

MULTILATERAL TRADE
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Group of Negotiations on Goods (GATT)
Negotiating Group on Trade-Related
Aspects of Intellectual Property Rights,
Including Trade in Counterfeit Goods

STATEMENT BY UNITED STATES AT MEETING OF 25 MARCH 1987

The United States delegation has requested that the following statement, made at the meeting of 25 March 1987 of the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, be circulated.

I. The Relationship Between Trade and Deficiencies in The
Protection of Intellectual Property Rights

The importance of these multilateral trade-related intellectual property negotiations cannot be overstated. The volume of trade in goods protected by intellectual property rights such as patents, trademarks, trade dress, trade secrets, mask works, and copyrights is becoming increasingly significant as more countries produce and consume products that result from creative activity and innovation or are known for their quality.

The protection of intellectual property rights fosters creative activity and innovation and encourages investment in the commercialization of new ideas and technology. A government's grant of some form of exclusive right in an idea or creation permits the inventor or innovator to recover the costs of developing technology and provides the monetary and technical basis for further research. GATT articles recognize the legitimacy of national laws that protect intellectual property rights.

Deficiencies in protection of intellectual property rights distort trade in goods and reduce the value of concessions negotiated in previous rounds of trade negotiations. Deficiencies impair negotiated trade concessions because copied goods displace legitimate exports of products from countries where adequate and effective protection is present. Furthermore, deficiencies defeat the GATT's objective of expanding world trade and reducing distortions to such trade.

Failure to provide intellectual property protection both distorts trade and impairs concessions because inventors and authors are unable or unwilling to enter markets where their products are unprotected. The immediate effect is to eliminate or diminish trade in potential markets.

In the short term, copiers may move into the vacuum created by the lack of protection. This often results in inefficiencies in the national market where the copying is taking place and diminishes demand for the product. Because of the limited scale of production that can result from local copying, economies of scale are not achieved and costs of production are often much higher than necessary. In the area of trademarks and trade dress, customer

deception and damage to goodwill and reputation can also result from lack of protection for these intellectual property rights.

Long term trade distortions also result from copying. Copiers do not invest in research and development. To do so would simply subject their inventions or creations to copying. Firms that previously have been willing to invest in research and development are faced with continuing piracy, low return on current investment, and lack of profits to finance additional research efforts.

Some countries consciously use intellectual property policy to discourage imports of goods that are protected abroad and encourage production of such goods domestically. Moreover, countries actively encourage exports of copied goods.

The United States believes that these policies are counterproductive and damage the global trading system. The global system suffers, for example, when the owner of an intellectual property right (1) loses sales, royalties and the value of the investment in the market where the invention or work is not protected, (2) loses sales to copiers in third markets, and (3) loses sales to copies in its own market.

II. Identification of Deficiencies In Intellectual Property Rights Protection

For some time now, the United States has been identifying deficiencies in intellectual property protection and enforcement of intellectual property rights that distort its bilateral trade. Moreover, the work done in the GATT on a draft measure to address trade in counterfeit goods represents a multilateral effort to address enforcement of rights in trademarked goods. Although the types of practices that distort trade in goods subject to intellectual property protection vary with regard to details, major problem areas can be identified.

Inadequacies in national laws include, for example, (1) total lack of patent or copyright laws, (2) narrow scope of protection under intellectual property laws resulting in failure to protect entire categories of products or works, (3) terms of protection that are too short to permit an innovator time to test a product, market it and achieve an adequate return on investment; and (4) misuse of compulsory licensing programs.

Instances of ineffective enforcement of national laws is another area in which deficiencies can result in trade distortions. Problems include: (1) lack of police enforcement or access to border enforcement of measures in appropriate circumstances; (2) difficulties in gaining access to judicial or administrative bodies dealing with intellectual property problems; (3) procedural and

evidentiary provisions that make it difficult, if not impossible, to establish a violation of the law, for example, placing the burden of establishing infringement of a process patent on the patent owner, and restrictive evidentiary discovery rules; (4) unavailability of preliminary relief resulting in long injurious delays before obtaining a remedy; and (5) penalties that are insufficient to deter further violations of the law.

Each of these deficiencies either permits and promotes copying or fails to deter copying. Denial of protection to an entire class of products results in unwarranted trade distortions. Moreover, the U.S. government believes that policies such as market reserve, or price control are not legitimate reasons to deny intellectual property protection or to impose conditions that preclude reasonable compensation for use of an invention or creation. Such policies interfere with obtaining and maintaining intellectual property rights and thus reinforce the direct distortion of trade that results from such policies.

III. Review of Existing Disciplines in the GATT and International Conventions

The three GATT articles that explicitly refer to intellectual property rights recognize the legitimacy of measures relating to the protection of intellectual property rights and the enforcement of those rights and also the potential for these measures or the lack of them to adversely affect trade. Contracting Parties, for example, are granted a general exception to the Agreement for adoption and enforcement of measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including. . . the protection of patents, trade marks, and copyrights, and the prevention of deceptive practices." (Article XX (d)) This general exception is predicated on the requirement that such measures are not applied in a discriminatory manner and are not a disguised restriction on international trade.

Articles XII:3(c)(iii) and XVIII:Section B(10) limit measures that Contracting Parties may take in restricting imports for balance of payments reasons. Contracting Parties may not apply restrictions so as "to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

Examination of these Articles reveals that they do not address the distortions of trade and impairment of concessions that arise from inadequate and ineffective protection of intellectual property rights. Consequently, these Articles do not adequately address the issue of preventing disguised trade barriers from arising in countries that do not provide adequate and effective protection of intellectual property rights. In light of these considerations, we

believe that this negotiating group should not become preoccupied with examination of existing GATT articles.

Outside of the GATT context, the standards contained in some international conventions do not provide adequate protection of intellectual property rights. Furthermore, these conventions do not provide effective enforcement mechanisms. Thus, we have a unique opportunity to build on and create effective discipline in this area.

The United States believes that the negotiating group should recognize those areas in which an international consensus already exists and develop a mechanism for enforcement of that consensus. In addition, recognizing the deficiencies in international norms and standards for the protection of intellectual property rights that exists in some areas, the negotiating group should consider concrete suggestions for the development of an international consensus on adequate norms and standards in those areas. Such norms and standards, of course, would strengthen and would not in any way diminish existing norms and standards. The negotiating group should then embody these efforts in an Agreement on protection and enforcement of intellectual property rights.

Furthermore, efforts within the context of these negotiations to develop a consensus on norms and standards would complement efforts in other international fora and would expedite the achievement of the Negotiating Objective, i.e., the reduction of distortions and impediments to legitimate international trade.

IV. Steps To Address Trade Distortions And Impediments To Trade Resulting From Inadequate Or Ineffective Protection Of Intellectual Property Rights

The United States intends to make suggestions and table texts that propose measures to improve protection and enforcement of intellectual property rights including patents, trademarks, trade dress, copyrights, mask works and trade secrets. We believe that the entire trading system as a whole will benefit from eliminating trade distortions resulting from lack of adequate and effective protection of intellectual property rights. The problem is growing and it is important to act quickly on a multilateral basis.

As an immediate step, the United States suggests that interested Contracting Parties should immediately sign the current draft Agreement On Measures To Discourage The Importation Of Counterfeit Goods without modification or further negotiation on the text. Signing the anticounterfeiting code is but a first step and does not preclude suggestions or submission of texts on further measures to improve protection and enforcement of rights relating to trade in goods bearing trademarks as part of the broader effort on intellectual property rights.