

PROTECTING  
PROTECTING  
INTERNATIONAL  
INTERNATIONAL  
INTELLECTUAL  
INTELLECTUAL  
PROPERTY  
PROPERTY

*A Report for the Pacific Council on International Policy*

**Jonathan D. Aronson**

**Michael Brownrigg**

**Keith E. Maskus**

**Karen B. Crockett**

**Richard H. Steinberg**



PACIFIC COUNCIL ON INTERNATIONAL POLICY



PROTECTING  
INTERNATIONAL  
INTELLECTUAL  
PROPERTY

*A Report for the Pacific Council on International Policy*

Jonathan D. Aronson

Michael Brownrigg

Keith E. Maskus

Karen B. Crockett

Richard H. Steinberg



PACIFIC COUNCIL ON INTERNATIONAL POLICY

JANUARY 1998

PACIFIC COUNCIL ON INTERNATIONAL POLICY

LOS ANGELES, CA 90089-0035

TEL: (213) 740-4296

FAX: (213) 740-9498

E-MAIL: [PCIP@USC.EDU](mailto:PCIP@USC.EDU)

## INTRODUCTION

Intellectual property issues are central to the economy of the western United States and to industries whose health is critical to America's economic vitality — entertainment, computer software, biotechnology and health care, communications and aerospace, to name some. With this point in mind, the Pacific Council on International Policy convened a study group designed to explore how the United States should focus our international intellectual property concerns. I was asked to chair the group and was pleased to do so.

What follows are our recommendations and a summary of the reasons underlying them. They constitute, I believe, a concise, pragmatic, focused effort — supported, indeed, by a consensus of our diverse participants — to consolidate and implement recent gains in intellectual property agreements as well as undertake appropriate efforts, both domestically and internationally, to maintain and expand support for these significant accomplishments.

Although our report does not suggest dramatic new policy initiatives, it provides a blueprint for ensuring that much-needed international intellectual property protections are promptly and fully implemented and supported politically, so that the articulated rationale supporting these measures is actually translated into tangible, long-term, meaningful protection. We believe that cooperative public-private efforts can and should lead the way. Through such public-private cooperation, international intellectual property protections will be grounded solidly and on a long-term basis.

Honorable Mel Levine  
*Chairman*  
*Pacific Council Study Group*



# PROTECTING INTERNATIONAL INTELLECTUAL PROPERTY

## *A Report for the Pacific Council on International Policy Executive Summary*

Key West Coast copyright industries (software and entertainment) and patent industries (aerospace and biotechnology) are increasingly global and highly dependent on innovative technologies, and therefore classify the protection of their intellectual property rights as among their highest priorities. The United States government should concentrate on implementation and enforcement of existing laws and treaties before turning to new intellectual property rights (IPR) negotiations. The private sector ought to take a prominent role in persuading other countries to develop strong IPR laws and to enforce them.

- In the near term, emphasis should be placed more on the implementation, monitoring, and enforcement of existing IPR laws and treaties than on extending, streamlining or regionalizing intellectual property protection through new initiatives.
- The US government should promote local support for IPR in industrializing countries. The government might also develop incentives to persuade countries to implement their Trade Related Intellectual Property agreement (TRIPs) obligations ahead of schedule and should not tolerate delayed or weak implementation.
- US firms, in cooperation with the US government, need to help developing countries implement their TRIPs obligations. US firms should also demonstrate to governments and firms in developing countries that it is in their economic self interest to curb piracy and to enact and enforce strong intellectual property protection. Firms also should offer to advise countries that are drafting new legislation, help pay for local IPR improvements, and reward countries and firms that improve their IPR enforcement with favorable publicity indicating that strong IPR protection helped attract their investments. At the same time, firms need to devote time and money to the prosecution of IPR pirates in local courts.
- The US government should continue to monitor and adapt existing intellectual property laws and treaties. For example, the US government should push to streamline international patent filing, focus on the question of parallel imports, address the growing use of “cultural issues” as an excuse to limit US exports of broadcasts, music and film, and consider new IPR challenges raised by the revolution in biotechnology and the emerging Global Information Infrastructure.





## INTRODUCTION

Many of the key US growth industries that provide high-paying jobs for American workers and innovation for the US economy depend on intellectual property to sustain their competitive strength. These industries include computer software and hardware, telecommunications and information technology, biotechnology, aerospace, music, motion pictures, television broadcasting and the national research labs (e.g., Los Alamos National Weapons Laboratory). Often it is easier and less expensive for foreign firms to reproduce the products of these industries than to create them in the first place. Companies must therefore work diligently to ensure recognition of their copyrights used to protect IPR related to books, software, movies and music; patents usually used to protect IPR related to aerospace, pharmaceuticals and biotechnology; and trademarks and trade secrets. Strong legal protection of intellectual property is crucial to the continued innovation, profitability and survival of these firms.

All these industries are based in or have substantial operations in the western United States, and the business community in this region has become increasingly concerned with effective protection of its intellectual property rights in the United States and overseas. Currently, 50 percent of US software sales are overseas, and more than 50 percent of box office receipts for US-made motion pictures are generated overseas. US trade associations estimate that they lose \$15-20 billion annually to international piracy.

With the Uruguay Round Trade Related Intellectual Property agreement (TRIPs) and North American Free Trade Agreement (NAFTA) as international benchmarks, the Pacific Council on International Policy convened a Study Group to consider whether and how the IPR agenda should be recalibrated. The Study Group relied on experts from a range of IPR-reliant industries, government, law and academia, and also included the perspectives of thoughtful non-experts based in the western United States. The group's aim was to examine what unfinished business remained after TRIPs and NAFTA, to consider the most effective steps the US government and US industry could take to bolster international IPR protection, and to suggest what the international IPR protection priorities should be for the remainder of the decade and beyond.

This report has been signed by five individuals, who take full responsibility for its content. In preparing this report, however, they have been guided by the Study Group's deliberations and by subsequent exchanges among many of its members, and they believe that consensus exists among most of the group's members on the main points of the report.

**K**ey US  
growth  
industries  
depend on  
intellectual  
property  
for their  
competitive  
strength.

**M**ajor new  
multilateral IPR  
agreements are  
unlikely in  
the short to  
medium term.

## THE INTELLECTUAL PROPERTY RIGHTS LANDSCAPE

**International:** The Uruguay Round TRIPs accord, completed in 1994, was a watershed for international intellectual property rights protection. TRIPs built on the principles contained in the Paris Convention on Industrial Property, which protects patents, trademarks and trade secrets, and the Berne Convention on Copyright. TRIPs signatories are obligated to adhere to an international baseline for copyright, patent, trademark, trade secret, and other forms of IPR protection. TRIPs also establishes World Trade Organization (WTO) mechanisms for settling disputes over intellectual property issues and for ensuring compliance with the agreement, thus providing new rules for handling international conflicts over IPR and business regulation.

Many developing countries remain wary of a system that they believe will transfer wealth from their countries to large multinational firms. As a result, the industrialized world has agreed to lengthy transition periods for implementation of TRIPs. Developing countries and countries moving from a centrally controlled and planned economy towards a free market economy may postpone some of their new intellectual property commitments until January 1, 2000. Developing countries that do not currently provide product patent protection for inventions such as agricultural chemicals, pharmaceuticals and foodstuffs can delay meeting the standard level of protection for patents until 2005. The least developed countries can delay implementation of the increased level of patent protection until 2006.

**Regional:** The 1990s also saw IPR progress on a regional basis. The NAFTA accord, completed in 1993, provides IPR protection for Mexico, Canada and the United States that is, in some aspects, stronger than TRIPs protection. (Although NAFTA was completed before the Uruguay Round, the NAFTA IPR negotiation was completed after the outcome of the TRIPs negotiations became generally evident.) Moreover, US authorities are likely to insist that any country wishing to join NAFTA in the future adhere to its intellectual property rights requirements, thus widening their coverage.

The European Union (EU) also tried to harmonize and strengthen Europe's intellectual property standards. The EU is working on trademark and patent systems which should lower costs for IPR applicants and streamline the process for achieving EU-wide protection. Furthermore, non-members which apply to join the EU may need to embrace the European Union's IPR standards, so these standards will likely spread across Europe. By contrast, no meaningful regional IPR accords exist in Central or South America, Africa, Eastern Europe, the Middle East or Asia. However, participants in the Asia Pacific Economic Cooperation (APEC) process have identified IPR as an area on which they need to work.

## NEAR TERM AGENDA: IMPLEMENTATION AND ENFORCEMENT

Intellectual property issues climbed much higher on the policy agenda much more rapidly than anyone would have predicted a decade ago. Many trade specialists were surprised, for instance, that more progress was made on the TRIPs agreement than on liberalization of trade in services during the Uruguay Round of multilateral trade negotiations. But progress in negotiations does not automatically translate into successful implementation. Negotiators will meet in 2000 to review progress on the TRIPs agreement. Other than that exercise, there are unlikely to be major new multilateral IPR agreements in the short to medium term. Instead, the next two to five years are likely to be a period in which governments work to implement and monitor existing multilateral, regional and bilateral IPR agreements that have already been negotiated and work to enforce them. In addition, it will be important to build support for the agreements among skeptics in business and government around the world. In general, the attention of the US government and business community should therefore shift from a focus on raising the bar higher to one of ensuring that countries clear the bar that has just been raised. Accelerated implementation, compliance, and enforcement should be the watchwords. At the same time, piracy has yet to be controlled and is likely to be a top priority for the rest of the decade.

### **Recommendation 1: Use incentives to accelerate TRIPs implementation.**

The United States and other major intellectual property-producing countries should encourage WTO member states to implement their TRIPs obligations ahead of the TRIPs deadlines. Non-WTO countries also should be encouraged to meet TRIPs standards as soon as possible. One patent specialist noted that the chemical and pharmaceutical industries view the acceleration of the adoption of TRIPs patent protection as their top IPR priority.

Accelerated implementation is more likely to be accomplished with incentives rather than sanctions. After all, developing nations are not obligated to implement TRIPs ahead of schedule. Most incentives involve offering improved market access to industrialized markets for the developing world. This approach was adopted during the NAFTA, Uruguay Round, and Eastern European Most Favored Nation (MFN) trade negotiations. US negotiators might offer expanded use of the Generalized System of Preferences (GSP) tariff program. The United States also might develop special rewards for early implementors by “graduating” them out of the Special 301 review. Or US negotiators might examine whether better terms for development bank loans, development assistance or trade finance might be offered in exchange for expedited IPR implementation. In addition, the US government ought to insist that non-WTO members seeking WTO membership agree to implement the TRIPs commitments on an expedited timetable as a price for

**A**ccelerated  
implementation,  
compliance and  
enforcement  
should be the  
watchwords.

**F**  
**or**  
**developing**  
**countries,**  
**domestic**  
**development**  
**provides the**  
**best incentive**  
**to improve**  
**IPR protection.**

admittance. If significant IPR problems persist in countries that accede to the WTO, the United States might withhold full WTO relations until adequate IPR protection is in place.

**Recommendation 2: Monitor implementation and use the WTO dispute settlement mechanism if countries miss deadlines.**

Careful monitoring by industry and government officials is needed to ensure that countries comply with their new IPR obligations. US diplomats stationed overseas should closely monitor their host country's IPR legislation-drafting process, which will require substantial IPR and legal skills and close liaison with US industry in-country. The business community, and particularly the American Chamber of Commerce in key countries, should provide Washington with early warnings if legislation is not moving forward or is being drafted in ways that might pose concerns later on. Every effort should be made to identify problems early and to work quietly with government officials to rectify them.

The US government should strategically employ WTO dispute settlement procedures if members fail to implement their TRIPs commitments on time or in an appropriate manner. The US government also should enlist help from like-minded countries to increase diplomatic pressure and make the threat of retaliation more credible. When US negotiators consider a foreign government's IPR practice to be inconsistent with TRIPs or other WTO provisions, then WTO dispute procedures should be used, even if the timetable is longer and the result less certain than unilateral action. If the outcome does not favor the US position, the United States should consider WTO appeals but generally should not undertake unilateral action or retaliation. If the United States expects to encourage other countries to accept unfavorable WTO decisions, it cannot ignore decisions with which it disagrees.

**Recommendation 3: Promote local support for IPR in industrializing countries.**

The extension of IPR protection and its vigorous domestic enforcement will be greatly aided if governments and US and foreign firms work together to promote a new political consensus in key developing countries in favor of strong intellectual property rights. Many, perhaps most, developing countries are not convinced that strengthening their IPR systems would help them or their own domestic firms. The impact on their consumers often is misunderstood: they value inexpensive knock-off drugs and pirate software, but the danger to consumer welfare of shoddy counterfeits such as airline brake pads or of virus-ridden pirated software is less well appreciated.

The private sector needs to talk less to the US government and more to their foreign partners about the importance of intellectual property protec-

tion. Indeed, domestic development is the best “carrot” for developing countries to improve IPR protection. Global firms and, to a lesser extent, the US government, can help tilt the balance in this direction in various ways:

- Many developing countries signed the TRIPs agreement in the hope that a strong global intellectual property system would enhance their access to the emerging world information economy. To reinforce this view, firms that create intellectual property need to help developing countries maintain efficient, affordable access to the Internet and new software. If international firms charge too high a price for these new technologies in developing countries, building support for strong, cross-the-board IPR protection will be more difficult.
- Global firms based in the US and elsewhere should encourage more product innovation in local markets and increase their R&D activities in partner firms and subsidiaries. They should also help local firms develop their own trademarks and reputations for quality.
- The US government and global firms should actively disseminate research and analysis that demonstrate that IPR protection provides an incentive for increased foreign investment and for increased levels of research, development, invention and creation in countries with strong IPR laws.
- When strong or improving domestic IPR protection helps persuade firms from industrialized countries to increase their inward direct investment in a developing country or the transfer to it of sophisticated technology, they should publicize this link.
- More generally, US firms, in conjunction with US diplomats, should work to identify and highlight instances of local firms in industrializing countries that are developing intellectual property and depend on its protection.
- To overcome hostility in many developing countries to trade secrets laws, international firms should persistently explain why a legal framework that protects trade secrets helps diffuse innovation throughout the economy.
- Other creative strategies should be pursued. For example, an entrepreneur in Hong Kong, working with Microsoft, IBM, and other prominent software companies, has developed a TV sitcom for the China market in which a young man and his two female roommates buy and work on a computer; every so often a quiet anti-piracy theme is built into the script. It is one of the most popular TV programs in Beijing and may quietly influence consumers.

**T**he private sector should take the lead in monitoring and advising countries on IPR legislation.

**D**eveloping countries are concerned about the expense and manpower needed to meet IPR obligations.

**Recommendation 4: The private sector should help developing countries implement their TRIPs obligations.**

As a result of TRIPs, many countries are in the process of amending their IPR legislation. During the next five years, more national intellectual property legislation will be drafted and enacted than during any previous five-year period. Since each country has its own laws and a unique legal history, no two implementing packages will be identical. This situation presents a massive near-term opportunity and responsibility for the private sector. IPR-reliant firms, industries, trade associations and International Chambers of Commerce should closely monitor and, where appropriate, offer expert advice as legislative proposals are drafted and debated. Private sector initiatives of this type would complement efforts by the World Intellectual Property Organization (WIPO) to help draft model laws and provide technical advice to developing countries. Most national authorities and legislatures appreciate the advice and comments of IPR practitioners, especially when couched in helpful rather than threatening terms. Realistically, the private sector has more IPR manpower at its disposal than the US government. Therefore, the private sector should take the lead in this effort. When necessary, however, the international IPR community should seek outside diplomatic intervention to help make the case for strong, well-conceived national intellectual property laws. It is far more difficult to persuade a country to rewrite poorly conceived and drafted IPR legislation than to help them get it right in the first place.

Developing countries budget only limited funds or attention to IPR protection. Many developing countries are concerned that they cannot afford the expense or the drain on their skilled manpower of establishing patent offices, copyright and trademark registries, and/or the judicial procedures to enforce their new IPR obligations. Since firms that own intellectual property rights will benefit from the establishment and strengthening of these institutions, they should be willing to contribute to their upkeep. They already do so through the payment of fees. In addition, to signal a willingness to contribute to this endeavor, firms that own IPR should make commitments, individually, through their industry associations, and through the International Chambers of Commerce to provide technical advice and financial assistance to train IPR manpower and to help create and maintain national IPR institutions. Such assistance programs exist today, but they are tiny compared to the level of ignorance about IPR and the losses surrendered to IPR piracy. Unless firms contribute, IPR protection will evolve more slowly, be implemented less efficiently, and be enforced more haphazardly.

**Recommendation 5: Beyond implementation, work to ensure aggressive enforcement.**

Enacting laws is not enough. Countries, particularly those where piracy is a major problem, need to be persuaded to enforce their IPR laws aggressively. Inevitably, enforcement requires sustained attention by different branches and levels of government. Coordinated actions between the private sector and government also are needed.

Deterrence should be the ultimate objective in enforcement efforts. No country, not even the United States, can catch all its pirates. But good enforcement of tough laws can deter many from pursuing piracy. To do this, a country's IPR laws need significant, credible penalty structures and enough trained law enforcement manpower (customs and police) as are required to enforce them. Prosecutors and judges should be encouraged to use the full weight of their laws when prosecuting pirates. Fines should be harsh and prison should be an option for egregious violations or repeat offenders. If judges or juries will not impose stiff fines under the law, then minimum sentencing guidelines might be sought through legislation, where appropriate. Yardsticks are needed to help countries measure the impact of their enforcement efforts: these might include the average amount of fines imposed, the prevalence of pirated goods by neighborhood or region, or the number of arrests, prosecutions and convictions.

International firms need to avail themselves of the local legal system in their pursuit of intellectual property pirates. High local legal costs or perceived corruption may discourage firms from relying on customs, police and the courts, but even if the outcome is uncertain, pursuing justice in local courts is an investment in the future. If companies do not use local enforcement systems, local governments will discount their complaints. If sustained private sector efforts do not result in convictions or other meaningful deterrence of intellectual property pirates, then the US government can intervene to convince senior host country officials that their legal system has been tried and found wanting. Without this empirical evidence, however, host countries will not act to improve the situation.

As for the US government, international enforcement requires a different blend of agency expertise than IPR negotiations. The Office of the U.S. Trade Representative (USTR) alone cannot promote intensified enforcement. To stimulate other governments' attention to enforcement, the US team needs to integrate State Department, FBI, Justice, Commerce, Customs, Library of Congress and other enforcement and trade bodies into a coherent IPR team. Law enforcement agencies abroad often treat IPR enforcement as "low level white collar crime," not worth their attention compared to other pressing matters. The FBI and Customs, working with other US agencies, can help move IPR issues higher on the policy agenda in other countries. These agen-

**D**eterrence  
should be  
the ultimate  
objective in  
enforcement  
efforts.

cies also should work with countries to help them improve their border controls and bring their police and customs officials to the United States for training. US diplomats should help design strategies for “selling” such programs abroad and should work in-country to encourage host governments to set prosecution targets. Regular prodding of the local legal process by US embassy and consulate officials could also help stimulate local IPR implementation and enforcement efforts.

**Recommendation 6: Retain annual Special 301 review of IPR-infringing countries.**

The United States should continue to employ the “Special 301” process enacted in the Omnibus Trade and Competitiveness Act of 1988. The USTR should continue to furnish to the Congress an annual report, based on submissions by industry and by US diplomats overseas, on IPR infringement and market access problems around the world. The Special 301 process may irritate US trading partners, but also prods them to adopt better IPR protection. The USTR can legitimately conduct Special 301 investigations and complaints through the WTO dispute settlement process and can pursue IPR complaints and sanctions against non-WTO members unilaterally. Unilateral measures against WTO members should be taken in extraordinary cases. Such

### SECTION 301 AND SPECIAL 301

There is confusion in international and domestic circles about the “Section 301” and “Special 301” processes in US trade law. Some US trading partners argue that these provisions are not WTO-consistent.

Nothing in the WTO prohibits any country from investigating another country’s trade practices. Section 301 of the 1974 Trade Act gives the President (and his delegate, the US Trade Representative) the ability to investigate government practices in other countries that may place an unfair burden on US firms. Special 301 of the 1988 Trade Act builds on Section 301 and specifically covers intellectual property protection and market access for intellectual property goods.

Section 301 and Special 301 also

authorize the US Trade Representative to remove trade benefits, such as MFN tariff rates, if after a set period of time the burdensome foreign practices are not removed or modified. Through Section 301, Congress, which has the sole authority to raise revenues in the United States, has authorized the Executive Branch to raise or modify tariffs in a narrowly defined context. This authority is not necessarily WTO-illegal. However, if Section 301 trade sanctions are applied against a WTO member without WTO authorization, (e.g., without going through the WTO dispute settlement procedure), then the United States could be in breach of its WTO commitments. It is not the US law, but the way it is administered, that matters.



a move would likely be challenged by the targeted trading partner and other WTO members, perhaps provoking a WTO dispute settlement action against the United States.

When devising unilateral sanctions against a WTO member, the United States should make every effort to craft penalties that are WTO-consistent. This could include withdrawing Generalized System of Preferences (GSP) trade privileges or withholding bilateral development aid. Threatening or acting to withdraw Most Favored Nation tariff benefits from a WTO member without the WTO's approval should only be taken when the underlying damage to U.S. interests is especially severe. If, however, the violation is manifestly not addressed by WTO rules, or if the foreign country is not a WTO member, the United States should be prepared to conduct unilateral investigations and enact unilateral trade sanctions.

## THE IPR NEGOTIATING PROCESS

Sustained interagency cooperation within the US government is a precondition for persuading other countries to adopt and enforce strong IPR regimes. At the same time, unless the private sector presents a unified, coherent position on IPR issues, the US government is far less likely to act internationally.

### **Recommendation 7: Build domestic consensus before entering negotiations abroad.**

US negotiators should ensure that the issues are “ripe” for resolution before they seek international rules. Before the United States presses others for stronger intellectual property rules, it needs to make certain that its own industries and the public are in support of the negotiating objectives. If the American house is divided, US negotiators risk obligating the United States to follow suboptimal IPR rules, or they could provoke domestic political opposition to agreements that emerge.

This might seem self evident until one reflects on the December 1996 World Intellectual Property Organization (WIPO) meeting, at which US negotiators pressed for an outcome sharply opposed by some key US firms and interests. Led by the Patent and Trademark Office, US negotiators sought to expand copyright protection to databases, but the US industry and consumer groups were divided. Dissension within the United States signaled to other countries that they could safely block that US initiative, at least for now. In this context, it is important to ensure that large, well organized firms and their special interests do not overwhelm the voice of smaller, grassroots organizations, firms and individuals.

U<sup>s</sup>  
industries  
and the  
public must  
support  
negotiating  
objectives.

**B**inding IPR  
rules were  
accepted in  
exchange  
for market  
access in  
other sectors.

**Recommendation 8: Focus IPR attention in the World Trade Organization but do not abandon the World Intellectual Property Organization.**

The World Intellectual Property Organization (WIPO) was traditionally where all international IPR work occurred; it is the forum in which, before TRIPs, many major IPR conventions were negotiated. WIPO boasts a technically expert but narrowly focused secretariat and a large membership, but no dispute settlement mechanism or enforcement powers. As in the United Nations, debate often ends in gridlock, so agreements are slow to emerge.

To push negotiations forward and create dispute settlement options, trade negotiators began to address IPR issues in the WTO. When IPR issues did arise during the Uruguay Round, they moved forward rapidly. In all governments, trade negotiators have been more powerful than intellectual property experts and, when motivated, they are able to move the process along. In addition, the WTO process was able to offer developing countries market access concessions in other sectors in return for binding IPR rules.

Ironically, this trespassing by WTO on WIPO's turf has begun to reenergize the latter organization. Most dramatically, WIPO organized a December 1996 conference to review new issues concerning digital technology. This was the first major WIPO copyright negotiation in more than two decades. The WIPO conference aimed to update copyright and neighboring rights treaties and to make them relevant to a digital age. Some positive results were achieved, but other issues could not be resolved this time around.

**Recommendation 9: Use bilateral and regional IPR negotiations to move the process forward.**

Although major new IPR initiatives seem unlikely, bilateral agreements, which provide the United States with significant leverage, may help address specific problems. Such negotiations might provide an opportunity for dealing with specific IPR deficiencies because the objective is more discrete and, therefore, the threat of trade sanctions is more likely to be taken seriously. Moreover, if countries do not abide by their bilateral IPR agreements with the United States, they may be subject to immediate US trade sanctions. At the same time, bilateral negotiations are not IPR panaceas, in part because negotiating IPR agreements one country at a time requires proportionately more negotiating manpower than do regional or multilateral efforts. Indeed, it took four years to negotiate state-of-the-art IPR agreements with just three countries: Sri Lanka, Jamaica and Trinidad/Tobago. Unless considerable learning and demonstration effects occur, the payoff from bilateral agreements may not seem worth the expenditure of scarce IPR negotiating expertise.

Regional negotiations may provide the best settings for making future substantive improvements in IPR protection. The United States should work with the EU, Japan, and other like-minded industrialized countries to coordinate a common position on the elements of the next phase of IPR protection. For example, the TRIPs review in 2000 will provide an opportunity for assessing the evolving system and pushing for further multilateral standards and procedures. The NAFTA accession and Free Trade Area of the Americas (FTAA) creation processes could smooth the implementation of intellectual property rules throughout the Americas by 2005. The United States should press countries acceding to NAFTA to embrace the NAFTA IPR provisions and perhaps to strengthen them through a new TRIPs Plus agenda. Strong intellectual property protection should also be part of the FTAA from the start. APEC may be a useful forum to press for enhanced IPR protection throughout the Asia Pacific region. However, the United States has less bargaining power in APEC than in the NAFTA/FTAA context. But important interests in key countries, including Indonesia, Malaysia and China, are not yet convinced that expanding intellectual property protection is in their interest.

## THE FUTURE IPR AGENDA

Several significant areas of unfinished IPR negotiation are of deep concern to industry in the western United States. These issues range from the need for patent protection for biotechnology to copyright protection on the Internet.

### **Recommendation 10: Address new IPR issues and focus on key sectors dependent on IPR as they arise.**

New technologies inevitably raise new issues with which firms and governments must grapple as they unfold. The case of CD technology (see page 16) illustrates one specific example of how technological innovation may make illegal piracy simpler to commit while no clear solution is in sight. More broadly, breakthroughs in key sectors strongly represented on the West Coast raise important IPR issues.

**Patents:** Patents need to be sought on a country-by-country basis, while copyright registration provides almost world-wide protection. Achieving international patent protection is therefore time consuming, labor intensive and expensive. Lawyers and patent inspectors consume both public and private resources. The United States should support efforts to streamline patent systems and facilitate the filing of patents inexpensively and efficiently on an international basis. International coordination would help patent applicants obtain faster, cheaper global patent protection. The United States also should explore whether it is feasible to adopt regional, EU-style patent systems in settings such as NAFTA or the planned Free Trade Area for the Americas. A

**R**egional negotiations may provide the best settings for substantive improvements in IPR protection.

one-stop central patent authority could provide regional patent coverage to supplement national patent registries. However, the US government would be reluctant to cede sovereignty over patent issuance to any international body that does not follow rules and procedures comparable to those of the US Patent Office. Similarly, other countries are unlikely to scrap their systems and embrace US laws. Therefore, coordination of rules and standards probably will need to occur before establishing new regional patent institutions. This is unlikely in the short or medium term.

### CD TECHNOLOGY CRISIS; CD TECHNOLOGY ANSWERS?

CD format movies are uncommon in the US market, but increasingly available throughout Asia. This advent of recordable CD technology provides the prospect, almost unique to the digital age, that a single plant might be able to pirate the outputs of diverse industries. This new technology could tremendously expand the scope of CD piracy — which already costs US movie, music and software firms billions of dollars each year in lost revenues. A small investment could allow pirates to churn out vast numbers of perfect CD copies. Small, mobile, mom and pop operations could proliferate with alarming speed.

A strategy is needed to combat this looming technological challenge. A legal solution alone almost certainly will not be sufficient to hold back the flood of pirated goods which could threaten the solvency of important legitimate CD industry segments and provoke serious trade friction between the United States and its trading partners. Therefore, government and the private sector will need to collaborate to seek a strategy that also uses technological

solutions to frustrate piracy or make it possible for pirated goods to be traced back to their manufacturers.

Various technical approaches are possible. The software industry might revisit its opposition to CD software “locks” that prohibit copying. (Software producers are concerned that locks will frustrate legitimate users and that determined pirates will pick the locks.) Or, the CD equipment makers might agree to design unique identifying stamps which make it possible to identify which machine produced any legitimate or pirated CD. The Chinese government might be persuaded, for instance, to allow machines already in service to be retroactively labeled. Intergovernmental solutions also might be explored. One partial solution might be for US negotiators to work with other countries to develop labeling laws and treaties that would require all imported CDs to have a source identifier. Such an approach might not curb CD piracy within the pirates’ home market, but it could hamper the export of pirated products to lucrative export markets.

**Parallel Imports:** Some US companies respond to the complaints of developing countries about high prices by developing dual pricing regimes: higher prices for industrial country consumers, and lower ones for developing country consumers. By charging more to richer customers, these companies hope to lower prices for poorer countries and thereby diminish incentives to piracy while maintaining profitability. The strategy falls apart, however, if there is substantial “parallel importing” from developing to industrialized markets. “Parallel imports,” sometimes called grey market goods, are legitimate products, legitimately made, but imported illegitimately because of licensing or other agreements. The case of Hong Kong, now settling into the People’s Republic of China (PRC), provides an example. Intellectual property-owning firms want to be paid top prices in Hong Kong, but recognize they need to discount their prices to sell to PRC customers. Despite new legislation, there remains a huge temptation, therefore, to reexport legitimate and pirated products from China to Hong Kong. Parallel imports also can undermine marketing strategies for the release of films and other products if, for example, films are available in video format before they open in local theaters in developing countries. US negotiators should determine whether or not stronger multilateral rules against parallel imports are needed.

**Biotechnology:** TRIPs left biotechnology — an important emerging area of patent law — only partially protected because, when TRIPs concluded, there was no US or international consensus on what sorts of protection for bio-engineered products should exist or how to compensate countries from which unique genetic materials are extracted. Since then, however, progress has been made on identifying core protections and a rough balance between developers and resource owners. Either a TRIPs extension should be negotiated or a new agreement worked out among a relevant subset of countries.

**Software:** US firms unanimously condemn piracy at home and abroad, but they disagree about the level of protection innovators should receive. Firms which develop popular software platforms want strong intellectual property rules to protect their interests and enhance their profits. Some users, integrators and software developers contend that platform owners receive too much compensation and protection, and that prices would fall and innovation would increase if emphasis were placed more on interconnection and less on intellectual property protection. This is an important issue, but major international progress is unlikely until the US industry develops greater internal consensus.

**THE NATIONAL AND GLOBAL INFORMATION INFRASTRUCTURES:** The explosive growth of the Internet and World Wide Web raises broad IPR policy questions. How should innovators be compensated fairly and global seamless interoperability be provided at the same time? Both are necessary for a Global Information Infrastructure to flourish. Similarly, how can copyright piracy be minimized while still promoting scientific progress through the

US firms  
condemn  
piracy but  
disagree  
about the  
level of  
protection  
innovators  
should  
receive.

**B**enefits  
to creators  
and users  
of IPR  
should be  
balanced.

free, or at least inexpensive, publication and distribution of information over networks? And how should fair use (e.g., the use of copyrighted materials without permission, for research or criticism) and first sale (e.g., the restriction of sales by copyright owners, but not of the subsequent lending of copyrighted materials) be handled?

**Television and Film:** TRIPs and the WTO services agreement did not address market access barriers which limit the export of US films, television programming, and various forms of advertising. China limits the import of foreign films and also imposes a pre-screen quota on its theaters. A directive by the European Union stipulates that at least 50 percent of television programming in EU member states should be produced locally. Australia imposes “local production” requirements on broadcast advertising. Canada’s cultural restrictions are notorious. Indeed, in Canada, France and elsewhere, barriers are often justified as cultural protection, not as industrial protection. Such “cultural” barriers deprive the US entertainment and software industries of potential sales and may coerce film makers and broadcasters into producing films and programming abroad, at the expense of US workers and suppliers to the industry. So far, US negotiators have failed to ameliorate the situation, and new approaches are needed. For example, the entertainment industry might work with its partners and overseas broadcasters, theater owners, telecommunications providers, and manufacturers of information processing equipment to lobby for openness. In addition to presenting the routine trade arguments, the US government might use non-trade fora, including bilateral VIP meetings, cultural festivals, and meetings on free flow of information, to make the case that cultural barriers restrict ideas and consumer choice.

## PROSPECTS FOR THE FUTURE

More broadly, intellectual property rights are a tool necessary to constructing the global economy of the next century. Unless substantial international intellectual property protection prevails in most parts of the globe, global commerce will develop less rapidly than it might otherwise. Innovation, research and the development of new products and services will proceed more slowly if inventors are not rewarded for their creativity and investors do not reap sufficient profits on their investments. At the same time, unless new ideas and technologies are made available to the public and firms in many countries at affordable prices, they will not respect IPR rules and treaties. In short, governments and firms should remain cognizant of the need to balance the benefits of creators and users of intellectual property. If the balance tilts too far in either direction, support for the international intellectual property regime could begin to crumble.

## STUDY GROUP PARTICIPANTS

Mr. Marc Apfelbaum  
*Vice President and Associate  
General Counsel  
Time Warner Cable*

Dr. Jonathan D. Aronson  
*Director, School of International  
Relations  
University of Southern California  
Organizer, Pacific Council Study Group  
on Protecting International Intellectual  
Property*

Mr. Walter S. Baer  
*Senior Analyst  
RAND Corporation*

Dr. Francois Bar  
*Assistant Professor of Communications  
Stanford University  
Berkeley Roundtable on the  
International Economy (BRIE)*

Ms. Stephanie Barron  
*Chief Curator of Modern Art  
Los Angeles County Museum of Art*

Ms. Nancy Y. Bekavac  
*President  
Scripps College*

Dr. James R. Beniger  
*Associate Professor  
Annenberg School for Communication  
University of Southern California*

Mr. Michael Borrus  
*Co-director  
Berkeley Roundtable on the  
International Economy (BRIE)*

Mr. David Brancaccio  
*Host-Senior Editor  
"Marketplace"-KUSC  
University of Southern California*

Mr. Lorin Brennan  
*President, Independent Producers  
Association  
American Film Marketing Association*

Dr. Douglas K. Brotz  
*Principal Scientist  
Adobe Systems Incorporated*

Ms. Kaye Caldwell  
*President  
Software Entrepreneurs Forum*

Dr. Donald S. Chisum  
*Professor of Law  
University of Santa Clara*

Mr. Peter M. C. Choy  
*Deputy General Counsel  
Sun Microsystems, Inc.*

Mr. Roger Cloud  
*Senior Counsel, Intellectual Property  
Informix Software*

Dr. Peter Cowhey  
*Professor  
Graduate School of International  
Relations and Pacific Studies  
University of California, San Diego*

Ms. Karen B. Crockett  
*Assistant General Counsel  
Price Waterhouse*

Mr. Paul R. De Stefano  
*Partner  
Pennie & Edmonds*

Mr. Gary Demos  
*President  
Demografix*

Dr. Richard L. Drobnick  
*Vice Provost for International Affairs  
and Director, CIBEAR  
University of Southern California*

Ms. Kimberly T. Ellwanger  
*Director of Corporate Affairs  
Microsoft, Inc.*

Mr. Ian Feinberg  
*Partner  
Gray, Cary, Ware & Friedenrich*

Mr. Paul E. Geller  
*Attorney and Adjunct Professor of Law  
University of Southern California*

Mr. Robert L. Gullette  
*Assistant General Counsel  
The Boeing Company*

Mr. David Y. Handelman  
*Counsel  
Troy & Gould*

Dr. Jerry Hanley  
*Vice President of International  
Public Affairs  
AT&T Center for Telecommunications  
Management  
University of Southern California*

Ms. Lynn Hvalsoe  
*General Counsel  
Nintendo of America, Incorporated*

Dr. Michael D. Intriligator  
*Professor of Economics, Political Science  
and Policy Studies  
Department of Economics  
University of California, Los Angeles*

Ms. Molly Kellogg  
*Vice President of Anti-Piracy  
Warner Bros.*

Mr. Richard King  
*President  
Richard King International*

Mr. Keith LaQua  
*Executive Director  
Artists Rights Foundation*

Mr. Peter Lyman  
*Librarian*  
*University of California, Berkeley*

Honorable Mel Levine  
*Partner*  
*Gibson, Dunn & Crutcher*  
*Chairman, Pacific Council Study*  
*Group on Protecting International*  
*Intellectual Property*

Ms. Linda Fayne Levinson  
*Consultant*

Dr. Abraham F. Lowenthal  
*President, Pacific Council on*  
*International Policy*  
*Professor, School of International*  
*Relations*  
*University of Southern California*

Dr. Keith E. Maskus  
*Professor of Economics*  
*University of Colorado, Boulder*

Mr. Daniel McDonald  
*Program Manager*  
*Star Sight Telecast Incorporated*

Ms. Margaret McKeown  
*Managing Director and Partner*  
*Perkins, Coie – Seattle*

Mr. Nils Victor Montan  
*Vice President and Senior Intellectual*  
*Property Counsel*  
*Warner Bros.*

Mr. Michael C. Mullen  
*Executive Director*  
*Japan Society of Southern California*

Mr. Sherman O. Parrett  
*Partner*  
*Snell & Wilmer*

Mr. Billy A. Robbins  
*Of Counsel*  
*Fulbright & Jaworski*

Mr. Nicholas Rockefeller  
*Principal*  
*Rockvest Development Group*

Ms. Jenice L. Rutherford  
*Staff Attorney*  
*World Vision International*

Dr. Wayne Sandholtz  
*Associate Professor*  
*Department of Politics and Society*  
*University of California, Irvine*

Mr. William I. Schwartz  
*Attorney*  
*Morrison & Foerster*

Mr. Emery Simon  
*Executive Director*  
*Alliance to Promote Software Innovation*

Mr. Richard Jay Solomon  
*Senior Scientist*  
*Center for Communications &*  
*Information Science & Policy Program*  
*on Vision Science & Advanced*  
*Networking*  
*University of Pennsylvania*

Mr. Richard Steinberg  
*Acting Professor of Law*  
*University of California, Los Angeles*  
*Senior Fellow and Research Director*  
*Berkeley Roundtable on the*  
*International Economy (BRIE)*

Mr. Abraham Wagner  
*Attorney at Law*  
*Los Angeles*

Mr. Raymond J. Waldmann  
*Vice President for International Business*  
*The Boeing Company*

Dr. Glenn A. Woroch  
*Professor of Economics*  
*University of California, Berkeley*



## AUTHORS OF THE REPORT

**Dr. Jonathan D. Aronson** is both the director and a professor in the School of International Relations at the University of Southern California (USC). He is also a professor in USC's Annenberg School of Communication. A member of the Council on Foreign Relations, he has held a Council International Affairs Fellowship. His specializations are in international trade, telecommunications, and the political economy of international finance and trade.

**Mr. Michael Brownrigg** is vice president of ChinaVest, a San Francisco investment banking firm which focuses on the China market. During 1996-97, he was a Department of State James Pearson Visiting Fellow at the Pacific Council on International Policy. As a Foreign Service officer, Mr. Brownrigg had served previously as a trade policy officer at the U.S. Consulate General in Hong Kong, as executive assistant to U.S. Trade Representative Carla Hills, and as desk officer for the European Single Market.

**Ms. Karen B. Crockett** is assistant general counsel to Price Waterhouse, where she focuses on intellectual property issues and computer hardware and software contractual matters. Prior to joining Price Waterhouse in 1996, Ms. Crockett was of counsel to the law firm of Gibson, Dunn & Crutcher. During twelve years of private practice, she has developed expertise in intellectual property matters and high technology transactions.

**Dr. Keith E. Maskus** is professor of economics at the University of Colorado, Boulder. Dr. Maskus has also been visiting professor at the University of Adelaide, senior economist at the U.S. Department of State, and visiting scholar at the Federal Reserve Bank of Kansas City. He has written extensively on empirical testing of trade theories, trade policy and international trade negotiations, with particular emphasis on the international economics of intellectual property rights, a subject on which he has been a consultant to the World Bank and UNCTAD.

**Dr. Richard H. Steinberg** is acting professor of law at the University of California, Los Angeles, where he teaches international law. He is also senior research fellow at the Berkeley Roundtable on the International Economy (BRIE) at the University of California, Berkeley. He was previously assistant general counsel in the Office of the United States Trade Representative and an associate at Morrison & Foerster.

## PACIFIC COUNCIL ON INTERNATIONAL POLICY

*The western partner of the Council on Foreign Relations*

The Pacific Council on International Policy seeks to help leaders from many sectors respond more effectively to a rapidly changing world. Established in 1995, the Council promotes the exchange of ideas on international issues, fosters public understanding of global trends and their implications, and enhances international communication on vital economic, social and political questions. As the western partner of the Council on Foreign Relations of New York and headquartered on the campus of the University of Southern California, the Pacific Council is an independent, non-partisan organization. It is supported by corporations, foundations, membership dues and individual contributions.