

# Association Internationale de Droit Económico (A.I.D.E.)

## **The TRIPS Agreement : European and Latin American analysis of the last ten years**

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# Tripping Over Trips



Author Rights  
&  
Access to  
Information

# This conference's paper

- **TRIPs, First decade: Author rights and access to information – a Latin American perspective**
- <http://denisbarbosa.addr.com/buenos3.pdf>

# What TRIPs has done

- TRIPs rose to a certain degree the protection levels, especially in regard to computer programs and database and, to a lesser extent, also regarding neighboring rights, particularly in relation to phonograms.
- However, the Author Rights chapter was not so innovative or encompassing as the patent or the enforcement sections.
- In fact, the most significant changes resulted from the post-TRIPs, WIPO- hosted agreements of 1996

**TRIPs is a balanced proposition**

# TRIPs and Balancing of Interests

- **"This is not to say the agreement is without its critics. All parties 'won' and 'lost' important issues. Some industries in some countries are deeply troubled by the compromise package put forward. Nonetheless, the opportunity to obtain multilateral rules and enforcement mechanisms across so many disparate issues will likely be viewed as one of the major accomplishments in any concluded Uruguay Round" [1].**

[1] Dunkel, In "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", GATT DOC.MTN.TNC/W/FA (20 December 1991).

# TRIPs and Balancing of Interests

- "The TRIPS Agreement, therefore, does not consecrate an ' absolutist ' paradigm of Intellectual Property, in which only interests the protection of the rights of the bearer. Much to the contrary, it is based on the balance between the promotion of the innovation and the diffusion and technology transfer" [1]

[1] Carlos Correa in Acuerdo TRIPS - Régimen internacional de la propiedad intelectual. Buenos Aires, Ediciones Ciudad Argentina, 1998, p. 28-29.

# TRIPs and Balancing of Interests

- The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) attempts to strike a balance between the long term social objective of providing incentives for future inventions and creation, and the short term objective of allowing people to use existing inventions and creations [1]



[1] TRIPS and pharmaceutical patents, Fact Sheet, April 2001

# The Diversity Problem

# TRIPs and the Diversity Problem

- In this author's view of the TRIPs future, contemporaneous to the first negotiation spree[1], the aim of all exercise was to eliminate national diversity in the IP field.
- Diversity here is essentially the power to set the pace of IPR impact in each specific economy and culture.



[1] Porque somos Piratas (1988) (Revista Brasileira de Comercio Exterior, Setembro de 1988)

# TRIPs and the Diversity Problem

- The uniformization of IP norms would result in crystallizing and keeping a situation of absolute inequality in the division of the informational wealth of the world.
- The monopoly of the scientific, technological and commercial information, added to the predominance of OECD countries in the vehicles of cultural diffusion, would assure them control on international economic flows and on the capacity of development of each country.
- But the main loss would be the notion of national diversity.

# TRIPs and the Diversity Problem

- In 1988, my point was that all nations had a fundamental right to a certain time of free access to knowledge.
- “Thus, the problem for the Brazilian technological development is not the fame of pirates that we had perhaps earned in the last times. The risk is that we were not allowed to be pirates the same time Sir Francis Drake and its followers, American, Japanese or Swiss enjoyed. The question is of time”.

# TRIPs and the Diversity Problem

- Copyright piracy is not primarily a cultural problem or a development issue. Nor is it a necessary byproduct of authoritarian rule. Rather, it is a battle between the stakeholders and nonstakeholders over the change and retention of the status quo. It is as relevant today as it was two centuries ago, when the United States was one of the biggest pirating nations in the world. [1]



[1] Peter K. Yu, Four Common Misconceptions About Copyright Piracy, 26 Loyola LA International & Comparative Law Review 127 (2003)

# TRIPs and the Diversity Problem

- The right to a self-timed growth of IP restraints is epitomized in the Italian Constitutional Court decision that, in 1978.
- In 1957 the Court had decided that the non patenting of remedies, as provided by the Italian Law, was constitutional
- But in 1978, the Court felt that this provision was rendered unconstitutional – since 1957 - by the historical changes that eventually included the country in the developed world

# TRIPs and the Diversity Problem

In truth, in the last years **our conscience of supervening lack of every rational ground to this exception** [to patentability] has grown step by step with the assertion of the value of the scientific-technical research and the duty of the Republic to promote it;

with the more and more elevated capacity of the Italian pharmaceutical industry to organize the research, also in connection with the conditions of competitiveness with the other countries;

and finally with the more intense relations with the foreign markets, particularly with the states pertaining to the organization of the Council of Europe and to that one of the European Economic Community (as it is attested from the conventions stipulated from the Italian government, all oriented to restrain or to eliminate radically the possibility to prohibit the patenting of singular fields). [Corte Constitucional de Itália, 1978, Sentenza 20/1978]

# TRIPs and the Diversity Problem

- Diversity was the natural environment of the Paris Convention: except for very limited aspects, the 1883 system left member countries to fit Intellectual Property into their peculiar needs.
- Harmonization exercises and minimum standard systems, like TRIPs, restrain diversity, and it is notable that those trends only appear in the Historical context in which the central issues were already harmonized among the main players – when diversity stays as more a right than a fact.

# TRIPs and the Diversity Problem

- TRIPs occurred at a time where all core OECD countries had effected authonomously the same Constitutional equation. The same was not necessarily true for all countries.
- It is not suprising therefore that diversity continued to be a constant argument of developing countries to resist post-TRIPs encroachment.
- Also it is not surprising that unilaterism justified itself on the diversity discourse practised by such countries.

# The unfulfilled bargain of Multilateralism

# The unfulfilled bargain of Multilateralism

- Most impressive promise of the multilateral exercise was that the era of unilateral sanctions was over.
- **“Understanding leaves no doubt that it is intended to strengthen the multilateral trading system. In short, the Understanding leaves no doubt that freelance, unilateral, or even unauthorized bilateral dispute resolution is not acceptable[1].**

■ [1] Michael Young, Dispute Resolution in the Uruguayan Round – Lawyers triumph over diplomats, 29 Int'l. Lawyer. 389 (1995).

# The unfulfilled bargain of Multilateralism

- The process of integrating intellectual property law into international economic law necessarily imposes short and medium-term social costs on the developing countries.
- These costs are, to varying degrees, offset by the prospects of enhanced market access, of technical cooperation to implement the TRIPS Agreement, **and of relief from unilateral trade sanctions in future discussions of intellectual property protection. (...)**
- J.H. Reichman in Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement, 29 Int'l. Lawyer. 345 (1995)

# The unfulfilled bargain of Multilateralism

- **Therefore, adhering to the TRIPs agreement meant that developing countries would have no more U.S. Section 301 sanctions to be dealt with[1].**
- **To the developing countries, which had been granted a the 5-year suspended application of IP requirements and received a bonus 5-year moratorium against non-violation complaints, the assurance that international pressure would be mediated through WTO composed a reasonable bargain to composite the short term losses resulting from higher level IP laws.**
- **[1] Section 337 of the Trade Act had been challenged in a GATT National Treatment panel in 1989 and found infringing of the 1947 rules.**

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# The unfulfilled bargain of Multilateralism

- **A very important aspect of this post-TRIPs era is the denial of the multilateral promise.**
- **We were assured that unilateralism was over.**
- **All of us were members of the club, after paying the steep entrance fee.**
- **It was not so. Members or non-members, the bullying continued and grew.**

# The unfulfilled bargain of Multilateralism

- **In response to the increased demands for diversification from less developed countries,** the European Union and the United States have begun to use bilateral and plurilateral treaties to enhance their bargaining positions and avoid stalemates in the international intellectual property arena.
- The need for such a change of strategy became apparent when the WTO Ministerial Conference ended prematurely in Cancun in September 2003.  
[1]

■ [1] Peter K. Yu, *TRIPs and Its Discontents*, 9 Marq. Intell. Prop. L. Rev .

# The unfulfilled bargain of Multilateralism

- Since the Cancun Ministerial, the United States has initiated a divide-and-conquer policy that seeks to reward those who are willing to work with the country while undermining the efforts by Brazil, India, and the Group of 21 to establish a united negotiating front for less developed countries.
- **As United States Trade Representative Robert Zoellick wrote in the Financial Times, the United States will separate the can-do countries from the won't-do, and it "will move towards free trade with [only] can-do countries."**
- By October 2004, the United States has concluded free trade agreements with Jordan, Chile, Singapore, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and Australia.
- Peter K. Yu, TRIPs and Its Discontents, 9 Marq. Intell. Prop. L. Rev

# Information Society and TRIPs

# Information Society and TRIPs

- Fact is, however, that the world contemporaneous to the Uruguay Round discussions has severally changed.
- It was changing fast during the negotiations, and TRIPs when came to force was a gift from a former Christmas.
- And such changes were particularly felt within the scope of our workshop.

# The WIPO Treaties and the Information Era

- Just after TRIPs entry into force, two other international IP instruments were negotiated not under the “trade” umbrella of WTO, but at the conventional venue of WIPO.
- By their possible intent and opportunity, they are called “internet treaties”.
- TRIPs treatment of copyright issues, especially for audiovisual and sound recordings, and databases, had suffered sudden obsolescence when the commercial Internet came by the time the Dunkel proposals were being drafted.

# The WIPO Treaties and the Information Era

- What WTC and WTTC Treaties provide
- An exclusive communication right whereby titleholders may avail to the public through on demand services (Internet, etc)
- Member countries are compelled to prohibit the **circumvention of technological measures** used by titleholders to protect their works.
- Member countries are compelled to incorporate in their domestic laws the prohibition that **electronic rights management information** was removed.

# The WIPO Treaties and the Information Era

- What WTC and WTTC Treaties do not provide
- The a new balancing – an equation where fair usage and due access to information would not be prevented by technical means intended to protect investment in information.

# The WIPO Treaties and the Information Era

- **The need to a new balancing**
- Some authors feel that IP had become entirely futile and should be dispensed with;
- Many other writers emphasize the risk that the information counterrevolution could privatize the knowledge and creation and stifle fundamental rights,
- Others still feel that technology may moderate technology (with concepts like steganography, or watermarking technology, and “fair use minima plus key escrow requirements”

# Information Society and TRIPs

- The hard truth these developments confirm is that, as currently constituted, the world's intellectual property system is simply not equipped to deal with the real problem of twenty-first century technological development (...)
- the long-term benefits of the TRIPs Agreement will fall well below present expectations.[1]



[1] J.H. Reichman, *Univerrsal. .. op.cit.*, at 373.

# Information Society and TRIPs

- Intellectual Property probably caused the Information Society, and is not coping with it.
- The plethora of legal means invented to prevent copy in such Society is only comparable to the profusion of technical means to make for the insufficiency of legal means, and the ingenuity of legal means to assure that the technical means would work as intended.
- In the last years, copyright appeared to be a frenzied dog chasing its own tail.

Side stepping IP as the dance of  
fashion

# The open access choice

- This presentation was prepared in an open access program.
- This would seem to be a quite unrelated fact to the matter of this conference, if this very same software were not the office package the Brazilian Federal Government has chosen as an official supply to its agencies.

# The open access choice

- **“The current government left clearly in some chances that it supports the adoption and the production of free software as a new paradigm that makes possible the growth and strengthening of the industry, generating jobs and income.**
- **President Luís Inácio Lula Da Silva, in 2003, ordered the planning and the implementation of free software, digital inclusion and integration of systems.**
- **Currently, the National Institute of Technology of the Information - ITI co-ordinates the Technical Committee of Implementation of Free Software”.**

# The open access choice

- **The Ministry of Culture shall introduce a new copyright public policy in 2006, as “the present policy based in repressive measures is bound to failure”. Gilberto Gil**



# The open access choice



- **"A world opened up by communications cannot remain closed up in a feudal vision of property," he says. "No country, not the US, not Europe, can stand in the way of it. It's a global trend. It's part of the very process of civilization. It's the semantic abundance of the modern world, of the postmodern world - and there's no use resisting it."**

# The open access choice

- In this context, the ideas of open access to the wealth of information, as expressed in the proposed A2K treaty, is not a marginal or negligible aspect of Intellectual Property Law.
- It is an official aspect of Brazilian IP policy at this moment. It is a clear sign that we need a increased supply of Intellectual Property rights.
- Only that now, they must be *inclusive rights*.