

Intellectual property: protection and enforcement

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated during the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time.

Origins: into the rules-based trading system....

The idea of trade, and what makes trade valuable for societies, has evolved beyond simply shipping goods across borders. Innovation, creativity and branding represent a large amount of the value that changes hands in international trade today. How to enhance this value and how to facilitate the flow of knowledge-rich goods and services across borders have become integral considerations in development and trade policy.

The TRIPS Agreement plays a critical role in facilitating trade in knowledge and creativity, in resolving trade disputes over intellectual property, and in assuring WTO members the latitude to achieve their domestic objectives. The Agreement is legal recognition of the significance of links between intellectual property and trade.

"Intellectual property" refers to creations of the mind. These creations can take many different forms, such as artistic expressions, signs, symbols and names used in commerce, designs and inventions. Governments grant creators the right to prevent others from using their inventions, designs or other creations — and to use that right to negotiate payment in return for others using them. These are “intellectual property rights”. They take a number of forms. For example, books, paintings and films come under copyright; eligible inventions can be patented; brand names and product logos can be registered as trademarks; and so on. Governments grant creators these rights as an incentive to produce and spread ideas that will benefit society as a whole.

The extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations. New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and to settle disputes more systematically.

The Uruguay Round achieved that. The WTO's [TRIPS Agreement](#) is an attempt to narrow the gaps in the way these rights are protected and enforced around the world, and to bring them under common international rules. It establishes minimum standards of protection and enforcement that each government has to give to the intellectual property held by nationals of fellow WTO members.

Under the TRIPS Agreement, WTO members have considerable scope to tailor their approaches to IP protection and enforcement in order to suit their needs and achieve public policy goals. The Agreement provides ample room for members to strike a balance between the long term benefits of incentivising innovation and the possible short term costs of limiting access to creations of the

mind. Members can reduce short term costs through various mechanisms allowed under TRIPS provisions, such as exclusions or exceptions to intellectual property rights. And, when there are trade disputes over the application of the TRIPS Agreement, the WTO's dispute settlement system is available.

The TRIPS Agreement covers five broad areas:

- how general provisions and basic principles of the multilateral trading system apply to international intellectual property
- what the minimum standards of protection are for intellectual property rights that members should provide
- which procedures members should provide for the enforcement of those rights in their own territories
- how to settle disputes on intellectual property between members of the WTO
- special transitional arrangements for the implementation of TRIPS provisions.

Basic principles: national treatment, MFN, and balanced protection

As in the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), the starting point of the TRIPS Agreement is basic principles. And as in the two other agreements, non-discrimination features prominently: [national treatment](#) (treating foreign nationals no less favourably than one's own nationals), and [most-favoured-nation](#) (MFN) treatment (not discriminating among nationals of trading partners). National treatment is also a key principle in other intellectual property agreements outside the WTO.

The TRIPS Agreement has an additional important general objective: intellectual property protection should contribute to technical innovation and the transfer of technology. Both producers and users should benefit, and economic and social welfare should be enhanced, the TRIPS Agreement says.

How to protect intellectual property: common ground-rules

The second part of the TRIPS Agreement looks at different kinds of intellectual property rights and how to protect them. The purpose is to ensure that minimum standards of protection exist in all WTO members. Here the starting point is the obligations of the main international agreements of the [World Intellectual Property Organization \(WIPO\)](#) that already existed before the WTO was created:

- the [Paris Convention for the Protection of Industrial Property](#) (patents, industrial designs, etc)
- the [Berne Convention for the Protection of Literary and Artistic Works](#) (copyright).

Some areas are not covered by these agreements. In some cases, the standards of protection prescribed were thought inadequate. So the TRIPS Agreement adds significantly to existing international standards.

Copyright

Copyright usually refers to the rights of authors in their literary and artistic works. In a wider sense, copyright also includes ‘related rights’: the rights of performers, producers of phonograms and broadcasting organizations.

During the Uruguay Round negotiations, members considered that the standards for copyright protection in the Berne Convention for the Protection of Literary and Artistic Works were largely satisfactory. The TRIPS Agreement provisions on copyright and related rights clarify or add obligations on a number of points:

- The TRIPS Agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how databases must be protected under copyright;
- It also expands international copyright rules to cover rental rights. Authors of computer programs and producers of sound recordings must have the right to prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners’ potential earnings from their films; and
- It says performers must also have the right to prevent unauthorized recording, reproduction and broadcast of live performances (bootlegging) for no less than 50 years. Producers of sound recordings must have the right to prevent the unauthorized reproduction of recordings for a period of 50 years.

Trademarks

A trademark is a sign or a combination of signs used to distinguish the goods or services of one enterprise from another.

The TRIPS Agreement defines what types of signs must be eligible for protection as trademarks, and what the minimum rights conferred on their owners must be. It says that service marks must be protected in the same way as trademarks used for goods. Marks that have become well-known in a particular country enjoy additional protection.

Geographical indications

A name or indication associated with a place is sometimes used to identify a product. This “geographical indication” does not only say where the product comes from. More importantly, it identifies the product’s special characteristics, which are the result of the product’s origins.

Well-known examples include “Champagne”, “Scotch Whiskey”, “Tequila”, "Darjeeling" and “Roquefort” cheese.

Using the indication when the product was made elsewhere or when it does not have the usual characteristics can mislead consumers, and can lead to unfair competition. The TRIPS Agreement says members have to provide ways to prevent such misuse of geographical indications.

For wines and spirits, the TRIPS Agreement provides higher levels of protection, i.e. even where there is no danger of the public being misled.

Some exceptions are allowed, for example if the term in question is already protected as a trademark or if it has become a generic term.

The TRIPS Agreement provides for further negotiations in the WTO to establish a multilateral system of notification and registration of geographical indications for wines, which was subsequently extended to include spirits. The question of whether to negotiate extending this higher level of protection beyond wines and spirits is also being discussed in the WTO.

Industrial designs

Industrial design is generally understood to refer to the ornamental or aesthetic aspect of an article rather than its technical features.

Under the TRIPS Agreement, original or new industrial designs must be protected for at least 10 years. Owners of protected designs must be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy or substantially a copy of the protected design for commercial purposes.

Patents

The TRIPS Agreement says patent protection must be available for eligible inventions in all fields of technology that are new, involve an inventive step and can be industrially applied. Eligible inventions include both products and processes. They must be protected for at least 20 years. However, governments can refuse to issue a patent for an invention if its sale needs to be prohibited for reasons of public order or morality. They can also exclude diagnostic, therapeutic and surgical methods, plants and animals (other than micro-organisms), and biological processes for their production (other than microbiological processes) from patent protection.

Plant varieties, however, must be protectable by patents or by a special system (such as the breeder’s rights provided in the conventions of [UPOV — the International Union for the Protection of New Varieties of Plants](#)) or by both.

The TRIPS Agreement describes the minimum rights that a patent owner must enjoy, and defines the conditions under which exceptions to these rights are permitted. The Agreement permits governments to issue “compulsory licences”, which allow a competitor to produce the product or use the process under licence without the owner's consent. But this can only be done under

specific conditions set out in the TRIPS Agreement aimed at safeguarding the interests of the patent-holder.

If a patent is issued for a process invention, then the rights must extend to the product directly obtained from the process. Under certain conditions alleged infringers may be ordered by a court to prove that they have not used the patented process.

Layout designs of integrated circuits

An integrated circuit is an electronic device that incorporates individual electronic components within a single 'integrated' platform configured to perform an electronic function.

The protection of layout designs of integrated circuits ("topographies") in the TRIPS Agreement is provided through the incorporation of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, a treaty that was concluded under the [World Intellectual Property Organization](#) in 1989, but has not yet entered into force. The TRIPS Agreement adds a number of provisions: for example, protection must be available for at least 10 years.

In practice, layout designs of integrated circuits are commonly protected under patents.

Undisclosed information

Undisclosed information includes trade secrets and test data. Trade secrets must be protected against unauthorized use, including through breach of contract or confidence or other acts contrary to honest commercial practices. Such protection is conditional upon the information being secret, having commercial value and reasonable steps having been taken by its owner to keep the information secret.

Test data submitted to governments in order to obtain marketing approval for new pharmaceutical or agricultural chemicals must also be protected against unfair commercial use and disclosure. Extended transition periods continue to apply to least developed country members (see section below on transitional arrangements).

Anti-competitive practices in licensing

One way for a right holder to commercially exploit his or her intellectual property rights includes issuing a licence to someone else to use the rights. Recognizing the possibility that right holders might include conditions that are anti-competitive, the TRIPS Agreement says that under certain conditions, governments have the right to take action to prevent anti-competitive licensing practices. It also says governments must be prepared to consult each other on controlling anti-competitive licensing practices.

More generally, the TRIPS Agreement recognizes that right holders could use their rights to restrict competition or impede technology transfer. The Agreement gives governments the right to take action against anti-competitive practices. In certain situations, the TRIPS Agreement also

waives some conditions required for the compulsory licence of a patent in cases where the government grants the compulsory licence in order to remedy a practice determined to be anti-competitive.

Enforcement

In order for the protection of intellectual property rights to be meaningful, WTO members must give right holders the tools to ensure that their intellectual property rights are respected. Enforcement procedures to do so are covered in part III of the TRIPS Agreement. The Agreement says governments have to ensure that intellectual property rights can be enforced to prevent or deter violations. The procedures must be fair and equitable, and not unnecessarily complicated or costly. They must not entail unreasonable time-limits or unwarranted delays. People involved must be able to ask a court to review an administrative decision or to appeal a lower court's ruling.

The TRIPS Agreement is the only international agreement that describes intellectual property rights enforcement in detail, including rules for obtaining evidence, provisional measures, injunctions, damages and other penalties. It says courts must have the right, under certain conditions, to order the disposal or destruction of goods infringing intellectual property rights. Wilful trademark counterfeiting or copyright piracy on a commercial scale must be subject to criminal offences. Governments also have to make sure that intellectual property rights owners can receive the assistance of customs authorities to prevent imports of counterfeit and pirated goods.

Technology transfer

Developing country members in particular see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights. The TRIPS Agreement aims for the transfer of technology (see above) and requires developed country members to provide incentives for their companies to promote the transfer of technology to least-developed countries in order to enable them to create a sound and viable technological base.

Transitional arrangements: One year, 5 years or more

While the WTO agreements entered into force on 1 January 1995, the TRIPS Agreement allowed WTO members certain transition periods before they were obliged to apply all of its provisions. Developed country members were given one year to ensure that their laws and practices conform to the TRIPS Agreement. Developing country members and (under certain conditions) transition economies were given five years, until 2000. Least-developed countries initially had 11 years, until 2006 — now extended to 1 July 2021 in general.

In November 2015, the TRIPS Council agreed to further extend exemptions on pharmaceutical patent and undisclosed information protection for least-developed countries until 1 January 2033 or until such date when they cease to be a least-developed country member, whichever date is

earlier. They are also exempted from the otherwise applicable obligations to accept the filing of patent applications and to grant exclusive marketing rights during the transition period.

Institutional arrangements

The main forum for work on the TRIPS Agreement is the Council for TRIPS, which was created by the WTO Agreement. The TRIPS Council is responsible for administering the TRIPS Agreement. In particular, it monitors the operation of the Agreement. In its regular sessions, the TRIPS Council mostly serves as a forum for discussion between WTO members on key issues. The TRIPS Council also meets in “special sessions”. These are for negotiations on a multilateral system for notifying and registering geographical indications for wines and spirits.

Cooperation with other intergovernmental organizations

The preamble to the TRIPS Agreement calls for a mutually supportive relationship between the WTO and WIPO as well as other relevant international organizations. Cooperation between the WTO and WIPO covers notifications of laws, technical assistance and implementing the TRIPS obligations that stem from Article 6ter of the Paris Convention for the Protection of Industrial Property.

The WTO also coordinates with a wide range of other international organizations, in particular as regards the organization of symposia, training activities and other events on intellectual property and trade and how these relate to other policy dimensions, such as public health and climate change.