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## Legally Speaking / This Stick Has No Carrot

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# Legally Speaking

## This Stick Has No Carrot

Column Editor: **Glen M. Secor** (YBP, Inc.)

"Super 301." "Special 301." The latest jeans from Levis? "Button-fly 301s?"

No, Super 301 and Special 301 relate to Section 301 of the Trade Act of 1974 (19 U.S.C. 2411), a primary retaliatory provision of U.S. trade policy. Section 301, particularly through the provisions of Special 301, has been a key weapon in U.S. efforts to gain adequate worldwide intellectual property protection, and is thus of particular relevance to the publishing industry. Before examining the intellectual property aspects of Special 301, though, let us consider Section 301 generally.

The United States has long employed a "carrot and stick" approach to trade matters, both within the context of GATT and in bilateral negotiations. When it comes to Section 301, though, our approach could be characterized not as "walk softly and carry a big stick," but rather "kick the door down and aim a shotgun." Section 301, you see, bypasses GATT (now WTO) and other international trade dispute settlement mechanisms, opting instead for unilateral determinations and retaliation by the U.S. It is one of the most controversial of all international trade laws, despised by our trading partners for its unilateral nature and adored by U.S. trade hawks for the same reason.

I will not go into the complete genesis of Section 301 as we know it today, but it is interesting to note that it began in 1962 as a law allowing the President to take discretionary trade retaliatory measures. Over the years, Congress has shifted the authority for retaliation from the President to the U.S. Trade Representative (USTR) and has made retaliation in some instances mandatory rather than discretionary. The essence of Section 301 is that it allows the USTR to determine that various practices of our trading partners are unfair and to punish those countries for these practices. Again, this happens outside the normal international trade dispute processes.

If Section 301 is the equivalent of a shotgun held to the head of our trading

partners, then Super 301, as enacted in the Omnibus Trade and Competitiveness Act of 1988, was a handheld grenade launcher. It required the USTR, for the years 1989 and 1990 (coinciding with the commencement of the Uruguay Round of GATT talks), to initiate Section 301 proceedings against "priority countries" found guilty of "priority practices." These priority practices include a variety of enumerated trade barriers, export subsidies, and discriminatory practices.

Special 301, arising out of the same Omnibus Trade and Competitiveness Act of 1988, relates specifically to intellectual property protection and takes a somewhat softer approach than that of Super 301. Under Special 301, instead of identifying priority countries and priority practices, thereby triggering mandatory Section 301 proceedings, the USTR from time to time establishes a "watch list" and "priority watch list." The watch lists, as the name would indicate, alert a trading partner to our dissatisfaction with their intellectual property protections. So long as that country is making substantial progress or has entered good faith negotiations regarding their intellectual property laws, Section 301 proceedings (i.e. retaliation) are not pursued. Obviously then, the watch lists serve as a shot across the bow of an offending country, letting it know that sanctions will be imposed if improvement is not forthcoming.

This approach seems to have been effective in securing greater protection for U.S. intellectual property in many countries since 1989. Countries which have increased intellectual property protection in response to making one of the watch lists include Brazil, India, Korea, Mexico, China, Saudi Arabia, Taiwan, Thailand, Chile, Mongolia, Japan, Venezuela, Bulgaria, Egypt, Greece, Indonesia, Germany, (the former) Yugoslavia, Poland, (the former), Czechoslovakia, Malaysia, and Russia.

On June 30 of this year, USTR Mickey Kantor designated the Peoples' Repub-



lic of China as a "priority foreign country" (not a watch list country), threatening 100% tariffs on Chinese exports to the U.S. if China did not begin enforcing its copyright laws before the end of 1994. The threat succeeded brilliantly, as the Chinese government needed just five days, to July 5, to approve criminal penalties for copyright piracy. Please see the July-August and September-October 1994 issues of the **AAP's Inside Export** for more information on this development, including an amusing story of how U.S. trade negotiators were able to procure pirated copies of U.S. software products on Chinese streets, complete with Chinese government stamps, even as Chinese negotiators were insisting that China was adequately enforcing its copyright laws!

Intellectual property protection has clearly become a major priority of U.S. trade policy. If Special 301 continues to be effective in gaining additional international copyright protection for U.S. products, perhaps Levis would be well-advised to market "button-fly 301s" to the U.S. publishing and software industries. ☛