From: Stephen Mark Maurer [maurer@econ.Berkeley.EDU]
Sent: Tuesday, December 14, 2004 5:17 PM
To: FN-USTR-FRO439; FN-USTR-FRO439
Subject: Berkeley "Transatlantic Roundtable" Meeting

Dear Ms Errion:

I enjoyed talking with you at this morning's "Transatlantic Roundtable" discussion here at Berkeley. Also, I want to complement USTR on your representative's repeated statements that she wanted to hear what attendees thought and, in particular, any new ideas they might have. This is exactly the way government ought to be – thank you!

In that same spirit, I'd like to clarify my concerns about about the interaction between domestic IP law and international IP agreements.

One of the most salient features of patents is that royalties are concentrated and visible, but costs are widely disbursed – a tax, if you will, on everyone who uses a particular idea. The political corollary is that patent owners are vocal and well-organized, while consumers barely know that they are being taxed. Empirically, this is true even when the tax is large – witness the social security recipients who ration their medicines (or take trips to Canada) because they cannot afford the pharmaceuticals they need to stay alive. Very few of them understand that the price is a conscious decision to fund R&D.

Despite this built-in political bias towards strong IP, domestic political debates usually recognize that there needs to be some kind of balance between strong IP and high prices for consumers. In particular, most Congressmen realize that setting patents "as strong as possible" is bad policy and (perhaps) bad politics.

The politics are fundamentally different in the international arena. In America, patent owners are very vocal about taxing French consumers, but French consumers have no voice in Congress. And of course, a mirror-image dynamic works in France. The net result is that international politics is heavily biased toward patent owners and against consumers.

The TRIPS experience provides a striking example of this dynamic. When the world set out to harmonize IP treaties, it would have been natural to think that high- and low-protection countries would reach a compromise somewhere in the middle. Instead, the world converged on the highest possible standard, which in this case favored the US. That outcome is usually interpreted as successful American arm-twisting, but the political dynamic I have described is much more plausible.

[Alas, I cannot claim that the insight is original. It comes from a paper by my colleague, Prof. Suzanne Scotchmer. You can download a copy at http://socrates.berkeley.edu/~scotch/treaties.pdf. The argument is also found in her book, *Innovation and Incentives* (MIT 2004).]

I was interested to hear speakers respond to this argument by saying that the companies and legislators they talk to – both here and in India – favor patents. I think the observation supports my argument. One expects patent owners to be vocal and they are.

Whether or not TRIPS was a good result is obviously a moot. But I think we should worry about the fact that international trade politics have a way of driving domestic IP legislation. Two current examples come to mind.

First, the US and Europe both have very substantial public R&D programs.
The conventional instinct is that US national laboratories should patent knowledge and charge European firms for using it. Conversely European laboratories should charge American firms. The problem that people overlook is that patented knowledge is expensive and therefore scarce.
Would it not be simpler and wiser to have the US and Europe sign a "disarmament"

treaty, in which both sides agreed to renounce patents for publicly-funded knowledge. The upside benefit is clear: Quicker, faster, and more widespread use of taxpayer-supported technology on both sides of the Atlantic. The downside cost is that whichever side had the most productive national laboratories would lose revenue. Notice, however, that royalties are proportional to the *difference* of US and European inventiveness -- and therefore much smaller than the absolute size of either side's R&D budget. I would argue that the arm's control metaphor is apt here: Competition is expensive, cooperation saves money for everyone.

Second, the US and Europe have disagreed about the need for database protection. Under traditional copyright law, anyone can use data without charge. Since 1996, however, Europe has provided copyright-like protection for data – and insisted that the US do likewise. After long debate, Congress has apparently decided not to follow suit. Now the matter is set to become an international trade dispute. For reasons stated above, harmonization talks would probably converge on the highest -- i.e., European -- standard. But is this rational? All available evidence suggests that database protection has done little or nothing for Europe. [S. Maurer, P.B. Hugenholtz & H. Onsrud, "Europe’s Database Experiment," 294 Science 789 (2001)] Would it not be better for the Europeans to reopen their hotly contested domestic debate on whether database legislation was a good idea in the first place? Pressing on to a worldwide standard will make data owners happy -- but that does not mean that this result is in society's interest.

It seems to me that the problem I have described is generic – i.e., that international treaties, with their built-in bias towards strong IP, often drive pro-IP legislation that countries would never have adopted in isolation. Naturally, I recognize that the political dynamics I have described are real and that USTR must cope with them. What worries me is that some of the speakers seem to have become complacent that strong patents are ever and always a good thing. The fact that patent owners believe this (and say so at every opportunity) does not mean that they speak for the "public interest" -- but the politics of international trade makes it dangerously easy to think so.

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