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From Moral Rights to Market Rules: How TRIPS Transformed Copyright into a Tradable Commodity

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Abstract. Copyright entering into the world trading system via the Agreement on Trade Related Aspects of IP (TRIPS) represents a big shift in how creative things are governed between countries. The author of this paper looks at how copyright went from being a rights thing that WIPO took care of to a way to enforce trades in WTO. By studying doctrinal TRIPS provisions and looking at laws put into place in different places, this paper looks at 3 key issues about why copyright rules went from WIPO to the WTO, what minimum levels of copyright protection TRIPS demands, and how the Agreement's need for enforcement made copyright more like something that could be traded using sanctions and solving arguments. It is found that TRIPS greatly changed copyright's character: it placed the interests of rightsholders for profit above everyone else's access to knowledge, and limited what policies WTO members could follow, especially those like developing countries. People conclude that to make sense of contemporary Digital Enforcement Debates, it is necessary to understand Access To Knowledge debate, as well as what should be the correct balance between Private Rights & Public Goods in Copyright – TRIPS.

Keywords: TRIPS Agreement, copyright, intellectual property.

1. Introduction

Until fairly recently, most of the laws on copyrights were created to treat writers' rights like cultural or moral claims instead of something to sell for money. The Berne Convention for the protection of literary and artistic works (first adopted in 1886) is run by the WIPO. It established principles of national treatment and minimum protections without specifying much on implementation. Nevertheless, it has been transformed dramatically by the conclusion of the Uruguay round of multilateral trade negotiations and the creation of the WTO in 1994: The Agreement on TRIPS put copyright well inside the multilateral trading system, changing it in a big way.

TRIPS is said by one commentator to have been a paradigm change in the international regime for intellectual property [1,2]. It was the first time copyright duties would become enforceable through the WTO's binding dispute settlement method with possible trade sanctions for members who did not comply.

The present paper studies transformations of copyright due to the TRIPS agreement with three connected questions: The first is why copyright norms became part of the WTO framework as opposed to continuing in the WIPO system. Secondly people look at the actual minimum standards

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that TRIPS requires from the members of the WOT. Third, on how the third part makes it so that copyright became a 'trading commodity' and brings in new ways of protecting commercial interests abroad.

The analysis goes into 6 parts. After the introduction in section 1, Section 2 will trace history from WIPO to WTO, exploring why it was that copyright ended up in the trade arena. The third section looks into the TRIPS' substantive Minimum Standards on how they take and develop upon what was protected under The Berne Convention. Section 4 takes a look at enforcement sections that have some most trade-like chapters of tris. Civil Remedies, Border Measures, Criminal Procedures. The Consequence of Copyrights' Trade-ification for Cross-Border Commerce and National Policy Space, especially in developing countries is section 5. In terms of the debate on how low people should interpret TRIP's lowest standard, this is discussed in section 6 alongside maximalism by rights holder and maintaining policymaker discretion. Section 7 ends with thoughts about how international copyright law will be different in the time of digital trade.

2. From WIPO to WTO: why copyright became a trade issue

2.1. The limitations of the WIPO framework

Deciding on the addition of IP rules into the multilateral trading system wasn't sudden, it was because more developed countries like the US were getting fed up with how things worked under the WIPO-run conventions. The Berne convention although setting up key ideas around international copyright protection had some seen problems with regards to rights holding companies.

First of all, the Berne convention did not have any good way to make sure people follow its rules. Convention did state that it would let the International Court of Justice fix problems, but not many people chose to use this, and it did not help people who broke the rules. Member states could and sometimes didn't have to do what they were obligated to do. Second Berne framework was based on moral persuasion and diplomacy rather than binding decisions so right holders had to rely upon national governments in order to protect themselves. Third, while the basic rules of the convention were pretty full, it had lots of holes in protecting newer kinds of artistic creations like computer programs and sound recordings.

Rome Convention of 1961, which gave protection to performers as well producers of Phonogram and Broadcasting Organizations had even less members with much weaker enforcement provision [3]. By the 1980's industries based in countries which relied on copyrights to protect themselves (publishing, films, music, software) began demanding from their governments more powerful methods of stopping what they called piracy worldwide.

2.2. The strategic shift to trade forums

The inclusion of IP in the GATT Uruguay round negotiations was a conscious, strategic decision on part of the developed countries and their copyright industry. By recasting insufficient copyright protection as something that stood between countries trading with each other, they were able to change how this was viewed from a cultural issue to being about markets and fair competition.

There were many reasons behind it. America became an export of their own kind of copyright-protected work so there were now powerful domestic constituencies that wanted even greater international protection for it. The movie association of America, recording industry association of America, and new - formed software industries associations lobbied strongly for trade-based enforcement machinery. Those industries claimed it would cost them billions of dollars a year

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overseas and be unfair competition if those who do not have enough copyrights were allowed to compete.

The European Communities and Japan, each with their own thriving copyright industries, went along with the US in seeking a trade-oriented resolution. The link of intellectual property to trade gave them some benefits from their perspective: it will be subject to the more powerful dispute resolution mechanism under the GATT; it can engage in cross-sector retaliation, making intellectual property rights related to market access for goods; and it is an obligation that must be met before joining the new WTO, which will have nearly universal acceptance.

2.3. The bargain of the uruguay round

IP has been included into Uruguay round is also part of a bigger bargain between developed and developing countries. Developed countries along with other countries that have been against more intellectual property protection at WIPO meetings agree to allow developing countries into the TRIPS agreement so they can access textiles and products as well as market access for traditional export.

But this deal was very uneven. Developing countries did not fully comprehend the long-term implications of TRIPS and what it would mean for access to knowledge and technologies. They had to adhere to a certain level of protection that is set by and for the industrials – usually it's an expensive price to pay for adaptation, ongoing constraint toward their own Nationalism.

As one commentator has noted, the result was to globalize the standards for intellectual property of the developed countries and impose them on developing countries at very different stages of development than they are without thinking about what will happen when people try to get access to knowledge, transfer technologies, and continue their own innovations [4,5].

3. Minimum standards for copyright under TRIPS

3.1. Incorporation of the berne convention

TRIPS set up some basic rules on copyright safety via 2nd approach. First of all, Article 9.1 states that Members of WTO should observe the provisions of articles 1-21 and its Annex to Berne convention (1971 Paris act). And thus, making those substantive provisions of the Berne Convention binding on all WTO members – irrespective of whether or not such states have themselves acceded to the Berne Convention.

However, the inclusion of Berne has an important exclusion: article 6bis on moral rights, which allows authors to say they are authors and not like when people treat their works in a mean way, is left out from TRIPS. Its exclusion reveals the trade focus of the agreement. Moral right of guarding the non-economic interest for author were not as strong when it came to foreign markets that were exploiting the copies commercially.

Copyright protection is based on the principles embodied in the Berne convention which is part of TRIPS. All members of the WTO must follow the baseline of protection set out by these measures.

3.2. Trips-plus additions to copyright protection

In addition to including the Berne convention, it adds several important requirements which extend copyright more than is needed by the earlier treaty. These Berne+ provisions deal with both gaps that are already there and also new technologies since last time the Berne convention was revised.

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Art. 9.2 affirms the basic principle that copyright protection shall not extend to ideas, procedures, and methods of operation or mathematical concepts as such. Although the idea/expression distinction had already been firmly established by many national legal systems, it is still useful to have this guiding concept included in TRIPS.

Article 10.1 - Computer programs are protected by this regulation as literary works per the berne convention and must include source, object code. This was new back when TRIPS were adopted, as it included software under copyright for all WTO countries, even if they didn't previously have such laws. Inclusion of computer program was the strong lobby by the software industry in developed country and also it is having huge implication on global software industry [6,7].

In Article 10.2 there is protection given to database and other compilations of data or material whether in 'machine readable' form or some other form which are by virtue of the selection, arrangement etc. of their contents constitute intellectual creations. The protection is available only for the compilation as such and does not extend to data / material compiled. This shall not prejudice any existing copyright in the underlying material.

Art. 11 creates a new rental right which will apply at least to computer programmers and possibly also cinematographic works. It allows the author to say yes or no to commercial rentals of their work by other people. Rental Right: Concern about unauthorized rental harming the market for legitimate copies is most acute in software and film.

3.3. Term of protection and limitations

Article 12 of TRIPS deals with works which term is not based on the lifetime of a natural person, complementing rules for terms of protection as established by the Berne Convention. For these works, their term of protection has to be a minimum of fifty years from the conclusion of the calendar year when they're allowed to publish them or fifty years after the end of that same calendar year in case they don't get published within this period.

Art.13 stipulates that there must be limitations or exclusion on this exclusive right only limited to that special case, if it does disturb normal works' exploitation as well as the legitimate benefit of authors. This clause refers horizontally towards all the exceptions laid down in Berne convention. Such a provision cannot affect the legal rights of an author.

3.4. The architecture of enforcement

Maybe the most different compared with earlier international copyright conventions was TRIPS's overall treatment of enforcement. The Part III of the Agreement contains 21 articles which specify in detail the procedures and remedies for enforcing intellectual property right that should be offered by members of WOT. These provisions change copyright from a thing one has to something that can be enforced via the power of the state.

Enforcement obligations were included due to negotiations amongst developed nations, as they wished for intellectual property to be protected on the ground, and not just written in their national laws. Earlier customs conventions have generally left enforcement up to each country on its own, so even those countries with strong laws still could not adequately remedy infringements.

The Article 41 provides general duties for enforcement, namely that such procedures should be 'fair and just', should not be unnecessarily complex or expensive, nor cause unreasonable delay without good reason. Merit decisions must be written and reasoned, decided solely upon matters which the parties have had a reasonable opportunity to consider, open to judicial scrutiny.

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3.5. Civil and administrative remedies

Articles 42–49 establish detailed requirements of civil and administrative procedures and remedy. The members should use civil judicial procedures for any kind of intellectual property which is protected by the Agreement. The defendants have the right of a written notice and being able to get their own lawyer.

Under article 44 judicial authority should be able to order a party not to do an infringement and that they also have the right to prevent infringing goods from reaching commercial channels. Article 45 is about damages, which means it says courts should be able to make people who break rules pay others money if that breaks something they care about. The members can also authorize the recovery of the infringers profit and any pre-established damages, even though the person committing the infringement did not do so on purpose.

Article 46 Other Remedies - Judicial Authorities shall have power to order the infringing goods which are not disposed through other channels of commerce or destroy them with no compensation at all. Infringing goods are created with many materials and tools, which can also be disposed of by other than channel of commerce. The aim being, to deter the same thing from happening again.

3.6. Border measures and criminal procedures

In Articles 51 – 60, it establishes special requirements regarding border measures and states that members should have such procedures in place so that a right holder can apply for the suspension of release from free circulation if they have good reason to believe that importation of counterfeits will occur. The provision thus calls on customs authorities to act upon copyrights at the border and regard them as forbidden imports.

Article 61 - Member members shall take measures to establish the crime and penalties of intentionally infringing upon a trademark or producing pirated copies commercially. In connection with the copyright: They must contain either prison time (and possibly also money fines) that they would be seen as deterrents, just like the punishment for equally bad sins. In an appropriate case, remedy is also to seize, forfeit and destroy infringing goods and material.

There is no definition of commercial scale in the Agreement which has created room for later agreements, like the ACTA, to attempt to limit it. Criminally enforcing copyright is criticized for being very imbalanced and for setting up the right place between civil laws and crime.

4. Commerce and policy space

4.1. Transformation of copyright's character

By putting copyright within the TRIPS agreement, it has changed what this is a legal right for. Under the auspices of the WIPO framework, it is seen as right of an author which is based on natural law theory or utilitarian justifications but limited in the public interest for access to knowledge. Copyright became a tradeable item under TRIPS; it could be enforced via trade sanctions and was subject to market access.

It can be seen from the very form of the Agreement. Preamble states its goal to lower the impairments and barriers towards international trade and make sure that what countries adopt along with processes regarding Intellectual property... does not hinder regular transactions between people for profit. The objectives as per article 7 is adding some contribution related to inventing creating new inventions and how these will spread around or dispersed; there was an attempt by this accord

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at attempting a balance among rights and duties but it has provisions under it which when enforced via WTO's disputes mechanism provide much push towards prioritising interests of right holders above all others.

4.2. Impact on cross-border commerce

The trade-ification of copyright has had huge impacts on cross-border trade in copyrighted stuff. Right holders can stop stuff from reaching store shelves at customs, which means a lot less of law enforce is being done by the country itself. In many countries' land Customs officers also become de facto copyright enforcers and impound shipments at complain of copyright holders without courts.

The Dispute Settlement Machinery of the WTO provides another place to enforce Copyright. This will be the first big dispute concerning whether or not something was copied that has warranted multi-lateral punishment. When one member is deemed to have violated his TRIPS duties he will get suspended from any sector within the WTO arrangements including merchandise and services totally separate from IP. And it gives the TRIPS obligations some coercion that people haven't seen before with intellectual property.

4.3. Constriction of policy space

Probably the largest effect that TRIPS has had is narrowing the amount of room left for WTO members, developing ones especially, when trying to design a copyright system appropriate to their level of development or domestic situation. TRIPS with the minimum standard provision gives little leeway to states on what they may need in their safeguard list; with fear of dispute, none has tested limitations and exceptions.

In the Doha Declaration on the TRIPS Agreement and Public Health (2001), an attempt was made to reclaim a bit of policy space by declaring that the TRIPS agreement does not and must not stop countries taking actions to protect public health. The Declaration stressed that The TRIPS agreement should be interpreted and implemented in a way as to support the rights of WTO member countries in order to protect public health and especially to promote access to drugs for everyone.

But it was mainly about protecting patents on pharmaceuticals rather than copyright. And there's still not much room for copyright in the policy space. Article 13's triple-step test has an exception, but when read via WOT DW there is some question as to what extent leeway will be offered [8].

5. The ongoing controversy: interpreting minimum standards

5.1. The spectrum of interpretive approaches

TRIPS Agreements being called Minimum Standards has a lot of controversy behind it about how to interpret those standards correctly. On one end is a rights-holder advocate, who claims that TRIPS sets floors and countries can set higher, but they cannot be interpreted to lower the level of protection. On the contrary, people from underdeveloped countries and public interest groups believe that policy space has to remain so as not to endanger the legitimacy of what public-interests' groups can achieve with it.

WTO dispute settlement practice is basically in a cautious and step-by-step manner in terms of interpreting the Agreement. The Appellate Body pointed out that its interpretation should be based on what the terms of the agreement say, not on what any member or party expected. That textualism keeps some flexibility here but has also kept back interpretive directions which could explain what is permitted and allowed in terms of limitation or exception. Because those who decide these kinds

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of things narrow settlement is still lots of problems unsettled, for making copy right system people public interest goals isn't very clear whether they plan can meet with WTO challenges [9,10].

5.2. The Canada-pharmaceutical patents case

In Canada's case of Patent protection of Pharmaceutical Products, people have some insight about how such limitations and exceptions provisions similar to Article 13 are understood. Though this was a case about patent rights, not copyright, how they talked about the 3-step test in article 30 still matters for thinking about articles 13 because the sentences look kind of alike.

The case challenged both provisions of the Canadian patent law on stockpiling by manufacturers who could make patented products six months prior to patent expiration and also regulatory review, which allows using the patented invention in order to get regulatory approval of the generic drug. European Communities asserted that both were in violation of Article 30, which allows limited exception for patent right if certain condition is met i.e., it should be limited, shouldn't lead to unreasonable conflict with normal exploitation or shouldn't result into unreasonable prejudice to legitimate interest of owner having regard to interests of third party.

And in terms of Step 2: That no exception unreasonably conflict with normal exploitation, the panel said that normal exploitation means how right holders generally try to get money off their rights, and this can include ways to make money now as well as things they might want to use later. Because patent holders generally don't use patents at the time of regulation, it has held up. Stockpiling exception failed due to it deprived patent owners from the post expiration market which is normal exploitation. Copyright: It also means that exceptions cannot be economically competitive with the normal ways that rights holders get value out of their work and can't interfere with any future market. And this causes huge doubt for libraries and educational institutes hoping to use exceptions with digital versions because those are often the exact situations when rights owners want to get money by using licenses.

With regard to step three that exceptions should be such as not unduly prejudice the legitimate interests of the right holder, it was said by the panel that 'legitimate interest' meant what is supported either by policy or social norms, thus allowing for user and public interests. But if there is no reason to cause harm then prejudice is unreasonable. Applied to copyright means looking at how bad the harm was, what kind it is and if there were any other choices available Given the panel's focus on the degree of prejudice and its limited view of the regulatory review exception, it seems likely that there is a presumption in favor of rightsholders that may be difficult to disprove with respect to copyrights.

5.3. The push for trips-plus standards

TRIPs were adopted and the push for stronger copyright protection didn't end there. The Developed Countries also wish to get TRIPS plus in their BILAT/REGIONAL FTAs, asking for tougher rules of protection than TRIPS permits and commitment on enforcement, stricter exception etc. ACTA was an effort by some members to establish even more stringent enforcement standards outside of the WTO [11].

TRIPs-plus agreements have also been a problem, mainly because of what they mean for access to knowledge and the public domain. That ACTA failed to become law when it was first proposed indicates that there are some limitations on the TRIPS+ agenda, but bilateral and other regional agreements still promote stronger norms. USMCA and the CPTPP also include similar TRIPs articles on copyrights but there are some provisions that go further than just copyrights such as

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longer terms with stricter enforcement requirements. Such deals show that work on getting better protection isn't over just because no multilateral deal can happen [12].

6. Conclusion

Including copyright into the multilateral trading system through TRIPs arrangement was a substantial alteration in the way creative work would be governed, as opposed to previous rights regime under WIPO, now it has been shifted to being regulated by trade at WTO. There are several factors for this. Shift in strategy from WIPO to WTO which was spurred by frustration over the lack of effort towards enforcing the under Berne standard, setting high standards by combining and enhancing what is covered by Berne along with strong exclusions against Moral Right; making it appear civil remedy, border and procedure where copyright becomes more commodified as they give people something and people do something when there's a dispute via the WTO.

The on-going TRIPS row, and the subsequent calls for TRIPS plus via Bilateral and Regional Agreements, indicates that there is still contest around what copyright should look like and be. How close permissible margins or exceptions can go is given only some indication from the practice of resolution within the WTO, leaving members that might want to invoke them uncertain, it appears to secure their commercial interests via trade enforcement but there's still enough latitude available for purposes like getting access to knowledges and taking part in cultural making new things. Therefore, copyright has to be read beneath the transformation of TRIPS and current arguments on digital enforcement and the right equilibrium involving private rights plus general products in this international IP regime.

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