

Tips for TRIPS

A Guide for Libraries and Librarians to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

There are very few countries today that are not members of the World Trade Organization (WTO). Today it has over 140 members (China joined recently, and some 30 more countries are in the process of joining). The WTO is an international body which administers rules covering international trade. These rules are set out in a range of agreements, including the General Agreement on Trade and Tariffs (GATT).

When a dispute arises about trade matters between two countries, the WTO also provides for a dispute settlement procedure. A WTO member can take a complaint about another country to a dispute settlement panel which determines whether or not that country is complying with the agreed rules. If it is not in compliance and refuses to rectify the problem, the member that made the complaint can retaliate with trade sanctions up to the level of the damage which the original problem caused. There are other ways of dealing with non-compliance. For instance, in a recent case brought by the European Union, the US Copyright Act was found by a panel not to comply with WTO rules. At the request of the two parties, an arbitrator set a sum of financial compensation that would be payable to the EU by the US to account for the damage to copyright interests arising from the non-compliant provision in the US law.

An important part of the WTO treaty system is the Agreement on Trade-Related Aspects of Intellectual Property Rights (known as TRIPS). TRIPS is intended to set common standards for the intellectual property regimes of all member countries. It covers such different types of intellectual property as:

- Copyright and related rights
- Trademarks, including service marks
- Geographical indications
- Industrial designs
- Patents
- Layout-designs (topographies) of integrated circuits
- Undisclosed information, including trade secrets

TRIPS sets standards for IP protection that are similar to the levels of protection that most developed countries had. Because most developing nations did not protect intellectual property to that extent before the TRIPS Agreement was concluded, they were given additional time to comply with TRIPS. Developing countries were due to comply in most respects by 2000. All least-developed nations, which are members of WTO, are due to comply by 1 January 2006 (although this can be extended, and has already been extended for pharmaceutical patenting).

Of course, the most important type of intellectual property as far as libraries are concerned is copyright.

The main effect of TRIPS, with respect to copyright, is that it imports most of the provisions of *the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention)*. The Berne Convention is the oldest and most important international copyright treaty. It was first agreed to in 1886, and has been revised and expanded since then. 149 States are currently signatories to the Berne Convention.

The only provisions of the Berne Convention which have not been incorporated into TRIPS concern moral rights. Moral rights are the right of the author to control certain uses of their works to protect their reputation as artists, and for their authorship to be recognized. Moral rights are distinct from what are sometimes known as economic rights (such as the right to make copies or the right to broadcast).

Put simply, the provisions that TRIPS does incorporate from Berne require member countries to grant the

following basic protection:

1. That the following subject-matter should be protected as 'literary and artistic works': "books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."
2. That the author (or the owner of copyright) of a work be able to authorize:
 - its reproduction in various forms, such as a printed publication;
 - its public performance, as in a play or musical work;
 - recordings of it, for example, in the form of compact discs, cassettes or videotapes;
 - its broadcasting, by radio, cable or satellite;
 - its translation into other languages, or its adaptation, such as a novel into a screenplay.

[Note that TRIPS/Berne does not specifically require that digital or online uses be covered (these are covered by the WIPO Internet Treaties which are not part of TRIPS). However, typically the right of reproduction will cover digital copying, such as scanning a publication or storing a copy on a hard drive.]

3. That the duration for copyright protection for works should be the life of the author plus 50 years.

This level of protection for copyright owners is mandatory under TRIPS/Berne. However, TRIPS/Berne also allow for copyright exceptions which are very important for libraries and library users.

'Exceptions' are provisions of the copyright law which exempt certain types of uses from the control of copyright owners. For example, it is the copyright owner's right to control all reproductions of his or her work; however, an exception might allow a student to make a copy of part of this work for study purposes without paying anything or seeking permission.

Generally speaking, the rights of copyright owners are very broad and cover many uses while exceptions are narrow and cover more specific situations. (It is worth remembering, however, that rights do not cover all possible uses. For example, nothing in TRIPS/Berne gives copyright owners the right to control the physical movement of copies of a work, such as a library loan).

Exceptions are included in copyright legislation for public policy reasons. Just as the interests of the public are served by granting authors certain rights over their works so that they can be remunerated for their effort, so too are the interests of the public served by relaxing these rights in the cause of, for example, education or research.

Whether or not these exceptions are applied is basically the choice of a national government or legislature to decide. Berne/TRIPS simply requires that, where they exist in national law, they shouldn't unreasonably impair the copyright owner's interests. This is expressed in a so-called 'three-step test' which appears in Berne concerning exceptions that allow you to make copies without the copyright owner's permission, and which TRIPS then applied more generally to all forms of copyright (Article 9.2 of Berne, Article 13 of TRIPS). In the Berne Convention this provides that countries can permit reproduction of copyright works without the permission of the copyright owner *'in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'*

This possibility of exceptions to the rights of copyright owners within the scope of this three-step test has led to a wide variety of useful exceptions around the world.

Perhaps the most well-known of these is the United States fair use doctrine which permits any use of copyright for free and without permission provided it is 'fair'. For example, a famous case concerned whether it would be fair use to videotape a TV program to watch it later. Whether something is fair or not is determined according to the following four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fair use doctrine allows libraries and libraries users to do many things that would otherwise infringe copyright.

In the US, and in many other countries around the world, there are exceptions which allow private citizens to make copies for their own use (and this use does not have to be for the purposes of research or study). Other exceptions allow libraries to share resources; for example, one library that lacked a certain article can request it from another library. Some countries have exceptions to benefit their schools and universities; they are able to put together 'reading bricks' or transmit material to distance education students for free or at least at discounted rates.

It is important to remember that copyright law exists for the benefit of society as a whole, not just so that writers and publishers can make money. Sometimes the interests of society are better served when the rights of owners don't apply.

By enacting exceptions and allowing a greater use of copyright material by students, researchers, teachers and librarians in developing nations, those nations will be helping to promote copyright's ultimate goal: the increase of knowledge.

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