

## THE POLITICAL-ECONOMY OF REFORM OF INTELLECTUAL PROPERTY PROTECTION

Taimoon Stewart (Ph.D.)  
Research Fellow

*Institute of Social and Economic Research  
The University of the West Indies  
St. Augustine*

**T**he new Intellectual Property regime needs to be understood in its international political and economic context if we are to understand what led us to this juncture i.e., in the case of Trinidad and Tobago and Jamaica, the race to meet a deadline for revising and implementing our intellectual property laws well in advance of the deadline required by the World Trade Organization.

The fact that we must have our laws revised and the infrastructure for full implementation put in place by September 1996 is solely due to the requirements imposed on us by our bi-lateral treaty arrangements with the United States on Intellectual Property Rights (IPR). Most developing countries have until the year 2000 (under the new international trade agreement) to reform their IPR laws and implement them. Even that five year time frame is considered by most to be too short, given the complexity of the issues and the lack of human and financial resources in these countries.

The US has been using unilateralism to force the upgrading of intellectual property laws in the more industrialized developing countries. In 1988, the Special 301 Clause of the Trade Act was passed which requires that the office of the US Trade Representative identify countries that deny adequate and effective protection of US Intellectual Property Rights, or deny fair and equitable market access for US exports that rely on IPR protection. The US also fought for and succeeded in getting IPR included in the agenda of the Uruguay Round of Trade Negotiations. Why is this so?

Protection of IPR has become an important issue to the industrialized countries because the frontier line technologies today are easily copied (computer software, masks for chip manufacture and pharmaceuticals, and biotechnological processes) but very expensive to produce. For the pharmaceutical industry, for instance, an average expenditure of more than US\$231 million is required

to discover, test and secure marketing approval for a new drug in the US. At the same time, the product life cycle is shrinking dramatically and this reduces the time within which Research and Development costs might be recouped. In order to re-coup their investment, therefore, companies need to market the resulting product globally and therefore need world-wide intellectual property protection, not just for **processes** but also for the **products** of leading technologies.

This is precisely why negotiations for the revision of the Paris Convention (on patents) was hijacked and moved from the World Intellectual Property Organization (WIPO) to the General Agreement on Tariffs and Trade (GATT). In doing so, goods qualified for IPR protection, a very significant point given that the IPR component of information technologies is embedded in software, a good. This move was also a successful strategy used by the US, supported by other industrialized countries, to negate the WIPO negotiations since there was a deadlock between the North and the South. The North could not achieve their objectives in the WIPO since South countries outnumbered them and the system was "one country, one vote." In the WTO, however, negotiations were linked with those in agriculture and in textiles and the industrialized countries were able to trade off concessions in these areas in return for developing countries' support for the TRIPs regime. Now South countries like Trinidad and Tobago, simply have to fall in line with the directives of the North.

What did the industrialized world achieve by bringing intellectual property rights under the international trade agreement? Simply put, all the proposals for changes in the Paris Convention to incorporate the interests of the South were excluded. Of critical importance to the South was the requirement that a patented technology must be worked in a country in order to qualify for protection (that is, using the patent for commercial exploitation). Compulsory licensing ensured that a patent was

worked, by giving a license to an applicant to work the patent in the case where the patentee neither worked the patent nor gave permission for another to do so.

Under the new IPR law (which we have adopted), the conditions under which compulsory license can be granted have been narrowed, and Article 27 of the Trade-Related Intellectual Property Agreement states that "patents shall be available, and patent rights enjoyable without discrimination as to place of invention, the field of technology and whether products are IMPORTED OR LOCALLY PRODUCED." What this means, simply, is that the patent does not have to be "worked" in the country in order to be protected; the derived products can be imported.

The whole basis for attracting foreign investment as a result of strong intellectual property protection has thus been removed, and the current wisdom that we will attract foreign investment if we have strong IPR Laws is therefore flawed. Moreover, recent studies done in the US and Europe show that only in certain sectors such as pharmaceuticals and chemicals, are foreign investors concerned about strong IPR laws in host countries. What the industrialized world wants to do is protect its goods from being copied (computer software, films etc.).

The new intellectual property regime reverses the burden of proof (Article 34 of TRIPs), so that if someone produces a product that is similar to a patented product and is accused of infringing a patented process, the defendant has to prove that the process which he used to obtain his identical product is different from the patented process. It therefore relieves the patentee of producing any proof of infringement of his process patent. He

merely has to accuse and claim difficulty in obtaining information. The defendant is required to prove that he is innocent.

A further change from the WIPO system is that whereas before a country could choose whether or not to sign and ratify an agreement based on its national interests, under the new regime, all members of the World Trade Organization are automatically signatories to all provisions of the TRIPs agreement. The Agreement on Layout Designs of Integrated Circuits did not come into force under the WIPO because there were not sufficient signatories. It was brought into the trade agreement and automatically came into force.

The big producers in the industrialized countries need intellectual property protection to secure their profits derived from the use of new technologies. This is what has been achieved by the new IPR regime. While some benefits can accrue to us in terms of protection for our artistes under copyrights, by far the bulk of the new intellectual property regime protects owners of foreign goods and technologies. Most patent registration in the region are by foreigners, and indeed, over 90 per cent of patents in the world are owned by subjects of the industrialized countries.

We need to understand how the new IPR regime will affect access to technology, or allow space for imitating the strategy of the ASIAN NICs in their development. They deconstructed and reconstructed products of Western technology to grasp and imitate the process. They were able to do so because intellectual property protection was not an issue in the 1950s and 1960s. It is to prevent a repetition of this challenge that the Western countries are determined to internationalize their standards of intellectual property protection.