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In trade battle with U.S., Antigua may be the 'Mouse That Roared'

Peter Sellers was an immensely talented British actor, known for his roles in "Dr. Strangelove," "Lolita," "Being There" and his most famous role as Inspector Clouseau in "The Pink Panther" movies. He was at his peak in the 1960s and 1970s.

One of Sellers' earlier roles was in the 1959 movie "The Mouse That Roared," based on the novel by Leonard Wibberley. It is a satirical story of a tiny, fictional country known as the Duchy of Grand Fenwick. Though the story is set in the Cold War era of the 1950s, time has passed by the remote alpine duchy, which has retained its preindustrial economy and culture.

Its economy is primarily based on its local wine, Pinot Grand Fenwick. When an American winery makes a knockoff version called "Pinot Grand Enwick" — a blatant trademark violation — it results in Grand Fenwick falling off a fiscal cliff, its economy devastated by the unfair trade practice.

Grand Fenwick decides the best way to rectify its economic difficulties is to declare war on the U.S. The strategy is that Grand Fenwick will promptly lose the war and receive the type of foreign aid that Germany received from the U.S. after World War II. Led by Sellers as Field Marshal Tully Bascomb, Grand Fenwick invades the U.S., outfitted in chain mail and armed with longbows and arrows.

The warriors land in Manhattan to find it deserted (due to a citywide disaster drill to prepare for nuclear war). As they wander the streets to find someone to surrender to, they stumble into a secret government lab and unintentionally capture the world's most powerful weapon, the Q-bomb, capable of destroying the world. Once Grand Fenwick is in possession of the Q-bomb, the U.S. is at its mercy, and, needless to say, everything changes.

I mention this whimsical story of "The Mouse That Roared"

because a similar story is currently being played out on the world stage of international copyright law (relax — no weapons are involved).

It involves a trade battle between the tiny Caribbean island of Antigua and the United States. Antigua, sometimes called "the land of 365 beaches," has a population of 82,000. For purposes of comparison, the Chicago suburb of Cicero has roughly the same population (but no beaches). In the past, Antigua's economy has been dependent not only on tourism but also on Internet gambling enterprises that use the island as an offshore haven.

In the late 1990s, the U.S. started cracking down on Internet gambling. It invoked various laws to prevent offshore gambling providers from accessing the U.S. market. Antigua claims it lost a \$3.4 billion industry. It also says that the prohibition of online gambling violated U.S. obligations under World Trade Organization agreements.

The WTO supervises international trade among its 158 member states, including the U.S. and Antigua. One of the many functions of the WTO is to provide a process for resolving disputes among its members. WTO member countries agree that if they believe another member is violating trade rules, they will use the WTO system for resolving the matter. One of the WTO agreements, called the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, deals with intellectual property aspects of international trade.

A decade ago, Antigua filed a complaint against the U.S., claiming that U.S. prohibitions on Internet gambling violated the WTO agreement on trade in services. This led to years of proceedings under the WTO dispute resolution process. The U.S. argued, among other things, that its ban was permitted under an exemption for "measures

INSIDE IP LAW



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necessary to protect public morals."

Given that the U.S. allows gambling in places like Las Vegas, Atlantic City, N.J., and at racetracks and riverboats around the country, its "public morals" argument apparently lacked persuasive power and the WTO rejected the argument. In 2007, it found that the U.S. had violated the trade-in-services agreement by interfering with cross-border trade in online gambling services. It ruled that Antigua was injured to the amount of \$21 million annually. The parties have been trying to settle the dispute, but to no avail.

The intriguing recent development in this case is that last month the WTO granted Antigua "authorization to retaliate." This ruling alone would have been cold comfort for Antigua because it would have allowed retaliation only in the same sector, "trade in services." Since Antigua does not import many services from the U.S., it would have no real leverage to retaliate.

Recognizing this, the WTO went a step further and authorized Antigua to "cross-retaliate" — that is, retaliate in a different trade sector, namely, the intellectual property sector rather than

the services sector. The ruling means that Antigua can suspend its intellectual property obligations to the U.S. under the TRIPS agreement up to a level of \$21 million annually.

Like Grand Fenwick, Antigua now has control over a very large bomb. It is no longer obligated to enforce the copyrights of U.S. companies. Antigua could allow low-cost downloading of movies, music or books with impunity in order to recapture its \$21 million annually. One of the goals of the WTO is to level the playing field between large and small nations and it seems to be following that course here.

It is unclear exactly how Antigua will proceed. Harold Lovell, the country's minister of finance, stated that its economy has been "devastated" by the U.S. campaign against online gambling. Antigua has indicated that it hopes to reach a settlement with the U.S., but if no accord is reached it could "move forward with the implementation of the sanctions" authorized by the WTO.

The U.S. responded with much bluster in a statement by Deputy Assistant U.S. Trade Representative Nkenge Harmon that it "will not tolerate theft of intellectual property and will take whatever steps are most efficient and effective to prevent this from happening."

But is it "theft" if the WTO authorized the conduct?

Antigua is in a remarkable position. No country has ever suspended its obligations to enforce intellectual property rights under the WTO agreements before. Antigua is sitting on the "Q-bomb" of intellectual property.

Like Grand Fenwick, it started out simply looking for some economic aid for its devastated industry. As a result of last month's ruling by the WTO, it is now holding a potentially powerful weapon. Stay tuned to see if Antigua pulls the trigger and, if so, whether that "Q-bomb" is a dud.