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ESSAY ON PAPER PRESENTED BY ROBERT M. SHERWOOD

GEORGE C.J. MOORE*

It is a pleasure to comment upon the excellent and useful paper by Robert Sherwood, who makes a myriad of important interconnected points at this Symposium on Free Trade in the Western Hemisphere. Sherwood correctly observes that intellectual property (IP) protection has become critical to the economic development of all nations, especially developing nations, and that the intellectual property systems of many countries in the Western Hemisphere are in many ways deficient.

Sherwood's study also lays bare the assumption that the North American Free Trade Agreement (NAFTA) and the Trade Related Intellectual Property Standards (TRIPS agreement of the World Trade Organization) adequately embody the standards for the future. In reality, NAFTA and TRIPS represent the lowest common denominator and afford only trade barrier reduction while failing to provide additional standards or mechanisms to facilitate and promote IP protection and resulting international trade and investment.

Focusing on ten countries to the south of Florida and providing a point system which the author devised to analyze multiple criteria, Sherwood's study is useful and is commendable for at least five reasons:

1. Sherwood's study has contemporary, real world implications and sets a specific agenda for immediate action. Its critique of Argentina's patent system, deducting thirteen from seventeen possible points under this heading, despite Argentina's newly enacted patent law, preceded the U.S. Trade Representative's announcement last January that the United States would retaliate against Argentina's inaction on patent protection under the "Special 301" provision of the Trade Act of 1974 and remove

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duty-free GSP (Generalized System of Preferences) benefits from \$260 million of Argentine imports. Approximately one-half of all Argentine imports will be impacted, which will result in some \$13 million in penalties. Significantly, Argentina is by no means alone in the Western Hemisphere to receive a low assessment of patent protection in the Sherwood study.

2. Sherwood's insightful description and definition of the new dynamic and future imperative that, today, technology drives investment which, in turn, requires security, is apparent in the following statements:

Twenty years ago foreign investment was the leading actor on the international business stage. Technology was seen in a supporting role. The image itself was static. Today, technology drives investment. Now the image is dynamic and always changing.... Proprietary technology will move along paths where its conductivity is protected from loss. It is reluctant to flow where it is not protected...through such devices as patents, copyright, and trade secrets [which] enhance conductivity.¹

The public is seldom aware of these risk points but they have their quiet influence on investment decisions... . A potential investor's first impression of a country will often be its experience at the patent and trademark registry.²

Throughout the hemisphere, individuals who aspire to being creative and inventive are routinely frustrated by lack of protection for their work. These people are more numerous in every country than is recognized. They represent a pent-up demand for protection. Although they represent the future, their voices have not yet been heard.³

Injection of new technology into an economy is the single most powerful factor for promoting growth. Intellectual property will be viewed more widely as a critical part of national infrastructure for the competitive twenty-first century... . Any

1. Robert M. Sherwood, *Intellectual Property in the Western Hemisphere*, 28 U. MIAMI INTER-AM. L. REV. 565, 567-68 (1997).

2. *Id.* at Part II.A.

3. *Id.* at Parts II.D., G.

country faces the choices of participation, leadership or trying to catch up.⁴

3. The dearth of other comparative research in the area of intellectual property protection greatly increases the value of Sherwood's work. Edwin Mansfield has produced recent studies for the World Bank on the degree to which intellectual property influences direct investment, joint ventures, and licensing decisions in sixteen countries. However, Mansfield's study explains only in the most general sense the relative gradations of an intellectual property system in relation to investment decisions. This is the result of the study's asking companies to report the consequences of each country's intellectual property system, in the manner that the company might choose to appraise it. One might wish that the Mansfield study included more countries, particularly those in our own hemisphere, but because of the methodology employed, corporate executives in those countries are not likely to provide informed opinions about their host countries' IP systems since most would be found ignorant or at least unfamiliar with them. Indeed, in a number of our neighboring Latin countries, trademark registration and speculation is a recognized sport. Sherwood's study differs from that of Mansfield in deriving from a multitude of different on-site sources.

4. The analytical ingenuity of Sherwood's work is also commendable. The broad spectrum of intellectual property is divided into the obvious, the less obvious, and the altogether new, and includes the threshold new topic of IP protection for new life forms in plant and animal science. Sherwood's criteria and sub-criteria are almost Linnaeus-like in charting the integrated spectrum of IP topics including the large area of trade secrets and, underlying IP security in any regime, the important topic of judicial integrity and independence.

5. Sherwood's study is salutary in approaching the topic comparatively. It is less confrontational than targeting a single country broadside and in isolation, and more inspiring in enabling countries to see their strengths and weaknesses within a context of relativity. The importance of this approach, in terms of its palatability, cannot be exaggerated. Indeed, I understand that even with this comparativist approach, officialdom was not

4. *Id.* text accompanying note 5.

invariably welcoming to Sherwood, as he arrived from time to time to assay the local situation as an emissary of the Inter-American Development Bank and other international institutions. Thus organized and presented, Sherwood's study focuses not on one empire or emperor who is seen revealingly, it is all of them; and within such a context, it is possible to view the constructive criticism as collective inspiration.

6. Finally, I wish to commend Sherwood for providing a study which is far from static, but rather, is fully forward-looking and, indeed, sets an agenda. The study assesses each country on all criteria and subcriteria, and adds and compares the final totals. Individual strengths and weaknesses are identified both quantitatively and qualitatively, and Sherwood's text provides the specific rationale for each of the point assessments. Thus, Guatemala's thirteen and Nicaragua's seventeen out of 100 points translates into an enormous agenda, and the Bahamas, ranking first in the study with eighty-three points, while conveying much less urgency, is still provided with its own unique agenda since the Bahamas' eighty-three still falls significantly short of the ideal 100. The Bahamas trademark statute, for example, dates from 1906 and could indeed be modernized.

Similarly, Sherwood rates the NAFTA and TRIPS at sixty-eight and fifty-five out of 100, respectively, on the same set of standards he applied to the ten hemispheric countries—this for being minimalist and taking a lowest common denominator approach which, while leveling barriers and easing frictions, fails to inspire or pave the way for genuine trade integration. Regarding the Free Trade Agreement of the Americas (FTAA), which is envisioned to succeed NAFTA and embrace the entire hemisphere, Sherwood asks, "will the FTAA seek only lowest common-denominator tariffs and accompanying trade facilitation standards, or will deeper integration of some kind be sought? Will attention be given to encouraging investment?"⁵

Ranging from a macro realm of multilateral international trade unto the relatively microscopic niches of the remote but nevertheless gifted innovators worldwide, the scope for realizing the true potential of creativity and ingenuity has by Sherwood been more analytically and inspiringly described—and challenged.

5. *Id.* at Part II.D.

As for my own wish list, I urge Sherwood's future research to pioneer into other nearby territories of special significance to Florida and the U.S., including, in particular, the Dominican Republic (which is Florida's fifth largest trade partner) and Trinidad and Jamaica, both of which are major players among the multiple nations of the Commonwealth Caribbean.

As demonstrated through the Internet every day, any person with adequate infrastructure can participate and prosper in the global economy. It is none too soon to hear the "voices of inventors which have not yet been heard" and heed the "pent-up demand for protection"—thereby facilitating not only transfer and use of intellectual property but resulting economic development as well.