

January 1986

U.S.-Canada High Technology Trade Issues

Harvey E. Bale Jr.

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

Harvey E. Bale Jr., *U.S.-Canada High Technology Trade Issues*, 11 Can.-U.S. L.J. 13 (1986)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol11/iss/6>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

U.S.-Canada High Technology Trade Issues**

*by Dr. Harvey E. Bale, Jr.**

I want to make what Professor Kind would term as, “broad strokes.” The speakers that are scheduled to address you over the next several days know much more of the detailed aspects of the areas to be discussed—especially the private action concerns of these issues. There are, however, certain broad areas of policy involvement that I want to emphasize, particularly from the U.S. government’s perspective. Intellectual property and trade policy issues have become, over the last several years, closely intertwined.

The first point I want to make in general terms is the linkage between intellectual property policies and regulations and trade. A fundamental point that I hope you keep in mind during this conference, and in any discussions of U.S.-Canadian issues and U.S. foreign trade relations, is the politics of trade in the United States. To many, U.S. trade policies seems to be volatile and unpredictable, especially with regard to the U.S.-Canadian relations; however, it is fundamentally based upon one simple relationship—the constituencies in the United States which support a free-trade policy by the United States.

However, the question is: Is it agriculture? No, there is less support today than at any time since World War II. Is it manufacturing? No, there is far less support. Is it consumer interest? This is certainly so, but is not, in any country that I’m aware of, an effective force. What is perhaps the mainstay of U.S. trade policy, including that enunciated last September by the President, is the international business interests in the United States, whether you describe them as transnational, or multinational, or international corporations. This is the fundamental constituency for U.S. free-trade. The implications of this fact on trade policy and intellectual property policy are enormous. If in the United States, the Administration and Congress do not support the basic concerns related to the activities of the largest generators of U.S. exports, investments, and intellectual property, then U.S. trade policy will change permanently, and it will change for the worse.

One great Austrian born economist, Joseph Schumpeter, argued in 1939 against the United States deviating from protectionism and adopting a free-trade policy on very simple grounds. Why, he asked, should we, the United States, subject ourselves to the vicissitudes of interna-

** Remarks given at Conference.

* Assistant U.S. Trade Representative for trade policy and analysis.

tional conditions and perturbations of an economic or political nature? Instead, Schumpeter argued, we ought to rely on our own large internal market in which we can enjoy both the benefits of substantial economies of scale and basic protection. The U.S. policy, however, dating back several years before Shumpeter wrote his article, has been quite different, and various administrations, including this one, have made strenuous efforts, (of course, not always with success!) to encourage and maintain a liberal trade policy.

Intellectual property plays very heavily into the support of such a policy. Intellectual property is a field in which historically there has been a large chasm between the patent and copyright expertise and the trade expertise. They have been drawn together by the interaction of the basis factors that generate intellectual property developments.

Generally, one of the factors is that it takes financial and real resources to develop new technology. When one considers that aspect of intellectual property development, one immediately begins to think about government policies that can encourage or discourage the devotion of resources to innovative and technological development. It can be government procurement policies which can direct resources locally to foster high technology development. It can also be subsidies, whether on a provincial, state or national basis.

The other aspect of intellectual property development is encouraging the application of know-how and engineering— activities which require their rewards. Piracy, infringement, and unauthorized use of intellectual property play an important role in the aspect of intellectual property development. In the absence of adequate protection of that know-how, losses can be substantial. When the absence of intellectual property protection in one country affects returns to know-how and resources in other countries, these losses occur through shifts in trade. It is interesting to look at the trend of U.S. trade legislation. There is a lot of it in Congress today. Almost every one of the bills being put forward by various members of Congress typically have a title addressing itself to intellectual property protection.

New legislation began in 1983 with the Caribbean Basic Recovery Act. Under that act, an effort is being made to provide greater access for the products of the Caribbean countries in the U.S. market by the provision of duty-free treatment. In that legislation, it is stipulated that one condition for that duty-free access is that the countries in the Caribbean should provide on an individual basis adequate protection to U.S. intellectual property.

In 1984, the Trade and Investment Act was enacted and our generalized system of preferences (GSP) was renewed. Additional stipulations were made that countries receiving GSP benefits should provide adequate and effective protection with regard to intellectual property.

There are no definitions in this trade statute as to what is “adequate

and effective.” That is, and has been, a matter of interpretation by the Administration with regard to certain issues that Minister Côté referred to; compulsory licensing of patents, the scope of copyright protection, product coverage of patent protection, enforcement penalties, etc.

My point is that, at least in the United States, intellectual property protection matters are being driven almost as much today by trade policy as by intellectual property statutes.

Another major point that I think we have to keep in mind for both Canada and the United States, taking into account their respective resource capabilities and development of high technology industries, is that for both countries high technology and intellectual property protection are increasingly important forces in their structural adjustment. This is necessary for Canada and the United States to adapt to tougher conditions of international trade in this decade and beyond. For Canada, which depends to a great extent on exports of resource-based sectors, and the United States, where basic industries are still important, intellectual property protection and the promotion of technological development provide avenues of adjustment, higher standards of living and greater sustained international competitiveness.

Another issue relates to the relations between Canada and the United States in the high technology field. The United States has, for a time, experienced a large trade surplus with Canada in high technology products. It is clear that Canada ranks relatively low among OECD countries, or at least the major OECD countries, in the proportion of its gross national product that is devoted to research and development (R&D) expenditures. Furthermore, according to my Canadian colleagues, only a small proportion of Canadian patents are of Canadian origin—the Canadian portion is about 5%. Thus, Canada is a “technology importer” and, given that the United States is a “net exporter,” there can arise both bilateral frictions in trade and frictions over the degree of protection that should be given to intellectual property. I want to come back to these concerns in a moment. With those differences in mind and given the costs of R&D, there is a point to be made about the benefits of open bilateral trade.

The costs of investment in R&D expenditures are high and they are growing. In some industries, the shelf life of technology is growing shorter, so it’s important that the economies of scale be realized in order to lower those costs of R&D per unit, and important that protection be given to innovation. From a Canadian prospective, of course, the free-trade agreement that’s being considered by our two governments is important from the point of view of providing the necessary economies of scale for its industries. These industries possess a smaller internal market and face oversea barriers to its trade. These barriers can also be a significant impediment to the development of technology-based industries in Canada. This is, again, because of the high start-up costs of innovation.

Getting back to potential bilateral frictions over intellectual prop-

erty protection, however, there are several that are well-known. The copyright field has concerned the United States, as well as other countries, regarding the computer software protection. In this field, there is concern in the United States about the rights of original owners and developers of broadcast programs and films. There are the concerns of those who develop pharmaceutical products and what can be done to recoup their costs. From the Canadian side, there are continuing concerns about export controls and extraterritoriality. All of these subjects, as Minister Côté has already said, are subjects of continuing discussion; hopefully these discussions will be fruitful in their results. If they are not, they could pose serious obstacles to the successful conclusion of our bilateral trade talks.

Despite these differences and frictions, which are serious, we nonetheless share certain common goals—and that's another major point that I think has to be kept in mind at this conference. Both countries participate in what we call a "quadralateral discussion" involving the trade officials from Canada, the United States, the European Community, and Japan.

At these meetings, there has been a common view expressed by both countries, and is being confirmed by the Japanese and the Europeans, that intellectual property protection is an issue that goes beyond the borders of each individual country and must be extended through stronger international rules. The World Intellectual Property Organization must play the key role, but perhaps, the GATT can play an important role, as well.

One of the major concerns today is that the existing international conventions dealing with intellectual property (for example, the Paris or Berne Convention) do not have adequate enforcement mechanisms. These agreements are not self-enforcing. The GATT has one characteristic which perhaps is useful in this area, and that is that it is a contract-based agreement. The obligations are binding and penalties can be imposed by governments for nonadherence to agreements. Therefore, the GATT can and, I believe, will contribute to stronger intellectual property protection through agreements that will be developed among key developed and developing countries over the next several years.

A final point about, U.S. trade policy is that it is increasingly focusing on problems of intellectual property protection. Aside from the United States Administration acting multilaterally through the GATT and the World Intellectual Property Organization, it is not satisfied to wait until these organizations develop international or multilateral rules addressing these. Instead, the Administration feels that it is urgent, in order to sustain its basic free-trade policy approach, to pursue aggressively bilateral efforts to improve the standard of protection given to United States, and by the most-favored nation process, other countries' intellectual property.

Again, trade statutes are playing an important role in this process.

Section 301 of the 1974 Trade Act has been extended to cover intellectual property abuses. We are currently pursuing cases with regard to Brazil and Korea.

In closing, let me again stress the growing importance of intellectual property protection for the management of trade policy in the United States. Recently, the Administration requested that the Congress pass the "Intellectual Property Improvements Act of 1986." This act which would make certain changes in our patent and trade laws, was originally announced as part of the President's trade action program last September. Only a few of its provisions directly relate to trade; nevertheless the indirect effects of the proposed changes in our patent laws on U.S. trade competitiveness are sufficiently important to merit attention as a trade issue.

It is vital that Canada and the United States address the need to improve intellectual property protection in North American and elsewhere. It is a key element of sustaining our thrust for a more open U.S. and world economy.

