



TRIPS: Floor Versus Ceiling?

What Is TRIPS?

The Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly referred to as the TRIPS Agreement, was negotiated through part of the Uruguay Round that established the World Trade Organization (WTO) and entered into force in 1995.

TRIPS is the most comprehensive multilateral agreement on intellectual property (IP), covering most facets of IP policy. It contains rules for the enforcement of IP rights in the way of provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures, and criminal procedures. The agreement provides for dispute settlement in the case of trade issues related to IP among WTO members.

This universal level of protection creates a body of global jurisprudence that facilitates the transfer of knowledge-based goods and services. Similar to the trade of traditional products and services, the transnational exchange of creative and innovative works requires an underlying rules-based economy.

Rationale for TRIPS

A rights-based system for creative and inventive works has played a critical role in the development of technological innovation, has added value to the economy through innovation, and has contributed significantly to job and wage growth across diverse industry sectors. Indeed, America's IP-intensive industries employ 18 million workers, with U.S. intellectual property worth \$5.5 trillion, more than the GDP of any other country. These industries account for more than half of all U.S. exports, helping drive 40% of America's domestic growth.

Moreover, jobs in IP-intensive industries often have higher wages and are expected to grow faster over the next decade than those that are less IP-intensive. Dr. Robert J. Shapiro and Dr. Nam D. Pham, in a 2007 study, *The Economic Effects of Intellectual Property-Intensive Manufacturing in the United States*, found that "those [manufacturing industry sectors] that are relatively more IP-intensive produce greater value added per employee, pay higher average wages, and have stronger records in job creation."¹ The TRIPS Agreement was created to provide enhanced opportunities for the exchange of creative and inventive works protected by IP rights. Douglass North, author of *Structure and Change in Economic History*, the work that won him a Nobel Prize, says that the "failure to develop systematic property rights innovation until fairly modern times was a major source of the slow pace of technological change."²

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Mark Dutz, Antara Dutta, and Jonathan Orszag collaborated on a study³ examining the relationship of stronger patent protections in developing countries from 1990 to 2005 and its effect on both technology transfer and local innovation. The authors note that strong IP protections are an essential precursor for allowing innovators the appropriate return on their efforts and for providing incentive for future investments. The TRIPS Agreement provides a strong, multilateral guarantee, which enhances the economic climate for foreign direct investment and increased technology transfer.

Dutz's, Dutta's, and Orszag's empirical analysis reviews numerous studies reaching the conclusion that "stronger IP protection has increased innovative activities by firms in some of the more technologically advanced developing countries and has also led to a greater transfer of technology in various forms to these locations."⁴ Without a multilateral framework for IP protections, little incentive exists for investment and economic gains. TRIPS has established a global structure for protecting investments and fostering innovation.



An Academic Debate: Floor Versus Ceiling

Many have argued that TRIPS is viewed as a minimum standard for IP protection by developed countries and as a maximum standard by developing countries, thus creating the question of "floor" versus "ceiling." Developing countries, especially least developed countries, have expressed an array of concerns over TRIPS implementation, mostly grounded in the perception that these rules will predominately benefit more advanced economies with greater investment in IP.

While developing countries are not promoting TRIPS as a ceiling, but rather continue to negotiate implementation schedules, some academics have proposed introducing the concept of maximum rights, or so-called "ceiling rules,"⁵ to avoid the "spiral movement ... towards ever-increasing levels of protection."⁶ Scholars Annette Kur and Henning Grosse Ruse-Khan argue that advancing the concept of a ceiling for TRIPS would protect flexibilities under TRIPS from encroachment by "IP maximalists." In every respect, this is an attempt to create balance for negotiations, instead of advancing a viable position.

Numerous IP scholars point to TRIPS as a floor. In *Teaching International Intellectual Property Law*, Peter K. Yu, director of the Intellectual Property Law Center at Drake University, describes TRIPS as having "introduced to all WTO member states many uniform minimum standards on which there was no international consensus before."⁷ Professor Daniel Gervais of Vanderbilt University, and a personal witness to the early TRIPS negotiations while serving at the World Intellectual Property Organization, also notes in *The TRIPS Agreement: Drafting History and Analysis* that the

TRIPS Agreement created a global minimal standard for IP protection.⁸ J.H. Reichman repeats the mandate that TRIPS established a floor for global IP norms in *Universal Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement* contends that "states must accord to the nationals of other member states those international minimum standards of intellectual property protection that are comprised within 'the treatment provided for in this Agreement.'"⁹

TRIPS Is a Floor

The TRIPS Agreement was clearly drafted as a floor, not as a ceiling. This is evident in the text of the concluded agreement. Among many examples are the following:

- Article 1.1 (Nature and Scope of Obligations): “Members may, but shall not be obliged to, implement in their law *more extensive protection* than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”
- Article 26.3 (Protection of industrial designs): “The duration of protection available shall amount to *at least 10 years*.”

The international treaties that were incorporated into TRIPS, such as the Berne Convention for the Protection of Literary and Artistic Works (Berne) and the Paris Convention for the Protection of Industrial Property, also offered a minimum standard of protection, a floor. For example, Article 7 of Berne provided that the term of protection is the life of the author plus 50 years after death and that the term of protection for photographic works and works of applied art shall be “*at least*” 25 years¹⁰. Article 7(6) expressly states that countries “may grant a term of protection *in excess* of those provided [see above agreements].”¹¹

The WTO makes clear that TRIPS is a floor, stating that TRIPS “sets out the minimum standards of protection to be provided by each Member. ... The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. ...”¹² Elsewhere, the WTO states that TRIPS “establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. In doing so, it strikes a balance between the long term benefits and possible short term costs to society. ...”¹³

Many other agreements go significantly beyond TRIPS, providing further proof it is a floor that leaves substantial room to create higher standards. Prominent examples are the free trade agreements that the United States concluded with Singapore, Chile, Morocco, Australia, Bahrain, Oman, El Salvador, Nicaragua, Costa Rica, Honduras, Guatemala, the Dominican Republic, and Peru as well as the ongoing negotiations with Colombia, South Korea, and Panama. Other agreements, including those concluded by the EU, provide for IP standards that go beyond TRIPS.

Examples of “TRIPS-plus” provisions are not limited to developed countries. For starters, the majority of bilateral free trade agreements with the United States involve a developing country trading partner. Developing countries have also joined and are in the process of implementing the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, known collectively as the WIPO Internet Treaties. Nearly 50 developing countries have already signed on each of these treaties, all of which set standards for copyright protection for works and related rights in the digital environment. These treaties clearly and purposefully go beyond the minimum standards set out in Berne and TRIPS.

Bipartisan Support for TRIPS as a Floor in the United States

The creation, implementation, and enforcement of international IP rules enjoy strong and continued support from Democrats and Republicans in the United States. Legislation implementing the TRIPS Agreement passed in bipartisan fashion by a 2-1 margin in the U.S. House of Representatives (288-146) and a 3-1 margin in the U.S. Senate (76-24) in 1994 and was signed into law by Democratic President William J. Clinton. From 2000 to 2007, the U.S. Congress and Republican President George W. Bush passed and signed into law free trade agreements with 13 countries containing commitments that extend beyond TRIPS minimums.

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Most recently, the U.S. Congress again strengthened IP protection and enforcement efforts and created a high-ranking White House official focused largely on coordinating compliance and enforcement of TRIPS obligations around the world. This legislation, commonly referred to as the PRO-IP Act (S. 3325), passed the House of Representatives last year by a vote of 410-11 and the Senate by unanimous consent.

Democratic President Barack Obama has also continued to advance plurilateral negotiations begun during the previous Republican administration to create stronger protections for intellectual property than those required by TRIPS. The Anti-Counterfeiting Trade Agreement (ACTA) is being negotiated by a mix of developed and developing countries including Mexico, Jordan, Morocco, the United Arab Emirates, South Korea, and Singapore. TRIPS, which was negotiated well before the explosion of Internet piracy and the increased sophistication and scope of criminal counterfeiters, does not address these problem, a situation that the ACTA purports to address.

Conclusion

The Uruguay Round was a multilateral negotiation that resulted in the creation of the WTO and the most substantial and comprehensive commitments across a broad range of trade issues ever agreed on. For each area of focus of the negotiations—including tariffs, services, agriculture, the environment, and IP—the Uruguay Round provided a baseline level of commitments for developed and developing countries alike. Member states regularly exceed these commitments through unilateral action or through agreements with trading partners designed to build upon the floor established with the creation of the WTO. Using the foundation of the WTO, member states can upgrade legal systems and enforcement mechanisms to build a more competitive and liberalized global economy that extends benefits to producers and consumers around the world.

Intellectual property rights are considered by many to be a key driver of creativity and innovation. Past efforts to strengthen these rights and to improve their enforcement have accelerated investment, R&D, and new inventions and ideas across a broad range of industries. This, in turn, has led to job creation, economic growth, and advances that have benefited not just the country of origin in the short run but all nations and people in the long term. As such, it is imperative that the TRIPS Agreement not only be preserved as the “floor” for global standards, but that the international community constantly looks to strengthen TRIPS and other agreements.

Endnotes

1. Nam Pham and Robert Shapiro, *The Economic Effects of Intellectual Property-Intensive Manufacturing in the United States*, July 2007.
2. Douglass C. North, *Structure and Change in Economic History*, Norton, New York, 1981.
3. Mark Dutz, Antara Dutta, and Jonathan Orszag, *Intellectual Property and Innovation: New Evidence on the Relationship Between Patent Protection, Technology Transfer and Innovation in Developing Countries*, CompassLexecon, <<http://www.compasslexecon.com/highlights/documents/IP%20AND%20INNOVATION%20-%20final.pdf>>, October 2009, p. 10.
4. Ibid, p. 10.
5. These are referred to as “ceiling rules” in: Annette Kur and Henning Grosse Ruse-Khan, *Enough is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection*, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01, December 8, 2008.
6. Ibid, pg. 1
7. Peter K. Yu, *Teaching International Intellectual Property Law*, Saint Louis University Law Journal, p. 931, Vol. 52:923, 2008.
8. Daniel Gervais, *The TRIPS Agreement, Drafting History and Analysis*, (Second Edition). Sweet and Maxwell, London, 2003.
9. J.H, Reichman, *Universal Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, The International Lawyer, Vol. 29:345, 1995.
10. *Berne Convention for the Protection of Literary and Artistic Works*. World Intellectual Property Organization. Web. <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P127_22000>.
11. Ibid
12. *World Trade Organization—intellectual property—overview of TRIPS Agreement*. World Trade Organization, <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm>.
13. *World Trade Organization Understanding the WTO - Intellectual property: protection and enforcement*. World Trade Organization—Home page. Web. <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm>.