

The Letter of Marque – An Intellectual Property Paradox

January 15, 2005

Dr. David E. Martin

CEO, M-CAM Inc

Fellow, Batten Institute, Darden Graduate School of Business Administration
University of Virginia

In the dawn of the 19th century, considerable international commerce fueled the expanding markets of Europe and the newly independent United States of America. Caravans followed centuries old paths overland to bring goods from the East to markets in Europe. However, with growing populations eager for the exotic and with the need to more rapidly move goods from manufacture to market, the seas became the corridors for trade. Ships plying the trade routes were frequently exposed to piracy – a splendid business in which others bothered to retrieve goods which, with relative swiftness and aided by cannon, musket and sword, could be repatriated for the benefit of the opportunistic and strong. Napoleonic fervor fueled the court of Britain to create a class of civilized piracy to undermine the economy of France and its allies creating a designation of ships with the “Letter of Marque”. Thusly empowered, these ships could “take prizes” (a terribly civilized term for piracy) with impunity surprising their quarry under false colors and in disguise. In other words, piracy was what others did – defense of economic interest was what Letter of Marque ships did.

This Wednesday, outgoing Secretary of Commerce, Don Evans, excoriated the Chinese for their failure to reign in intellectual property piracy. Suggesting that the Chinese should imprison those guilty of violating patent, copyright, and trademark laws, Secretary Evans’ issued a clarion call for the defense of U.S. sovereign intellectual property rights. By suggesting imprisonment as a remedy for what in the U.S. calls for financial sanctions only when infringed parties have sufficient liquidity to seek remedy in the courts, his suggestions seem ironic in light of a historical position on human rights and due process criticisms of China. Was Secretary Evans representing a U.S. position which holds all intellectual property rights (IPR) as requiring united national defense or was he, like others, representing a minority of vocal business interests who defend a policy of the Letter of Marque? Namely, when others do it, it’s piracy, when the U.S. does it, its called innovation.

Presaged at the World Trade Organization gatherings in Doha and Cancun, the duplicitous U.S. policy on IPR may be unraveling. We don’t want our creative works annexed by others but we fail to address two fundamental inconsistencies. First, we deny the well-established reality that our IPR granting systems are ineffectual in ensuring that only legitimate rights are granted. The same Commerce Department, which oversees the United States Patent & Trademark Office, fails to defend international interests against U.S., European, and Japanese commercial entities who engage in the expatriation of the one resource that emerging economies have in excess – namely, biodiversity and traditional knowledge regarding its beneficial uses.

Attributing to malevolence that which is ignorance is unjustified. In meetings with senior Commerce Department officials, we are aware that many of them are unaware of the depth of dysfunction in the IPR granting institutions whose products they wish to defend.

Therefore, one can argue that Secretary Evans is merely guilty of an industry-advocated farsightedness in which the real IPR violations of others can be seen more clearly than the same activity at home. It is ironic that a number of European states are beginning to realize the need for national defense of IPR held by small and large business interests within their borders while in the U.S., enforcement is only available to those with liquidity to access the courts.

Where was Secretary Evans call for jail time when Columbia University sought to double-patent its co-transformation technology licensed to Amgen, Genetech, Abbott, and others? Who is serving time for applying for, granting, or enforcing patents on indigenous cultivars of China, Brazil, and India?

IPR theft is wrong in any context. Secretary Evans' passion is admirable. However, under the rule of law, precedent serves as a cruel master. Should the U.S. seek global respect for its commercial deployment of IPR, it should insure that it grants only that which is statutorily valid serving the Constitutional social benefit incumbent thereon and, once granted, advocate for equal enforcement regardless of venue. A Letter of Marque IPR policy is unsustainable and one day may be used against us.