

# DFAIT Roundtable on Enforcement of Intellectual Property Rights in the G-8 Context: Canadian Perspectives

**Frederick M. Abbott**

Florida State University College of Law

January 11, 2007

Ottawa, Canada

# Current G-8 Focus on IP Enforcement Predictable within Evolutionary Context of TRIPS

- Initial effort in 1986-2004 timeframe (GATT Uruguay Round mandate through end of developing country transition under TRIPS Agreement) directed at adoption of common minimum IP protection standards
- Leakage of "technology rents" through incomplete enforcement anticipated under initial TRIPS regime
- Attention to closing off routes of technology rent "leakage" represents a second phase of OECD efforts

# Changes in Global Economic Landscape Present IP Enforcement Challenges

- Success of China reinforces hypothesis that key transition phase of economic growth is enhanced by appropriation of foreign-owned technology and IP, i.e. lack of enforcement. As local innovation increases, interest in protection should increase if historical patterns hold (see Maskus curve)
- Developing countries view OECD enforcement focus largely as effort to displace local industry and capture increased technology rents. OECD is very unlikely to persuade developing countries that IP enforcement benefits the local economy as it is used to shut down local market actors – pharmaceutical sector a case in point

# Multilateral Institutional Framework

- From enforcement perspective, WTO provides effective rule negotiating forum at points of maximum leverage, e.g., accession process, see China and Russia
- WTO provides relatively weak legal mechanism for compelling IP enforcement by countries with substantial economic power
  - Standards not well defined. Dispute settlement process moves slowly and with difficulties in implementation -- EU and US are masters at "gaming" WTO dispute settlement and avoiding implementation of decisions
- WIPO not designed as an enforcement arena

# Multilateral Institutional Framework

- Idea of global enforcement institution with comprehensive jurisdiction as posited on meeting agenda a dismal idea
- Values such as freedom of expression are not commonly defined or shared, and underlie US and other OECD IP balancing tests. Multilateral institutions poorly designed to accommodate such values.
- IPRs typically granted as "presumptions" in favor of applicants, not as fixed property interests. Multilateral system is not designed with institutions capable of assessing entitlement to rights.
- What institution is being considered? World Customs Organization? WIPO? WTO? OECD?

# Trends in Enforcement

- Shift of US and EU to bilateral and regional trade agreements where more leverage on enforcement issues may be exercised over countries with weaker bargaining positions
- Adoption by EU of IP Enforcement Directive
- Criminalization of violations

# Disaggregating IP Forms and Values

- Public policy implications of IP enforcement differ widely among forms of IP and social function
  - Protection for trademarks and other identifiers raises substantially fewer public policy concerns than protection for patents. Copyright lies in middle ground.
  - Throughout Uruguay Round negotiations, rules against "trademark counterfeiting" and "copyright piracy" substantially less controversial than standards for patents.
- Criminal penalties tied to patent infringement are a uniquely bad idea
  - Patents are often granted based on inadequate review of prior art and assessment of inventive step, and are frequently invalidated when challenged. Criminalization would unreasonably elevate legal status of patent grants, and have *in terrorem* effect on prospective industrial competition
- Successful implementation of enforcement policy may be predicated on limitation of subject matter addressed

# Creation of "Fortress OECD" or "Fortress G-8" May Be Most Realistic Enforcement Option

- Application of "border measures" as opposed to attempting to intervene in developing country enforcement processes
- Restricting imports may result in short-term gains and protection of employment. Less clear whether long-term results would be beneficial.

# International Enforcement a Question of Political and Economic Power

- If real economic power is shifting to the BRIC countries, G8 power to impose enforcement rules is weakening
- Changes in pattern of global wealth distribution may, on other side, favor IP enforcement agenda
- Changes in enforcement trends more likely to occur based on shifts in national interest (as economic development thresholds crossed), than on active enforcement institution-building