

Secret's Out: The Ineffectiveness of Current Trade Secret Law Structure and Protection for Global Health

Comment By

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INTRODUCTION: WHY ONE SET OF STANDARDS IS NOT WORKING

Trade secret theft may be “the greatest threat to United States economic competitiveness in the global marketplace.” By the year 2000, United States companies reported losing over \$1 trillion from intellectual property theft, and that number is growing by an estimated \$250 billion each year. Additionally, intellectual property often represents an enterprise’s most valuable asset. The rapid growth of the field and the international policies toward intellectual property over the last two decades underscores its value. Despite international efforts to establish an intellectual-property framework, countries are left to their own devices to enforce the purported international minimum standards.

...Through attempts at streamlining international law on intellectual property, countries are forced to assess their domestic treatment of intellectual property rights and whether they are in fact meeting international standards. However, individual countries’ laws are a product of the values emphasized in the country. The assumption that countries will alter years of jurisprudence to enforce a legal structure that is not necessarily reflective of their values and understanding of the law is a difficult assumption to make.

...[T]he United States was instrumental in international structuring of minimum standards for intellectual property, including trade secrets, and other nations have formatted their trade secret laws to those of the United States. **Yet today new models are gaining attention that may challenge the dominant United States framework.**¹⁹

(p. 779)

19 See Lawrence A. Kogan, *Brazil’s IP Opportunism Threatens U.S. Private Property Rights*, 38 U. Miami Inter-Am. L. Rev. 1, 9-10 (2006)

...II. BACKGROUND: HEALTH, TRADE SECRETS AND TRIPS

A. *Setting the Stage: Why Intellectual Property is Important for Health*

...Politicians in the United States are confronted with quite a challenge as they seek to drive down the costs of healthcare, while simultaneously trying to extend quality access to all citizens. This interplay between cost, quality, and access is at the heart of any healthcare debate. **Some developing countries claim that access to current science and technology, which they lack, at concession-rate prices is necessary to promote international peace and stability.**⁴¹...While developed⁴³ countries, such as

the United States, seek to find the balance between affordability, quality and access, **they also must contend with the implications of their position for the international market.**⁴⁴...Accordingly, **“developing”⁴⁶ countries⁴⁷ must define for themselves what type of intellectual property scheme they wish to implement and enforce...**
(p. 781)

41 See Kogan, supra note 19, at 9-10. Brazil is leading the push for the doctrine of sustainable development which will “enable developing countries to liberate themselves from endemic poverty and disease, so that they may ultimately achieve economic and social parity with the developed world”. *Id.*

44 See Kogan, supra note 19, at 9-10.

47 See Kogan, supra note 19, at 7. “Furthermore, Brazil has opportunistically defined itself, for these and other purposes, as a developing country.” *Id.* See also Allan Segal, Comment, TRIPS: With a Painful Birth, Uncertain Health, and a Host of Issues in China, Where Lies its Future? 7 San Diego Int’l L.J. 523, 538 (2006) (stating that China designates itself as a developing nation, an unpopular move in the international community).

...V. AN ALTERNATIVE MODEL: BRAZIL AND OPEN SOURCE

While the United States represents the dominant model²³⁹ on intellectual property law and China openly appears to be following suit, ²⁴⁰ **Brazil**, once also a follower,²⁴¹ **has recently presented an alternative path.²⁴² Brazil now proposes an “open source model”²⁴³ that has gained attention from the international community.²⁴⁴ This new model could be viewed as a threat to the United States, ²⁴⁵** but given the history and development of Brazil it may present a better future for her country.
(p. 801)

242 See Kogan, supra note 19, at 7.

243 *Id.*

244 *Id.*

245 See generally *id.* at 20-30 for a discussion of how Brazil’s “IP opportunism” may pose a threat to U.S. private property rights.

A. History and Culture of Brazil

Brazilians focus on community and maintaining a high degree of social involvement.²⁴⁶ Brazil is rich with natural resources and opportunities for economic growth.²⁴⁷ Yet the country is saddled with the after-effects of hundreds of years of a plantation society.²⁴⁸

As a result, there is a massive gap between the rich and the poor in an otherwise wealthy country.²⁴⁹ Consequently, experts state that Brazil lacks the “core human capital, namely, education, and a market-friendly enabling environment that incorporates strong recognition and protection of exclusive intellectual property rights.”²⁵⁰ Additionally, the government suffers from systemic corruption, making domestic goals, such as affordable national healthcare, difficult to accomplish.²⁵¹

(p. 802)

246 See *id.*

247 See Kogan, *supra* note 19, at 4-5.

248 *Id.*

249 *Id.*

250 *Id.*

251 See *id.*

...While this broad overview reflects the commonalities of United States, Chinese, and Brazilian treatment of trade secrets, Brazil has recently challenged its own degree of protection afforded to intellectual property in the country.²⁶⁸ Brazil now presents an example of an alternative method of conceptualizing intellectual property that could have a big impact on international trade. ²⁶⁹

C. New Global Framework Advanced by Brazil

Brazil has defined itself as a developing country that has been promoting a controversial global framework that calls for open access to knowledge and technology for developing countries.²⁷⁰ This framework is grounded in an “expanded notion” of sustainable development that challenges strong intellectual property rights by favoring public or communal rights over private-property ownership.²⁷¹ The framework is fairly simple, requiring a continuous flow of any new science and technology to be transferred to self-defined developing countries at concession-rate prices.²⁷² While Brazil and its growing number of supporters in this movement maintain that this model will enable developing countries to “liberate themselves from endemic poverty and disease so that they may ultimately achieve economic and social parity with the developed world,” others feel that this model actually hinders such countries’ prospects for scientific, technological, economic and social advancement.²⁷³

Brazil has advocated a critical reading of TRIPS that would create a greater balance between intellectual property protection and public-health objectives.²⁷⁴ Brazil has influenced the World Health Organization (“WHO”) to openly encourage a flexible reading of TRIPS that would make public health concerns paramount.²⁷⁵ In 2003, the WHO World Health Assembly (“WHA”) issued a resolution advising developing countries

to structure legislation to take advantage of this flexible reading.²⁷⁶ In 2006, the WHO proposed an “alternative simplified system for protection of intellectual property.”²⁷⁷ The system would allow for royalty-free copying of patents if necessary for public health reasons.²⁷⁸ The system proposed that research and development, one of the largest driving costs factors of medicine, would then be financed in other ways, such as taxes or government subsidies.²⁷⁹ Again, intellectual-property scholars seem divided on what such a plan would do to innovation, affordability and access.²⁸⁰

(pp. 804-805)

268 See Kogan, *supra* note 19, at 4-9.

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.* at 8-9 (referring to these prices as “essentially free”).

273 See Kogan, *supra* note 19, at 10-11.

274 *Id.* at 36.

275 *Id.* at 38-39.

276 *Id.* at 39.

277 *Id.* at 42.

278 See Kogan, *supra* note 19, at 43

279 *Id.*

280 *Id.* at 39-44.

B. Consequences of the Current Systems

...Opening access to pharmaceutical data and intelligence may seem appealing for “developed countries” or those who wish to reach the same level economically and health-wise²⁹⁵ as “developed” countries. However, looking at the history of trade-secret-law development, those countries that have started with a strong conception of private rights seem to have benefit greatly in research and development.²⁹⁶

(p. 806)

295 See Kogan, *supra* note 19, at 10-11.