

US academic exposes IP maximalists' TRIPS-Plus-Plus agenda

by Sangeeta Shashikant

Proponents of a 'maximalist agenda' on intellectual property (IP) have launched a major, almost surreptitious, campaign to increase IP protection and enforcement far beyond the standards set in the World Trade Organisation (WTO), in ways that are 'TRIPS-Plus-Plus', according to a recent paper by a senior academic.

The proponents, mainly global business firms and governments in OECD (Organisation for Economic Cooperation and Development) countries, are making use of trade agreements, plurilateral government initiatives and programmes in international agencies to push their agenda to set or enforce higher IP standards, using the three concepts of 'counterfeiting', 'piracy' and 'enforcement'.

Part of their aim is to counter recent setbacks in raising standards at the multilateral level, and to counter public campaigns such as the 'access to knowledge' movement, says the paper entitled 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play'.

The paper, which is dated 9 June 2008, is authored by Susan Sell, Director of the Institute for Global and International Studies and Professor of Political Science and International Affairs at George Washington University in the United States. She is also the author of a well-known book on the origins of the WTO's agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

According to the paper, the IP anti-counterfeiting and enforcement agenda involves hundreds of OECD-based global business firms and their foreign subsidiaries, as well as initiatives and programmes such as the Anti-Counterfeiting Trade Agreement (ACTA); Interpol's Standards to be Employed by Customs for Uniform Rights Enforcement (SECURE); the US Chamber of Commerce (USCC)'s 'Coalition against Counterfeiting and Piracy Intellectual Property Enforcement Initiatives: Campaign to Protect America'; the Security and Prosperity Partnership of North America (SPP); the World Health Organisation (WHO)'s 'International Medicinal Products Anti-Counterfeit Taskforce' (IMPACT); the World Intellectual Prop-

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erty Organisation (WIPO)'s Advisory Committee on Enforcement (ACE) discussions; bilateral and regional free trade agreements, investment treaties and Economic Partnership Agreements.

These new anti-counterfeiting and enforcement initiatives are the latest mechanisms to achieve the goal of what Sell calls the 'IP maximalists', which is to 'ratchet up' IP protection and enforcement worldwide, beyond the TRIPS Agreement.

The paper discusses the 'strategic forum shifting' by OECD countries and arenas pushing the IP enforcement agenda. It also outlines industry's goals and strategies while discussing some of the challenges that the IP enforcement agenda poses including how the enforcement agenda conceals 'far-reaching substantive goals that directly endanger the goals of access to knowledge (A2K)'. The paper also offers preliminary suggestions for responding to the enforcement agenda.

According to Sell, advocates of a maximalist IP agenda have since the 1980s shifted forums both horizontally and vertically in order to achieve their goals.

She gives the example of how the US first shifted horizontally from WIPO to the General Agreement on Tariffs and Trade (GATT) in the mid-1980s when it sought to leverage its large market (i.e. market access) to induce developing countries to adopt minimum standards of IP protection culminating in the TRIPS Agreement.

The US and EU have also shifted forums vertically by pursuing bilateral and regional trade agreements mandating IP protection standards beyond TRIPS. This way, Sell adds, the EU and US can bypass multilateral debates and pressure individual countries and/or weaker regional partners to adopt TRIPS-Plus IP standards.

Industry, according to Sell, has been relentless in pursuing its IP agenda, circumventing developing

country and NGO opposition and favouring non-transparent forums of 'like-minded' actors.

She asserts that IP-based firms, with the support of their governments, wish to go far beyond TRIPS in IP enforcement with the main goals of documenting and explaining the value of IP; ensuring strong government support for IP in the US; rallying allied nations and organisations to defend IP; and attempting to punish or blame governments that are considered weak in IP enforcement.

According to Sell, advocates of the IP enforcement agenda have engaged in a shrill public relations campaign characterised by 'strategic obfuscation' and an intentionally misleading message, to frighten people into accepting their agenda. The fear-mongering ranges from tales of exploding cell phones, toxic counterfeit drugs, to unsubstantiated allegations of organised crime and even terrorist involvement, Sell adds.

She gives the example of how in April 2008, the US Attorney General Michael Mukasey asserted that terrorists sell pirated software to fund their operations simply to frighten people into backing a PRO-IP law (the Prioritising Resources and Organisation for Intellectual Property Act) in Congress, which would, among other things, create the post of a copyright enforcement czar to coordinate IP protection efforts. No evidence was presented for this claim, she adds.

IP enforcement agenda advocates have also promoted two sensationalist books, *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy*, and *Knockoff: the Deadly Trade in Counterfeit Goods*.

Sell states that the International Chamber of Commerce (ICC) funded a public broadcast of a programme based on *Illicit*, which equates counterfeiting with human smuggling, drug smuggling, small arms trafficking, and black market trade in nuclear materials while *Knockoff* appears to be entirely based on information from ACTA

advocates: the International Trademark Agency; the International Intellectual Property Institute; the International Anti-Counterfeiting Coalition; the Association Against Counterfeiting and Piracy; and the Anti-Counterfeiting Group.

She refers to a paper by Kevin Outterson and Ryan Smith titled 'Counterfeit Drugs: the Good, the Bad and the Ugly' (in the *Journal of Science and Technology*) which concludes that the evidence for counterfeit drugs is anecdotal rather than empirical and that the only comprehensive collection point for global data on counterfeiting is the Pharmaceutical Security Institute - a trade organisation created by the security directors of 14 global drug companies - that does not make its data available to the public.

That paper pointed out that 'the terms fake or counterfeit have included a wide range of drug products, from those resulting in criminal acts of homicide, to placebos, to safe and effective drugs from Canada'.

Sell says that by casting a wide rhetorical net, global pharmaceutical companies hope to curtail drug importation from Canada, parallel importation, and the TRIPS-compliant use of compulsory licences - three important avenues for increasing access to essential medicines.

IP enforcement agenda advocates are constructing a big tent that includes all types of intellectual property: trademarks, patents, and copyrights, despite the very real differences between all the types of intellectual property, adds Sell.

The big-tent approach to 'counterfeiting' and 'piracy' is designed to capture behaviour that is legal, allowing proponents to construct a multi-pronged attack on the A2K and development agendas and undo developing countries' abilities to issue compulsory licences.

The paper describes an initiative by the US Chamber of Commerce Coalition against Counterfeiting

called 'Campaign to Protect America' as laying the groundwork for all of the other efforts. Sell outlines seven goals of the Campaign.

The first goal is to improve coordination of US federal government IP enforcement resources. The initiative intends to designate a chief IP enforcement officer ('IP czar') within the White House (which awaits a Senate vote) and to raise anti-counterfeiting and anti-piracy responsibilities to senior levels at the Department of Justice and Department of Homeland Security.

In 2004, the White House initiated its 'Strategy Targeting Organised Piracy' (STOP) focusing on inter-agency coordination, and established the 'National Intellectual Property Enforcement Council' which includes the US Coordinator for International IP Enforcement and high-level officers from the Departments of Commerce, Homeland Security, Justice, State, and USTR (US Trade Representative). The US Copyright Office serves as an adviser to the Council.

The second goal is to focus on border protection against counterfeiting and piracy, which involves expanding information-sharing capabilities, developing databases to flag suspect shipments, fund more agents and training programmes, and giving customs and border-protection agents more legal authority to audit and assess fines for importers, exporters, or other parties that materially facilitate the unlawful entry of counterfeit and pirated goods into the US.

Sell argues that this raises important questions because what constitutes a 'counterfeit' or 'pirated' product varies from jurisdiction to jurisdiction. This involves complex legal issues that Customs officers are neither trained nor authorised to adjudicate.

She adds that border-protection goals include eliminating the existing 'personal use' exemption and outlawing importation of any quantity of counterfeit or pirated products including via mail

or courier service, which could then impact the fair-use doctrine, or allowances for infringements for non-commercial purposes.

The third goal is to strengthen law-enforcement capacities to crack down on 'intellectual property theft' by increasing funding for law enforcement (US Attorneys' Offices, FBI, training for state and local law enforcement), enhancing penalties for counterfeiters who cause bodily injury or death, and increasing coordination between law enforcement and industry.

The fourth goal is to coordinate with law enforcement and customs officials across borders and abroad. Activities include training and technical assistance to train governments in IP enforcement, establish IP attaches at US embassies, and increase funding for IP Law Enforcement Coordinators internationally. The US Trade Representative and industry are together to devise and coordinate priorities for technical assistance. The initiative also endorses the use of the Generalised System of Preferences (GSP) and regional trade preference programmes to encourage enforcement of IP rights.

The fifth goal is to establish a pilot programme for judges to handle counterfeiting and piracy cases, and institute treble damages against complicit activity related to counterfeiting.

The sixth goal is to create and administer a nationwide consumer awareness campaign revealing the harms caused by counterfeiting and piracy (including the use of advertisements for television, radio, print, and the Internet). Also planned is the directing of funding agencies to favour those campuses that have the most stringent anti-piracy practices.

Sell's paper also describes the various fora in which IP enforcement is being discussed and the actors involved in each of the fora.

In WIPO, an 'Advisory Committee on Enforcement' (ACE) was established in 2002. This Committee is industry-dominated, and has devoted its efforts to discussing strengthening enforcement and problems that rights holders face in third countries. Sell says that ACE has not devoted attention to public interest considerations or rights holders' obligations.

The WHO's initiative on enforcement through the 'International Medicinal Products Anti-Counterfeit Taskforce (IMPACT)' is supported by the International Federation of Pharmaceutical Associations (IFPMA) which represents the interests of multinational pharmaceutical companies. Other members include representatives of WIPO, OECD, WTO, the World Customs Organisation (WCO) and Interpol. Government participation is voluntary.

IMPACT tends to be industry-dominated and tends to blur distinctions between parallel trade, compulsory licences, and generics, the paper adds.

At the WTO, developed countries are pressing to make enforcement a permanent part of the TRIPS Council agenda, while the industry is very involved in monitoring the WTO accession process, says the paper.

G8 countries also opened negotiations at the Brussels-based WCO to establish customs enforcement standards. Sell describes the WCO as a congenial forum for IP rights holders because there they are on equal footing with governments. Discussions at the WCO have not been transparent and consumer groups have not been able to participate.

The paper adds that the WCO's provisional Standards to be Employed by Customs for Uniform Rights Enforcement (SECURE) dramatically expands the scope and level of enforcement protections beyond TRIPS, leading some commentators to refer to these as 'TRIPS-Plus-Plus' standards.

The paper describes SECURE as TRIPS-Plus-Plus because it extends the scope from import to export, transit, warehouses, transshipment, free zones, and export-processing zones; extends protection from trademark and copyright to all other types of IP rights; removes the obligations of rights holders to provide adequate evidence that there is prima facie an infringement to initiate a procedure; requires governments to designate a single authority as a contact point for Customs; gives Customs administrations the legal authority to impose deterrent penalties against entities knowingly involved in the export or import of goods which violate any IPR laws (and not just for trademark counterfeiting and copyright piracy). Brazil has been an outspoken critic of these measures, the paper adds.

At the Working Group's third meeting on SECURE the WCO Secretariat announced that consultations on SECURE had been completed and it was looking to adopt SECURE at its June 2008 meeting. The WCO works with WIPO, Interpol, OECD, the European Commission, WHO, and the Council of Europe to coordinate its activities.

Interpol is another body that has become involved in IP enforcement. President and CEO of the USCC Thomas Donahue has actively supported an expanded role for Interpol through lobbying governments, and targeting 'hotbeds' of piracy such as China, India, and Russia, the paper adds.

In 2006, Interpol entered into partnership with the USCC to develop a database on IP crime to facilitate information-sharing, which it presented in 2008 to the G8's IP Experts Group meeting in Japan as a 'best practice' for all countries to adopt. Critics of the database have raised privacy concerns, the paper states.

Other activities of Interpol that the paper mentions include conducting an IP crime training programme (introduced in 2007) and working with the Business Software Alliance, the Entertainment

Software Association, the International Federation of the Phonographic Industry (IFPI), and the Motion Picture Association (MPA) to build Internet anti-piracy capacity.

ACTA, a proposed plurilateral trade agreement (expected to be concluded this year) being negotiated by the US, Japan, Switzerland, Australia, New Zealand, South Korea, Canada, Mexico and the European Commission to set high IP enforcement standards, is another initiative discussed by Sell's paper.

A central feature of ACTA's approach is to enlist the public sector in enforcing private rights, meaning that taxpayers' dollars would be used to protect private profits, says Sell, adding that ACTA will authorise border guards and customs agents to search and confiscate laptops, iPods, and cell phones for infringing content.

Under the agreement, Customs officials will have the authority to take action against suspected infringers even without complaints from rights holders, to shut down production plants 'on suspicion' of counterfeit production, and require Internet Service Providers to police and control their systems for infringing content. ACTA proponents claim that the treaty will help developing countries with 'capacity-building' in enforcement.

Sell asserts that ACTA will create an additional international IP governance layer atop an already remarkably complex and increasingly incoherent IP regime and that its 'one-size-fits-all policy' will reduce policy space for developing countries to design appropriate policies for their economic development.

Sell further argues that the opportunity costs of switching scarce resources for border enforcement of IP 'crimes' are huge and there are more pressing problems for law enforcement in developing countries than ensuring profits for OECD-based firms.

Other concerns mentioned are further tilting the balance in favour of IP rights holders, privacy issues arising over extensive data-sharing and possible wire-tapping, presuming suspects to be guilty, and undermining due process of law.

In the Asia-Pacific Economic Cooperation (APEC) the US has also been advocating an 'Anti-Counterfeiting Piracy Initiative'. APEC has adopted a number of US proposals including five model guidelines on reducing trade in counterfeiting and pirated goods.

Industry-supportive 'think tanks' such as the International Intellectual Property Institute, the Institute for Policy Innovation, the Stockholm Network, and the Center for Innovation and Economic Change have been producing studies for the cause of ratcheting up IP standards and enforcement, says Sell.

The Security and Prosperity Partnership (SPP) of North America is another White House-led initiative among NAFTA (the North American Free Trade Agreement) signatories (the US, Canada, and Mexico) 'to increase security and to enhance prosperity' which under a competitiveness rubric aims to enhance IP enforcement and crack down on counterfeit and pirated goods.

According to Sell, SPP is an ongoing dialogue rather than a formal agreement and is focused on increasing private-sector engagement in the process to help North America's competitive position in the global economy, and its targets are the export-processing zones in particular in Mexico.

She adds that one of the IP maximalists' objectives is to build a virtual IP network, through a non-governmental organisation (NGO), capable of influencing leading European political parties and non-business think tanks in favour of government support for IP - in Germany, Austria, Switzerland, France, Italy, Scandinavia, and the UK.

The paper presents several ideas for dealing with the enforcement agenda:

- Define terms such as 'trademark', 'counterfeiting' and 'copyright piracy' quite explicitly to distinguish between and create different sets of rules for counterfeited goods, pirated goods, grey goods, parallel imports, generic goods, and goods produced under TRIPS-compliant compulsory licences.
- Highlight the hypocrisy of the campaign, especially the narrative that counterfeits cause injury.
- Conduct more evidence-based empirical analysis, to counter outlandish claims advanced in support of the enforcement agenda. Many IP enforcement agenda advocates rely on just one economist, who continues to produce reports that echo the ACTA lobbyists' narrative. Sell gives the example of Steve Siwek who provides figures for the International Intellectual Property Alliance (IIPA), the Recording Industry Association of America (RIAA), and the Motion Picture Association of America (MPAA) and who helped formulate methodology for WIPO to calculate the copyright industries' role in all economies.
- Emphasise that 'enforcement' should not be a one-sided concept, i.e. it should not only mean enforcing IP holders' rights, but also enforcing balance, exceptions and limitations, fair use, civil rights, privacy rights, and antitrust (or competition policy).

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