

The Intellectual Property Rights Debate: The WTO Needs Citizens' Advice on Patents over Life

By David R. Downes and Matthew Stilwell

At its meeting in December 1998, the TRIPs Council for the first time discussed plans for the 1999 review of Article 27.3(b) of the TRIPs Agreement. In the coming months, this review will raise the contentious question of whether the TRIPs Agreement should be extended to require governments to recognize patents over 'life itself.' In the December meeting, governments focused on procedural issues (see related article on page 5). Unfortunately, available information suggests that governments overlooked one of the main procedural items – the need to open the process to public scrutiny and public input.

Life patenting involves issues relating to consumer rights, biodiversity conservation, environmental protection, sustainability of agriculture, indigenous rights, scientific and academic freedom, and the economic development of countries dependent on new technologies. Are living organisms or parts of organisms, such as human genes, to be considered 'inventions' that can be patented under intellectual property law? To ensure adequate public debate about these issues, the review of Article 27.3(b) must involve a broad, public debate about the many implications of extending intellectual property rights to cover life.

Intellectual property in some form is almost universally recognized as an essential policy tool in market economies. Inventors are granted intellectual property rights as a reward for innovation, and as an incentive to disclose information, thus promoting innovation by others. These rights provide a time-limited exclusive right to control the commercial use and sale of a valuable product. As well as encouraging innovation, they allow the holder to raise the price and reduce supply to consumers and may therefore give market dominance or even a monopoly to the owner.

The scope of exclusive rights – in terms of duration, technology, activities and geographical application – should thus be carefully defined to maximize the benefits to the public. An equitable and creative society must develop intellectual property laws that strike the right balance between incentives and fair returns to innovators on one hand, and the risk of market dominance, profit-taking and losses of consumer welfare on the other.

Today, the balance seems to be shifting. Intellectual property laws are defined during closed international negotiations dominated by industry. They are then brought to national legislatures as *faits accomplis*, without democratic deliberation. In the name of national competitiveness in the global market place, industrialized country governments are promoting corporate interests by helping to expand corporate control over – and corporate profits from – new developments in biotechnology and pharmaceuticals.

Many citizens' groups in both the developed and developing world are concerned about the economic, social, environmental and ethical impacts of these developments, and in particular their latest manifestation: the prospect of the TRIPs Agreement being extended to cover life patenting. Moreover, many developing country governments are concerned that control of the nature and distribution of new life forms by multinational corporations may affect their development prospects and food security.

Article 27.3(b) of the TRIPs Agreement

Negotiated in the Uruguay Round of trade talks, the Agreement on trade-related Intellectual Property Rights (TRIPs) is the most important international law on intellectual property. It sets minimum standards and enforcement procedures for national protection of intellectual property rights. Its enforcement measures – including trade sanctions against non-complying WTO members – are unprecedented in international intellectual property law.

Article 27.3(b) of the TRIPs Agreement requires countries to recognize patents on most products and processes, including pharmaceuticals, modified microorganisms and 'microbiological processes'. Currently, however, it does not require countries to recognize patents on plants or animals, or 'essentially biological [but not microbiological] processes for the production of plants or animals'. Each country has the discretion whether to recognize these patents. Countries may protect plant varieties either through patents or an 'effective *sui generis* system' or both. This exception exists because many other countries rejected on economic, legal or ethical grounds demands by the United States for patenting of plants and animals.

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In 1999, the TRIPs Council of the WTO will review Article 27.3(b). It is expected that the United States will seek to remove this discretion so that TRIPs requires countries to recognize patents on plants and animals. Other industrialized countries may side with the United States, especially since the European Union recently decided to extend patents to cover life forms. Many developing countries are likely to oppose the removal of the exception.

WTO should maintain the life patenting exception

It is our view that the WTO Members should resist the proposed extension of TRIPs to life patenting and maintain the current language of Article 27.3(b) allowing for plant and animal discretion and the right to develop *sui generis* systems for plant variety protection. Members should also consider expanding the exception to cover microorganisms. This discretion is essential for a number of reasons:

- **Maintaining flexibility to address indigenous and biodiversity goals**

It gives countries the space they need to experiment with various approaches to implementing Article 8(j) of the Convention on Biological Diversity, requiring protection of traditional knowledge, innovations and practices of local and indigenous communities. Given the complexity of the issues, countries badly need to develop experience resolving them through pilot projects and programs, and this will require a phase of experimentation. Requiring all countries to recognize life patenting and uniform systems of plant variety protection, would hinder countries from gaining the experience needed to implement Article 8(j) effectively.

Continued on page 16

Intellectual Property Rights Debate, continued from page 3

• **Avoiding trends toward overly broad biotechnology patents**

The scope of biotechnology patents in countries that are furthest along the road of patent expansion, such as the United States, is frequently too broad, which could actually stifle, rather than stimulate, productive innovation with consequent effects on international competitiveness and consumer health and welfare. There is significant concern about over-broad patent claims in the US itself. This suggests that the rest of the world is better off taking a 'wait-and-see' approach and learn from the US experience, rather than rushing into a decision whose benefits are unproven.

• **Maintaining competitive markets**

The combination of expanded international intellectual property protection with shifts in market dominance in the global economy raises significant concerns about market competitiveness. The over-broad patent claims in biotechnology, with a continued blurring of the lines between invention and discovery, intensify the risk of anti-competitive impacts, although some argue that intellectual property rights in the hands of small firms or newcomers to a market may sometimes serve as a tool to enhance competition.

In any case, there is currently a policy imbalance within the WTO. The WTO provides powerful protection of intellectual property through the TRIPs Agreement. While the TRIPs Agreement permits Members to take 'appropriate measures' to prevent the abuse of intellectual property rights or practices that unreasonably restrain trade, there is no international set of competition disciplines to guard against market abuses, in large part because of US opposition. No further expansion of intellectual property should take place without a thorough examination of the competitive impacts and the possible need for competition disciplines to manage them.

• **Preventing greater disparities between North and South**

The proposed extension of TRIPs to life patenting would further unbalance the Uruguay Round bargain in favor of industrialized countries and against developing countries. The protection afforded by the TRIPs agreement expands exclusive intellectual property protection in time (from 17 years in the US to 20 years under TRIPs); in scope (the TRIPs Agreement covers 'any invention'); and in geographical application (to all WTO Member countries). The increase in prices that is likely to result from recognition of patents on products such as new seed varieties and pharmaceuticals will reduce access to these goods for poor people in the developing world.

In addition, as intellectual property rights are predominantly owned and controlled by corporations in industrialized countries, the protection of these rights worldwide entails a significant transfer of revenues from developing to industrialized countries. The concessions offered to developing countries in the Uruguay Round to offset this transfer – including reduction in agricultural subsidies, better market access and special and differentiated treatment – have not yet been honored by industrialized countries. Until they are, the WTO should not add to its requirements for intellectual property protection.

• **Managing investment in biotechnology**

Countries may not want expanded TRIPs to life patenting until a proper regulatory framework governing biotechnology is in place to control the environmental impacts of modified organisms. By definition, intellectual property rights are designed to encourage

private sector investment in technological development. Hence, avoiding the extension of intellectual property to modified organisms remains a reasonable policy choice for countries wishing to control the development of biotechnology, at least until an effective biosafety protocol is negotiated and enters into force, and effective national regulations and institutions are in place.

• **Counterbalancing unilateralism on intellectual property.**

The WTO should not raise TRIPs standards while major trading nations are applying unilateral pressure to force trading partners not only to meet TRIPs standards but to go beyond them. For instance, the US threatened Argentina with trade sanctions on the grounds that Argentina's protection of IPRs is not strong enough. Yet some of the US demands seemed to seek stronger protection than TRIPs requires.

• **Addressing environmental and ethical concerns.**

Life patenting raises significant environmental and ethical issues for many people in many countries. There are concerns that patents on crop varieties, for instance, augment incentives in favor of monoculture and use of expensive inputs such as fertilizer; this in turn causes environmental harm. In addition, many people in many societies feel that the structures of genes, animals or plants – the structure of life itself – should be kept free from commodification and market transactions, as an ethical matter. The private ownership and marketing of these fundamental structures of life violates religious and moral principles in a number of cultures. The WTO should not adopt a blanket rule when so many perspectives and concerns are yet to be considered.

**WTO should examine broader concerns
about intellectual property**

As Lester Thurow wrote recently in the *Harvard Business Review* (1997), '[i]t is clear that the invention of a new gene for making human beings different or better cannot be handled in the same way as the invention of a new gearbox.' Decisions about the evolution of intellectual property cannot be left for specialists or to the WTO alone. They need debate by a full range of institutions, experts, and representatives of civil society. As steps toward such a discussion, we recommend the following:

- A full and public discussion within the TRIPs Council and the 1999 WTO Ministerial Conference of the public interest questions raised by intellectual property.
- A commitment by WTO members to discuss fully and openly the public interest concerns involved in intellectual property, and to carry out a thorough review of the TRIPs Agreement in 2000, before starting negotiations on additional intellectual property requirements.
- A commitment in the WTO to address related issues alongside intellectual property policy.
- Involvement of other relevant institutions, such as UNESCO, FAO, World Health Organization, World Intellectual Property Organization, and the full participation by citizens' groups.

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