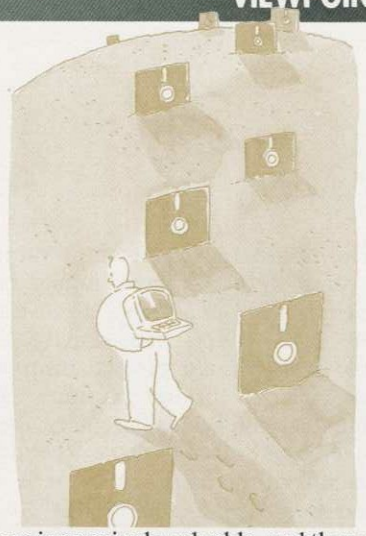
Putting a Price on Intellect

By Yuji Masuda



Intellectual property rights are handled in a number of different ways these days, and there is widespread interest not only in industrial rights such as patents and trademarks but also in the broader range of intellectual property including copyrights. Intellectual property rights are, in essence, an effort to define the fruits of intellectual labor and to assign ownership of the rights to them. As a result, different definitions have grown up for different kinds of creative work, and the information explosion has created whole new areas of rights needing protection.

The concept of intellectual property rights has outgrown its traditional definitions. Modern industry's technological output has in the past been mainly hardware—tangible things—and the rights were easily protected as part of the legal system providing for the protection of industrial property rights. However, there has recently been a striking increase in the software—intangibles such as ideas and information—that does not lend itself to such protection. And as the use of this intellectual property has become increasingly important, strategically and tactically, there has been a commensurate increase in the number of disputes over such intellectual property rights.

Creative activity

The information revolution is gaining momentum daily as companies find new ways to commercialize individual creative activity, and the potential for increasingly frequent and increasingly acrimonious conflict over intellectual property rights is obvious. Nevertheless, the effort to expand the scope of application for legal provisions protecting industrial property rights has proved an unsatisfactory and inadequate way to deal with these new intellectual property rights, and there is thus a need for a new framework anticipating the technological and information revolution now under way.

The problem at issue is not simply one of protecting new hardware technologies. It extends to intangible software. At the same time, this is an issue transcending national borders—a global issue that is fraught with important international ramifications.

As noted in the 1987 report of the United States Council of Economic Advisers (CEA), "The United States provides substantial protection to all forms of intellectual property rights. Yet some countries do not provide any protection, or provide only minimal protection, to overseas rights holders. Some countries even have legal provisions allowing the copying of foreign technologies that they want."

As a result, the United States has sought to protect its citizens' intellectual property rights through concluding bilateral trade agreements and has called for the elimination of protectionism and other practices that distort free trade. At the same time, it has worked in GATT and other forums to draw up international rules and to conclude international protocols regarding protection of intellectual property rights.

In general, the term "intellectual property rights" refers to the title to intangible creative assets deriving from efforts in the intellectual, scientific and artistic fields. Just as property law usually forms the basis for protecting ownership rights to tangible assets, intellectual property rights laws govern the rights to distinctive patterns or expressions incorporated within assets. In this sense, intellectual property rights differ from real estate deeds and other rights in other realms.

Many of the problems that have arisen with regard to intellectual property rights stem from changes in the economic and technological structure. Indeed, the reason the United States is so intensely interested in protecting intellectual property rights is that its economic structure is moving away from manufacturing industries and more toward services. Accordingly, intellectual property has become increasingly valuable, and there is a perceived need to find some legal means to accord appropriate protection to this new technology. As knowledge and information are increasingly commercialized, problems regarding intellectual property rights are expected to become increasingly important not only in the United States but worldwide.

Second, the United States is looking at the relationship between intellectual property rights and international trade and seeking to ensure more effective use of intellectual assets to strengthen its international competitiveness, which accounts for the vigorous efforts the federal government is making in this area of intellectual property rights. Intellectual stock is one of the areas where the United States still has a comparative advantage internationally, and the United States hopes to use these intellectual property rights to develop an international trade strategy complementing its international technology strategy.

Trade issue

Third, while the Reagan administration has forcefully advocated the maintenance of free trade and has refused to allow protectionism a foothold in U.S. trade policy—a position that the CEA report mentioned earlier said was at sharp variance with those who would seek to rectify the trade imbalance with protectionist trade policies—the U.S. government has instead sought to use intellectual property rights as a weapon in its global trade strategy.

At the GATT Ministerial Meeting held in Punta del Este, Uruguay, in September 1986, it was decided to take up the issue of intellectual property rights in connection with the trade in goods.

The ministerial statement regarding the start of the Uruguay Round confirmed the need for an open, effective and enduring multilateral trade structure that would help contain protectionism and other trade-distorting pressures and stated that intellectual property rights should be part of the Uruguay Round negotiations in this spirit. However, it was found impossible, even in this GATT meeting, to resolve the many difficult and far-reaching problems as already noted.

There are three basic issues that would have to be dealt with in any international protocol on intellectual property rights.

The first is the issue of defining the scope of intellectual property rights. This is a very difficult issue for GATT to confront head-on, and it is expected that the compromise will be to confine discussions to intellectual property rights as covered by the Paris, Berne and other international conventions. However, this is unsatisfactory, since it is software and other areas not covered by the existing conventions that have brought intellectual property rights to the fore as an international trade issue.

The second issue is the question of how well national copyright laws address the situation in the United States, Europe and Japan. Most of the leading industrial countries are out of line in some way or other, both with international conventions and with each other. Accordingly, the issue of intellectual property rights is fraught with potential friction, and there is an urgent need to promote greater harmonization of legal systems.

Third, even assuming it is possible to formulate an international code on intellectual property rights, is the question of how to achieve an effective mix of incentives and penalties. Violations of intellectual property rights, particularly patent infringements, are especially rampant in the developing countries, and the question of how to protect the copyright holder is particularly vexing. At the same time, the need for technology transfer means that the code should include provisions facilitating technology transfer, and the task of reconciling this seeming contradiction is a major issue to be tackled in the Uruguay Round of talks.

One of the most intractable aspects of the question of intellectual property rights protection is that the scope of what constitutes intellectual property rights is constantly expanding as technological frontiers are pushed back, making it extremely difficult to define the scope of coverage. As information and new softwares have proliferated and their value has been recognized, there has been an increasing number of disputes over intellectual property rights. The need to provide protection for the creators and holders of intellectual property rights has become urgent.

Information-related software is internationally protected under copyright conventions, but not all information and data are covered by copyrights. However, the trend has been for broader protection, as witness the efforts by U.S. computer manufacturers to have their ideas and computer-external information considered private property and protected as trade secrets.

More acrimonious

Some people have also suggested that the possibility of software protection under copyright laws should be reconsidered, and this is currently being studied. Nonetheless, there is every reason to believe that this will continue to be an area of considerable dispute. The dispute over intellectual property rights protection is becoming increasingly acrimonious as the information revolution gets more and more international.

Knowing the value of information, the United States is seeking to expand the scope of coverage and is shifting to the international norm of prior-applicant priority. This is clearly an attempt to gain greater protection for its stock of technology and to gain the high ground in trade negotiations. Yet just as U.S. moves in the intellectual property rights field are obviously part of an overall trade strategy, so are they part of a technology strategy. Article 337 of the U.S. Tariff Code's very sweeping prohibition of unfair practices may be invoked for either–or both–trade strategy reasons and technology strategy reasons.

While the article as it now stands requires both economic factors and technology factors to be involved before it can be invoked, the revised Omnibus Trade Bill eliminates both the requirement that there be a viable U.S. industry and that there be substantial injury as a result of the imports. Under the old law, U.S. industry bore the burden of proving that it had sustained substantial injury as a result of manufactures imports.

The new law makes it much simpler for U.S. companies to file complaints with the International Trade Commission (ITC). As a result, it is expected that it will become even easier to block the import of manufactures thought to infringe on U.S. patents simply by citing the existence of U.S. patents, trademarks, copyrights and other protection and charging unfair practices.

This revision thus appears to be aimed at linking trade strategy and technology strategy as the United States attempts to maintain its advantages in trade and technology by invoking protection for intellectual property rights, and there is a very good chance that this could develop into thinly disguised protectionism and an impediment to trade.

Given these circumstances, it is imperative that every effort be made to protect Japanese economic interests and the interests of internationally competitive Japanese industries by protecting Japanese intellectual property rights. Yet this call must not be interpreted as simply meaning strengthening the protections for intellectual property rights. Rather, the need is increasingly to share technology with the developing countries so as to revitalize the world economy.

There is no inherent reason why the demands for the protection of intellectual property rights and technology transfer should be in conflict, and it is imperative for new possibilities to be created for world economic growth by reconciling these two needs.

Yuji Masuda is a professor at Tokyo Keizai University. He has authored various books on high-tech industry and information networks. He also contributes articles to economic magazines about intellectual property rights.