademark, patent, and copyright laws. This has harmonized U.S. law with the general standards of protection in the Western world. Legislative initiatives have plugged loopholes and have enhanced coverage under U.S. law. For example, until the enactment of the recent amendments, U.S. patent law did not protect products made abroad that infringed upon patented processes. This loophole was closed by an amendment to the Patent Act.⁷⁰ Even more dramatic are the recent changes to U.S. trademark law. The Trademark Counterfeit Act of 1984⁷¹ greatly strengthened remedies for trademark counterfeiting, and the 1988 amendments established for the first time an application of registration based on the proposed use of a mark.⁷² Momentous changes also have taken place in the copyright law, which has undergone a vast overhaul during the last fifteen years. In 1976, the Copyright Act⁷³ was revised completely to meet the challenge of the late twentieth century media. By a 1980 amendment, computer software was

69. GAO Report, *supra* note 9, at 17.

70. 35 U.S.C. § 271(g) (1984). Another change in the patent law has been the Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified at 35 U.S.C. §§ 155-56 (1990)), which, among other things, restores the term of patent on a product for half the period of regulatory review, not to exceed five years. *Id.* at 98 Stat. 1598-1603 (codified at 35 U.S.C. §§ 155-56 (1990)). *See also* Patent Law Amendments Act of 1984, 35 U.S.C. § 271(f) (prohibiting the supplying of components of a patented U.S. invention for assembly abroad); Inventions in Outer Space, Pub. L. No. 101-580, 104 Stat. 2863 (1990), amending 35 U.S.C. § 105 (1988) (inventions made, used, or sold on a space vehicle under U.S. jurisdiction shall be covered by U.S. patent laws).

71. Pub. L. No. 98-473, 98 Stat. 2178 (1984).

72. 15 U.S.C. § 1051(a)(1) (1988).

73. 17 U.S.C. §§ 101-810 (1988).

given explicit protection in the Act.⁷⁴ In 1988, the Act underwent another revision to allow adherence to the Berne Convention, and in this revision the rights of copyright owners were strengthened and penalties for copyright infringement were increased.⁷⁵

Traditional forms of intellectual property protection have proven to be inadequate for certain new technologies. Semiconductor chips presented a problem for legal protection under traditional patent law because they often lacked the inventiveness sufficient to meet the standards of patentability. Semiconductor chips also were barred from copyright protection because they are essentially utilitarian. To remedy serious gaps in protection, Congress responded by creating new safeguards for intellectual property, the model of which can be found in the Semiconductor Chip Act of 1984.⁷⁶ This Act provides a *sui generis* approach to semiconductor chip protection and extends coverage to a major new technology vitally important to the U.S. economy. The Act also provides an innovative statutory solution to the problem and contains procedures to encourage protection in foreign countries through bilateral negotiations.⁷⁷

Although U.S. intellectual property law has undergone key revisions,⁷⁸ changes must continue to occur that will enable the United States to join a worldwide consensus on standards of protection. Changing U.S. law to conform to these world standards will not only strengthen domestic law, but will give the United States further leverage in promoting a GATT intellectual property code that will set standards for the world community. One prospective major change lies in U.S. patent law, which differs significantly from world practice. The United States is the only Western country to confer patent rights to the first proven inventor. By comparison, the rest of the world bases protection on the first-to-file for the patent.⁷⁹ In a short time, Congress may see fit to adopt a first-to-file system.⁸⁰ Other changes on the intellectual property agenda would include adoption of industrial design protection. Legislation conferring specific

74. 17 U.S.C. § 117 (1988).

75. See 17 U.S.C. § 504 (1988); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988) (effective Mar. 1, 1989). For other recent changes to U.S. copyright law, conferring enhanced protection for the copyright owner, see Pub. L. No. 101-650, 104 Stat. 5089 (1990) (providing protection for architected works and the rights of visual artists, and abrogating trust sale doctrine as it applies to producers of computer software).

76. See 17 U.S.C. §§ 901-914 (1988). A semiconductor chip, the building block of computers, is a wafer-thin slice of silicon, composed of integrated circuits. These circuits consist of thousands of complex logic functions. For an overview of the Act, see Erstling, *The Semiconductor Chip Protection Act and Its Impact on the International Protection of Chip Designs*, 15 Rutgers Computer and Tech. L.J. 303 (1989); Note, *Protection of United States Semiconductor Designs in Foreign Countries Under the Semiconductor Chip Protection Act of 1984*, 12 Rutgers Computer and Tech. L.J. 433 (1987).

77. 17 U.S.C. § 914 (1988).

78. Sentiment in the U.S. industry also appears to be shifting toward a first-to-file system. See Lachica, *U.S. is Offering to Revise its Patent Code if Other Countries Agree to Reciprocate*, Wall St. J., June 15, 1988, at 21, col. 3.

79. For instance, Canada recently adopted a first-to-file system. See Oyen, *supra* note 57, at 237.

80. See Dunner, *First to File: Should Our Interference System Be Abolished?* 68 J. Pat. Off. Soc'y 561 (1986).

protection on industrial design has been introduced into Congress yearly in the past decades without success,⁸¹ but it may be that the time for protection has come.

B. Policing the Borders: Section 337 of the Tariff Act

Counterfeit goods make their way into the U.S. market, often under-selling goods of legitimate origin. These goods include clothing sold under infringing trademarks, bootleg videocassettes, patented pharmaceuticals, and illegally copied software. Section 337 of the Tariff Act of 1930,⁸² as amended,⁸³ designates a remedy against the importation of infringing goods. The Act provides for relief against unfair methods of competition and unfair acts in the importation of articles into the United States or their sale. Unfair acts include trademark, patent, copyright, and mask work infringement which occur in connection with the importation of goods into the United States. This section prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States."⁸⁴ Under section 337, private citizens can petition to proceed before the U.S. International Trade Commission ("ITC"),⁸⁵ which has the power to exclude the importation of infringing articles. For example, a drug manufacturer, a copyright owner of an audiovisual work, or a trademark owner of an article of clothing could potentially petition the ITC to exclude the importation of the counterfeit drug, videocassette, or article of clothing.⁸⁶

Despite their usefulness in impeding infringing works from entering the U.S. market, actions under section 337 provide limited help in the fight against the international piracy of intellectual property. Section 337 has serious procedural, substantive, and practical limitations.⁸⁷ First, petition-

81. See, e.g., Design Protection Act of 1985, H.R. 1900, 99th Cong., 1st Sess. (1985).

82. 19 U.S.C. § 1337 (1988).

83. For an overview of U.S. International Trade Commission procedure as applied to patent law, see Krosin & Kozlowski, Patent Based Suits at the International Trade Commission Following the 1988 Amendments to Section 337, 17 AIPLA 47 (1989).

84. 19 U.S.C. § 1337(a) (1988).

85. Section 337 cases are litigated before an Administrative Law Judge ("ALJ") who conducts the litigation similar to a federal court judge. If the ALJ finds a violation, and no appeal is made to the ITC, an in rem order excluding the infringing articles from the United States may be issued. This is known as an "exclusion order," and is often a more effective remedy than an injunction, which would require personal jurisdiction over foreign manufacturers or exporters. In addition, articles subject to an exclusion order can be seized and forfeited in certain clear instances of bad faith on the part of the owner or importer of the articles. Those instances are when "the owner, importer, or consignee previously attempted to import the article into the United States; . . . or the article was previously denied entry into the United States" by a previous exclusion order. 19 U.S.C. § 1337(i)(A), (B) (1988). The exclusion order does not take effect immediately. The President has 60 days to review it for possible veto. At the end of 60 days, the order becomes effective, although review of the Commission's determination is available by the federal courts of appeals. Unlike private litigation, the plaintiff does not have to bear the cost of service and enforcement. See generally Lupo, International Trade Commission Section 337 Proceedings and Their Applicability to Copyright Ownership, 32 J. Copyright Soc'y 193 (1985).

86. See Newman, The Amendments to Section 337: Increased Protection for Intellectual Property Rights, 20 Law & Pol'y in Int'l Bus. 571, 581 (1989).

87. In addition to the limitations listed in the text, section 337 has caused tension with U.S. trading partners because it violates the GATT provisions. In 1987, the European Community

ers are faced with difficult burden of proof problems. Although recent amendments have abrogated the necessity to prove domestic injury, petitioners still must prove that the products are indeed infringing. Relief is also limited in an action under section 337 because petitioners cannot obtain damages, only a cease and desist order. This lack of remedial teeth has rendered action under section 337 ineffective against unscrupulous, determined pirates. Absent fear of damages, dishonest importers are tempted to import until ordered to stop. Even if so ordered, they often find other channels of distribution to import the infringing products.⁸⁸

C. The Multilateral Approach: International Treaties and the Role of the World Intellectual Property Organization

It is a truism that the problem of intellectual property piracy hardly can be remedied by purely domestic initiatives. Once counterfeit goods are produced, they will find their way into world markets. Consequently, an integrated solution must include a coordinated international effort. Through the years, U.S. intellectual property owners have looked to the various international agreements covering trademark, patent, copyright, and related matters to protect their intellectual property rights worldwide.

The major treaties⁸⁹ are administered by the World Intellectual Property Organization ("WIPO"), a United Nations organization established in 1967 and headquartered in Geneva.⁹⁰ One of seventeen specialized agencies of the United Nations,⁹¹ the WIPO promotes the protection of intellectual property rights. For this purpose, it collaborates with a large number of international and intergovernmental organizations. In so doing, the WIPO gives legal and technical assistance and provides educational and training programs. It has established working groups in all areas of

Commission initiated complaint procedures under the GATT, alleging that Section 337 discriminates against foreign companies.

The GATT panel ruled in November of 1988 that in most cases Section 337 was not compatible with Article III of the GATT. . . . The panel reasoned that Section 337 discriminates against foreign companies because it gives the ITC jurisdiction over imported products while domestic companies which infringe patents are never brought before the ITC.

In addition, "under ITC procedures foreign companies may not raise counterclaims as they could in [U.S.] federal court." See *Foreign Trade: EC Endorses Panel's Ruling That § 337 Violates GATT Non-Discrimination Rules*, 37 Pat. Trademark & Copyright J. (BNA) 1, 302 (Feb. 2, 1989); *Foreign Trade: GATT Council Finds That § 337 Discriminates Against Foreign Companies*, 39 Pat. Trademark & Copyright J. (BNA) 29, 29-30 (Nov. 9, 1989).

88. For an overview of these problems as they relate to process patents, see Gould, *Protecting Owners of U.S. Process Patents From the Importation of Pharmaceuticals Made Abroad by Use of the Patented Process: Current Options, Proposed Legislation, and a GATT Solution*, 42 Food Drug Cosm. L.J. 346, 354-55 (1987).

89. The most important of these treaties are the Paris Convention for the Protection of Industrial Property and the Berne Copyright Convention. For a text of the major treaties on intellectual property with commentary, see *International Treaties on Intellectual Property* (M. Leaffer ed. 1990).

90. See World Intellectual Property Organization, Special Agency, United Nations, Pub. No. 436(E), *WIPO: What It Is, What It Does* (1987).

91. See *The Statesman's Year-Book* 12-28 (J. Taxton ed. 1990) (describing various specialized agencies).

intellectual property, including trademarks, patents, copyrights, and design. The WIPO administers thirteen unions and conventions, of which the United States is party to seven, and presides over conferences designed to revise these conventions.⁹² The most important conventions are the Paris Union (ninety-seven members)⁹³ and the Berne Convention (seventy-six members).⁹⁴ U.S. participation in the international community progressed with its participation in the Berne Convention in March of 1989.⁹⁵

The international conventions have served and will continue to serve a useful function in protecting intellectual property worldwide. But from a U.S. perspective, these conventions still have significant drawbacks despite their importance to the world community. The conventions fail to provide adequate substantive norms covering important subject matter areas and flexible dispute resolution mechanisms when member states do not meet their treaty obligations.

Inadequate subject matter coverage has occurred in international treaties because they traditionally have excluded important areas of intellectual property. For example, trade secret protection receives no recognition in the treaty system. Moreover, incorporation of important new technologies has lagged. Semiconductor chip protection is not subject to an international arrangement, and such an arrangement has been stymied by the developing countries.⁹⁶

92. See World Intellectual Property Organization, Special Agency, United Nations, Pub. No. 659(E), Background Reading Material on Intellectual Property 39 (1988); M. Leaffer, *supra* note 16, at 595-610.

93. Established in 1883, the Paris Convention for the Protection of Industrial Property covers industrial property in the widest sense, including inventions, tradenames, trademarks, service marks, industrial designs, utility models, and unfair competition.

94. See generally Kirk, WIPO's Involvement in International Developments, 50 Alb. L. Rev. 601 (1986) (outlining important topics in international developments).

95. The Berne Convention was established in 1886 at a diplomatic conference by the Swiss Federal Council as a union of states for the protection of literary and artistic works. The United States had been one of the few countries (the USSR and China being the other major countries) that was not a member of this most important international copyright convention. Adherence to Berne required significant changes in U.S. policy. Before Berne, the United States relied on bilateral agreements and the Universal Copyright Convention (UCC). The UCC is administered by UNESCO, a UN organization from which the United States has withdrawn. Interest in joining the world copyright community and establishing copyright relationships with countries not covered by either bilateral agreements or the universal copyright conventions provided the impetus for U.S. entry. For an overview of the reasons for U.S. adherence to Berne, see Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 Cornell Int'l L.J. 171 (1989).

96. The developing countries have been successful in blocking an integrated circuit treaty proposed by the WIPO. See Third World Questions the Need for Integrated Circuit Treaty, 34 Pat. Trademark & Copyright J. (BNA) 59-60 (May 21, 1987). On May 26, 1989, a diplomatic conference in Washington, D.C. adopted the Treaty on Intellectual Property in Respect of Integrated Circuits. The United States and Japan, by far the world's largest producers of semiconductor chips, have refused to sign the treaty. The Treaty has been signed by only six Third World countries: Egypt, Ghana, Guatemala, Liberia, Yugoslavia, and Zambia. The U.S. objections to the Treaty have focused on the broad compulsory licensing provisions, the short term of protection, the lack of compensation for innocent infringement, the failure to adequately address the issue of importation of products that contain infringing chips, and the dispute resolution process which it considers to be too "politicized." See U.S., Japan Refuse to Sign Treaty to Protect Integrated Circuits, 3 World Intell. Prop. Rep. 156 (1989). For a text of the Treaty on Intellectual Property in Respect of Integrated Circuits, see Industrial Property

The Paris Union, the Berne Convention, and the other international arrangements do not create truly transnational rights for intellectual property, nor do they include a meaningful system for the enforcement of minimum standards of protection. They simply confer national protection with certain minimum rights.⁹⁷ The Conventions do little to harmonize administration practices, which vary from country to country.

The Conventions have proven to be ineffective when countries simply do not enforce their laws. The agreements do not contain effective mechanisms for challenging countries that ignore their obligations.⁹⁸ The reason for this inability to develop effective enforcement mechanisms relates to the political makeup of the WIPO. The WIPO has served as a forum sympathetic to those who have an anti-intellectual property position. As would be expected, most of the opposition to enhancing the WIPO's role as an effective forum against international piracy has come from the developing countries.⁹⁹ This opposition has curtailed efforts to incorporate a dispute settlement mechanism within the WIPO context to address the problem of inadequate protection for intellectual property.¹⁰⁰ Although a serious need exists for a uniformity of international norms, this position runs counter to the current institutional arrangement under the international treaties.¹⁰¹ In sum, the multinational conventions have not been ideal mechanisms for challenging noncompliant countries.¹⁰²

Because the international convention system is unable to deal with the problem of international piracy of intellectual property, those affected have called for a fresh approach. This approach must be trade-based and flexible enough to meet the needs of the international community faced with a piracy problem that cannot be solved by traditional means.

at text 1-011, 001-007 (June 1989).

97. For example, the Paris Convention stipulates a right to priority for patents, trademarks, and industrial designs. This right to priority works as follows: on the basis of a regular application filed in one or more of the contracting states, an applicant may apply for protection in another contracting state within a given time period. The application will be regarded as having been filed at the same time as the original. The Berne Convention also stipulates minimum rights, such as a minimum term of at least the life of the author plus fifty years and the right to copyright protection conferred by member states without formalities such as copyright notice and registration. *See generally* M. Leaffer, *supra* note 16, at 1-14 (describing Paris and Berne Union systems).

98. For an overview of Convention violations, see Gansser, *Violations of the Paris Convention for the Protection of Industrial Property*, 11 *Int'l Rev. Indus. Prop. Copyright L. (IIC)* 1 (1980).

99. *See* GAO Report, *supra* note 9, at 25.

100. *See* Revision of the Paris Convention on Industrial Property: Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 1 (1982).

101. Dissatisfaction with the WIPO and the international conventions relates to a larger dissatisfaction with the one nation, one vote system in the international sphere. The developing countries constitute overwhelming majorities in many of the international institutions. *See* Jackson, *Remarks*, 22 *Vand. J. Transnat'l L.* 343, 349 (1989).

102. *See* GAO Report, *supra* note 9, at 25.

D. The Bilateral Trade-Based Approach: Section 301 of the Trade Act

Frustrated with current international arrangements covering intellectual property, many persons in business and government have pushed for a bilateral trade-based approach as the best short-term solution to the piracy dilemma.¹⁰³ The bilateral approach involves the use of direct negotiations, facilitated by economic sanctions, with a given country in order to achieve an agreement over intellectual property matters. This tactic is not new. Bilateral trade agreements have long been a mainstay of U.S. policy.¹⁰⁴ Over the years, the United States has entered into a series of bilateral agreements on patent and copyright law.¹⁰⁵

Bilateral negotiations can effectively promote U.S. interests. They can target practices of a particular country offensive to U.S. interests and do so in an expeditious manner. By employing direct trade sanctions against noncomplying countries, the current U.S. bilateral effort coerces problem countries to adopt adequate standards of protection. The idea is the carrot and the stick.¹⁰⁶ Former noncomplying countries receive the right to export to the United States as a most favored nation in exchange for providing proper intellectual property protection.¹⁰⁷ Thus, if protection is adequate in the foreign country, U.S. direct investment will occur and export to the United States will be facilitated.

When bilateral persuasion is ineffective, the United States can threaten to impose unilateral trade sanctions. These sanctions have been greatly strengthened by the Omnibus Trade and Competitiveness Act of 1988,¹⁰⁸ which mandated the protection of intellectual property rights as one of the priorities of U.S. trade policy. Under these 1988 Amendments to

103. See Basic Framework, *supra* note 36, at 16-17.

104. See H. Stalson, *supra* note 9, at 60.

105. See U.S. Copyright Office International Copyright Relations of the United States Circular 38(a).

106. See The Caribbean Basin Economic Recovery Act ("CBRA"), Pub. L. No. 98-67, § 212(b)(5), 97 Stat. 369, 384-87 (1983) (codified at 19 U.S.C. § 2702(c)(9) (1988)), which conditions the benefits of the Caribbean Basin Initiative on the executive branch finding that governmental organizations do not engage in poaching and retransmittal of broadcast signals.

The CBRA was followed by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 503, 505, 98 Stat. 2948, 3019-23 (codified at 19 U.S.C. §§ 2462(c)(5), 2464(c)(3)(B)(ii) (1988)), which delegates authority to the President to consider a country's laws and practices in adequately protecting intellectual property rights as a condition of receiving the trade benefits of the Generalized System of Preferences Program (GSP). Section 304 of the Trade and Tariff Act of 1984 clarified § 301 of the Trade Act, which applies to instances where intellectual property is inadequately protected. See 19 U.S.C. §§ 2411(d)(3)(C), 2411(d)(4)(B) (1988).

In 1988, Congress enacted the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1301-1480, 1341-42, 102 Stat. 1107, 1164-84, 1211-16, 19 U.S.C. §§ 1337, 2411 (1988). Under these amendments, the United States Trade Representative must assess annually the adequacy and effectiveness of the intellectual property protection offered by U.S. trading partners.

107. See, e.g., USTR Creates Priority Watch List Not Priority Country List, 38 Pat. Trademark & Copyright J. (BNA) 119 (June 1, 1989); USTR Will Begin 301 Investigation of Argentina's Patent Laws for Drugs, 36 Pat. Trademark & Copyright J. (BNA) 583 (Sept. 29, 1988). The USTR has identified 25 countries for special watch. See also Thailand Denied Certain GSP Benefits for Weak Intellectual Property Laws, 37 Pat. Trademark & Copyright J. (BNA) 279-80 (Jan. 26, 1989) (possible action under "Super 301").

108. 19 U.S.C. §§ 2242, 2411-2420 (West Supp. 1990).

the Trade Act,¹⁰⁹ the government may use trade measures as leverage to achieve adequate protection of U.S. intellectual property worldwide. Until the 1988 amendments, section 301 of the Trade Act did not force action by the U.S. Trade Representative ("USTR") or the President, who retained complete discretion in deciding whether to take action and the type of action to take.

The new amendments enhance the role of the USTR in negotiating U.S. interests.¹¹⁰ They give the USTR discretion to initiate section 301 investigations.¹¹¹ But once an investigation is initiated, the Trade Act limits USTR discretion and requires mandatory action in cases involving unjustifiable acts, such as a failure to protect intellectual property.¹¹² Under the Trade Act, the form of any retaliatory action is discretionary, but the Act requires that either a preference to tariff increases be given or that tariff preferences be removed. Section 301 gives explicit authority to the USTR to enter into binding agreements with foreign countries.¹¹³

The 1988 Trade Act has established a special section 301 procedure requiring the USTR to identify countries that deny adequate and effective protection of intellectual property rights,¹¹⁴ "priority" countries that are the most egregious intellectual property transgressors, and countries that fail to undertake or make progress in negotiations with the USTR.¹¹⁵ The process of establishing priority countries is designed to lead ultimately to the imposition of sanctions if progress cannot be made. On May 25, 1989, pursuant to these provisions, the USTR placed seventeen countries on a "watch list"¹¹⁶ and eight countries on a priority watch list.¹¹⁷ Because intellectual property protection has become a high priority trade issue, the role of the USTR has now superseded the role of both the Department of State and the U.S. Customs Service.¹¹⁸

Advocates of the bilateral approach maintain that the problem of intellectual property piracy is too pressing to be handled by international agreement, and that we simply do not have time to suffer through the

109. Both the GSP and CBRA link adequate protection of intellectual property with a most favored nation status. See *supra* note 106 for a discussion of the GSP and the CBRA.

110. See generally USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property, 6 Int'l Trade Rep. (BNA) 715-21 (May 31, 1989) [hereinafter USTR Fact Sheets] (discussing how "Super 301" provisions demand "identification of U.S. trade liberalization negotiating principles by May 28 this year").

111. 19 U.S.C. § 2412 (c) (1988).

112. Section 301 imposes mandatory action on the executive branch, but contains rather broad escape clauses that cast doubt on the extent to which the executive branch is bound. See 19 U.S.C. § 2411(a)(B)(iv) (1988).

113. 19 U.S.C. § 2411(a), (b)(2), (c)(2)(C), (d)(3)(B)(i)(II), (d)(4)(B) (1988).

114. *Id.* § 2241.

115. *Id.* § 2242(a)(2), (b), (c).

116. Countries included on the list are: Argentina, Malaysia, Canada, Pakistan, Chile, the Philippines, Colombia, Portugal, Egypt, Spain, Greece, Turkey, Indonesia, Venezuela, Italy, Yugoslavia, and Japan. See USTR Fact Sheets, *supra* note 110, at 119.

117. Countries included on the priority watch list are: Brazil, the Republic of Korea, India, Saudi Arabia, Mexico, Taiwan, the People's Republic of China, and Thailand. *Id.*

118. See GAO Report, *supra* note 9, at 17. The Department of State sponsors negotiations covering international agreements on intellectual property and the U.S. Customs Service impedes entry of counterfeit goods into the country. *Id.*

laborious process of changing international institutional arrangements.¹¹⁹ Even the most promising of these negotiations, which are currently taking place in the GATT framework, may take years to complete and yield no results.

The bilateral trade-based approach has enjoyed concrete successes in various countries. Notable examples include Taiwan, which amended its copyright law to allow for more stringent penalties against pirates and enacted a new patent law. In response to direct pressure, Singapore has passed an improved copyright law, and Korea has made several improvements in its intellectual property coverage.¹²⁰

Despite these successes, bilateral trade agreements may run counter to U.S. long-term interests for a healthy, stable trade environment. The international system is one in which the rights and obligations among states are equal, and in which trade is based on the principle of nondiscrimination, otherwise known as most favored nation treatment.¹²¹ The current trend, however, toward arbitrary unilateral action under Section 301 runs counter to these basic long-term interests.¹²²

In general, bilateral agreements tend to fragment the world trading system. They can create resentment, particularly among Third World countries who view imposed bilateral agreements as a species of colonialism. These tensions have come to fruition in the USTR's imposition of \$40 million in *ad valorem* tariffs on certain Brazilian imports in response to Brazil's long-standing refusal to confer patent protection on pharmaceuticals. Brazil has countered that its patent policy is a matter of local concern and contravenes none of its responsibilities under international treaties or the GATT. Brazil is correct in its assertion that patent protection for pharmaceuticals neither is mandated by the Paris Convention nor constitutes a discrimination against foreign imports under the GATT. Moreover, Brazil claims that the U.S. initiative under Section 301 violates U.S. responsibilities under the GATT.¹²³

119. For a lively debate on the relative advantages of the bilateral and multilateral approaches, see Baucus, A New Trade Strategy: The Case For Bilateral Agreements, 22 Cornell Int'l L.J. 1 (1989); Aho, More Bilateral Agreements Would be a Blunder: What the President Should Do, 22 Cornell Int'l L.J. 25 (1989).

120. For a summary of these numerous successes, see Office of the United States Representative, Special 301 on Intellectual Property, May 25, 1989; *see also* Note, A Trade-Based Response to Intellectual Piracy: A Comprehensive Plan to Aid the Motion Picture Industry, 76 Geo. L.J. 417, 446-47, 458-59, 487-88 (1987); Treaties: Indonesia Signs Bilateral Agreement With U.S. to Protect Copyrights, 37 Pat. Trademark & Copyright J. (BNA) 634-35 (Apr. 13, 1989); Conferences: U.S. Continuing Efforts to Negotiate Bilateral Agreements to Curb Piracy, 37 Pat. Trademark & Copyright J. (BNA) 11-12 (Nov. 3, 1988).

121. *See* Aho, *supra* note 119, at 32.

122. *See* Bliss, The Amendments to Section 301: An Overview and Suggested Strategies for Foreign Response, 20 Law & Pol'y Int'l Bus. 501, 503 (1989).

123. *See* 6 Int'l Trade Rep. (BNA) 238 (Feb. 22, 1989).

III. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (THE MULTILATERAL TRADE-BASED APPROACH)

A. Background

Intellectual property protection has become a trade issue as the economies of the United States and other Western countries have become dependent on selling information. As transfer of technology becomes increasingly internationalized, and the costs of production of this information become continually more expensive, Western countries, and particularly the United States, need a vast international market to recover their costs. If the costs cannot be recouped, the result will be less production and less trade in technology. The large disparity between the inventor's costs and those of the pirate may result in an effective trade barrier—even more so than a tariff.¹²⁴ In the face of these challenges, the international bodies governing intellectual property have been largely ineffective. By the early 1980s, the United States and other Western countries began to look for an innovative multilateral solution to the piracy dilemma. In this context, the GATT began to be seen as the international institution best equipped to provide the needed remedy.

B. Overview of the GATT

The GATT is the most important international agreement regulating trade among nations, with more than ninety countries, accounting for well over four-fifths of world trade, now subscribing to the agreement. The GATT was formed after the Second World War through negotiations between the United States and the United Kingdom culminating in the Havana charter, and it came into effect on January 1, 1948.¹²⁵ Paradoxically, the GATT was conceived as an ancillary tariff agreement to work within the context of a more broadly designed International Trade Organization, which would work alongside the International Monetary Fund and the International Bank for Reconstruction. Intended to be no more than interim measures, the GATT provisions were to be incorporated into the larger organization.¹²⁶ The International Trade Organization never materialized, but the GATT has remained in place since the late 1940s. Despite its ambiguous origins and incoherent organizational structure, the GATT has been surprisingly successful.¹²⁷

The GATT's declared objective is to provide a framework of certainty and predictability about the conditions in which traders conduct their transactions in the world market. It is the only multilateral instrument that lays down agreed upon rules for the conduct of international trade. The GATT also is a forum for negotiations as well as a code of rules.¹²⁸

124. See H. Stalson, *supra* note 9, at 51.

125. See S. Golt, *The GATT Negotiations 1986-90: Origins, Issues, and Prospects* 2 (1988).

126. R. Hudec, *The GATT Legal System and World Trade Diplomacy* 9-10, 45-46 (1975).

127. See Jackson, *The General Agreement on Tariffs and Trade*, in *A Lawyer's Guide to International Business Transactions* 41, 43 (W. Surrey & D. Wallace Jr. 2d ed. 1977) [hereinafter Jackson, *General Agreement*].

128. See S. Golt, *supra* note 125, at 2.

Concerned primarily with the international trade of goods, the GATT system, which is constantly evolving, is based on five basic principles: (1) the most favored nation principle (contracting parties must give unconditional most favored nation treatment to the products of other contracting parties); (2) the national treatment principle (contracting parties may not impose more onerous internal taxes or regulations on imported products than on similar domestic products); (3) the tariff concession principle (contracting parties must maintain customs duties on imported products at levels not more than those specified in the latest applicable schedules that the party has filed); (4) the principle against nontariff barriers (contracting parties should not use quantitative and other nontariff barriers to restrict trade); (5) the fair trade principle (contracting parties should not promote exports through subsidies or dumping and may defend domestic industries from such unfair practices only through the use of reasonable, proportionate tariff measures).¹²⁹ In addition, the GATT also provides a dispute settlement mechanism, a necessary adjunct to an international body whose goal is to harmonize today's complex international trading relationships.

C. Intellectual Property in the Uruguay Round

Whether the GATT could play a role in the protection of intellectual property among nations has been discussed since the late 1970s.¹³⁰ But only in the Uruguay Round of the GATT, possibly the most comprehensive round in its history,¹³¹ has the idea gained momentum. The role of the GATT in the protection of intellectual property surfaced for the first time

129. See K. Dam, *supra* note 20, at 17-22; J. Jackson, *supra* note 20, at 54. There are several key GATT provisions. Article I makes a general commitment to the principle of the most favored nation ("MFN") with which any contracting party must comply. K. Simmonds & B. Hill, *supra* note 20, § 1.A at 1-2. Under the MFN, any privilege granted by any contracting party to any product imported from any other country must also be granted immediately and unconditionally to any like product imported from any contracting parties. Article XXIV(9) allows the formation of a free trade area between two or more contracting parties. *Id.* at 57-62. Article XI prohibits the use of other prohibitions or restrictions on imports from contracting parties. *Id.* at 54-55. Article XIII requires nondiscrimination in quantitative trade restriction. *Id.* at 18-19. Article VI concerns dumping. *Id.* at 12-15. Articles XIX, XX, and XXI permit trade restrictions by a contracting party to protect certain national interests. *Id.* at 51-52, 54-55. Article XXV commits contracting parties to a series of meetings to seek further reductions in barriers to international trade. *Id.* at 19-20. Articles XXII and XXIII deal with dispute resolution. *Id.* at 55-56.

130. Intellectual property is considered only tangentially by the GATT. Article IX established that marks of origin should not be used to hamper international trade. K. Simmonds & B. Hill, *supra* note 20, at 19-20. Article XX(d), however, places trademarks, patents, and copyrights and the prevention of deceptive practices among the exceptions in the GATT. *Id.* at 53.

131. In addition to the inclusion in the Uruguay Round of the intellectual property issue, the GATT is considering other extremely complicated trade matters. Some specific issues on the agenda are a greater liberalization of the agricultural policies of member nations, trade in services, and the modification and strengthening of the GATT's dispute settlement mechanisms. See Results of the GATT Ministerial Meeting Held in Punta del Este, Uruguay: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 99th Cong., 2d Sess. 3, 12-15 (1986) (statement of the Hon. Clayton Yeutter, U.S. Trade Representative). The current Uruguay round negotiations broke down at a ministerial meeting at Brussels on December 7, 1990. Dullforce & Montagnon, *An EC Pitchfork in the Works*, *Fin. Times*, Dec. 8, 1990, § 1, at 6, col. 4.

at the end of the Tokyo Round in the 1970s. These discussions, which concerned the counterfeiting of trademarks, launched a serious effort to integrate intellectual property into the GATT.¹³² These talks focused on the proposed code to discourage trade in counterfeit trademarked goods, the draft of which was prepared by the United States but was never submitted to the GATT.¹³³ Beginning with this draft code, the U.S. scope has broadened to include all forms of intellectual property within the GATT framework.¹³⁴

Political pressure in the West has played a key role in placing the intellectual property issue at the forefront of the trade negotiating calendar. Industry advocates both here and abroad have actively promoted the GATT solution.¹³⁵ United States lobby groups have pointed to the use of section 301 and other trade sanction provisions as clear precedents for a trade-based approach to intellectual property protection. They maintain that these sanctions are more effective in changing certain practices of Third World nations than recourse to traditional international institutional agreements. In sum, a general consensus in the West has placed the intellectual property issue at the top of the current GATT negotiations in the Uruguay Round.¹³⁶

D. Strengths and Limitations of the GATT

1. Dispute Settlement Mechanisms

The GATT is perceived to have certain advantages over other multinational remedies in solving the problem of intellectual property piracy. As a principle advantage, the GATT provides not only a forum for negotiations, but also an enforcement mechanism that does not exist in traditional multilateral agreements. By comparison, under the multilateral

132. See GAO Report, *supra* note 9, at 35. The introduction of intellectual property rights into the Uruguay Round took place through difficult negotiations during a six year period beginning in 1980. See generally Bradley, Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations, 23 Stan. J. Int'l L. 57 (1987) (describing history of U.S. involvement to include intellectual property rights, investment, and trade in services in GATT negotiations).

133. See GAO Report, *supra* note 9, at 35.

134. The passage of U.S. trade legislation, the Trade and Tariff Act of 1984 and the Generalized System of Preferences Renewal Act of 1984, greatly influenced the move toward a consideration of intellectual property in the Uruguay Round. See Bradley, *supra* note 132, at 64-65. Over the objection of several developing countries, intellectual property was included in the Uruguay Round. Intense pressure from U.S. Trade Representative Yeutter, who threatened that the United States would turn to bilateral measures, proved to be persuasive. *Id.* at 85.

135. See U.S., European and Japanese Business Groups Agree on Intellectual Property Approach to GATT, Intellectual Property Committee, June 14, 1988. The industry groups most active in this effort are the U.S. Intellectual Property Committee ("IPC"), the Japanese Federation of Economic Organization (Keidanren), and the Union of Industrial and Employers' Confederations of Europe ("UNICE"). The members of the IPC include Bristol-Meyers, Dupont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Pfizer, and others.

136. See Turnbull, Intellectual Property and GATT: TRIPS at the Midterm, 1 J. Proprietary Rts. 10 (1989).

conventions such as the Berne Convention and the Union of Paris, a country can overtly ignore its obligations without fear of sanctions within the treaty mechanism. The GATT's dispute settlement procedures,¹³⁷ which facilitate bilateral consultations between governments, constitute the key to a successful multilateral strategy to curb the problem of piracy.

Through the years, the GATT has developed procedures for settling disputes by using third party panels of experts. After a complaint has been filed by an aggrieved party, the review proceeds to permanent GATT committees and third party panels of experts who investigate and attempt to resolve the dispute. These experts act in their individual capacities and not as representatives of governments.¹³⁸ The panel reports its conclusions and recommendations to the entire body of contracting parties. The body then rules on the matter, and generally defers to the panel's recommendations.¹³⁹ Although the dispute settlement mechanism has produced mixed success, there is nothing similar to it under the multilateral conventions. If a dispute arises under the WIPO conventions, a claimant must bring the dispute before the International Court of Justice.¹⁴⁰

The GATT dispute settlement mechanism is occasionally ineffective and inefficient. Recent GATT cases are notorious for interminable hearings and extreme politicalization by member countries.¹⁴¹ If the GATT is to become a more effective organization, these shortcomings in the dispute mechanism must be remedied.¹⁴² Accordingly, some negotiators suggest that more attention should be given to surveillance procedures and the

137. The dispute settlement provisions are found in two articles of the GATT. Article XXII provides that any contracting party, when asked, will consult with any other contracting party with respect to any matter affecting the operation of the General Agreement. K. Simmonds & B. Hill, *supra* note 20, at I.A. 55. Article XXIII, entitled "Nullification and Impairment," basically provides that GATT contracting parties may suspend the obligation toward the contracting party that has caused the impairment or nullification. *Id.* at 55-56; *see also* Davey, *Dispute Settlement in GATT*, 11 *Fordham Int'l L.J.* 51 (1987). *See generally* Bliss, *GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects*, 23 *Stan. J. Int'l L.* 31 (1987) (discussing reform in the Uruguay Round, including GATT dispute settlement procedures).

138. *See* Davey, *supra* note 137, at 58.

139. *See* R. Hudec, *supra* note 126, at 74-96 (discussing the GATT dispute settlement mechanism).

140. *See* GAO Report, *supra* note 9, at 36-37 (comparing the GATT and WIPO dispute resolution procedures).

141. A 1987 GAO study of GATT dispute settlement procedures reported that the average U.S. complaint to the GATT took 45 months to resolve. *See* GAO Report, GAO Publication No. N.S./AP-87-100 at 18 (Mar. 1987). In the so-called DISC case, in which the European Community alleged that certain U.S. tax legislation amounted to an export subsidy, it took almost three years to appoint the panel. For a discussion of the DISC case, *see* Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 *Am. J. Int'l L.* 747 (1978). From an historical perspective, GATT dispute settlement was considered effective during the first twenty years, but it has become progressively less effective. In addition to long delays and ineffective implementation, the GATT dispute mechanism also has suffered criticism because of its emphasis on judicial solutions for problems that could be solved only through negotiations. For the above reasons, the GATT dispute resolution system has been used less and less. For example, between 1959 and 1978, the GATT dispute settlement was invoked only once per year. *See* Davey, *supra* note 137, at 62-63.

142. *See* Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 *Cornell Int'l L.J.* 145, 148 (1980).

reporting of actions inconsistent with the rules.¹⁴³ The GATT has resolved many disputes, despite the lack of remedies and sanctions similar to those in domestic civil and criminal systems.¹⁴⁴ There is, however, a pervasive belief that the system needs to be more streamlined and formal. To bolster the dispute mechanism, the United States and other countries have pushed for a more legalistic dispute mechanism, one which involves shorter time limits, excludes disputing parties from any decision in their case, and provides more immediate and automatic imposition of sanctions.¹⁴⁵ On the whole, if a stronger and more effective GATT is to become a reality, contracting states must be prepared to cede certain sovereign rights to the GATT.

2. *A Flexible Institutional Arrangement*

The GATT provides a flexible yet weak institutional structure for remedying problems of international trade. The GATT is in essence a contract between governments¹⁴⁶ that was created not as a permanent organization, but rather as a provisional agreement among nations to uphold principles of free trade.¹⁴⁷ As a result, the GATT remains a contract supported by an extremely weak organizational infrastructure.¹⁴⁸ The GATT's weakness in organizational structure, however, should not overshadow its practical successes due in large part to its flexibility. Although no one would maintain that the GATT enjoyed a perfect record in dealing with departures from its basic goals, it remains the only multinational organization with any kind of track record in promoting the goals of free trade. It also provides a unique forum through which one hundred nations can consider ways to ease trade restrictions.

As compared with the international intellectual property treaties, the GATT has provided a flexible institutional arrangement for participation and a fluid mechanism for adopting new measures, principally because GATT members have not formed rigid voting blocks as in other international institutions. A good example of this institutional flexibility can be

143. *Id.* at 168-70.

144. See Waincyner, *GATT Dispute Settlement: An Agenda for Evaluation and Reform*, 14 N.C. J. Int'l L. & Com. Reg. 81, 92 (1989).

145. See Bliss, *supra* note 137, at 50. More specifically, a streamlined procedure would offer the disputants mediation by the Director-General of the GATT. Arbitration also should be offered as an alternative to the traditional panel process. Nongovernmental experts could be used on the panels. Decisions of the contracting parties no longer would require an absolute consensus. Expedited and enforceable deadlines would be established as well. A declaration also should be issued so that the contracting parties will abide by these procedures. *Id.* at 50-52.

146. *Id.* at 53.

147. See generally Fisher, *Making the World Trade Regime Work: An Agenda For GATT*, 6 SAIS Rev 53 (1986) (advocating discussion of certain issues in the then upcoming round of GATT negotiations).

148. In this regard, deficiencies in the decision-making procedures of the GATT system have been pointed out: "The awkwardness of fragmented bodies, distributed among the GATT and a variety of Codes and ancillary agreements leading to Balkanization . . ." Jackson, *Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round*, in *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* 18 (E.V. Petersman ed. 1988).

found in nontariff barrier agreements embodied in codes to which adherence is optional. Their success is derived from the GATT's institutional flexibility. Maximum participation in the codes has been achieved through the wide range of bargaining that takes place during GATT rounds.¹⁴⁹

Despite its institutional flexibility, will a GATT solution undermine the current international arrangements? More specifically, will the GATT be able to work with the WIPO without a wasteful struggle for turf? Such a risk exists. The GATT, however, has had a rich history of working with, rather than displacing, other international organizations. For example, the GATT traditionally has relied on experts in other areas for such tasks as administering codes on customs valuation and standards. Consequently, if a GATT code on intellectual property were adopted, it would not replace the multinational conventions, but would work in conjunction with other international bodies. In this regard, the WIPO could be asked to lend its expertise on matters of intellectual property protection. In sum, the adoption of a GATT code would bolster rather than undermine international institutions governing intellectual property.

E. Implementing a Trade Related Aspects of Intellectual Property (TRIPS) Agreement in the GATT

Several issues will have to be resolved before a GATT agreement covering intellectual property can be accomplished. First, which institutional mechanism should be used in amending the GATT? Second, which substantive standards should be adopted? Third, should differential treatment be given for certain developing countries? On each of these issues the United States will have to adopt a more flexible bargaining stance.

The first issue is by which amendment mechanism the GATT should institutionalize its recognition of intellectual property. The alternatives range from formal and coercive mechanisms to a more flexible means. The GATT formally recognizes only one method for amending its terms. Although it has never been used, Article XXX(2)¹⁵⁰ constitutes the most far-reaching institutional provision in amending the GATT. This provision allows the contracting parties to adopt an amendment binding on all members; those that do not accept it must withdraw from the GATT. Such a coercive amendment procedure would be met with stiff opposition from the developing world and should be avoided if a truly comprehensive solution is to occur. A less coercive measure is found in Article XXX(1).¹⁵¹ Under this provision, amendments to the GATT are binding on contracting parties that accept them by a two-thirds majority. Even if a two-thirds majority could be acquired under this procedure, most of the problem countries probably would not vote for the measure. But if intellectual property is incorporated into the GATT, it could form the basis by which the developing world could join the rest of the world and the roughly sixty nations who signed the amendment.

149. See H. Stalson, *supra* note 9, at 56-57.

150. See K. Simmonds & B. Hill, *supra* note 20, at I.A. 71-72.

151. See *id.* at 71.

The 1979 Tokyo Round of the GATT developed a more flexible means of amendment. During the Tokyo Round, the GATT membership produced a series of agreements called "The Codes" that generally deal with nontariff barriers. For example, the major codes are the Standards Code,¹⁵² the Customs Valuation Code,¹⁵³ the Subsidies and Countervailing Duties Code,¹⁵⁴ and the Revised Anti-Dumping Code.¹⁵⁵ The provisions of the Codes apply only to the members who sign them and they set forth their own dispute settlement mechanism¹⁵⁶.

The most effective strategy regarding the TRIPS agreement would be to take a middle approach. This would place a general provision in the basic GATT agreement pursuant to the XXX(1) amendment process in conjunction with a specific intellectual property code. The general provision would recognize the importance of adequately protecting intellectual property and would emphasize that inadequate protection is a trade barrier. A specific code would be drafted and signed by parties wishing to join. A TRIPS agreement placed in the Code still would need a critical mass of participants from both the developed and Third World countries to be truly effective, but it could be the start of a movement toward world standards concerning intellectual property.¹⁵⁷

F. Substantive Standards and Differential Treatment

Once the proper mechanism to amend the GATT is determined, the next issues are who should develop the substantive standards and what those standards should be. Developing a consensus on substantive standards may prove to be the most divisive and difficult issue to resolve in forging an agreement.¹⁵⁸ The difficulty lies in the basic discrepancy between the developing countries and the United States as to what those standards should be. The standards proposed by the United States are unsurprisingly much like the U.S. law of trademark, patent, and copyright.¹⁵⁹ These norms are clearly quite different from those in the

152. See id. at I.I.C.4 99-127.

153. See id. at I.I.C.3 53-59.

154. See id. at I.I.C.1 1-33.

155. See id. at I.I.C.2 33-53.

156. As a result, some commentators have argued that the separate dispute resolution mechanism procedure will lead to balkanization and confusion, which ultimately will undermine the GATT dispute settlement process. See Bliss, *supra* note 137, at 41. The codes contain the same jurisdictional requirement embodied in Article XXIII: to invoke the dispute mechanism, a party to the code must allege nullification or impairment of benefits. See K. Simmonds & B. Hill, *supra* note 20, at I.A. 55-56.

157. See Turnbull, *supra* note 136, at 18.

158. The U.S. proposal is reprinted in U.S. Intellectual Property Proposal is Proposed to GATT Negotiating Group, 34 Pat. Trademark & Copyright J. (BNA) 655 (Oct. 29, 1987).

159. The U.S. proposal contains the following provisions. Copyright standards should contain, at a minimum, the standards of the Berne Convention. Adequate protection should be extended to mask works, computer software, and sound recordings. Patent subject matter should include chemicals, pharmaceutical products, and microorganisms. Compulsory licensing and working requirements generally should be abrogated. Trademark protection should be provided on the basis of use or registration. Rights should not lapse unless the trademark has not been used for a period of time. Licensing should be freely permitted. Border and international enforcement mechanisms for intellectual property protection should be vigor-

developing countries.

The United States has provided a list of minimum substantive standards to be integrated into a TRIPS agreement.¹⁶⁰ In addition to the more traditional aspects of intellectual property, new informational products raise further problems. Particularly difficult standardization issues will involve such new informational products as computer software, semiconductors, and biotechnology. For example, many countries protect computer software. Although there is a general consensus that software falls into the domain of copyright, the consensus ends there. No general agreement exists on how long the term of protection should last or the exact substantive scope of protection. There is even less of a consensus on how to treat semiconductor chips. A few countries, primarily the United States and Japan, have adopted a *sui generis* protection for mask works. Although the United States has tried to encourage other countries to do so, only a few countries give protection to semiconductors. In this regard, the WIPO has drafted several international proposals covering semiconductor chips, but has not achieved the necessary consensus.¹⁶¹ Biotechnology is another general area which has posed many of the same issues, particularly as to the scope of protection for living organisms.

An even more basic question is whether the GATT should establish its own norms or whether it should look to those norms and standards set for intellectual property protection by the prevailing international institutions. This was a major point of contention at the Montreal meeting of the Uruguay Round, which broke down into a North-South schism. The developed countries would like to use the GATT as the standard-setting mechanism for establishing the substantive rights to be determined. By comparison, the developing countries would prefer leaving the substantive standards to traditional international bodies such as the WIPO or UNESCO.¹⁶² For these reasons, the goal of the West in the Uruguay Round should be tempered by these difficult issues that will be resolved neither quickly nor adequately unless the special needs of the developing countries are taken into account.

ously maintained. See U.S. Proposal for Negotiations on Trade-Related Aspects of Intellectual Property Rights, 34 Pat. Trademark & Copyright J. (BNA) 667 (Oct. 29, 1987).

160. See Turnbull, *supra* note 136, at 15; see also R. Benko, *supra* note 9, at 30-45.

161. Efforts to Adopt Integrated Circuit Treaty Suffer Set Back, 32 Pat. Trademark & Copyright J. (BNA) 273-74 (July 24, 1986). The convention could not reach an agreement on any matter, with the United States, Japan, and the European Community opposing the developing countries. WIPO to Hold Meeting On Integrated Circuit Treaty, 33 Pat. Trademark & Copyright J. (BNA) 625-26 (Apr. 9, 1981); 'Third World' Questions Need for Integrated Circuits Treaty, 34 Pat. Trademark & Copyright J. (BNA) 59-60 (May 21, 1987); U.S., Japan Refuse to Sign WIPO Treaty on Protection of Semiconductor Chips, 38 Pat. Trademark & Copyright J. (BNA) 123 (June 1, 1989). The United States and Japan refused to sign, contending their laws provide more protection. The reasons for the U.S. refusal were disagreements about the length of protection, determining when protection begins, and dispute resolution. WIPO Draft Treaty on Chip Protection, 37 Pat. Trademark & Copyright J. (BNA) 600-03 (Apr. 6, 1989).

162. India was the main advocate of such a position at the Montreal meeting. See GATT: Indian Proposal Says Developing Countries Should Get Patent, Trademark Concessions, 6 Int'l Trade Rep. (BNA) 953 (July 19, 1989); see also Turnbull, *supra* note 136, at 18.

Related to the question of substantive standards is the issue of whether differential treatment should be allowed for certain developing countries and whether these countries should be allowed to be parties to a TRIPS agreement without adopting all of its elements.¹⁶³ The current U.S. bargaining position strictly denies differential treatment of the developing countries. This approach will have to be modified if the United States and other Western countries are to achieve an agreement that covers the countries most responsible for the problem. The differing needs of the developing countries must be recognized by forging a two-tier system that accommodates their needs. This two-tier system should not be viewed as permanent, but instead should include transitional periods within which the developing countries could reasonably comply with the new standards while avoiding the dislocations of a changing legal system.

G. Conclusion: Toward a New Multilateralism

Integrating intellectual property into the GATT system would constitute a far-reaching step in promoting the adequate worldwide protection of U.S. intellectual property. In itself, even if such an agreement is forged in the current Uruguay Round of negotiations, it will not be a total solution to the problem. The history of the GATT reveals that the developing countries, which provide the least amount of intellectual property protection, exist largely outside the GATT system. It will be difficult to include intellectual property in a system that cannot deal with problems of regionalism, state enterprises, and safeguard clauses. In addition, the GATT officially has exempted from trade liberalization entire sectors, such as agriculture and textiles, and has ignored deviations from free trade principles in other industries, such as steel and textiles. This catalog of GATT problems is well-known and indicates that folding an effective intellectual property agreement into the GATT will flow neither smoothly nor quickly.¹⁶⁴

Including the developing countries in the GATT system will require a less legalistic method than many are advocating at this time. As the GATT negotiations have shown, the member nations may be unable to agree on clear, precisely stated, enforceable substantive rules. The reason for this inability is obvious. One need only consider the nature of the world trading system, which is comprised of highly disparate units, varying widely in political orientation, social organization, and stages of development. A certain amount of differentiation in this environment will have to be accepted. In effect, there will have to be a two-tier system that institutionalizes lower levels of protection for the developing countries. This two-tier

163. See generally M. Camps & W. Diebold, Jr., *The New Multilateralism* 59-72 (1983) (need for differential action).

164. The GATT itself only covers about 7% of world commerce. Major economic powers such as the Soviet Union and China are not GATT members. Nor does the GATT address capital flows, international investment, trade in services, and exchange rates. In addition, certain other practices that arguably distort trade) such as voluntary restraint agreements and variable levies, are excluded under the GATT. Trade in textiles and agricultural products also exists outside of the GATT framework. See Choate & Lyner, *Tailored Trade: Dealing with the World as It Is*, 88 Harv. Bus. Rev. 86 (Jan.-Feb. 1988).

system also must contain transitional provisions that consider the dislocations of the new substantive standards. If worldwide substantive standards are to be established, they will evolve through a system phased in over a number of years. A system that does not take into account the differing cultural, economic, and moral aspirations of the developing countries will be doomed to failure and will not be enforced effectively by those countries on which it is imposed. It is, therefore, an illusion to believe that an organization like the GATT can incorporate tightly drafted substantive rules to be applied immediately. At best, progress will take place slowly, and the United States and other Western countries may have to subsidize heavily the developing countries in their attempts to establish a governmental infrastructure to administer a system of intellectual property rights.

For the immediate future, however, there may be limited areas of agreement, such as establishing an anticounterfeiting code similar to the one almost passed during the Tokyo Round. In addition, there also may be agreement on certain kinds of situations that must be kept under multilateral surveillance, and on procedures that may be established so that complaints can be investigated. But apart from these measured steps, an international consensus and effective agreement will evolve, if at all, over a long period of time.

The evolution of the world trading system will not occur smoothly, nor will it develop in a way that will meet the demands of all intellectual property owners. The current proliferation of industry reports and governmental position papers, which divide the world into producers and creators versus parasites and pirates, should not be taken literally if a long-term, stable solution to the problem is sought. In addition, the unequivocal list of advantages of strong protection for intellectual property in the developing world should be regarded as a self-serving justification for a legal regime based on the interests of the information producing world. Moreover, the United States must acknowledge that persuading the developing countries to enter into an intellectual property code will come at a price. The developing countries will demand a quid pro quo for any drastic changes in their substantive law and enforcement practices. The United States and other Western countries will have to provide special trade concessions and debt reduction, as well as direct subsidies, to expedite the process.¹⁶⁵

Establishing an intellectual property code for the GATT will be a challenging task, but one that must be accomplished. Failure to forge an agreement will provide a justification for overly intense bilateral efforts which, in the long run, are not in the U.S. interest in supporting free trade. The opposite extreme also must be avoided: forcing on the Third World a TRIPS agreement that does not reflect its economic and cultural realities. Instead, the Western approach should be gradual, integrating the devel-

165. Tying trade concessions and debt reduction to enhanced intellectual property protection already has been considered in the U.S.-Mexico trade talks. These bilateral talks involved the resolution of problems concerning the protection of U.S. intellectual property. See Steel Trade, Intellectual Property Rights Top Agenda Items for U.S.-Mexico Discussions, 6 Int'l Trade Rep. (BNA) 1045 (Aug. 9, 1989).

oping countries through negotiation in limited areas of agreement.¹⁶⁶ Only through this patient effort will a fruitful new multilateralism be established in which all the participants will benefit.

Meanwhile, the United States must continue to enhance its own domestic intellectual property law protection, and it also must continue to harmonize this law with the recognized world consensus on the substantive rules of intellectual property law. In addition, a measured and careful bilateralism can be useful in encouraging the problem countries toward recognized world standards of protection. The traditional international agreements and institutions also must be strengthened and extended to protect areas of intellectual property law that until now have not been recognized in the world arena. The United States must act in a balanced manner on all these fronts. This, in itself, will encourage an eventual multilateral solution.

166. A middle-of-the-road consensus on a TRIPS agreement may be developing. On September 12, 1989, India declared that it had accepted the principle of policing TRIPS within the framework of the Uruguay Round multilateral trade negotiations. Until then, India had systematically refused to accept that the GATT had this responsibility rather than the WIPO. India, however, made the distinction between enforcement at the frontier and internal enforcement, insisting that the latter had nothing to do with international trade and was therefore not a GATT concern. *See India Accepts Principle of Policing Trade-Related Intellectual Property*, 3 *World Intell. Prop. Rep.* (BNA) 244-45 (1989).