



Statement by the  
BIAC Committee on Technology and Industry  
on

**THE IMPACT OF INTELLECTUAL PROPERTY PROTECTION  
ON INNOVATION AND TECHNOLOGY DEVELOPMENT**

October 1997

In response to a request from the OECD Committee on Science and Technology Policy (CSTP) to provide input on the subject of intellectual property rights the BIAC Committee on Technology and Industry (CTI) wishes to make the following comments on the impact of intellectual property (IP) protection on innovation and technology development.

1. General Comment: The OECD paper on "Intellectual Property Rights: Patents and Innovation in the International Context" (DSTI/STP/TIP(96)13/REV2) acknowledges that there are six basic kinds of intellectual property rights (patents, copyright, trademarks, design, plant varieties protection, and trade secrets), and focuses on Patents. However, the intellectual property elements that have an impact on the ability of industry in the OECD countries to innovate and develop technology include patents, copyrights, trademarks, industrial designs, trade secrets, including proprietary data submitted to governments for gaining regulatory approval, as well as semiconductor layout designs. It is critical to recall, without undermining in any way the importance of patents, that the development of an information economy and society depend heavily on software innovation, which is protected by copyright as well as patents. Indeed, innovation in information technology is a major force in assisting innovation in all industrial sectors. The primary focus of the BIAC comments, however, will remain on the impact of patent protection on innovation and technology development.

2. Incentive for strong IP Protection: Strong IP protection, by balancing the benefits that products and technologies provide society as a whole with the need both to provide incentives for continued innovation and an environment in which that innovation is rewarded, serves to induce innovators to develop and bring their technologies to the market place. The historical record in the industrialised countries of the OECD demonstrates that intellectual property protection has been one of the most powerful instruments for economic development, export growth and the diffusion of new technologies.

Today's challenge is to ensure that:

- \* all countries set high standards of IP protection and enforcement in their national laws and effectively enforce the standards once the improved laws are in place;
- \* all countries recognise the special IP needs of industrial sectors whose inventions, because of regulatory requirements, reach the market place with considerable lags after patent grant; and
- \* that IP protection is maintained in the rapidly changing technological world of today.

Industry Requirement: Industry requires a high level of intellectual property protection, substantial reductions in the costs of acquiring, maintaining and enforcing intellectual property rights and non-discriminatory regimes conducive to full market access for intellectual property-protected products throughout the world.

A common message from industry is the desire for legal certainty accompanied by a substantial reduction in costs, prompt patent examination and continued efforts to ensure the highest levels of intellectual property protection and enforcement world-wide. It is recognised that the means and political will for such improvements will be facilitated by a move towards a uniform patent system with the same specifications and claims for all countries, which can take advantage of a common data base and a standardised novelty search with mutual recognition of the results. Legal uncertainty has a chilling effect on investment.

Industry supports the harmonisation of the criteria for obtaining patents. The following items should be considered in the development of an efficient system among the OECD countries:

- adoption of first-to-file;
- early disclosure of patent applications (i.e., eighteen month publication);
- abolition of the Hilmer doctrine
- improvements in the process for challenging granted patents;
- Modernisation of licensing systems for patent filings abroad;
- improvements concerning validity and effective technical scope of the patent right;
- improvements in the laws and civil and administrative procedures, including adequate damages for infringement, regarding the enforcement of patent rights; and
- reduction in government fees for obtaining patents and in the number and extent of required translations, preferably with a stipulation that translations only be required when a patent infringement suit has been filed.

There are other aspects of harmonisation which are felt to be important by some representatives of industry, but there is no unanimity on these issues:

- adoption of grace periods: while some representatives of industry believe grace periods are important, others believe that too long a grace period increases uncertainty.
- adoption of the approach contained in the common law practice of “discovery”: while some representatives of industry consider this as a fundamental principle, others believe that the cost of discovery can act as a deterrent against innovation.

3. International IP Standards: Countries seeking accession to the OECD should be required to provide the highest levels of intellectual property protection and enforcement at the time of their accession. Membership in the Patent Co-operation Treaty should be promoted in order to realise an international standard of patent examination.

Developing nations and least developed nations should abide by the provisions of the WTO TRIPs treaty and provide, at the very latest, by the end of the transition period (by the year 2000 and 2006, respectively) granted, the legal structure, procedures and remedies required to achieve the minimum standards for effective IPR enforcement. Those governments of developing countries or of economies which have recently accomplished their transition to a market-based environment, although recognising the importance of adopting strong IP legislation, may face many operational problems - such as effective patent examination and enforcement - as they seek to build up their industries and intellectual property infrastructure. For example, low quality of patent examination adversely affects industry as patent holders have a less certain right and patents that should never have been issued provide barriers to other innovations. It is incumbent upon the OECD member governments and their industries to support the provision of technical assistance, both on bilateral and multilateral bases, for the purpose of, for example, improving the quality of patent examination, establishing domestic or, preferably, regional patent and trademark offices and the proper training of police, judicial and customs officials in the enforcement of intellectual property rights.

Positive action by government officials towards eliminating counterfeit and imitation goods is necessary. Action against imitation goods, especially in developing nations, should not however be limited to government organisations. Education of and recognition by the public is indispensable.

Industry believes that the WTO, WIPO and the OECD have critical roles to play in ensuring that IP protection is a positive force for innovation and the development of technology. WTO is the international mechanism for ensuring that all countries meet their obligations to provide high levels of IP protection and enforcement. WIPO, through its administration of the PCT, facilitates the acquisition of patents; through its technical assistance, helps developing countries and economies in transition to overcome the institutional hurdles to effective IP protection; and, through its role in treaty negotiations, can serve as the venue for the elaboration of appropriate international norms of IP protection. The OECD, through its IP-related projects and analytical support, can help make the economic and technological case for strong intellectual property protection and, through its ability to develop guidelines, can help in the development of principles of IP protection that will inform the standards that countries should be seeking.

4. Mechanism for international examination: A system which provides for the issuing of uniform rights through such methods as promoting the use of a common database, establishment of patent examination standards, exchange of patent examiners, and mutual recognition of search results, is necessary. This requires the existence of a common system with uniform criteria for novelty.

The ability of innovators to reap the benefits of their innovations may be severely circumscribed by narrow systems of claim interpretation. Narrow interpretation of claims enables companies to make minor changes to other companies' patented products or processes without being found to infringe upon them.

As economies are becoming increasingly borderless, the establishment of a regional patent and other co-operative mechanisms for patent grant based on economic regions (North America, South America, EU, ASEAN, Eurasian, including the C.I.S., etc.) such as that being considered in the ASEAN region, should be seriously explored

5. Differences in Priorities by Industrial Sector: Different industrial sectors have different priorities with respect to IP protection and enforcement. For many industrial sectors in the OECD countries -- particularly in the agricultural chemical and pharmaceutical industries -- innovation and technology development are related to the state of IP protection and enforcement outside of the OECD countries. For these industries, improved IP protection and enforcement outside of the OECD will be particularly critical. For other industries based in OECD countries, whose inventions enjoy strong protection, enforcement of the standards -- including the cost of enforcement and litigation -- within and outside of the OECD countries is paramount. For yet other industries, the need for harmonised, low cost and efficient patent systems is the principal IP issue faced.

6. In discussing international IP standards, reliance on standards found in the WTO TRIPs Agreement may not be sufficient. It is critical that there be a recognition that the TRIPs Agreement was negotiated with the technological issues of the 1980s and early 1990s in mind and included only minimum standards. In some areas of technology, new internationally-recognised norms are needed. For example, international patent norms should recognise the essentiality of pipeline protection for the pharmaceutical industry in order to deal with the impact on innovation in that industry resulting from the current environment where periods of marketing exclusivity are effectively being shortened by heightened competition within therapeutic classes and the simultaneous lengthening of the development time for such products. In addition, the continued development of the biotechnology industry requires internationally-recognised standards of patent protection for its inventions. One of the key first steps in that direction is to close the gaps among the OECD member countries concerning the patentability of genetic material, including plants and animals. It will be necessary in any international negotiations to guard against attempts to compromise existing intellectual property standards out of concern for such legitimate objectives as environmental protection and biodiversity.

In other areas of technology, international norms have already been developed since the negotiation of the TRIPs Agreement. Some of these norms are contained in such international treaties as the recently-negotiated WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

To deal with emerging issues associated with the protection of IP in an age of growing technological standardisation, especially in network apparatus and systems, international rules should be established to develop procedures that will balance the interests of intellectual property owners and users. There is an emerging issue encountered in technological standardisation, especially in a network society, that relates to intellectual property rights. Standardisation of network apparatus and systems is necessary to achieve compatibility of network technology. A feature of advanced network technology is that many kinds of patentable technology created by a number of people may be included in the relevant network products as standardisation and technological development occur in parallel. The dilemma is that in order to compensate for investments made in R&D, patent owners need to secure significant returns. However, if the royalty fees of the patents are too high, or licensing limited to certain companies, the technology will not be deployed as a standard, thereby limiting distribution, and resulting in inaccessibility of mutual communication.

Voluntary systems work well and are preferable due to their technology-neutrality. Voluntary licensing whereby technology leaders promote standardisation by offering licenses on reasonable terms is the optimal solution from the industry point of view.

7. In order to ensure that the appropriate high levels of protection of IP rights are achieved and maintained, national or regional exhaustion applicable only to regional areas that have achieved full economic integration should be recognised as the norm. Consumers will not necessarily benefit from international exhaustion, because the traders in parallel goods would “shadow price” (that is, price just below the free market price), thereby reaping most of the benefit from any price differentials. International exhaustion also prejudices supplies and the transfer of technology to low price markets, since the patent owner fears prejudice to his main markets.