Intellectual Property in Digital Trade: The Multilateral State of Play

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IP in Digital Trade: The multilateral state of play

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IP challenges of digital trade …
… and international regulatory responses

Challenges:
- Territoriality of IP rights
- New IP uses in digital trade (products and distribution)
- New IP business models (platforms vs users)

Regulatory responses:
- International private law / conflict of laws
- International standards (TRIPS / WIPO)
- Regional / sectoral harmonization
- Technological solutions (TPMs / DRM)
Copyright issues in the digital context (1) multilateral responses

- General principles enshrined in the TRIPS Agreement
  - Subject matter, automatic and independent protection, availability of exceptions
  - National treatment and MFN (no exceptions for FTAs/RTAs)
- Digital update WIPO Copyright Treaty and WPPT (1996)
  - Browsing and caching – reproduction? (Art. 10)
  - Right of making available (Art. 8)
  - Protection for technical protection measures (Art. 11)
- Differences remain
  - Ownership questions
  - Term of copyright
  - Scope of exceptions and limitations
Exception Regimes - Examples

**fair use doctrine**
- open factors
- case-by-case approach (judge)
- flexibility
- quick reactions to new developments?

**statutory exceptions**
- fixed requirements
- closed catalogue of limitations (legislator)
- legal certainty
- slow reactions to new developments?
Copyright issues in the digital context (2) international responses

- FTAs / RTAs in the region contain numerous rules on IP in the digital context
  - Reference to WIPO internet treaties
  - Term of protection
  - Definition and scope of protection of TPMs
  - Liability regimes for internet service providers (ISPs)
    - KORUS, CETA and CPTPP
      - all regimes enshrine “safe harbour” principle, i.e. exemption of ISP from liability for copyright violation by platform content if a certain take-down procedure is in place
      - no general monitoring obligation
- No common approach to current issues such as online exhaustion, orphan works, data mining, creations and infringements by AI systems
Trademark issues in the digital context (1) multilateral / international responses

- General principles enshrined in the TRIPS Agreement
  - Subject matter, grounds for refusal, availability of exceptions
  - National treatment and MFN (no exceptions for FTAs/RTAs)
- Digital update – non-binding WIPO Recommendations:
  - Joint Recommendation concerning provisions on the Protection of Marks, and other Industrial Property Rights in Signs, on the Internet (2001)
- FTAs / RTAs contain relevant provisions
  - Incorporation of Joint Recommendations (soft law -> hard law)
  - Domain name provisions (KORUS, JPN-CH)
(https://www.wto.org/english/res_e/reser_e/ersd202104_e.htm)

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