

# **WTO Agreement on Trade- Related Aspects of Intellectual Property Rights TRIPS**

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Dr. Christophe Germann

[www.eui.eu](http://www.eui.eu)

[www.germann-avocats.com](http://www.germann-avocats.com)

# Overview

- What are IPRs? Where are the sources of law?
- What is the TRIPS Agreement? Why are IPR part of WTO law?
- What does TRIPS cover? How does it cover the forms of protections?
- Case study on copyright and trademark protection: US versus China on piracy
- Non-trade concerns: IPR and cultural diversity

# Context, limits and further research

- National, regional and international law – only the “trade related” context
- Only an introduction since intellectual property protection is a huge field of law
- Links for further research:
  - ◆ [www.wto.org](http://www.wto.org)
  - ◆ [www.wipo.org](http://www.wipo.org)
  - ◆ [www.iprcommission.org](http://www.iprcommission.org)
  - ◆ [www.germann-avocats.com](http://www.germann-avocats.com)

# What are IPRs?

- **“Property” over “intangible” values such as knowledge:** “private rights” or “exclusive rights” over “values” (products of human activity) that are “not tangible” – one day “emotional property”?
- **“Non-rival public good”:** A characteristic of knowledge is that one person’s use does not diminish another’s (for example, reading these power point slides).

# Rationale of IPR protection

- “**Market failure**” caused by the difficulty of preventing others from using or copying intangible values and the copy costs more than original (the reproduction costs less than the production of the original):
  - ◆ Incentive to invest into creative activities, research and development, innovation, dissemination
  - ◆ Identifiers as information for the user and as incentive for the producer to invest into quality (or marketing?)
- Preamble, art. 7 and 8 TRIPS on **principles and objectives** that include technology transfer

- IPRs grant more or less extensive monopoly right over the economic exploitation of IP (*erga omnes* right) limited in time → tension with rationale of competition law
- Competition can serve to “fine tune” intellectual property protection: better balance between producers’, competitors and users’ interests
- Issue of balance: competition law is outside the scope of WTO law (see, however, art. 40 TRIPS)

# Where are the sources of law?

- Sub(ex)national: e.g. “encryption” by the ritual of a healer holding traditional knowledge
- National:
  - ◆ [http://www.wipo.int/clea/en/clea\\_tree1.jsp](http://www.wipo.int/clea/en/clea_tree1.jsp)
  - ◆ <http://www.ipi.ch/pool4s/links.shtm>
- Regional:
  - ◆ [http://www.wipo.int/clea/en/clea\\_tree\\_org1.jsp](http://www.wipo.int/clea/en/clea_tree_org1.jsp)
- International:
  - ◆ WIPO treaties: <http://www.wipo.int/treaties/en/>
  - ◆ TRIPS: [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf)

# Further links

- WIPO Intellectual Property Handbook: Policy, Law and Use:

<http://www.wipo.int/about-ip/en/iprm/index.html>

- Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London 2002:

[http://www.iprcommission.org/papers/pdfs/final\\_report/CI-PRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CI-PRfullfinal.pdf)

# What is the TRIPS Agreement?

- WTO agreement that entered into force with the conclusion of the Uruguay Round in 1995
- “Third pillar” of the WTO agreements besides GATT (trade in goods) and GATS (trade in services)
- “Trade-related” Intellectual Property Rights (“consistent interpretation” of private rights)

# Why are IPR part of WTO law?

- Obstacles to international trade:
  1. Tariffs
  2. Non-tariffs: quantitative restrictions (quotas)
  3. Domestic regulations (subsidies and IPRs)
- ◆ Differences of IP protection distort trade
- ◆ Obstacles to trade from private sources (dominant positions)? – No international competition law (“Singapore issue”)

# Integrating IPR into WTO law: What does TRIPS cover?

- **Forms of protections**
- **Minimum standards of IP protection**
  - ◆ Principles of National Treatment and Most Favoured Nation
  - ◆ Substantial rules by “incorporation”
  - ◆ New rules (software / database protection)
  - ◆ Procedural (and institutional) rules (civil, administrative and criminal rules)

- Transition periods for DCs and LDCs (special and differential treatment)
- Review by TRIPS Council
- Dispute settlement mechanism and sanctions – Dispute Settlement Understanding:

[http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf)

# TRIPS and other international agreements

- TRIPS as means for cross-retaliation for violation of GATT and GATS MFN (Ecuador – EC Banana arbitration)
- Trips Plus and MFN:
  - ◆ WIPO Copyright Treaty
  - ◆ WIPO Performances and Phonograms Treaty
  - ◆ Bilateral free trade agreements
- WTO and WIPO agreement of 1995:
  - ◆ [www.wipo.int/clea/docs\\_new/pdf/en/wo/wo030en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/wo/wo030en.pdf)
- TRIPS and IP related non-trade concerns: health (“access to essential drugs”), environment, education, culture

# Overview on institutions and treaties

- Multilateral institutions
- Regional institutions
- Institutions' layers and Functions
- Multilateral treaties

# Multilateral Institutions

## Core IP

- World Intellectual Property Organization (WIPO)
  - ◆ Sole competence
- World Trade Organization (WTO)
  - ◆ TRIPs Agreement one of several trade competences
- International Convention for the Protection of New Varieties of Plants (UPOV)

## Non-Core IP

- Convention on Biological Diversity (CBD)
  - ◆ Access to genetic resources and benefit sharing
  - ◆ transfer of technology
- Food and Agriculture Organization (FAO)
  - ◆ International Treaty on Plant Genetic Resources
- World Health Organization (WHO)
  - ◆ Access to Essential Drugs
  - ◆ Access to Health Care
  - ◆ Traditional Medicine

# Regional Institutions

## Regional Trade and Integration Arrangements

- European Union
- Association of South East Asian Nations (ASEAN)
- Asian and Pacific Economic Community (APEC)
- North American Free Trade Agreement (NAFTA)
- Mercosur

## Regional IP Offices

### European:

- European Patent Organisation (EPO)
- Office for Harmonization of the Internal Market (Trademarks and Industrial Designs) (OHIM)
- European Plant Varieties Office (EPVO)

### African:

- African Regional Industrial Property Office (ARIPO)
- African Intellectual Property Office (OAPI)

# Institutions

## Layers and Functions

	Rules and Norms (legislation)	Grant of Titles (executive)	Dispute Settlement (adjudication)
Multilateral	WIPO WTO CBD FAO WHO	WIPO	WIPO (private party) WTO (State/State)
Regional	Trade and Integration Arrangements: EU NAFTA ASEAN APEC Mercosur	European: EPO OHIM EPVO  African: ARIPO OAPI	
National	Parliament	National IP Office	Courts ADR

# Multilateral Treaties

	WIPO	WTO	Non IP-Specific Treaties
Norms & Standards	Paris Convention Berne Convention Rome Convention PLT TLT WCT WPPT	Trips	CBD International Treaty (FAO)
Protection Systems	PCT Madrid System Hague Agreement		
Administrative Cooperation	IPC Nice Classification Locarno Classification		International Treaty (FAO)

# WCT and WPPT as TRIPS+

- WCT entered into force on 6 March 2002 and WPPT on 22 May 2002
- Copyright and performers' rights in the digital age and the new meaning of the right of reproduction:

In June 1982, a **WIPO/Unesco Committee of Governmental Experts clarified that storage of works in an electronic medium is reproduction.** The Diplomatic Conference adopted an agreed statement which reads as follows: "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

- Circumvention:

## Article 11

### Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

- Quid limitations (e.g. fair use)?

## ■ Discussion

- ◆ What are the interests at stake?
- ◆ Who are the players at stake?
- ◆ In which fora are the players active?
- ◆ How much protection is appropriate? In which countries?

# How IP protection works

- Generation: ex lege or via registration
- What can be protected? (e.g. no trademark protection for signs for generic signs)
- Duration of protection
- Law and contract:
  - ◆ Law defines exclusive rights
  - ◆ Exploitation via transfer of rights/sale (assignment)
  - ◆ Exploitation via authorization to use/rental (licence)
- Limitation (“fair use”)

# Forms of protection

- Copyright
- Patent
- Trademarks

# Copyright

- Protection ex lege
- Copyright protects the creative expression against unauthorized copying or reproduction
- Subject matter: „Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression“ (Art. 2.1 Berne Convention)
- Moral Rights: Art. 6bis Related/Neighboring Rights: Rome Convention
- Fair use (dissemination rationale)
- Duration

# Angelica Huston v. Turner Entertainment

- French Cour de Cassation [1992] ECC 334  
28 May 1991
  - ◆ A French TV Station wants to show a new, coloured version of a black and white movie. A. Huston, a heir to John Huston, asks the court to prohibit the broadcasting, relying on the right to protect the integrity of John Huston's work.
  - ◆ The court rules that the author of a work can protect the integrity of its work, even if this is contrary to the applicable contract law or to the law of the country in which the work is published. The application of droit moral rules in French law is mandatory.
- Why are moral rights excluded from TRIPS?

# Patent Protection

- Protection upon application: protection against disclosure (first to come first served)
- Patent registration criteria :
  - ◆ novel;
  - ◆ involving an inventive step;
  - ◆ useful / capable of industrial application;
  - ◆ enabling disclosure
- “Invention”: “*include anything under the sun that is made by man*” - quid livings things and plants?
- Limitations
- Duration

# Compulsory license

- E.g. Anthrax case
- TRIPS 31:

## *Other Use Without Authorization of the Right Holder*

Where the law of a Member allows for other use<sup>7</sup> of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (...)

# Trademark protection

- Article 15 TRIPS: “Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark”
- First to come first served: Identity / similarity of signs (verbal, visual, sound, smell) related to a product or services (categories based on Nice Agreement)
- Functions:
  - ◆ Identifier - to distinguish products and services (information for consumer)
  - ◆ Reference to a particular quality for which the trademark stands for – protection for investment in achieved goodwill

# Case study on the protection of copyright

## ■ WTO Dispute Settlement System:

- ◆ [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/utw\\_chap3\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf)

## ■ China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products - Request for Consultations by the United States, 16 April 2007 (DS362 and DS363):

- ◆ [www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm#results](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results)

# Non-trade concerns: the case of cultural diversity

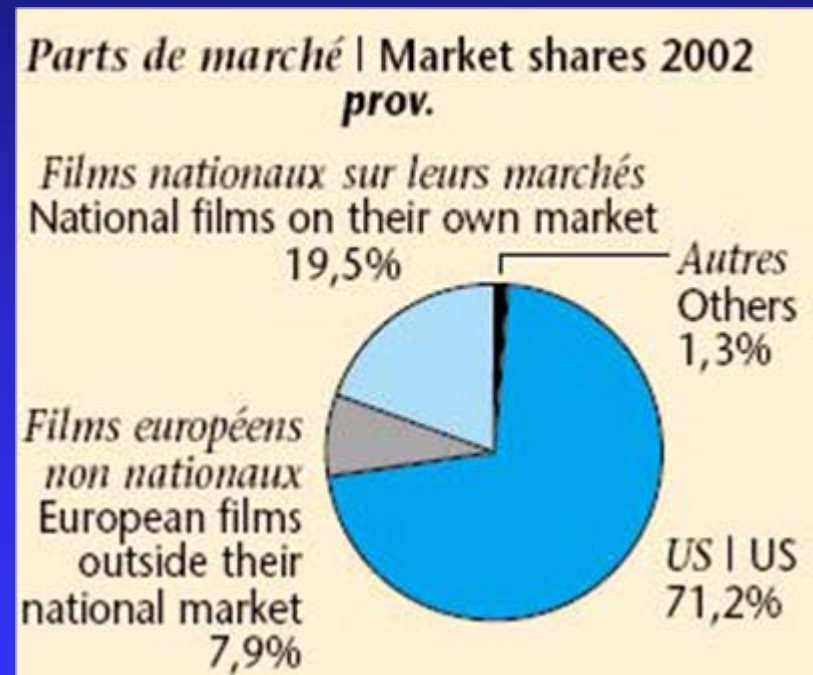
- UNESCO Convention on cultural diversity of 2005 that entered into force on 18 March 2007:
  - ◆ [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=2450&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=2450&URL_DO=DO_TOPIC&URL_SECTION=201.html)
- Christophe Germann, 2006 : Towards a Cultural Contract to counter trade related cultural discrimination, dans: Nina Obuljen / Joost Smiers (editors), UNESCO Convention on the protection and promotion of the diversity of cultural expressions - Making it work, Zagreb 2006:

# European Commission (1999)

The audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values. (...) They therefore help to determine not only what we see of the world but also how we see it.

# State Aid for Cultural Diversity

- EU: More than EURO 1 billion per year (x 3 in private investments)
- Promotion of European cultural identities and cultural diversity
- “Fortress Europe” vis-à-vis third cultures



# No State Aid for Culture

- USA: No State aid for “entertainment” industries
- DCs and LDCs: No money for “cultural” policies
- (EU tax payers finance the little remains of cultural diversity...)



# “Dogma” of Cultural Industries (1)



(1) No such “dogma” any more for pharmaceutical industries (“patent & public health”)

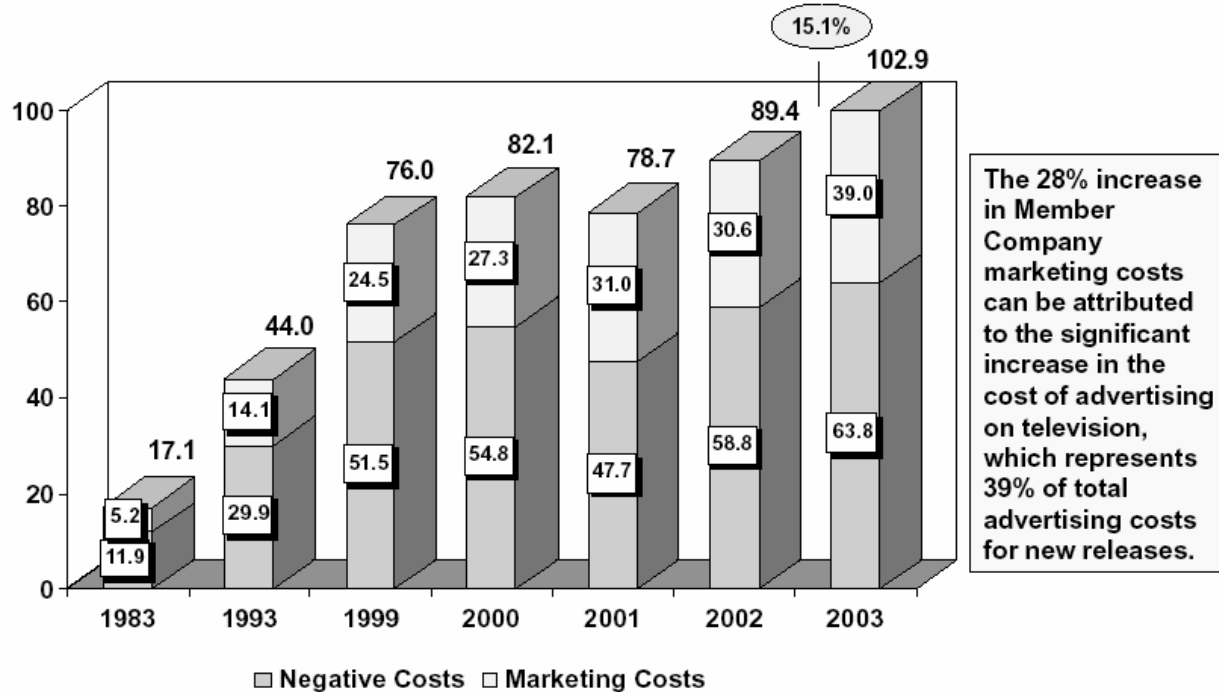
# Scope of IPR Protection: 40 to make & 60 to sell (SPA)

U.S. Entertainment Industry: 2003 MPA Market Statistics

United States

Theatrical Costs

**MPAA Member Company Average Theatrical Costs**



Source: MPAA

# The Meaning of Marketing (SPA)



## ■ DA VINCI CODE

- ◆ 160'000 in 3 days
- ◆ Tom Hanks, Audrey Tautou
- ◆ > 60 copies
- ◆ > Euro 1 m marketing

## ■ VITUS

- ◆ 160'000 in 3 months
- ◆ Bruno Gans (“Hitler”), Fredi M. Murer (Berlin Bär)
- ◆ < 15 copies
- ◆ < 0.1 m marketing

# The IPR Route: A Polemic “Formula”

**TMC = SPA = TMC**

**T**rade **M**ark & **C**opyright

=

**S**tars, **P**rint &

**A**dvertisement

=

**T**otal **M**ono **C**ulture

# Reaching a Level Playing Field

**TMC = SPA = TMC**

# No Total Mono Culture

**TMC = SPA = ~~TMC~~**

# No Stars, Prints & Advertisement

**TMC = ~~SPA~~ = ~~TMC~~**

# No Trade Mark & Copyright

~~TMC = SPA = TMC~~

# Solution

~~TMC = SPA = TMC~~

Piracy?

# Discussion

- DC/LDC: Are IPs good or bad for them
  - ◆ DC do not have IPRs in the beginning (e.g. Basel Chemical)
  - ◆ Good because protecting own assets (indigenous knowledge, geographical indications etc.)?
  - ◆ Bad because because most IPR assets owned by Industrialized Countries → DC's and LDC's markets will be harmed when introducing strong IP Protection?

# Thank you for your attention!

- Video summary:

- ◆ [http://www.wto.org/english/res\\_e/webcas\\_e/webcas\\_e.htm](http://www.wto.org/english/res_e/webcas_e/webcas_e.htm)

- Comments and questions:

christophe.germann@eui.eu