

THE NATIONAL INTEREST

Intellectual-Property Pirates of the Caribbean

By: Simon Lester - February 22, 2013

Antigua recently made [3] headlines [4] by threatening to set up a web site offering pirated U.S. products. But this is not some modern-day, government-run file-sharing service like Napster. Antigua is attempting to enforce a successful legal complaint [5] brought against the United States at the World Trade Organization (WTO), related to a U.S. ban on foreign online-gambling websites.

The case arose out of a U.S. commitment to open its market to cross-border trade in gambling. Antigua claimed that banning foreign gambling sites, while allowing some domestic online gambling, violated WTO rules. The United States contested that it had made such a commitment, but the WTO courts found that it did, and also that Antiguan gambling sites (think online poker) were being discriminated against.

While the legal victory at the WTO was nice, Antigua still had to enforce the verdict. Normally enforcement takes place through the complainant getting authorization to impose its own protectionism in an effort to induce compliance by the offending country. But Antigua took a different approach. Instead of imposing higher tariffs on U.S. goods, Antigua has proposed violating the WTO's intellectual property rules by offering copyrighted (or patented) U.S. goods.

Antigua is not the first to propose this, but its efforts have received the most attention. At this point, Antigua has offered only limited details [6] of its plan. But essentially it is proposing to make available U.S. copyrighted or patented works at low prices or for free. For example, it could set up a website offering free downloads of American music and movies.

Antigua's approach may seem odd, but it is within the bounds of WTO rules. Normally, if a country is found to have violated international trade rules (say, by imposing tariffs at a higher level than it promised), other countries affected by the higher tariffs can file a complaint. If the high tariffs are found in violation, the complainant can then seek the WTO's authorization to retaliate, for example by imposing its own higher tariffs.

Although the ultimate goal is to have the violating country remove its protectionism, the short-term result may be more protectionism, as the complaining country adds its own tariffs to the equation. This approach may seem antithetical to the cause of open markets. How can higher tariffs be consistent with free trade? Yet if it works properly, the extra protectionism is only a short-term fix, and eventually both the offending high tariffs and the retaliatory high tariffs are removed.

But in practice, this is not always the case. Sometimes both protectionist measures—the violation and the authorized response—linger for quite a while. And the extra protection has a negative impact on the economy.

In most cases, the nature of the retaliatory response should be related to the original violation, though there is an exception. It may be that the complaining country imports very little from the offending country, and thus extra tariffs on imported goods would have limited impact. This is a particular problem for developing countries trying to enforce decisions. Closing their market is unlikely to have much impact on rich trading partners such as the United States. Thus in that type of asymmetric case, retaliation can be in another sector.

One of these other sectors is intellectual property, and this is what Antigua focused on. There have been objections that this approach constitutes piracy. And it does. Intellectual property infringement is a serious problem, and it should not be promoted in an arbitrary manner.

Yet there is a widespread and growing [7] sentiment [8] that governments overprotect intellectual property. For example, the original copyright term authorized by Congress was 14 years, renewable for one additional 14 year term. Now the term is the life of the author plus 70 years!

The Antigua case suggests a novel way to improve the trade-enforcement mechanism, while also reining in some of the excesses of modern intellectual property laws: Use weak intellectual property laws as a way to induce compliance with trade agreement violations. . This does not mean abandoning intellectual property entirely (for example, allowing the latest Bruce Willis movie to be downloaded for free). Rather, it means adopting sensible intellectual property protection terms, and putting works that are past that term into the public domain.

This is a win-win. It avoids the problem of escalating protectionism through the quirky WTO dispute procedure, where successful complaints use protectionism as a tool to promote compliance with rulings. And it could bring intellectual property back to reality, to the time before big Western intellectual property holders began lobbying for ever greater protections.

Antigua's specific actions in the dispute over online gambling remain to be seen. No web site has actually been set up yet. And the U.S. response will be interesting. So far, the U.S. has expressed [9] a great deal of concern about these developments. But its actions will count more than its words.

Hopefully Antigua will not abuse the path it is taking. If it limits its actions to a reasonable weakening of its intellectual property laws, rather than abusive piracy, perhaps it can pave the way for a better approach to both trade enforcement and intellectual property protection.