

WORLD INTELLECTUAL PROPERTY ORGANIZATION AND THE EUROPEAN UNION

PROF. YU: People sometimes overlook the differences between treaties concluded in the WIPO forum and those concluded in the WTO forum. For example, there is virtually no enforcement mechanism under a WIPO treaty whereas there is a mandatory dispute settlement procedure under the WTO framework. Consider, for example, the Berne Convention¹ and the Paris Convention.² Administered by WIPO, these two conventions include only an optional dispute settlement mechanism under which disputes will be resolved through the International Court of Justice (ICJ). Because countries are reluctant to use this optional forum, the ICJ has never been used in practice, and the two conventions remain virtually unenforceable except by coercion or through diplomacy. By contrast, the WTO requires all member states to resolve disputes through its mandatory dispute settlement procedure.³ As a result, policymakers, especially those in developed countries, generally find the WTO a more effective forum for protecting international intellectual property rights.

The importance of this WIPO-WTO distinction, however, is decreasing. Panelists from the WTO Dispute Settlement Body increasingly look to WIPO treaties to resolve ambiguity in the TRIPs Agreement. For example, in a recent dispute between the European Union and the United States over the Fairness in Music Licensing Act of 1998,⁴ the WTO Panel looked to the WIPO Copyright Treaty⁵ (WCT) to determine whether subsequent development in international copyright law reflects the minor exceptions doctrine of the Berne Convention as incorporated into the TRIPs Agreement.⁶ Although the Panel ultimately found that the WCT did not constitute “a subsequent treaty” within the meaning of the Vienna Convention, the Panel noted the need “to seek contextual guidance . . . when developing interpretations that avoid conflicts

¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris* July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

² Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised at Stockholm* July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994).

⁴ Pub. L. 105-298, § 202, 112 Stat. 2830-31 (1998) (codified at 17 U.S.C. §§ 101, 110(5)(B), 504, 513 (2000)).

⁵ WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996).

⁶ United States—Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS/160/R ¶¶ 6.67-70 (June 15, 2000) [hereinafter Panel Decision], *available at* http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf. For excellent discussions of the dispute, see generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001); Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000).

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within this overall framework, except where these treaties explicitly contain different obligations.”⁷

The Panel’s activist language is troubling, because the WCT, at the time of the decision, has yet to be ratified and thus has not entered into force. While it sometimes is advantageous to look to treaties in other forums for clarification and for harmonization purposes, it is important that the treaty parties receive the bargain they struck in the negotiation process. Given the fact that WTO Panelists will now look to WIPO treaties to resolve ambiguity and to promote harmonization, policymakers need to be particularly cautious when they negotiate treaties in the WIPO forum. After all, provisions concluded in the WIPO forum might ultimately find their way into the WTO and become enforceable through the WTO’s mandatory dispute settlement procedure.

⁷ Panel Decision, *supra* note 6, ¶ 6.70.