

## COPYRIGHT AND TRADE AGREEMENTS

### What are trade agreements?

Trade agreements, also known as free trade agreements, are contractual agreements between two or more states under which they give each other preferential market access to each other's goods and/or services. Depending on the number of parties involved or the geographical area covered, these can be multi-lateral, regional or bi-lateral agreements. A trade agreement will usually apply to all trade in goods and often extends to areas such as trade in services, recognition of standards, customs cooperation and the protection of intellectual property rights, including copyright. It is the inclusion of copyright in trade agreements that makes them relevant to libraries. Signatories to a trade agreement must usually alter their domestic laws in order to comply with the terms of the agreement.

### Practice

#### Multilateral trade agreements: the WTO and TRIPS

Multilateral trade agreements are administered by the World Trade Organization (WTO), founded in 1995. At the heart of the system, known as the multilateral trading system, are the WTO's agreements signed by the 149 WTO member states and ratified in their national parliaments. These agreements are the legal ground-rules for international commerce.

It may seem surprising that an organisation devoted to lowering trade barriers and encouraging competition would choose to add to its portfolio intellectual property, which creates limited monopolies, but that's what controversially happened with the 1995 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, known as TRIPS. For the first time, intellectual property (IP) rules were brought into the multilateral trading system, linking IP protection and enforcement with other areas of trade such as agriculture and textiles. TRIPS extends to all IP rights e.g. copyright, patents, trademarks, etc. but it does not address the issue of copyright in the digital environment (this is covered by the WIPO Copyright Treaty<sup>i</sup>). TRIPS had several implications:

- it introduced the principle of *minimum* IP standards which means that any IP agreement subsequently negotiated can only create higher standards (known as TRIPS-plus);
- it removed a great deal of national regulatory discretion and introduced for the first time a global enforcement component (non-compliance can result in trade sanctions);
- it provides a mechanism for resolving disputes so that any WTO member may bring their case before a specially-appointed independent expert committee. One interesting case involved the so-called "three step test" used to evaluate the legitimacy of exceptions and limitations to copyright. In 2000, the WTO held the United States to be in contravention of its international obligations in a dispute proceeding initiated by the European Union (EU) on behalf of the Irish performing rights organisation<sup>ii</sup>. Taking an unaccustomed stance on copyright, however, the US has so far failed to amend its law and continues instead to pay a fine<sup>iii</sup>;
- it introduces the ability to "cross retaliate" across trade sectors. In 1999, when a WTO dispute panel found in favour of Ecuador in a dispute with the EU over banana exports, Ecuador requested to suspend implementation of TRIPS, focusing on sensitive sectors for the EU such as copyrights in the music industry and geographical indications for alcoholic beverages<sup>iv</sup>.

## Developing countries and TRIPS

Over three quarters of WTO members are developing or least-developed countries, yet it is estimated that only about fifteen developing countries took an active part in the TRIPS negotiations<sup>v</sup> and only one Least Developed Country (Tanzania)<sup>vi</sup>. Developing countries initially resisted bringing IP within the global trading system of the WTO. In the end, they succeeded in including two important Articles which make it clear that in introducing IP protection, countries should frame the rules "in a manner conducive to social and economic welfare"<sup>vii</sup>. In other words, IP is not an end in itself. The WTO Doha Declaration on TRIPS and Public Health (2001)<sup>viii</sup> draws directly from these two Articles.

Transition periods for implementation were agreed: developing and transition countries were given an extra four years i.e. until 1st January 2000 and Least Developed Countries (currently 32) until 1st January 2006, later extended to 1st July 2013. This recognises that TRIPS reaches deep into the internal legal system of a country and comes with costs, requiring the introduction of minimum standards, border controls, domestic enforcement procedures, and the setting up of the respective authorities.

In 1995, the World Intellectual Property Organization (WIPO) entered into a cooperation agreement with the WTO to provide technical assistance to developing countries on TRIPS implementation. This includes legislative advice, automation of national IP offices and training. In recent years, WIPO's programme has been much criticised by observers for taking a TRIPS-plus approach and for not providing the best advice to developing countries. Reform of the WIPO technical assistance programme is one of the elements of the Development Agenda for WIPO proposed by fourteen developing country member states. (See A Development Agenda for WIPO: International Policy Issues).

## Bilateral trade agreements

One of the reasons why developing countries accepted TRIPS was because they believed that a multi-lateral framework for IP would put an end to bi-lateral pressures such as the U.S. "Special 301" procedure. (This enables US trade representatives to threaten trade sanctions on countries which it deems to provide insufficient protection for US persons who rely on IP rights). However, a recent proliferation of bilateral and regional trade agreements, led in particular by the US and the EU, indicate that we are re-entering a bilateral phase and that many of these agreements adopt the so-called maximalist approach<sup>ix</sup>. This is known as the "double backdoor" policy: as more countries adopt TRIPS-plus (higher) standards, they become the norm and are more likely to be included in any revision of TRIPS<sup>x</sup>.

Two of the world's largest trading blocs have different names for their agreements. The United States agreements are called "free trade agreements" (FTAs) whereas the European Union agreements are usually known as "Economic Partnership Agreements" (EPAs). Both usually amount to the same thing: an extensive chapter on IP and the adoption by the receiving country of the "highest international standards of IP protection" (Tunisia, Jordan, Palestine EPAs) or "...a standard of protection similar to that found in United States law..." (negotiating objective for FTAs).

FTAs can include the following IP provisions:

- extension of the term of protection by an additional 20 years beyond TRIPS;
- U.S.-style obligations against circumventing technological protection measures;
- liability of internet service providers when copyright infringing material is distributed over their networks;
- prohibition of parallel imports of copyrighted works that have been lawfully sold in foreign markets;

- enforcement obligations beyond TRIPS requirements. Critical to developing countries, lack of resources cannot be invoked as a reason for non-compliance with enforcement obligations;
- adherence with the WIPO internet treaties (1996);
- in copyright infringement cases, the burden of proof can be placed on the defending party to show that the activity was non-infringing.

Each of these provisions could have a negative impact on libraries, illustrating the importance of library involvement in any negotiations. Developing countries in particular may have competing financial priorities, such as healthcare and basic education, from which resources should not be diverted. Such concerns have led to public debate, and sometimes protest, in several countries where bi-lateral trade agreements are being negotiated.

### **Policy Issues For Libraries**

Copyright provisions in international trade agreements, translated into national law, can have a great impact on the operation of libraries and the services they provide to their users. By imposing new obligations and strengthening enforcement, bi-lateral agreements can upset the traditional balance of rights and exceptions, so important to libraries, in international agreements and also perhaps in national law. This means that libraries are important stakeholders and must be consulted during any trade negotiations. This is not always easy for a number of reasons.

Unlike other areas of policy making, trade negotiations are often held behind closed doors with little or no public scrutiny. For example, the WTO TRIPS Council, which monitors the operation of TRIPS, holds its meetings in private with no observers from civil society. It can be difficult to find even basic information such as the timeline for bi-lateral trade negotiations or to obtain copies of documents under discussion. Negotiations are conducted by trade officials who may have little or no knowledge of copyright or the implications of their decisions for libraries, education and culture. Negotiators may concede to TRIPS-plus provisions as a trade-off to another sector, such as agriculture.

However, it is incumbent upon librarians and professional library associations to inform themselves of trade agreements being negotiated by their government, to ascertain the effect of any copyright-related provisions on access to knowledge, education and scientific research and to put forward counter-proposals to mitigate any negative effects.

Help is available. There are many sources of information such as [bilaterals.org](http://bilaterals.org) which report on "everything that's not happening at the WTO". Members of the consortium Electronic Information for Libraries ([eIFL.net](http://eIFL.net)) can avail of the IP programme for assistance. The International Federation of Library Associations and Institutions has issued policy statements on the WTO and TRIPS.

Market access sets quotas, which may change from time to time, for the export of goods from one country to another. If a country gives legal protection in return for market access, however, it is usually forever. This is why the library community must have a say.

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[www.bilaterals.org](http://www.bilaterals.org) "Everything that's not happening at the WTO"

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<sup>i</sup><http://www.wipo.int/treaties/en/ip/wct/>

<sup>ii</sup>Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=253867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253867)

<sup>iii</sup><http://www.bmr.org/page/article-3>

<sup>iv</sup>[www-rcf.usc.edu/~enn/text/Ecuador%20revised%2005.doc](http://www-rcf.usc.edu/~enn/text/Ecuador%20revised%2005.doc)

<sup>v</sup>Gervais, D.J. Intellectual Property & Development: towards a strategy, draft of Feb. 1, 2006

<sup>vi</sup>Resource Book on TRIPS and Development p. 715

<sup>vii</sup>TRIPS Article 7 Objectives and Article 8 Principles

<sup>viii</sup> [http://www.wto.org/English/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/English/tratop_e/dda_e/dohaexplained_e.htm)

<sup>ix</sup>Gervais, D.J. Intellectual Property & Development: towards a strategy, draft of Feb. 1, 2006

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