

KNOWLEDGE GOVERNANCE -
REGULATING THE DIGITAL WORLD

Is WTO the Right Forum?

Is Internet regulated
internationally?

TRIPS and Intellectual
Property Rights

What is TRIPS

- A 1995 WTO document regulating intellectual property rights
- **T**(rade) **R**(elated) Aspects of **I**(ntellectual) **P**(roperty) Right(**S**)
- Forces Members to introduce minimum standards into their laws

Three main tasks

- Removes distortions and impediments to international trade arising out of IP rights
- Increase IP protection
- Make sure that IP *enforcement* is not an impediment to trade

MFN & NT

- Most Favored Nation: any privilege given to some must be extended to others
- National Treatment: no discrimination between domestic and foreign

TRIPS predated...

- Internet commerce in TM goods
- digital distribution
- IT patents

Not completely blind to problems of developing countries

- Article 7: technological innovation, technology transfer and dissemination
- Article 8: flexibility in application, preventing abuses

What are the problems

- Territoriality of TRIPS:
 - difficult to protect digital works
- Property rights + tech neutrality:
 - difficult to include new technology

What are the problems

- Positive not negative (like the rest of WTO)
- Touches on sensitive spheres (culture, property, health...)
- No protection of national interests (i.e. no exceptions)

What are the problems

- The focus is on how to get more [rent from uses](#), not how to improve
 - output
 - dissemination
 - participation

What are the problems

- The focus is on how to get more rent from uses, not how to improve
 - **output**
 - **dissemination**
 - **participation**

The right holders' fear

- Users no longer passive recipients
- Technology enables all kinds of distribution/copying

Why were IP issues brought to GATT?

Early motives

- Pressure from industry in the West
- US Section 301 as a way of putting pressure
- Disappointment with WIPO

Negotiations

- Completely influenced by the West
- Initial idea: counterfeit goods
- Later expanded to positive harmonization of IP laws

Developing countries before TRIPS

- IP regulation modeled on Western countries
- Little recognition of local diversity
- Have developed counterfeit and/or generic goods industry

Developing countries during TRIPS negotiations

- Participation: too little & too late
- Main position: IP is not a trade issue
- Documents submitted:
 - **Brazil:** *the problem is rigid and excessive IP*
 - **India:** *owners of IP rights are the ones engaging in anticompetitive practices*

TRIPS and the digital world

Does TRIPS recognize digital world?

Most provisions do not

- Copyright exceptions, for example
 - Serve to restore the balance between the holders' and the users' rights
 - "Three step test" A. 13: exceptions allowed but may not conflict with normal exploitation
 - Nothing particular about digital world

Information technologies being recognized

- WIPO Copyright Treaty 2002
- WIPO Performances Treaty 2002

The right holders wanted total control

- Earlier WIPO drafts called for
 - no "first sale" doctrine
 - little fair use
 - owners control every digital transmission

Problems with WIPO Treaties

- They do not enhance incentives for creativity
- In many ways, they are more protectionist than TRIPS
- Infrastructure is the problem, not the treaties

The problem with both
WIPO/TRIPS

- Utilitarian approach: property incentives
- When people started moving to digital technologies, copyright owners sought to kill off the platforms/change architecture

ACTA

- Anti-counterfeiting trade agreement
- Secretly negotiated
- US, EU, Japan...

ACTA

- Essentially about enforcement of IP rights
 - civil enforcement
 - border measures
 - criminal enforcement
 - enforcement in the digital environment

ACTA

- Why is it so bad?
 - harsh enforcement measures
 - lack of safeguards
 - harsh on generic medicine
 - wide in scope

Alternatives

- Are proprietary incentives really the only way to encourage creation?

Alternatives

- Bottoms up: allow more flexibility to states
- Modify the agreement
- International agreements

Regulatory competition

- the desire of law makers to compete with each other in the kinds of laws offered to attract businesses
