

January 1994

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### Recommended Citation

Charles Levy, *When Sovereignties May Collide--Sovereignty and the Regulation of International Business in the Intellectual Property Area: An American Perspective*, 20 Can.-U.S. L.J. 185 (1994)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol20/iss/22>

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## When Sovereignties May Collide — Sovereignty and the Regulation of International Business in the Intellectual Property Area: An American Perspective

*Charles Levy\**

It still could be that the World Trade Organization (WTO) will go into effect on January 1, 1995. You might want to be non-lawyerish in this and just say that it will go into effect in 1995, instead of being specific. If the Congress and the Administration can get their acts together and the GATT implementing legislation is passed this year in the United States, there is a good chance that the rest of the world will follow quickly, and it might go into effect in 1995.

Just another comment. I think that you are absolutely right when the United States did give up Section 104 in the context of the NAFTA and also in the GATT, in return for American lawyers being able to practice their fine art of discovery around the world; the real question is, did we do it for the sake of process or compensation? I think I will leave it up to all of you to be the judge of that.

I am sorry that I was not here yesterday for the first part of the program. I did read about it in the *Plain Dealer* this morning. I spent a good part of yesterday with my colleagues in the private sector, meeting with the Ambassador Kantor, the U.S. Trade Representative, to try and figure out how the United States would pay for the GATT Agreement. As most of you know, the U.S. Government is not run like a business. We have something called pay/go in the United States. That means, everything has to be budget neutral; therefore, even though every economist/business person that you really want to talk to about the GATT will tell you that it is going to be a tremendous economic boom, corporations will sell more, and workers will be hired. As a result the tax base will increase in the United States, and the Congress must offset the loss of tariff revenue. The U.S. Government has to come up with a substantial amount of money. I think it is something like \$14 or \$15 billion to pay for the GATT before the Congress can enact it.

We spent much of the day yesterday trying to figure out how to pay for it. And your colleague and friend who was approached for change on the streets of Cleveland recently might be part of the process.

Because the Congress does not want to look at economics in a dy-

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dynamic manner, this is a very serious problem, and there is a very good chance that the United States will not be able to implement GATT this year. I remain optimistic, but this budget problem has become a very serious problem. But that is our problem. We will talk about broader issues of sovereignty right now.

I think as you probably all heard yesterday, at least from what I can glean from the *Plain Dealer* this morning, that the trend away from the traditional notions of sovereignty was recognized by many people in the 1970s. And for those of you who are among those people, you were very prescient, and I congratulate you, because it has truly become a truism. For those of you who did not think that there would be an interdependence in the world, and sovereignty would begin to erode, there is still a chance to be prescient because we do not know how far it is going to go. And indeed we are faced with a number of what I think are interesting issues that have arisen and that may in some way stop the trend towards what I consider to be a very important part of international law, and that is providing certainty and predictability in the international system.

What I would like to do is talk about some realities of the world economy before getting into some of the specific concepts that I think are affecting sovereignty today, particularly with respect to how they do collide with intellectual property and international business.

I think one of the realities is that the transnational economy is now mainly shaped by money flows, rather than by trade in goods and services. The monetary and fiscal policies of sovereign countries increasingly react to events in the international money and capital markets, rather than governments as they did in the past. I think that all you have to do is witness the unsuccessful attempt last year of the number of European countries to defend the EMU.

Second, in the international economies, additional factors of production, such as labor and land have increasingly become secondary.

You have a situation where trade is not only not following investment, but rather, it is becoming a function of investment. Investment is driving the world economy in many respects today, even more than trade ever did. I think that is a difference that is very significant in terms of how businesses operate.

I think equally important is the fact that the economy is becoming less material intensive. For example, 60 % of the costs of the representative industrial product of the 1920s, the automobile, was in raw materials and energy. The raw materials and energy costs of the representative industrial product of the 1980s and 1990s, the semi-conductor chip, is 2 %. And copper wire, which had material energy contents of close to 80 %, is now rapidly being replaced by glass fiber with a material and energy content of 10 %.

Another interesting fact is that 85 %, according to Dr. Mead of

Cal Tech, of all the scientists who ever lived, are alive today. And that while the industrial revolution increased productivity by a factor of about 100, the micro electric revolution increased productivity and information-based technology by a factor of over one million.

What does this all lead to in the context of intellectual property? That the social center of gravity is really becoming the knowledge worker; that more and more companies are worried about, not whether there will not be people for their labor force, but whether they will be educated enough; that the research and development components of products are beginning to become the real economic driving force today for corporations.

If you look at the computer industry in the world, the black box, the hardware is not the money maker for computers companies any more. It is the software. It is the systems integration. Some computer companies joke that by the beginning of the new century, if you want a computer, we will give it to you like glasses given away at gas stations. Because what they want is you to buy the software, the systems integration, and the services. And that is where they are going to make their money. Not in this big box that people are putting together.

All of these developments have very important implications for intellectual property protection around the world, and in turn for national sovereignty.

In preparing this talk, I went back to some things I had read in previous years, and I found something that I want to quote from Peter Drucker's book that he wrote several years ago called *The New Realities*, in order to set the stage for my discussion of the collision between sovereignty and intellectual property in terms of regulation of business. He wrote, "For almost two centuries we hotly discussed what governments should do. We almost never asked what governments can do. Now, increasingly, the limits and functions of governments will be the issue. And government is no longer, as a political and social theory postulates, the only power center. In the developed countries both the society and the polity have become pluralist again, in a startling reversal of the trend that prevailed since the end of the middle ages. These new pluralisms are very different from anything known earlier. The pluralism of society is one of apolitical performance, focused single task institutions. The pluralism of the body politic is that of new mass movements, small, highly-organized minorities, single cause or single interest in their focus, and totally political." And he goes on to say that, "as a result, the nature of government of these types of trends that the nature of government activities is increasingly becoming moral, as opposed to economic. And government actions are becoming absolute, seen as symbols and sacred, rather than utilities and means to an end."

This struck me as something that really reflects what is going on

in the context of a collision between sovereignty and business in the area of intellectual property. As my colleague pointed out this morning, there has been a national evolution in the intellectual property area of international agreements that are trying to set international standards. As a result, countries do give up a real base of their sovereignty.

We have the European Union, the European Free Trade Area, the enlargement of the European Union now; we have Free Trade Agreements; we have the NAFTA. We have the Canadian Free Trade Agreement. We have got MERCUSOR, the Andean Free Trade Pact, and many other negotiations ongoing in Europe, Asia and in our hemisphere that are creating new institutions, which in turn are incorporating agreements with respect to intellectual property that do take away some degree of sovereignty. And I do think in 1995 we will have the World Trade Organization, which will have probably one of the most refined intellectual property international agreements.

The difference between WIPO and the GATT, or the WTO, is going to be very significant in terms of dispute settlement. The WIPO agreements do not have dispute settlement. They are not binding obligations, whereas, the GATT and the WTO will have dispute settlement, which permits one government to challenge another government for not complying with their obligations and indeed has enforcement mechanisms in terms of sanctions that can be imposed if you are found by a panel not to be complying with your obligations.

That was actually one of the principal reasons that the United States was a *demandeur* in terms of getting an agreement on intellectual property in the GATT. First, there was a substantive problem with the WIPO agreements in terms of not providing adequate and effective intellectual property, but even if you had negotiated such agreements in the WIPO, they would be non-enforceable. And again, predictability and certainty, for international businesses are key today, and with an international agreement that you can enforce there is more certainty. That is why I think there has been, at least from the private sector, not just in the United States, but around the world, this push to have these international agreements in intellectual property that are enforceable. In turn, they do erode some national sovereignty.

Let us turn back to this question that I posed from the Drucker quote about the moral imperatives that are driving government today, as opposed to the economics. I started to look at what were the contentious issues in the context of the GATT negotiations on intellectual property, and even some of the negotiations in the NAFTA, and other intellectual property negotiations that are ongoing in other fora. It struck me, interestingly enough, that they have a high moral as opposed to what I consider to be a real economic content.

One of the major debates in the GATT was the whole question of the working requirements for patents, and whether imports satisfy the

working requirement, or whether you actually have to go into a country, invest, work your patent in order to maintain your patent rights. And during that debate, the developing countries led by India and Brazil did not talk so much about economic reasons. They did not say, "we want the investment, and therefore, it becomes a non-tariff barrier that forces the investment." That is somewhat understandable in world trade and investment terms. But, the debates focused on imports not satisfying the working requirements because of public health and safety. The developing countries said, "we have got to feed our people, so we do not want to be dependent on foreign adver-chemicals." It was a moral argument.

Now, in that context, the WTO agreement on the TRIPS agreement does have a provision which says that imports satisfy the working requirement. And countries were able to overcome this moral issue. But then look at some other issues that were controversial. What is one of the most significant new technologies that is developing in the world? Biotechnology. Biotechnology companies are springing up all over the world, and yet, the TRIPS agreement and the GATT and the NAFTA agreement provide absolutely no protection for biotechnology. Biotechnology is excluded from both of these landmark intellectual property agreements.

And in the context of the negotiations, why were they excluded? It was not for economic reasons. Indeed to the contrary, what you see in talking to European companies, because in Europe biotechnology is not eligible for patents as a general matter, is European biotechnology companies are actually shifting their research and production to the United States. The reason they are bringing them to the United States is to get that protection. Environmental reasons, and health and safety reasons, precluded the inclusion of biotechnology from protection. And I would submit that this is a moral question.

Another interesting area that just comes up, is with respect to the issue, which again was left undecided in the TRIPS agreement, and that is the one major exception to national treatment, and national treatment is a critical factor for business operations around the world, is the request to treat us just like you treat your companies. Yet, for sound recordings and for movies there is no national treatment. The European Community imposes levies on sound recording and movies for the purpose of subsidizing their own movie industry and recording industry.

Now, that is of course an economic reason. Yet, how was it couched? It was not couched in terms of economics. It was couched in terms of culture: that we need this in order to preserve European culture, so it is very fair for us to discriminate against foreign movie producers and foreign sound recording producers in order to maintain our culture. I do not have to point out that this is also an exception in the

CFTA for Canada. I think that these moral issues are going to be the fascinating issues in the future. As we clear the underbrush away of issues that we recognize as economic issues and look at an interdependent economic world and deal with those problems, and I do think that the TRIPS agreement and the NAFTA have dealt with many of those economic issues very creatively, and very constructively, we are left with many cutting edge issues with respect to technology that are unanswered, controversial. The real question then is, how much of it is economic and how much of it is moral? And even if it is economic, it is being given this moral certainty, this sacred cause, which is going to make it very difficult I would submit in the future to deal with some of these technological issues.

I have always found two business people that want to do a deal, will do a deal. However, as governments lock themselves into moral positions, they do not do deals, instead, they yell at each other. Fortunately, it is not the 18th Century anymore and we only have a few instances of actual wars because of moral positions. At least we are not going into what I would say, "economic wars" anymore. We do not have the War of Jenkin's Ear, which was one of the wars that England fought with Spain, as they cut Captain Jenkin's ear off because he was plundering their gold ships. But I think that these moral questions are really going to be very difficult to deal with. And the question is, to what extent are they going to impede the development in the intellectual property area, technology, and global interdependence?

For example, we now have a situation that is arising in Europe with respect to the information infrastructure. I mean, here we are on the verge of a revolution. All of us are not going to be sitting in this room in five or ten years. We will be hooked up on our computers, and color screens that are interactive, and we will be having this conference. Yet, it may be that we will have intellectual property problems. Will information flowing over the network be copyrighted? There is a proposed European directive that basically is saying that copyrighted information that is beamed by satellite into Europe, may not be afforded copyright protection.

That is an interesting prospect for this whole information infrastructure. And these issues, I would submit, are going to have to be dealt with very quickly. And we are going to have to turn them back into economic issues, as opposed to moral issues. Otherwise, for intellectual property, as we push the frontiers of technology, we could find ourselves stymied, and say "My God, we now have a terrific intellectual property agreement in TRIPS, we have a very good one in NAFTA, but if you really read those agreements closely, those were agreements that were written at best for the 1970s and 1980s. The issues of the '90s and the next century are really not covered there in terms of information technology, and how you transport it, and in

terms of biotechnology.”

We lawyers are always accused for the laws not keeping pace with technology. I think this is one case in which we had better be careful, because the dynamics of technology is pushing faster than even businesses can keep up with, let alone the law. And I think that is something that all of us as lawyers really have to give some thought to, and provide some guidance for our own governments to avoid the problems with these issues and deal with them just as they are, which I think are economic questions.

Now, interestingly enough, I think that the business community has found their sea legs in this context, and I think as my colleague, Mr. Hayhurst, said, one of the reasons that they have found their sea legs is the predictability and certainty businesses love. And I think that has created a new dynamic within the world economic order. One that I think governments do not like because I think it is another area where there is a collision with sovereignty. I think companies have always been somewhat bold. But not every industry. I mean, the oil industry has always had a reputation of being quite aggressive internationally. But I think now, this is universal in a lot of industries and particularly universal in the context of industries that rely on intellectual property as their lifeblood.

I am going to give you a couple of examples of that and then conclude with one of the final open issues here. Mr. Hayhurst talked about the fact that the United States was a very late signer of the Bern Convention. One of the most interesting side stories about the U.S. political process in the ratification of Bern, were who were some of the principal witnesses testifying before Congressional Committees in support of the U.S. ratification of Bern, and the repeal of the Manufacturing Clause - pharmaceutical companies. Why were pharmaceutical companies testifying before Congressional Committees on a copyright issue? They did it to mutually support another intellectually property-based industry, recognizing that while the United States stayed out of these conventions, it did not have the high ground in pushing for more international protection of intellectual property. Therefore, you had the Vice-President/General Council of Pfizer going in and testifying before the Senate Judiciary Committee on behalf of the Bern Convention. Never before had you seen that.

Another example is that chemical interests, pharmaceutical interests, computer interests, software interests, sound recordings, joined together in the United States and said, “we should have an intellectual property agreement in the GATT.” And our government said, “you are crazy.” And we went to Europe and Japan, and the companies there said, “you are right, we are all suffering from piracy and counterfeiting.” And they went to their governments and their governments said, “you are crazy, you can-

not put this in the GATT, you have WIPO.”

The result was the U.S., European, and Japanese business communities went out and in two years negotiated their own international model agreement on intellectual property for the GATT. They issued it in June of 1988, gave it to their governments and said, “if we can do it in two years, you guys can certainly do it in seven.” And actually, if you read this document, it is a very good road map for what was finally agreed. And that is an initiative that really, I think, shows that the business community is going to interfere with questions of sovereignty and push their governments.

One final comment, which is also a plug for seminars like this, and conferences like this. At breakfast this morning with Professor Brand from the University of Pittsburgh, we started talking about his students who are interested in international law, and myself as a practitioner, and how my firm would probably never hire me today since students are much better today than we were. But also, we started talking about private rights of action under international agreements. I had not actually focused on it in the context of this talk, but it struck me as an interesting issue. We have this evolution of international agreements on intellectual property that is colliding with sovereignty. But what is not keeping pace are the rights of the private parties. Because even though we now have in the GATT an intellectual property agreement that is enforceable, by whom is it enforceable? It is enforceable by the government. Even though it is very much the question of private rights. And this is I think, along with this moral question, going to be the next big issue. The issue is going to be, to what extent will private parties now have the right to bring actions in these international bodies? Two examples come to mind very quickly, and then I will stop for some questions for both of us.

First, if you look at the NAFTA, to me the most significant part of the NAFTA is not the intellectual property agreement, even though it is better than TRIPS. It is the investment provisions, because Mexico gave up the Calvo Clause. And by giving up the Calvo Clause Mexico accepted arbitration between private parties and the government, which in turn sent a signal to Mexican businesses that arbitration is a very acceptable form of speed resolution.

In the GATT agreement, the WTO agreement, you also have a breakthrough on transparency. The WTO I do not think was ever as secretive as Ralph Nader portrays it. But it was very much a government club. All of the panel reports and the briefs were confidential. You could get copies, of course, in Washington — we have more leaks than any place else in the world, although Europe is catching up. The Canadian Government needs to improve on its leak policy. We need to get more out of the Canadian Government. We should work on that in the next amendment to NAFTA; you have to leak more in Canada.

But in the WTO, there is now a provision that requires a party to release publicly its briefs in the case, and if those briefs contain proprietary information, to release a non-confidential summary of the briefs.

I predict that U.S. implementing law for the GATT agreement will mandate that the U.S. Government must in every single dispute settlement, request the other country to release the briefs, or a non-confidential summary of it. I think there is also going to be in that legislation, or in the legislative history of the United States, a provision that says that the U.S. private parties of interest in a GATT dispute settlement case, will have direct access to the U.S. government lawyers in preparing the case.

I think the next question is going to be, to what extent will a push be made in the years to come that private parties actually have standing to bring a case against a foreign government in the GATT, and perhaps other international institutions like the NAFTA, which have dispute settlement procedures? I think for those of us in the legal profession, all of this is a challenge. It is a challenge because I think we do provide input to our governments about how to build institutions, how to establish the process. And I think that is going to be the exciting task for not only people in universities, but private practitioners and companies; that these international agreements, these international negotiations do lead to a collision of sovereignty. There are going to be some tougher sovereignty issues than we had in the past. The question is, how do we do it to promote this interdependent world in a very constructive way that provides certainty, and also have a little fun at the same time? Thank you.

