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AT THE U.N., A MOUNTING WAR ON PATENTS

INTRODUCTION

Allowing inventors to reap the rewards of their creativity long has been appreciated as a major spur to technological innovation and economic development. It is patent law, upheld in most of the world, that establishes the ground rules assuring that inventors reap those rewards. These ground rules, however, are now being threatened. At a conference in Geneva, beginning this week, the globe's developing nations, led by the so-called Group of 77, and until now supported by several West European states, are preparing to propose far-reaching and drastic changes to what is known as the Paris Convention for the Protection of Industrial Property. These changes would threaten the technological vitality of the U.S. and other industrialized nations. More important, however, the changes would endanger the economic vitality of the very developing states which are challenging established patent laws and customs. One sure way to discourage investment in developing countries, transfer of technology, and economic development is to remove the kind of major incentive provided by patent guarantees.

ROLE OF PATENTS

Patents are the statutory grants for securing to an inventor for a specified term the exclusive right to make, use or sell his invention. The United States plays a very important role in the furthering of such innovation through the large number of patents filed annually by American citizens and corporations. In 1980, for example, there were 627,000 patent applications worldwide, of which 321,000 were granted. U.S. nationals or corporations filed between 80,000 and 105,000 of these. In fiscal 1981, the U.S. Patents and Trademarks Office granted 66,000 patents, of which approximately 43,000 went to U.S. citizens or corporations.

These individuals or entities also were granted more than 100,000 patents outside the United States, and sought protection for some 20,000 inventions in both the U.S. and in foreign countries. Because of the importance of patent protection to industries dependent on sizeable research and development investment, particularly pharmaceutical and agro-chemical firms, it is not unusual for such firms to seek patent protection for their products in as many as 40 countries.

The global guidelines for this is the Paris Convention for the Protection of Industrial Property. It is administered by the World Intellectual Property Organization (WIPO), an official agency of the United Nations with an annual budget of $6.06 million; the U.S. contributes almost half a million dollars to WIPO. A substantial part of WIPO's activities and resources assists developing countries, particularly in negotiating transfer of technology from the industrialized nations and from Western-based multinational corporations (MNC's). Although WIPO officials themselves do not openly support the Third World proposals to change the Paris Convention, their organization would be obliged to support the changes if adopted, and use them as a basis for all future patent negotiations. Having the changes approved under the auspices of an official U.N. agency would provide an "extra margin" of legitimacy to those changes in the international community. This offensive against patent laws, moreover, is but a part of the Third World's campaign against the industrialized West and the free enterprise system.

THIRD WORLD DEMANDS

The developing nations have a shopping list of proposed changes to the Paris Convention. Among them are that developing states pay lower fees to obtain patents, that they be granted longer periods of time to complete patent applications, and that they gain official recognition on a product label for products produced in their country by a Western-based MNC. There is almost no opposition to these concessions. It is a different matter, however, when it comes to the proposed revisions dealing with compulsory licenses and patent forfeiture or revocation in Article 5A of the Convention.

One proposed change in this Article would authorize a developing nation to force a Western-based MNC holding a patent to grant a license on an exclusive basis to a designated individual or firm in the developing country after 30 months from the grant of the patent to the MNC. The license would thus be "non-voluntary" and "exclusive." The developing nation could force this action, once it had determined that the patent owner had failed to "work" or "sufficiently work" the patent on its territory--that is, specifically failed to manufacture locally the invented product--within the period of 30 months, or had otherwise "abused" the patent privilege. The developing nation could compel the MNC to award this license to any entrepreneur, even a corporate competitor

of the original patent holder. The entrepreneur in the developing country could gain all rights to produce the patented invention in that country, and could even prevent the original patent holder from competing against him.

At present, only a handful of countries grant exclusive, non-voluntary licenses as a means of penalizing firms for not "working" a patent. Adoption of Article 5A would therefore severely weaken patent protection in almost all developing countries. In the case of the pharmaceutical and agro-chemical industries, which market products only after extensive clinical tests--often lasting up to ten years--have established product safety and efficacy, the new code would mean automatic confiscation of manufacturers' rights to their products.

Another change proposed for Article 5A of the Convention authorizes patent forfeiture or revocation where the patented invention is not "worked" or is otherwise "abused" in a developing country within five years from the grant of the patent in that country. According to the proposed revision, importing the product into the country would not meet the requirements of "working." For some industries, such changes would dissolve patent protection, since the time needed for meeting regulatory requirements would often not allow those industries to "work" their patents in the time prescribed.

The developing nations who are signatories to the Paris Convention have accused Western-based multinationals of traditionally abusing patent protection in the Third World by charging "excessive" prices for the patented invention not subject to competition. Third World nations also charge that multinational firms often import the product containing the patent knowledge from some other nation, instead of producing the product locally. These charges are largely unsubstantiated. To be sure, Western-based multinationals do not produce some products locally. The reasons, however, have to do with restrictive foreign investment and profit repatriation laws, the availability of raw materials, skilled labor, adequate transportation and other critical economic factors. Often the multinational concludes that quality in the production process could not be assured in the local country.

Under the proposed revisions to the Paris Convention, a U.S. manufacturer could face automatic confiscation of rights to his product technology if he delayed manufacturing the product because of such economic reasons. Although one change to the Paris Convention would establish a "uniform justification clause" that would excuse non-working of a patent in cases where the patent-holder can "justify" the non-working of the invention, there is nothing in the proposal that suggests what will constitute the grounds for such justification, or that would require a Convention signatory to acknowledge the reason for non-working of the patent. In short, the patent-holder would be hostage to the whimsy of the local government in a developing country.

The developing countries are demanding the changes to the Convention because they feel that, by gaining control over patents, they will acquire the technology they covet. Since several of these countries already require a majority role in a partnership in any ventures established jointly with a foreign industry or government, they would gain access to a particular technology by forcing a multinational to work the patent on their territories.

The East Bloc nations ironically do not oppose U.S. efforts to make a stand against Paris Convention revisions. What the Communist states seek, however, is a propaganda victory that would allow them to continue blaming the Western states for "exploiting" the nations of the Third World. The East Bloc, after all, cannot be the target of such blame, since it has little technology, protected by patents, to sell the developing world. In those cases where it does have marketable technology, it would benefit by maintaining current patent codes.

The Soviet Union would like to place what it calls "inventor's certificates" on a par with patents. The certificate gives the inventor the right to royalty payments, but it denies the innovator exclusive control over the technology. The Soviets also seek to impose a double standard: a U.S. company would have to settle for an inventor's certificate in countries where they are used, such as East Germany. An East German company, however, could get much stronger patent protection in the West. The U.S. Government can ill-afford to allow concessions that would permit the East Bloc advantages denied to Western inventors.

For the past two years, the United States has opposed changes to the Paris Convention that would weaken patent protection worldwide. The U.S. does not recognize the drastic 1980 changes in voting procedure which allow a qualified majority, instead of the traditional consensus, to approve decisions in the Convention. The U.S. opposes the Convention change that would allow developing country producers to produce a patented invention under the terms of an exclusive compulsory license, and allow developing country governments to revoke a patent, without the pre-condition of a compulsory license, merely because the patent has not been worked by the patent holder. This raises the "non-working" of a patent to the level of patent "abuse." Regrettably, several West European nations, including the United Kingdom, France, Switzerland, and West Germany, seem willing to acquiesce in the face of Third World demands for these anti-free enterprise, anti-competitive changes to the Paris Convention.

CONCLUSION

The U.S. has held a firm line in these negotiations so far. It should continue to do so. During the first week of October, the U.S. Delegation should use the opportunity of preliminary meetings of the Paris Convention to urge the major West European allies to oppose revisions to the Convention that would substan-

tially weaken patent protection, particularly in the developing countries.

There is little doubt that the U.S. and its industrial allies realize that the developing countries are justified in calling attention to their plight; they do need Western-based technology and capital. The developing nations are not, however, going to attract this vital and necessary capital and technology by weakening patent protection and thus removing incentives for continued investment from industrialized nations and multinationals.

It is in the best interests of the U.S. and its industrial allies to make it easier for developing nations to take full advantage of the patent system as a means of gaining important and critical technology. Third World nations, however, cannot realize these advantages until they create real incentives for foreign capital investment. Weak patent protection does not constitute such an incentive. Strong patent protection is a necessary and central component of an attractive investment climate. In many cases, even if a multinational is willing to license the production of a patented technology to a local manufacturer in a developing country, it may not be able to find a source who is capable of doing so. If the multinational is to seriously consider producing its invention locally, it must have the incentive to stay in the developing country and produce the patented technology itself. If the global corporation perceives that its invention is not going to be protected by patents in the developing country, it is going to go elsewhere to produce its invention. The loser is not the multinational, but the developing nation.

This is the message that the U.S. Delegation should carry to both the developing nations and the U.S.'s major European allies at the Geneva meeting of the Paris Convention. To bow to Third World pressure on this issue not only does a disservice to U.S. businesses, it betrays the American committment to work for global economic development and growth.

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