

“To copy is to steal”: TRIPS, (un)free trade agreements and the new intellectual property fundamentalism

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ABSTRACT

In theory, the vagueness of the World Trade Organization-administered TRIPS Agreement should provide developing countries with ample opportunities for creative interpretations of its provisions. Despite this, developing country freedom to exploit these opportunities is diminishing rapidly. Dispute settlement jurisprudence is one cause, but this is far less significant than that the United States, especially, and the European Union, have developed successful strategies to hold developing countries to more rigid and higher standards of IP protection than TRIPS compliance requires. In some respects these standards of protection are even higher than those the US has been willing to accept domestically.

One of the most effective strategies being employed is that of so-called free trade agreements (FTAs) containing highly constraining and protectionist “TRIPS plus” IP provisions that seem to be aimed to serve the interests of developed world corporations. The FTA negotiations and FTAs themselves seem to be neither wholly free, since the IP provisions in them are inherently protectionist, nor fair to the weaker negotiating parties. Unsurprisingly, business and pro-business interest groups have been very much behind the promotion of TRIPS plus measures. They are popular with the US government and the European Commission not only because they work, but also because the US and European economies, along with those of Japan and certain East Asian countries that tend also to favour TRIPS plus IP protection, are the major producers and exporters of patent, copyright and trade mark-protected goods and services and therefore have much to gain from them.

Increasingly, the promoters of TRIPS plus rules are deploying rhetoric that I refer to as the new intellectual property fundamentalism. In its most extreme form, the rhetoric labels copying as piracy as if the two words are synonyms, and even links piracy to terrorism. Oddly enough, as this article points out, this fundamentalism seems largely to be targeted at developing countries rather than being for domestic consumption. It is contended that the new IP fundamentalism is both dishonest and potentially dangerous. Neither the US nor the EU would countenance the elimination of well-established limitations to rights that allow copying of patent and copyright-protected goods and works under certain conditions. And yet, some developing countries have been pressured to adopt IP standards that are even stronger than in some developed countries. One example is the extension of the copyright term to life of the author plus seventy years in FTAs, as in the US and Europe, but without adopting also the fair use doctrine that is integral to American copyright law and that makes the whole system more balanced. History teaches us that today’s rich countries prospered in part by imitating first and innovating later. Korea copied from Japan and

the West, Japan imitated the U.S. and Europe, the U.S. in its turn copied from the European countries, who copied from each other and – something they rarely acknowledge – from the Middle and Far East. Much of this copying could not have happened under today's rules. If they cannot copy any IP at all, one may reasonably ask, will today's poor nations ever catch up?

In the last part of the paper, it is suggested that those governments that have been promoting strong international IP standards since the launch of the Uruguay Round and that are now pushing for TRIPS plus standards may eventually have a change of heart. Will the US government be so pro-patent when the proportion of domestic patents granted to Indian and Chinese inventors increase dramatically, or if more and more US firms "reward" their government for so aggressively promoting their interests by shifting their research operations to countries where top scientists are cheap and available and patent rights less enforceable causing, to borrow the words of former US presidential candidate Ross Perot, a giant sucking sound as research jobs and investment go out of the United States? It is suggested that the present situation, in which unprecedentedly strong IP protection is considered necessary on both utilitarian and moral grounds, may be short-lived. In the coming decades, the US may even take the role of leading patent and copyright-sceptic nation as it was, to some extent, in the past.

1. Introduction

Our goal is to control piracy through strong laws and effective enforcement worldwide, and to ensure that protection remains effective as technology develops in the future... effective protection of intellectual property rights involves customs, courts, prosecutors and police, commitment by senior political officials; and a general recognition that to copy is to steal and to deprive finance ministries of revenue... Our major tools are both bilateral and multilateral.

Office of the United States Trade Representative, 2004¹

Mr. Chairman, let me commend to your attention an article by Kathleen Millar in the November 2002 issue of U.S. Customs Today entitled "Financing Terror: Profits from Counterfeit Goods Pay for Attacks." ... The article ... states that the participants at the 1st International Conference on IPR hosted by Interpol in Lyon, France in 2001 "all agreed the evidence was indisputable: a lucrative trafficking in counterfeit and pirate products – music, movies, seed patents, software, tee-shirts, Nikes, knock-off CDs and 'fake drugs' accounts for much of the money the international terrorist network depends on to feed its operations" The article concludes that... "September 11 changed the way Americans look at the world. It also changed the way American law enforcement looks at Intellectual Property crimes."

Jack Valenti, President & CEO, Motion Picture Association of America, 2003²

Piracy is like terrorism today and it exists everywhere and it is a very dangerous phenomenon.

Kamil Idris, Director-general, World Intellectual Property Organization, 2003³

Jim Pinkerton of the New America Foundation has referred to three countries – China, India and Brazil – as the Axis of IP Evil. And I agree. Brazil's own government, for example, is in the process of confiscating drug patents. India seems to be getting better. China is another matter. China is making mischief. It is supporting, incredibly, a Brazilian as the next head of the World Trade Organization – Brazil, which was the prime culprit in the collapse of the WTO post-Doha conference in Cancun in 2003.

James K. Glassman, American Enterprise Institute, 2005⁴

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2. TRIPS in context

The international law of IP is complex, evolutionary and highly dynamic, never more so than today. Businesses that operate across national boundaries are never satisfied with the current IP rules, at least not for long. Since certain governments are structured in ways that allow the interests of such businesses headquartered within their jurisdictions (or even sometimes outside them) to convert rapidly to national trade policies and negotiating strategies that align closely to these interests, the pressure for change can become irresistible.

Until recently, TRIPS seemed to be the most important element of the effort to pull up developing countries' IP standards of protection and enforcement to the level of the developed countries and to modernise IP protection so as to accommodate rapid advances in emerging fields like biotechnology and the digital technologies. But now, the drivers of change are beginning to see TRIPS and the WTO forum as at least as much a brake as an accelerator. Indeed, TRIPS may be outliving its purpose for those corporations that successfully lobbied for an IP agreement in the Uruguay Round and the governments that took up their demands.

To understand what is going on, it is important to be clear about the problems that TRIPS was intended to solve, leaving to one side, as we should, the pro-development and social welfare language of certain of its articles.⁶ These are copyright piracy,

unauthorised use of trade marks, and unwelcome competition from generic drug firms able to take advantage of patent regimes excluding drugs from protection. TRIPS has failed to solve these problems completely, and in consequence, other solutions have been employed, which are described in the next section of the paper.

What does transnational industry actually want? In the area of patents, the priority is global harmonisation pitched at a level such that TRIPS is the floor; the absolute minimum that is acceptable.⁷ Initial demands for international harmonisation were directed mainly at procedural matters and aimed to reduce the uncertainty and duplication of effort caused by different patent offices examining applications for the same invention and to reduce costs for the applicants. The US, European and Japanese patent offices have been in close contact since 1983 and are cooperating in a number of areas to coordinate their approaches to searches, examinations and other procedures.

Moves are afoot at the World Intellectual Property Organization (WIPO) to go much further than TRIPS by intensifying substantive patent law harmonisation in the interests, it appears, of helping well-resourced companies to acquire geographically more extensive and secure protection of their inventions at minimized cost.^{8 9} Substantive harmonisation is more than just making the patent systems of countries more like each other in terms of enforcement standards and administrative rules and procedures. It means that the actual substance of the patent standards will be exactly the same to the extent, for example, of having identical definitions of novelty, inventive step and industrial application. Given the rich countries' interests in harmonisation, it is likely to result in common (and tightly drawn) rules governing exceptions to patent rights, and the universal removal of any options to exclude types of subject matter or fields of technology from patentability on grounds of public policy or national interest.

Harmonisation is important with copyright too, especially in such areas as term of protection and subject matter; for example, the developed countries are encouraging the developing countries to extend the term of copyright protection beyond that required by TRIPS to life of the author plus seventy years, as in Europe and the USA. But the situation is a little different. One reason is that the complex array of stakeholders¹⁰ whose economic and moral interests are affected by copyright makes harmonisation much more difficult to achieve. Another is that rapid technological developments have made the transnational copyright industries determined to achieve an international regime that is sufficiently dynamic to respond speedily to the massive opportunities and vulnerabilities afforded by technological advances that: (a) provide new means for copyright owners to disseminate their works to the public; but that also (b) threaten to undermine the control over markets in these works by enabling copiers to flood markets with unauthorised versions of these works and by allowing potential consumers to copy them. While new technologies also present challenges to the patent system, the traditional criteria for protection and well established legal doctrines have managed to accommodate them (albeit with some real difficulties with respect to certain new categories of subject matter).

3. TRIPS and its alternatives: persuasion, propaganda, coercion and bilateralism

As mentioned, TRIPS is inadequate as far as the demanders of ever higher IP protection levels are concerned. Consequently, the TRIPS approach is being supplemented by an expanding menu of alternatives. These include (i) “missionary work”, including the sending by developed country governments, business associations and WIPO of experts to spread the IP gospel; (ii) the dissemination of propaganda extolling the virtues of intellectual property,¹¹ or claiming that IP piracy is inimical to development, that it deters investment, that it is immoral or unfair, or that it supports terrorist activities; (iii) technical assistance provided by international organisations, developed countries governmental agencies and IP offices, and business and law associations; (iv) latent or overt trade threats and intimidation by rich countries towards poor countries they access of condoning piracy or having “inadequate” IP systems; (v) divide and rule tactics in multilateral negotiations;¹² (vi) the use of WIPO to introduce “TRIPS-plus” standards through new conventions, such as the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Substantive Patent Law Treaty (SPLT) currently under negotiation, and the revision of existing ones; and (vii) bilateral and regional free trade agreements and investment agreements.

Among the most effective of these solutions appears now to be the bilateral and regional free trade and investment agreement approach. These agreements have proved to be a useful way to get individual, or sometimes groups of, developing countries to introduce provisions that go beyond what TRIPS requires such as:

- (i) extending patents and copyright to new kinds of subject matter;
- (ii) eliminating or narrowing permitted exceptions including those still provided in US and European IP laws;
- (iii) extending protection terms;
- (iv) introducing new TRIPS-mandated IP rules earlier than the transition periods allowed by TRIPS; and
- (v) ratifying new WIPO treaties containing TRIPS plus measures.

The United States and the European Community both use this strategy, but the USA has been the more aggressive.

The US interest in bilateralism and regionalism does not mean abandoning the multilateral approach. According to the United States Trade Representative, Robert Zoellick, the idea is not to put all America’s eggs in one basket.¹³

When the Bush Administration set out to revitalize America’s trade agenda almost three years ago, we outlined our plans clearly and openly: We would pursue a strategy of “competitive liberalization” to advance free trade globally, regionally, and bilaterally... At its most basic level, the competitive liberalization strategy simply means that America expands and strengthens its options. If free trade progress becomes stalled globally – where any one of 148 economies in the World Trade Organization has veto power – then we can move ahead regionally and bilaterally. If our hemispheric talks are progressing stage-by-stage, we can point to more ambitious possibilities through FTAs

with individual countries and sub-regions. Having a strong bilateral or sub-regional option helps spur progress in the larger negotiations.

4. The stakes

It is not self-evident that harmonising the international IP rules and making them as responsive as possible to technological evolution is bad for developing countries just because they further the interests of transnational corporations. But making the rules identical and legally binding whether you are a very rich country with enormous balance of payments surpluses in IP-protected goods, services and technologies, or a poor country with highly burdensome trade deficits seems to be tremendously expensive and risky for the latter type of country.

If we consider the expense of it all, while it is impossible to reliably calculate the long-term economic impacts of TRIPS on developing countries and their populations, we can be certain that they will incur short-term costs in such forms as rent transfers and administration and enforcement outlays, and that these will outweigh the initial benefits.¹⁴ The cost-benefit balance will vary widely from one country to another, but in many cases the costs will be extremely burdensome. According to a recent World Bank publication, TRIPS represents a yearly \$20 billion plus transfer of wealth from the technology importing nations, many of which are developing countries, to the technology exporters, few if any of which are developing countries.¹⁵ This suggests that “a country would have little or no interest in protecting intellectual property rights in products of which it is solely an imitator and intends to remain so – here the national interest is above all consumer welfare, i.e. sourcing the product as cheaply as possible”.¹⁶ Such is the case for many poor countries. One might add that such products include not just software programs and music CDs, but also life-saving medicines and educational materials.

Turning to risk, agreeing to restrict one’s freedom to tailor national or regional IP regulations to specific needs and conditions in exchange for market access commitments from the developed countries could turn out to be extremely damaging. At worst, it could place a serious block, perhaps insurmountable, on development. Drahos suggests a worst-case scenario: “if it turns out that the global market in scientific and technological information becomes concentrated in terms of the ownership of that information it might also be true that the developmental paths of individual states become more and more dependent upon the permission of those intellectual property owners who together own most of the important scientific and technological knowledge.”¹⁷

As for patent harmonisation, if taken to its logical conclusion of a world patent system, Genetic Resources Action International has warned that it could conceivably “mean the end of patent policy as a tool for national development strategies”.¹⁸ Not only this, but it would represent a radical departure from most of the nineteenth and twentieth centuries, when many countries took advantage of their freedom (pre-TRIPS) to provide statutory subject matter bars on such grounds as infant industry protectionism and the prevention of corporate monopolies on important products like foods and drugs. For example, France only allowed pharmaceuticals to be patented in

1960, Ireland in 1964, Germany in 1968, Japan in 1976, Switzerland in 1977, Italy and Sweden both in 1978, and Spain in 1992. And around the same time, Brazil and India passed laws to exclude pharmaceuticals as such from patentability (as well as processes to manufacture them in Brazil's case).

5. The new IP fundamentalism and the lessons of history

Although the rhetoric of IP fundamentalism is most usefully deployed and readily accepted in places like Washington DC and Brussels, much of it seems to be inspired by the supposed recalcitrance of developing countries. So let us see what would, or rather what would *not*, have happened if the law in the past had treated all copying as stealing by considering a few examples.

Royal Philips Electronics was set up in 1891 to commercially exploit somebody else's invention, Thomas Edison's and Joseph Swan's carbon filament lamp. Commercial success generated considerable revenues that enabled the firm to produce its own inventions and eventually become one of the world's most innovative corporations. How was Philips able to get such a good head start? From 1869 until 1912, Holland had no patent law.

The well-known Swedish mobile phone company, Ericsson, was formed in 1876, the same year as Alexander Graham Bell made his first phone call. Sent some of these new devices to repair, the company worked out how to make them, and by 1878 was selling its own phones to the Swedish public. Bell had neglected to file patents on his invention in Sweden.

In 1960, Texas Instruments filed a patent in Japan on the integrated circuit, arguably one of the most important inventions of the second half of the twentieth century. The Japan Patent Office allowed itself 29 years to grant the patent. By that time Japanese companies, free to read the patent specification 18 months after filing, acquired the technology, improved upon it, and controlled 80 percent of the US market for computer semiconductors.¹⁹

The point to be made here is that such behaviour broke no international rules of the day. Furthermore, freedom to use such technologies was often beneficial not only to the imitator companies but also to the national economies in which they were based. Indeed, none of the recipient countries remained copiers for long; eventually they became among the world's most technologically advanced.

Indeed, historical evidence strongly suggests that by depriving developing countries of the freedom to design IP systems as they see fit, the rich countries are, to use the title of a recent book by Ha-Joon Chang, "kicking away the ladder"²⁰ after they have scaled it themselves. Let us consider a few examples of how differentiation worked well in the past to enable some of today's developed countries to catch up with the technology leaders in the past.

5.1 Japan and the Asian Tigers

It is somewhat ironic that Japan is probably the most ambitious proponent of substantive patent harmonisation given that only a few decades ago, the government's technology licensing policy was quite aggressive and foreign companies often felt discriminated against by the country's nationalistic trade and industry policy, of which the patent law was an essential component. For example, post-war Japan adopted a policy of aggressively pressuring foreign high technology firms to make their technologies available to domestic industries. In the late 1950s, a Vice-Minister at the Ministry of International Trade and Industry allegedly warned IBM that "We will take every measure possible to obstruct the success of your business unless you license IBM patents to Japanese firms and charge them no more than a 5 percent royalty". IBM had little choice but to comply.²¹

In a comprehensive study of the evolution of the Japanese patent system, which shows that for almost all of its existence it was very much "TRIPS minus", Fisher is drawn to conclude that: "The meteoric rise from feudal serf to technological whiz-kid that the country has undergone in less than 150 years is little short of astounding, and poses the question of whether it could be repeated today. The homogenisation of patent law, the claim implicit in TRIPS that one size can, and indeed should, fit all, does not adequately correspond with the picture of Japan's evolution".²²

Research by Kim on the experience of South Korea led him to find that "strong IPR protection will hinder rather than facilitate technology transfer to and indigenous learning activities in the early stage of industrialisation when learning takes place through reverse engineering and duplicative imitation of mature foreign products". He also concluded that "only after countries have accumulated sufficient indigenous capabilities with extensive science and technology infrastructure to undertake creative imitation in the later stage that IPR protection becomes an important element in technology transfer and industrial activities".²³ Similarly, Kumar found that in the East Asian countries he studied (i.e. Japan, South Korea and Taiwan), a combination of relatively weak patent protection and the availability of other IP rights such as industrial designs and utility models encouraged technological learning. The weak patent regimes helped by allowing for local absorption of foreign innovations. Industrial designs and utility models encouraged minor adaptations and inventions by local firms. Later on, the patent systems became stronger partly because local technological capacity was sufficiently advanced to generate a significant amount of domestic innovation, and also as a result of international pressure.

5.2 The United States

Despite the national treatment rules under the 1886 Berne Convention, nineteenth century national copyright laws tended to be less friendly towards the interests of foreigners than patent laws. Several reasons can be offered, but one important explanation is that while granting patent-type rights to foreigners was sometimes considered to benefit the country by encouraging the introduction of protected technologies, allowing foreigners to protect their literary and artistic works did not provide such obvious economic advantages to net importers of creative works.²⁴ For

example, for most of the nineteenth century, the United States refused to extend copyright protection to the works of foreigners at all, and was notorious as a pirate nation. Nonetheless, despite the highly TRIPS-incompatible US copyright regime of the day, a detailed economic study of the nineteenth century book trade by Khan showed that publishers, printers and the reading public all benefited. This led her to conclude that “the US experience during the nineteenth century suggests that appropriate intellectual property institutions are not independent of the level of economic and social development”.²⁵

By the late nineteenth century, voices could be heard in literary circles supporting reform. The editors of the *Atlantic Monthly*, for example, noting that “the rapid increase in the value and importance of American books brings prudence to the aid of morality”, advocated that “on every ground it is important that the barbarous system of pillage should cease”, and supported an international copyright convention giving equal rights to domestic and foreign authors.²⁶ History, however, shows that the United States wisely held off granting copyright to foreigners as long as the country showed, in terms of balance of trade, a net loss on the import/export ratio of cultural products; it was not yet in the interest of the United States to embrace reciprocal arrangements with foreign publishers. US copyright law discriminated against foreign works from 1891 until 1986 with the “manufacturing clause”, a protectionist measure intended to benefit American printers. Originally, this required all copyrighted literary works to be printed in the country. Although the clause was weakened over the years, when President Reagan vetoed a four year extension in 1982 in the face of an unfavourable GATT panel ruling and complaints from Europe, Congress disregarded the ruling and overruled Reagan. The fact that the United States had by that time become by far the world’s biggest exporter of copyrighted works suggests that its creative industries were not exactly held back by a copyright system that appears initially to have been inspired by infant-industry protectionism. Significantly, the world’s leading producer of entertainment products did not sign the Berne Convention until 1989.

6. The future: back to IP agnosticism?

There is ample historical evidence to indicate that freedom to imitate was an essential step towards learning how to innovate. In addition, numerous examples show that relatively unfettered access to goods, technologies and information from more advanced countries stimulated development in the less advanced ones. Support for both findings comes, as we saw, from the cases of Holland, Sweden, Japan, the United States and the Asian Tigers. It is difficult to see why they would not also be true for today’s developing countries.

In reflecting on the implications for policymaking and diplomacy, history would appear to indicate two things that are worthwhile considering. First, it is totally unreasonable for the developed countries to restrict the freedom of developing countries to take full advantage of the vagueness of many of the TRIPS provisions by holding them to rigidly defined TRIPS plus standards. Second, the developed countries can justifiably be accused of hypocrisy²⁷ when they demand that the rest of the world adopt their own patent and other IP standards – or even stronger ones – before the developing countries feel, for very good reason, they are ready for them.

Second, and this is much more important, in doing so they are preventing the developing countries from adopting appropriate patent and copyright standards for their levels of development, a freedom today's rich countries made sure not to deny themselves when they were developing countries *and may well adopt again if they find themselves being overtaken in certain strategic business sectors.*

Indeed, it is perfectly conceivable that if the United States experiences marked increases in the proportion of domestic patents being granted to inventors from advanced developing countries like China and India, something which currently seems inevitable, the tide may well turn back to the patent scepticism of yesteryear, especially if in consequence the reliably massive annual trade surplus in royalties and license fees is converted into a regular deficit. It also seems highly possible that the United States' and European economies will soon start to haemorrhage not just blue collar jobs but scientific and technical research positions as industry finds it can get cheaper scientists and technicians elsewhere to do the same work for a fraction of the cost. Indeed, this may be starting to happen irrespective of whether the IP systems of the countries concerned meet US or European standards of enforcement.²⁸ And it is conceivable that the very limited limitations to patentability currently permitted under US law will contribute to this.²⁹ Furthermore, though this does seem less likely, if the US finds itself becoming a net importer of entertainment products, educational materials and software from other areas of the world, it may reconsider its stance on copyright as well. The present bout of IP fundamentalism may turn out to be skin deep and fleeting, and something that the US will in time regret.

¹ www.ustr.gov.

² International Copyright Piracy: A Growing Problem with Links to Organized Crime and Terrorism. Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives. One Hundred Eighth Congress. First Session. March 13, 2003. Serial No. 9.

³ <http://uk.news.yahoo.com/031203/323/efqp1.html>.

⁴ James K. Glassman (2005 "An upbeat view". Speech to Ex-Im Bank's Annual Conference, Omni Shoreham. http://www.exim.gov/news/annualconf/glassman_speech.html

⁵ And, one might add, as it is already becoming in respect of one IP right, that of geographical indications.

⁶ Such as the Preamble and Articles 7 and 8.

⁷ This is not to say that the IP regimes of the developed countries are necessarily TRIPS compatible in their entirety.

⁸ Musungu, F.S. and Dutfield, G. (2003) *Multilateral Agreement and a TRIPS Plus World: The World Intellectual Property Organization*. TRIPS Issues Paper no. 3, QUNO & QIAP.

⁹ One of the earliest calls for the harmonisation of substantive patent law came from the USA in 1966, where the President's Commission on the Patent System declared: "the ultimate goal in the protection of inventions should be the establishment of a universal patent, respected throughout the world, issued in the light of, and inventive over, all of the prior art of the world, and obtained quickly and inexpensively on a single application, but only in return for a genuine contribution to the progress of the useful arts." Quoted in Rogan, J.E. (2002) "The global recognition of patents: an agenda for the 21st

century”. Prepared for the WIPO Conference on the International Patent System, Geneva, 25-27 March (<http://www.us-mission.ch/press2002/0326rogan.htm>).

¹⁰ These include authors, publishers, performers, film production companies, phonogram producers, internet service providers and broadcasters.

¹¹ WIPO appears increasingly to be a purveyor of poor quality propaganda loaded with unsubstantiated assertions. In addition to several in-house publications, a good example is the WIPO Policy Advisory Commission Declaration on Intellectual Property Rights.

¹² Such as when efforts were made to drive a wedge between India and Brazil on the one side, and the African Group on the other during the negotiations relating to the 2001 Agreement on the TRIPS Agreement and Public Health.

¹³ Letter from Robert Zoellick to David Walker, Comptroller of the United States, December 2003: <http://www.ustr.gov/releases/2003/12/2003-12-03-letter-gao.pdf>

¹⁴ Dutfield, 2003, *op cit*, p. 49.

¹⁵ World Bank, *Global Economic Prospects & the Developing Countries 2002*, World Bank, Washington DC, 2001.

¹⁶ Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed.), London, Routledge, London, 1999, p 314.

¹⁷ Drahos, P., ‘States and intellectual property: the past, the present and the future’, in D. Saunders and Brad Sherman (eds.) *From Berne to Geneva: Recent Developments in Copyright and Neighbouring Rights*, Australian Key Centre for Cultural and Media Policy and Impart Corporation, Brisbane, 1997, pp 47-70.

¹⁸ GRAIN, ‘WIPO moves toward ‘world’ patent system’ (<http://www.grain.org/publications/wipo-patent-2002-en.cfm>), 2002.

¹⁹ Chalmers Johnson, *Japan: Who Governs? The Rise of the Developmental State*, W.W. Norton & Co., New York and London, 1995, pp 74-5.

²⁰ See Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective*, Anthem Press, London, 2002. The expression was coined by the nineteenth century German economist Friedrich List.

²¹ Quoted in Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975*, Stanford University Press, Stanford, 1982, p 247.

²² Fisher, M., ‘Growth of the Japanese patent system: a lesson for us all?’ *Intellectual Property Quarterly* 22(1), 2004, pp 85-113, 113.

²³ Kim, L., *Technology Transfer and Intellectual Property Rights: The Experience of Korea*. Issues Paper no. 2, UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development, Geneva, 2003, p 5.

²⁴ Cornish, W.R., ‘The international relations of intellectual property’, *Cambridge Law Journal* 52 (1), 1993, pp 46-63, 48, 50.

²⁵ Khan, B.Z., *Does Copyright Piracy Pay? The Effects of US International Copyright Laws on the Market for Books, 1790-1920*. National Bureau of Economic Research Working Paper W10271, 2004.

²⁶ The Atlantic Monthly Editors, ‘Politics’, *Atlantic Monthly* 29(173), 1872, pp 387-8.

²⁷ One may of course reasonably counter that the current behaviour of the Americans and Europeans is not hypocrisy but reflects a genuine change of mind. But let us for a moment consider the response of the United States government to the recent anthrax biological warfare scare of two years ago. The government decided to stockpile vast quantities of Bayer's ciprofloxacin (Cipro) to ensure that up to 10 million people could receive immediate treatment should the need arise. The government was concerned not only about whether it was possible to acquire so much Cipro at short notice but about the cost of doing so. Tommy Thompson, the Secretary of Health and Human Services, threatened Bayer that if they did not halve the price he would simply acquire the drug from other sources. At one stage he even raised the possibility of asking Congress to pass legislation exempting the government from compensating Bayer for ignoring its patent. This tough approach worked. Thompson successfully negotiated a large discount. But, by threatening to override the patent, the US government, which was at the same time pressuring developing country governments not to issue compulsory licences to generic drug producers, looked hypocritical.

²⁸ For some evidence of this phenomenon, see Santini, L. 'Drug companies look to China for cheap R&D'. *Wall Street Journal*, 22 Nov. 2004.

²⁹ In the USA, the scope of the judicially created research exemption attracted critical attention as a result of the judgement in *Madey v. Duke University* [No. 01-1567, FCCA, 3 Oct. 2002]. The judgement gave rise to concerns that US courts may have gone too far in interpreting the research exemption into a state of virtual non-existence, and that in doing so it may well hinder universities from conducting the basic research upon which future commercially-oriented research ultimately depends and which the private sector cannot be relied upon to carry out all by itself. A recent *Science* article on the case notes the prediction expressed by some that Congress may respond by imposing its wish "to have the final word on the right balance between patent holders and the needs of academic researchers", concluding with a warning: "... that is, if all the scientists haven't moved to China.". The latter is certainly an exaggeration, but it does suggest, based as it was on the views of scientists interviewed by the article's author, that not only may an excessively narrow research exemption hinder follow on innovation, but may also stop basic research in its tracks, and even drive away scientists to other countries. Malakoff, D. 'Universities ask Supreme Court to reverse patent ruling'. 299 *Science* 26, 2003.