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GATT and NAFTA Provisions on Intellectual Property

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GATT and NAFTA Provisions on Intellectual Property†

Emery Simon*

Today I will talk about three or four different issues. One answers the question: why are we having conferences like this? When I started doing intellectual property at the Office of the United States Trade Representative ("USTR") seven or eight years ago, there weren't any meetings like this to go to. I think that this kind of conference reflects an evolution that has occurred.

I will also talk a little bit about two of the principal agreements that the United States has been negotiating from our perspective and at least one that I think we have come close to concluding. I will then give you some of my impressions about where I think some of these issues are going domestically and maybe internationally as well.

Why are we doing all of this? Why would somebody like me, who used to be a trade negotiator, be involved in intellectual property? The answer to that is quite straightforward—it's kind of crude too: money. The United States is a big exporter of intellectual property. Analyses of the U.S. economy going back to the 1950s demonstrate that we are principally good at producing know-how and being creative and innovative. In the early to mid-1980s, there was a convergence of events that made us think a little more aggressively about how we in the United States protect the value of our intellectual property in the trade context.

Interestingly enough, the Europeans—being the copycats that

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they are—figured out that it was in their interest too. Dr. Jean-François Verstrynge decided to develop his program, and now there are trade policy instruments, and they're copying section 301 [of the Omnibus Trade and Competitiveness Act of 1988 ("OTCA")],[1] and they're doing bilaterals with the Eastern Europeans. But that's the kind of stuff that we want people to rip off. That was a good idea and good ideas always get imitated.

The convergence of four different events happened in the mid-1980s. First, technology changed. It became much easier to steal intellectual property through the advent of videocassette recorders, audiocassette recorders—now digital technologies—and personal computers. In the trademark area, with color photocopiers and a little off-set printing, you can duplicate somebody's trademark no matter how fancy and fanciful with very little effort. In the patent area or in the chemical area, someone with a bachelor's degree in chemistry and a small lab can take apart an agricultural chemical, figure out what its chemical composition is, and go into business making it—never having spent a penny doing the research and development of the product. So technology posed a new threat, which was that the innovative and creative things that we were producing became much more vulnerable.

Second, the global economy became smaller. Many U.S. companies that produce intellectual property—European and Japanese companies as well—began to operate on a global scale. They became much more aware of the fact that it wasn't enough to sue the guy in Dayton, Ohio who was ripping off your patent, or to go after the street vendors on Fifth Avenue—who are still there; but that it was just as important to become aggressive with countries outside of the United States, particularly, in the early days, Pacific Rim countries like Singapore, Taiwan, and Korea. Later I will say a little bit more about developing countries and their role in all of this.

As companies operated on a global scale, information became disseminated on a global scale. For example, guys in Bangkok

1. Omnibus Trade and Competitiveness Act of 1988 § 301, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. §§ 2241, 2242, 2411, 2420 (1988)) [hereinafter OTCA].

stole Bruce Springsteen's latest album that was selling like hotcakes. They didn't steal the latest fusion jazz release. They stole the stuff that was successful; they knew what was successful. At one point during the late 1980s, because of videocassette technology, one of the problems that we had was that you could sometimes buy on the streets of Hong Kong or somewhere in Taiwan movies on videocassette that were just being first run in movie theaters in New York. It became almost instantaneous that the pirates found a good product and were ripping it off—very frequently before it ever was really disseminated, even in our own market.

Third, the mentality of a lot of people in corporate positions changed—at least it's my impression that there was a change. Traditionally, U.S. business people have viewed their intellectual property lawyers as kind of nerds—green eyeshade-type people who sat somewhere in the bowels of the legal department—and they didn't pay a lot of attention to their intellectual property.

At some point, some corporations began to realize two things. One was that intellectual property was just as much a part of their bundle of assets as their factory, as their equipment, as their machinery, as any other asset that they had. It was an intangible asset, but it was very much an asset. Just as they wouldn't sit still for somebody walking in and taking their typewriters, they became much more sensitive to people walking out with their intellectual property.

Two was that intellectual property really is a profit center because of licensing. For example, if you can figure out some way to get a factory in Brussels, which is now ripping off your patent, to continue manufacturing the product, but to do it under license and pay royalties for it, you can turn what is now a deadly loss to you—you are losing market because it's displacing your sales—into something that is profitable.

Fourth, there was a high level of frustration with the existing international institutions that dealt with intellectual property issues. I was talking to a conference participant last night about how traditionally in intellectual property, organizations like the World Intellectual Property Organization ("WIPO") deal with—and I mean this in the right way—relatively low-level government officials. It is

very unusual for a minister or cabinet officer to become involved with a WIPO deliberation, and the process in WIPO wasn't at all politicized.

Furthermore, the modernization of international intellectual property laws through existing institutions occurred at a snail's pace, largely because governments could not deliver the political will to actually follow through on things. It occurred at a snail's pace because you have a very strong, determined person running WIPO, [Director-General] Dr. Arpad Bogsch, and there was an enormous amount of deference for Dr. Bogsch to set the pace, the agenda, and the direction where all this was going.

As the business community became more aggressive, as the threats of piracy became larger, and as technology evolved, entirely new challenges were posed—and we are now having a new set of challenges with digital technology. There was a strong sense of frustration that international law was not evolving rapidly enough.

Another element was enforcement. It is not enough to have a good law on the books; you also have to be able to put somebody in jail, you have to be able to enforce the law, you have to be able to litigate, and you have to be able to get an effective result in the end which acts as a deterrent to further infringement.

Somebody mentioned this morning that the Berne Convention, like the Paris Convention, has a dispute settlement mechanism which provides that if you don't live up to your obligations, you can be taken to the International Court of Justice. In the hundred and four, five, six—however many years—of the Berne Convention, that never happened. Therefore, one of the other things that we wanted to do at the USTR was to create obligations for countries to perform better enforcement—to actually send out prosecutors and law enforcement officials and put the people who were violating the law out of business.

Then suddenly there was pent-up demand, in economic terms, for these new, better, more aggressive, and more modern intellectual property laws domestically and globally. The intellectual property community had pursued enforcement, but when it said to the Brazilians, "If you don't protect our software, we're not going to

let your software come to the United States," the Brazilians smiled and said, "Sounds like a good deal to us." The electronics community then said, "We've got to somehow rebalance the field." How do we rebalance the field? We cross-pollinate the disciplines of intellectual property and trade, and we use trade as leverage. Now we go back to Brazil and we say, "Protect our software." The Brazilians say, "Eh?" And we say, "We'll stop your coffee exports, we'll stop your sugar exports, we'll stop your exports of rubber footwear." Suddenly, there's something to save, creating an entirely different dynamic.

In the mid-1980s, the United States started making good intellectual property protection a precondition, in a sense, for certain kinds of trade preferences and the avoiding of certain kinds of trade paying. Actually, the United States started much earlier than that—although not in a very relevant way—in 1974 when Congress adopted the Jackson-Vanik Amendment to the Trade Act of 1974,[2] which is famous (or infamous) because of its emigration provisions and the granting of preferential trade status based upon whether or not the centrally planned economies permitted emigration. Back then, three of the ten criteria for granting trade preferences were intellectual property criteria: countries had to have patent laws, copyright laws, and trademark laws. However, we never enforced those criteria.

In 1983, the first precondition was enacted by Congress under a President Reagan initiative called the Caribbean Basin Initiative.[3] Then a change in law occurred in the Generalized System of Preferences Renewal Act of 1984[4] which permitted the President to grant duty-free access to the U.S. market. The law evolved through the 1988 Amendments to the Trade Act of 1974, by creating section 301[5] which is a specific intellectual property-tailored

2. Trade Act of 1974, Pub. L. No. 93-618, § 402, 88 Stat. 2056 (1975) (codified as amended at 19 U.S.C. § 2432 (1988)).

3. Interest and Dividend Tax Compliance Act of 1983, Pub. L. No. 98-67, 97 Stat. 369 (codified as amended at 19 U.S.C. §§ 2701-2706 (1988)).

4. Pub. L. No. 98-573, 98 Stat. 2948, 3018 (codified at 19 U.S.C. §§ 2461-2465 (1988)).

5. OTCA, *supra* note 1.

provision. Section 301 contains the unfair competition provision of the U.S. trade law.[6] The law was altered to create a specific cause of action regarding intellectual property.[7]

The domestic constituencies of the U.S. program evolved in two different directions. On the one hand, we became very active bilaterally. We had negotiations with Korea, Taiwan, Brazil, and Argentina. A whole bunch of bilateral negotiations were aimed specifically at resolving issues. Some were more successful than others; an agreement that we negotiated with South Korea in 1986 got them to improve their laws.[8] Interestingly enough, that agreement was three-and-a-half pages long.[9] The Intellectual Property Chapter of the NAFTA is twenty-eight pages long.[10] There's been a certain evolution here.

On the other hand, the bilateral program has produced any number of results. The U.S. Register of Copyrights, Ralph Oman, spoke earlier about how Dr. Arpad Bogsch was still nodding in the direction of the Japanese rental rights for sound recordings. The reason why the Japanese changed their rental rights for sound recordings and provided us even with one year of exclusivity was because we threatened them with trade sanctions. The reason why the Eastern Europeans—I guess they're now called Central Europeans, aren't they? Having been born in Central Europe, I should know this—reformed their intellectual property laws is that they all wanted trade agreements with the United States and preferential access to the U.S. market. We made it a precondition that those agreements contained a chapter on intellectual property. Some worked better than others. Some countries have lived up to their obligations. One country in particular has not.

Thus, the bilateral program was very aggressive. At this point

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6. *Id.* § 182, 19 U.S.C. § 2242.

7. *Id.* § 301, 19 U.S.C. § 2411.

8. Adequacy of Korean Laws for the Protection of Intellectual Property Rights, 50 Fed. Reg. 45,883 (Off. U.S. Trade Rep. 1985) (initiation of investigation), 51 Fed. Reg. 29,445 (Presidential Memorandum 1986) (terminating investigation).

9. *See* Korean Copyright Law No. 3916, Dec. 31, 1986 (effective July 1, 1987).

10. North American Free Trade Agreement, Dec. 22, 1991, *available in* LEXIS, Genfed Library, Extra File, NAFTA.

we—I shouldn't say "we" anymore since I don't work for the government any longer—the United States has negotiated something in excess of forty or forty-five bilateral agreements. I was fortunate enough to be involved in the vast majority of these; they were an interesting experience.

What were the U.S. objectives in establishing these kinds of programs? We were trying to ensure that there was still an incentive for innovation both domestically and internationally. We were trying to maintain U.S. competitiveness, and we felt that U.S. competitiveness was largely based on technology, know-how, and creativity. We were trying to diminish piracy. We were trying to make sure that when you invested $30 million in developing a new pharmaceutical, that you actually got to make some money having made that investment. Finally, we wanted to make sure that countries lived up to their obligations, which is one of the reasons why we inserted dispute settlement mechanisms and provisions on enforcement in most of the bilateral agreements.

The NAFTA and the GATT[11] are really a combination of this history that I have been briefly sketching out. We have learned a lot over the years. I mentioned that the Korean agreement was three or four pages long; we have since become much more detailed and much more specific. There are many new issues that we have included.

There is, however, a problem with these bilateral agreements as well. The problem is that in a strange kind of way these agreements are frozen in time. When we started negotiating these agreements aggressively in the mid-1980s, there were certain problems that were on the horizon. Rental rights for software and sound recordings and motion picture were an issue. The patentability of all kinds of subject matter was a problem. Protection for well-known marks was a problem. Enforcement was a problem too, such as the unavailability of access to courts and border enforcement.

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11. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

However, we didn't know anything about digital technologies. We didn't know anything about theft of encrypted satellite signals. We didn't know anything about biotechnology—or very little about biotechnology. A lot of elements have evolved in the last two or three years. In fact—and these are the things that make working in this area both fun and frustrating—no matter how well you do at trying to codify an international law or what you think is the solution to the problem at hand, because of, what a friend of mine calls, in international negotiations the "meshing of great bureaucracies" (I think it's more the gnashing of great bureaucracies), by the time those bureaucracies come together, it has taken so long that the technology has passed you by.

Thus, one of the flaws in the way these agreements are constructed is not that what's in them is not good—I think it is good, and I think what is in them solves a lot of problems—but that they are incomplete solutions and they are solutions that do not reach every possible consequence. It only takes imagination to come up with a new way to defeat the legal protection of intellectual property.

One of the reasons why there has been so much discussion of national treatment in this forum is that national treatment is not only an important concept, but it's an important economic and trade issue—not because of what's going on today, but because of what's going to go on five years from now. If the European Community applies a rule of reciprocity, which is basically that access to money that goes into a pool depends upon reciprocity, five years from now everything will be in that pool. Five years from now you won't go to a video store to rent a video; you'll get it on-line. You won't go to a record store to buy a record; you'll get that on-line. You won't buy a book at a bookstore; you'll get that on-line. You will pay a monthly fee to the service provider. The service provider collects all the money and then everybody will have to go to him and say, "I want my share." If you permit a rule of reciprocity to apply, you won't be able to get your money.

That's what it's all about, in my mind. It's not so much about whether the French get to keep twenty-five cents off the top for culture or you get to keep seventy-five cents off the top because

they've figured out two new creative ways to beat the system. And it's not about the pool of money that is out there right now because the money available right now in Europe for all of this is in the tens of millions of dollars, and it's going to grow into billions of dollars very quickly. If you permit the rule of reciprocity to apply, what you're going to get is an enormously diminished number of products that are going to be available to people, and you're going to get an enormously diminished global market. So much for the aside.

I'll talk about the GATT first because NAFTA is really an improvement on the GATT; in computer software terms, its sequence, structure, and organization are very much like the GATT. The GATT essentially has three components: standards, enforcement and basic principles.

The GATT agreement starts out with basic principles. It discusses concepts like national treatment and MFN (most-favored-nation). Then it basically builds on existing international law, primarily the Paris Convention and the Berne Convention. They used to call this a "Conventions-Plus" approach. I've always hated that term, but it is descriptive of what you get, which is that we were trying to improve upon what was in the treaties rather than diminishing the treaties.

For example, in the copyright area, the Berne Convention doesn't state specific standards for protection of computer programs. Although people argue that it does implicitly, we felt it was important to have an explicit statement. In the patent area, the Paris Convention provides very short terms of protection; we felt that the term of protection should be longer. It provides for very permissible compulsory licensing; we felt that needed to be improved. It provides for exclusions from patentability for almost any category of product that you want; we felt that needed improvement. Thus, we tried to build on those conventions.

Enforcement under the GATT basically requires signatories to have within their national regimes the availability of remedies both in the domestic courts and at the border. That may sound simple, but it's not. First, many of the countries do not have border enforcement. Second, even those countries that do have domestic

enforcement often have weird, quirky enforcement. I'll give you one of my favorite examples. The U.S. motion picture and recording industries have a big piracy problem in Thailand. In Thailand, vendors manufacture audiovisual tapes at night; the police cannot run a raid at night, but only during the day. All of the manufacturing is done at night, and all of the distribution is done at night. Although all of the sales are done during the day, enforcement requires tracking down each individual vendor, which is not very efficient.

I don't know why I'm picking on Thailand, but another key issue is that if you're in Thailand to prosecute, for example, a street vendor for having pirated a movie, and it's a Jack Nicholson movie, Jack has to show up and say, "My movie, my performance, it's my right that's being violated." The Thai courts won't accept an affidavit, so Jack has to show up in Bangkok and sit there, wait three or four days—weeks, a month—while the courts gets around to hearing the case. Jack must walk in and says "Yup, that's me in that picture. Yup, that's my movie. Yup, I'm hurt." Obviously, this is a very inefficient way to try to do enforcement. Some of the GATT agreement goes after some of those issues; it makes it easier to litigate the cases.

Some of these enforcement issues are going to have to do less with law and more with—how does one say this diplomatically?—more with baksheesh, more with the level of corruption that exists in some of these systems. In one particular South American country where I spent a lot of time in the last few years, if you want the police to run a raid, and if you didn't want the guy who was going to be raided to find out about it so he could get rid of the evidence, you would have to make it worth the police's while. It becomes very problematic, but you can deal with those kinds of things. Sometimes you like them better; sometimes you like them less. Therefore, it was important to get the concept of enforceability in the GATT agreement.

The GATT is basically a good agreement, however, it's lacking in a number of elements. I'm not an apologist for the GATT proposal on intellectual property. It is not complete or perfect, but it is an enormous step forward because it has brought the standards

for protection up to much higher levels, has made standards for enforcement, and has implemented them in the trade environment. I know Register Oman and others would agree with this; I don't think Dr. Bogsch and others would be doing half of what they're doing with the WIPO right now but for the challenge posed by the fact that any sovereign government can go through any forum it wants for negotiating on intellectual property. A government is not wedded to the WIPO just because it's called the "World Intellectual Property Organization." That's what being a sovereign government is all about. So I really think that the challenge posed to WIPO has energized that institution for the better.

There are some specific issues that U.S. industry would like to have improved about the GATT agreement. One is the national treatment issue, which really is a bilateral confrontation between the U.S. and the European Community which manifests itself in the GATT, in WIPO, and which will manifest itself probably in a very ugly bilateral confrontation before being resolved, largely because there's nothing in it for the EC. There's no reason why the EC should give the United States the benefit of national treatment in the area of copyright. We are major exporters, we import virtually nothing, the balance of trade is entirely in our favor, and they don't like it; I understand that. The EC is good at exporting some things. What we should do is try to figure out some ways to help those industries. That's the difference.

There are two flaws in the GATT agreement, as I see it. First, it is limited to the rights specifically enumerated in the Agreement. The national treatment and MFN obligations of the Agreement are limited to what is within the four corners of the Agreement. I see this as a major problem because the world is evolving too fast. If we were smarter, we would make an Agreement that is more expansive.

The second flaw with the Agreement, as I see it, is that although we always talk about the GATT setting floors and setting minima, the problem is: what are the minimum and the maximum levels of protection? That is something that is in the eyes of the beholder. There is no way to cure that particular problem. There is no way to reset these standards. But we need to be aware of the

fact that, over time, we are going to have to have some jurisprudence—through the GATT panel and other mechanisms—which will clarify some of those issues.

One should not be under a misconception that once we get an agreement like this and sign it and put it down, we are now done. We're going to have to tinker with it both through legislation—i.e., redrafting the Agreement—and through having some GATT panel decisions.

NAFTA cures one of those two major problems. NAFTA basically says that the parties to the Agreement must provide protection on a national treatment basis for all intellectual property rights. NAFTA doesn't say, "those enumerated in this Agreement" and it doesn't say, "those that we have thought about today." It says all intellectual property rights. I think that cures one major flaw in the proposed GATT agreement.

However, there's just no way to make GATT less prone to change over time through friction rather than amicable discussion. That's one of the realities that one has to accept when dealing with international agreements.

My guess is that the GATT agreement will be done this year, largely because everybody is exhausted, everybody is bored with it, and nobody wants to spend any more political capital on it.

We were talking about political capital earlier. One of the differences between NAFTA and GATT—and one of the reasons why we were able to negotiate NAFTA in fourteen months—was that NAFTA was among three countries instead of 108 countries. A second, and I think a somewhat more fundamental reason for the quick negotiation of NAFTA as compared to GATT, was that there was full, highest level political commitment for NAFTA. President Bush, Prime Minister Mulroney, and President Salinas were fully committed in every possible way. I'll tell you that as a negotiator, it's a hell of a lot easier to negotiate a deal when you know your President wants it than when you're trying to negotiate a deal that the President doesn't really know about, doesn't know whether he wants or doesn't want it, or hasn't really focused on it. (I can say those kinds of things now too.)

That's an enormous difference between NAFTA and GATT. Ultimately, I think the reason why the GATT agreement will be concluded this year in all its aspects is that I think that the political will is now involved in it—not so much because people really want it, but because the costs associated with this thing continuing to fester are getting a little too high and it's distracting people a little too much. (Personally, I don't have to worry about it anymore. I don't have to go to Geneva anymore. So I don't really care whether we conclude it this year or not, but I think we will.)

NAFTA requires a certain number of changes in U.S. law. The USTR identified about ten or twelve of them, most of which were trivial. Some involve changes in our customs regulations.

Two major legislative changes are required by NAFTA. For the patent lawyers, one of those legislative changes is going to do away with or alter section 104 of the Patent Act.[12] Somebody earlier was talking about "our quirky little patent law." The United States is not a first-to-file country, but a first-to-invent country. We have a first-to-invent patent system where you get into an interference practice and you actually fight about who really was the first to invent. Under the U.S. law, evidence of foreign invention activity is not admissible.[13] However, NAFTA provides that, at least for Mexico and Canada, inventive activity in those countries shall be admissible in a U.S. court for interference litigation.

Frankly, I don't see that as a major problem. I know some of the patent lawyers are a little worked up about it. Interference litigators are very worked up about it. But I think there is broad support in the Congress for it.

The second issue is really a much more complicated issue and will take much longer than the time I have left to talk about. When the United States joined the Berne Convention on March 1, 1989, we ducked on a couple of issues. One of the issues that we

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12. 35 U.S.C. § 104 (1988).

13. "In proceedings in the Patent and Trademark Office and in the courts, an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a foreign country . . . ." *Id.*

ducked on was retroactivity: do we provide protection for works that still are protected in their country of origin?

One of our obligations under the NAFTA—although we wrote the provision in a very vague kind of way—is to establish copyright protection for Mexican and Canadian motion pictures. This is limited to motion pictures which are still protected in those countries under copyright. The Europeans, among others, are anxious to have us apply such protection to them as well. The United States has a strong interest in it because when we negotiate with the Chinese, for example, to enact a new copyright law, we want them to provide protection for all of our classic works.

The reason why it's a very complicated issue is that there is a whole series of rather convoluted constitutional issues involved: is it an uncompensated taking?[14] If it's a taking, who compensates? the U.S. treasury? the individual? Our Constitution also talks about intellectual property protection for limited terms.[15] We are now re-establishing protection. We need to somehow deal with that constitutional issue.

More fundamentally, there is a real political issue too. A lot of people in the United States are public-domain publishers. A lot of companies in the United States distribute all kinds of movies and records and other products just because a foreign guy forgot to put a "c" in a circle on it or forgot to renew the registration after twenty-eight years. If you distributed a movie without a "c" in a circle, under our old law it fell into the public domain. A lot of people are making a lot of money by distributing these products.

The former Soviet Union is another issue. Although we don't really have copyright protection for the Russians, there is an enormous business in distributing scientific and technical literature that came out of the Soviet Union in the United States. There's no compensation for any of that. So potentially, it's a very politically and economically charged issue. My fondest hope is that we will

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14. *See* U.S. CONST. amend. V.

15. "The Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

be able to resolve it.

We have talked a great deal about the Berne revision—the New Instrument[16]—and other issues. I think that the resolution of those issues internationally is probably three to five years away, and it is going to take a long evolution. Sallie Weaver had asked a question about performers in the United States. We have difficult domestic issues to work out in the United States. We have difficult issues to work out on performers' rights and the mechanical compulsory licenses. Video rental rights raise issues that could put all of the video rental shops out of business. Our house is not yet in order.

Right now, I don't see the dynamic between the United States and the European Community, which is really the primary axis of dissonance on this issue, to have evolved to the point where there is enough of a vested interest on both of our sides to want to resolve the issue. Right now, the vested interest tends to be much more on our side. Somehow, that is going to have to be changed. A deal cut through the GATT, where there is that larger dynamic at work, could make the whole exercise not irrelevant, but a lot less urgent. In the alternative, do we somehow create a new dynamic whereby there is more at stake for both sides? Ultimately, every negotiation is about both sides winning.

We have had a lot of success in negotiating intellectual property agreements over the last several years. Many countries have done much better in providing better laws and better enforcement. We are often accused—at least I am often accused—of being this mean thug that came and beat up on developing countries, forcing them to do things against their will. Nobody in international negotiations does things against their will. These countries have changed their laws, in my opinion, largely because it is in their self-interest, and many of them have benefited profoundly from doing so.

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16. Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, 1st Sess., *Questions Concerning Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms*, Memorandum prepared by the International Bureau, WIPO Doc. INR/CE/I/2 (Mar. 12, 1993).