Information, Commodification

and the

World Trade Organization

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Abstract: the dramatic expansion of international trade regimes to encompass intellectual property rights and information services has far reaching implications for all societies. Because the goals of current trade policy reflect corporate priorities of privatization and de-regulation – they present a fundamental challenge to the programs, systems and laws needed to preserve and strengthen systems of public ownership, and service delivery intended to provide universal access to information, art and culture. Two recent trade disputes resolved under the new rules of the World Trade Organization, reveal that international conventions negotiated under the auspices of the World Intellectual Property Organization will now be subsumed to the enforceable framework of WTO disciplines. As these cases illustrate, information, artistic works and other forms of cultural expression will now be treated as commodities just like other commercial products and goods. Moreover, WTO dispute panels are likely to resolve competing claims to this intellectual property with little regard for the non-commercial values upon which a reasonable balance of private rights and public interest depends

If water will be the most vital resource of the 21st century; oil and gas – the most strategic, then information will probably be the most valuable. Just how valuable, will depend upon the success of efforts to transform information into an international system of codified property rights that can be protected by effective enforcement regimes. But

until the advent of the World Trade Organization (WTO) and two particular international agreements that are incorporated within its framework, this goal had eluded its sponsors for several decades.

One of these agreements - on Trade Related Intellectual Property Rights (TRIPS) - can be seen as the culmination of efforts to establish an effective international regime for the protection of intellectual property rights (IPRs). The second, the General Agreement on Trade and Services (the GATS), is only now in the process of being fully developed, but is will most certainly play a key role in determining for most societies, how information is used, by whom, and on what terms.

Both agreements have come into play in two recent trade disputes concerning Canadian magazine publishing and US copyright laws respectively. These cases make clear, that with the advent of the WTO a new era has dawned, one in which information, artistic works and other forms of cultural expression will be treated as commodities. Moreover, when competing claims to this intellectual property arise, they are increasingly likely to be resolved in accordance with the priorities of a trade regime established to serve the objectives of trade liberalization, and often to the exclusion of all other public policy considerations.

By way of introduction to these WTO decisions, I want to begin with a brief account of the events leading to the codification of intellectual property rights as part of the WTO regime.

From WIPO to the WTO

Until the launch of the Uruguay Round trade negotiations, multilateral rulemaking in the IPR area had been dominated by the World Intellectual Property Organisation (WIPO), which still has administrative responsibility for most of the important conventions in the area of intellectual property protection. But by the mid nineteen eighties, US frustration with the failure of WIPO to provide for the effective enforcement of those treaties and conventions had grown to the breaking point. Its domestic film, pharmaceutical and agric-chemical corporations were adamant about the need to provide their intellectual property more than hortatory protection. Thus, as the US continued in vain to build credible enforcement mechanisms into the WIPO framework – it decided to pursue its objectives in other venues as well.

Accordingly in 1986, among US proposals for a new Round of trade negotiations to reform the GATT, was the novel idea of negotiating within the framework of a new trade regime – an international agreement for intellectual property protection. That Round, which got underway at Punta del Este, Uruguay in September 1986, would ultimately

culminate in the founding of the World Trade Organization almost a decade later. Among more than a dozen multilateral agreements housed within the framework of that new global trade institution would be the realization of many US ambitions, but none more important, than the Agreement on Trade-Related Aspects of Intellectual Property Rights.

However, at the outset of those negotiations there existed very different views between industrialised countries that wanted a comprehensive agreement covering all intellectual property rights, and developing countries that wanted to limit any agreement about IPRs to the trade in counterfeit goods. But the US had critical leverage it could bring to bear, by having a established a domestic regime[1] authorizing the unilateral imposition of trade sanctions against nations that it regarded as being engaged in unfair trade practices. The priority assigned by the US to this particular aspect of its foreign economic policy agenda is revealed by the fact that the majority of the cases to invoke these unilateral sanctions asserted the interests of US based pharmaceutical and media corporations.

Naturally, US unilateralism was greatly resented and particularly by those who accused it of ignoring the copyright violations of its own companies. Nevertheless, the coercive effect of these sanctions ultimately produced the desired result. Accordingly in 1995, the TRIPs Agreement was born as an integral part of comprehensive international trade regime under the auspices of a newly founded WTO.

As the US had insisted, the TRIPS Agreement provided a broad framework for IP protection, and incorporated by reference the most important WIPO conventions. However, by far the most significant accomplishment engendered by this dramatic expansion of the world trading system, was making the newly minted and powerful enforcement mechanisms of the WTO available to ensure compliance with international agreements established to protect intellectual property.

It is unlikely, that even to this day, many concerned about the issues of IP protection fully appreciate the radical nature of the transformation of international trade regimes that occurred in 1995. Prior to that date, trade agreements were no more enforceable than WIPO conventions or international agreements to protect workers rights of preserve biodiversity. But with the birth of WTO a truly effective global enforcement regime has been established to compel adherence to all WTO requirements. When confronted with an adverse ruling from the Appellate Body of the WTO the losing party has two options: shed the offending policy, program, practice, law or regulation – or pay the price in trade sanctions. Moreover because of the principle of cross-retaliation, sanctions can be applied

[1] These are the somewhat notorious remedies available under Section 301 of the US Trade and Commerce Act.

to any aspect of the offending nations international trade economy – in other words, where they will be felt most.

The two WTO decisions, the details of which follow, expose how influential the TRIPs agreement will be in determining the policies and practices of nations when it comes to intellectual property protection. The first of these, involved a challenge to Canadian cultural measures intended to protect its domestic magazines and periodicals from being entirely swept away by a torrent of US based publications. This was the first challenge to invoke WTO rules in service of a large transnational media corporation (Time Warner before the merger with America Online) and elicited from the WTO some rather disturbing pronouncements about culture as a tradable commodity.

The second case to expose the importance of WTO disciplines concerning intellectual property, involved a challenge to US copyright laws. This case provides the first opportunity to observe WTO rules in action with respect to the enforcement of the Berne Convention for the Protection of Literary and Artistic Works (hereafter the "Berne Convention"). Again a great deal is revealed about the biases of the WTO when it is challenged to recognize the non-commercial aspects of intellectual property policy and law. Because both decisions are likely to have an enormous impact on the cultural and intellectual property rights policies of all nations, they are worth considering in some detail.

Canadian Periodicals, Japanese Beer and Other Goods

For Canadians and many others, it is easy to understand the global dominance of US based media, as a contest between U.S. and other cultures, and in many ways this is precisely what they are. But it is also true that these dynamics represent a struggle between increasingly monolithic media corporations and communities determined to maintain some modest opportunity for their own forms of cultural expression. In fact, concerns about the pernicious influence of large media corporations have also been raised in the U.S. itself.

No less an American cultural icon than **The New York Times** has sounded the alarm about "growing threats to the nation's cultural heritage." But, when President Clinton received the recommendations of the special committee he had established to consider the problem, he evinced little interest in acting on its recommendations to revitalize public and private support for culture in the US.

In fact, not only did his administration do nothing to rein in the power of such media empires as Time-Warner, but it has actually took up the cudgel on its behalf to assail efforts by other nations to resist the tsunami of US corporate culture.

Given the power of the large media corporations, it is not surprising that the US Executive Office has shown little enthusiasm for trying to hold back the tide of increasingly concentrated corporate control of cultural expression. But there is another and more important reason for the US administration to ally itself with the AOL – Time Warners of the world, and this has to do with importance of cultural and information services trade to the US economy.

For example, U.S. balance-of-trade surpluses in cultural products and services are enormous, and particularly important given the even larger trade deficits that the U.S. runs. For example in 1996 U.S. trade deficits of $183 billion were offset by trade surpluses of $74 billion in the area of services.

To ensure that its cultural trade surpluses continue to grow, the U.S. has seized on international trade rules to enforce the continued domination of global markets by U.S. corporations. In the first three years after the advent of the WTO, seven trade cases have been brought concerning cultural products, all but one by the U.S. on behalf of its media giants.

The first of these cases to be resolved – involved the challenge to Canadian cultural measures intended to protect its domestic magazines and periodicals. Thus Canadian cultural programs have the dubious distinction of being the first to fall victim to WTO rules.[2] Given Canada's long-standing efforts to deal with its particular vulnerability to the hegemony of U.S. culture, it is not surprising that Canada would be the first target of U.S. efforts to promote its agenda for establishing greater IPR protection internationally.

The domination of Canadian magazine markets by U.S.-based publications is not a recent phenomenon; in fact, it has existed since the first decades of this century. (In 1925, for example, U.S. magazines sold in Canada outnumbered Canadian publications by a margin of 8:1)[3]. And, for just as long, Canadian governments have sought, with varying

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[2] Canada - Certain Measures Concerning Periodicals, Report of the Appellate Body June 30, 1997 - WT/DS31/AB/R.

[3] Ted Magder, Franchising the Candy Store: Split-Run Magazines and a new International Regime for Trade in Culture, in Canadian-American Public Policy, the Canadian-American Center, the University of Maine, Number 34: April 1998, at p. 49.

degrees of determination, to prevent Canadian publications from being entirely swamped in a sea of U.S. print media.

In the mid-1960s, the Liberal government of the day, firmly committed to strengthening Canadian cultural institutions, established import tariffs under the Customs Act to ensure the viability of at least a small number of Canadian magazines. The tariffs were specifically designed to address the problems created by "split-run" U.S.-based magazines.

A "split-run magazine" is a spin-off of a parent publication, designed for a particular regional or niche market. As spin-offs recycle much of the editorial content of the parent, they are relatively inexpensive to produce, so advertising space in the typical split run can be offered at a substantial discount. This is obviously a bargain for advertisers seeking to reach that particular regional or niche market, but a disaster for local publishers competing for those advertising dollars, while covering the higher cost of producing original publications.

In an attempt to level the playing field for Canadian publishers, the federal government effectively imposed an import ban on split-run magazines. To reinforce this prohibition, amendments to the Income Tax Act were also made, prohibiting Canadian companies from deducting the costs of advertising in non-Canadian publications. By all accounts, the measures worked: Canadian publications grew substantially in number and circulation, and the regulations created a truce between U.S. and Canadian publishers that endured for nearly three decades.[4]

This is not to say that U.S. magazines were denied an ongoing and prominent presence in Canada. In 1992-93, for example, U.S. magazine exports to Canada were worth more than $600 million; Canada provided 80% of the foreign market for these publications. However, by the early 1990s, U.S. publications had been consolidated under the control of a handful of very large media corporations. As U.S. media markets had long been saturated, new growth opportunities had to come through global expansion.

This in part explains why one of the world's largest media conglomerates, Time Warner, announced in April 1993 that it would be publishing six "special editions" of **Sports Illustrated** in Canada, electronically transmitting the content from the U.S. to Canada, where it would be printed and distributed. Canadian advertisers in these editions could purchase a full-page ad for roughly half the cost of comparable space in editions prepared for regional U.S. markets.

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[4] Idem, p. 27-28.

Faced with a direct challenge to the ban on split-run magazines, the federal government scrambled for a response. Thus in June 1996 the government tabled legislation, which would impose an 80% excise tax on the gross advertising revenue of split-run magazines. To counter charges that it was discriminating against U.S. publishers, the excise tax would be applied to magazines distributed outside Canada, including those published by Canadian publishers.

Not unexpectedly, Time Warner took a dim view of the bill, and warned the federal government off its proposed legislation. But, when Canada proceeded anyway, the U.S. government galloped to the rescue of one of its most influential corporate citizens and filed a complaint under the WTO. Casting aside the putative support for Canadian cultural sovereignty, the U.S. invoked the new and powerful dispute processes of the WTO to assail all Canadian programs covering split-run magazines, including some that had been in place for decades.

While several technical issues were argued, the essential thrust of the U.S. complaint was that Canada was discriminating against U.S. split-run magazines in favour of its own domestic magazine and periodicals industries. Canada, it argued, was in breach of WTO obligations to provide "national treatment" to Time Warner products under WTO rules.[5]

To win the case, the U.S. would have to succeed with an argument that it had been unsuccessfully advocating in the international arena for decades – that information and other forms of cultural expression are essentially commodities and should be treated just like other goods or products. In this particular instance this meant persuading the WTO dispute panel that magazines should be subject to the trade in goods provisions of the GATT: a magazine was a magazine regardless of its origin, content or perspective. As the Office of the United States Trade Representative put it, the case had "nothing to do with culture. This is purely a matter of commercial interest."[6]

Of course, Canada protested: surely a magazine's content should be considered a distinguishing feature. A magazine developed specifically for a Canadian readership, published by a Canadian company, and written from a Canadian point of view could not,

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[5] "National Treatment" is one of the guiding principles of the WTO framework, and is set out in Article III of the General Agreement on Tariffs and Trade (the GATT). [5] The General Agreement on Tariffs and Trade (1994) (the GATT) reproduces the essential elements of the GATT 1947, and comprises the framework upon which other WTO agreements are built. National Treatment requires WTO members to accord to the goods of all other WTO members non-discriminatory treatment relative to those produced domestically.

[6] Maclean's, Raising the Stakes Over Magazines: Washington Threatens Trade War, Jan. 25, 1999.

it argued, be considered "like" one developed in and for another cultural, political, and social context.

To support its case, Canada stressed the importance of advertising revenues to Canadian periodical publishers, and described the direct correlation between circulation, advertising revenue, and editorial content: the larger a magazine's circulation, the more advertising it could attract. With greater advertising revenue, a publisher would be able to spend more on editorial content. The more the publisher spent, the more attractive the magazine would be to its readers, the greater its circulation, and so on. Conversely, the loss of advertising revenue would produce a virtual death spiral: declining editorial content, reduced readership, and a further reduction in the ability to attract advertising.

Not only was the WTO's Appellate Body (AB) unmoved by Canada's arguments, but it actually used them to buttress its conclusion that U.S. and Canadian magazines were in direct competition and therefore "like goods" within the meaning of Article III of the GATT. The AB made repeated reference to earlier trade decisions concerning alcoholic beverages and beer, in which trade panels had dismissed the notion that differential treatment of goods might be justified because of a beverage-particular characteristic. Adopting a purely market-oriented approach to the issues before it, the AB took pains to explain: "The GATT is a commercial agreement, and the WTO is concerned, after all, with markets." Thus, what was true for beer is true for cultural "goods": if they compete, they are alike.

Thus under WTO rules, a news-magazine is a news magazine, regardless of its character, orientation, or national perspective. One can only assume that the same principles would apply to other forms of cultural expression: a newspaper is a newspaper, what difference could national orientation and subject matter make? As has now become the norm for WTO decision making, the court of last appeal under the WTO demonstrated a stunning ability to keep its focus on trade policy objectives, no matter how skewed its reasoning might appear in the larger view.

By so clearly treating magazines as tradable commodities rather than forms of cultural expression, the WTO also set the stage for further trade challenges to other forms of cultural protection. Moreover, in rejecting the argument that editorial content is a distinguishing feature of periodical publications, the WTO ignored the significance of the full play of diverse opinions in democratic societies. The implications are chilling.

It is not necessary to delve into the esoterica of trade dispute resolution to appreciate what this case was actually about. Or perhaps, more appropriately, what it **wasn't** about. Because the periodicals dispute was not about the world’s largest media corporation

adding a few points to the circulation figures of one of its numerous publications. Rather the US saw in this parochial dispute over the regulation of magazine advertising revenues, an opportunity to win two much bigger prizes. The first was the treatment of intellectual property as just another commodity under international law. The second, was the deployment of an effective enforcement regime to guarantee proprietary, and inevitably corporate, claims to this new commodity.

Thus, 75 years after Canada first adopted measures to protect Canadian magazines, the onslaught of WTO disciplines finally defeated its efforts to preserve these important cultural programs. But viewed from an international perspective, the Canadian periodicals case really must be seen as a watershed in the establishment of an international regime to provide for the protection of intellectual property in precisely the same way as it would any other good or commodity.

United States "Fairness in Music Licensing Act"?

The first WTO case to consider issues of copyright protection involved a challenge by the European Communities (EC) to provisions of the US Copyright Act establishing certain limitations to the exclusive rights of copyright holders.[7] Ss. 110(5) of the Act, as amended by the "Fairness in Music Licensing Act, created exemptions for small commercial establishments that were not, so the US claimed, "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".[8]

However, the exemptions would apply to a reasonably diverse community which ranged from individuals who merely turned on a radio or television in a public place, to a significant number of commercial establishments including bars, shops and restaurants, none of which would be liable to pay royalty fees as long they fell within certain size restrictions.

Nevertheless, the amendments represented a compromise that had been reached as part of a bargain which extended, in other ways, the proprietary rights of copyright owners. Understandably, that political compromise hadn't included the interests of foreign copyright holders who now had an opportunity to turn to the WTO with their complaints.

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[7] United States – section 110(5) of US Copyright Act, (WT/DS160/5 of 16 April (1999).

[8] Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 94th Congress., 2nd Session 75 (1976), as reproduced in Exhibit US-2.

Thus the European Community invoked WTO rules to challenge these domestic US measures, which it argued would have far greater economic impact on the interests of foreign copyright owners, than the US was willing to acknowledge. In fact the extent to which this exemption represented a significant economic cost for the complainants varied dramatically depending on which whose estimates you preferred. The same disparity existing between EC and US estimates about the extent of US market share that EC rights holders might claim to have.

For example: according to US estimates the actual losses to EC rights holders were very modest – by its account less than $500,000 annually - an impact radically smaller than the $53.65 million annual price tag the EC pegged its revenue losses at. [9]

It is also worth noting that the complaint would have certainly been applauded by the US corporations that had resisted the exemptions that had been part the domestic bargain. But whatever the motivation, or merits of the EC complaint – the most important consequences of this trade dispute devolve from what the panel had to say, or didn't say, when for the first time copyright issues were considered within the framework of the TRIPs Agreement.

However, before I examine how the panel addressed these issues however - I should set the stage.

The legal framework

The substantive provisions for the protection of copyright are set out in Articles 9-14 of the TRIPS Agreement. Article (9)1 of the TRIPS Agreement obliges WTO Members to comply with Articles 1 to 21 of Berne Convention. Article 12, further provides a minimum term of protection of for many copyrighted works as the life of the author plus 50 years.

Article 11bis(1) of the Berne Convention grants the authors of literary and artistic works, including musical works, the exclusive right of authorizing not only the broadcasting and other wireless communication of their works, but also the public communication of a broadcast of their works by loudspeaker or any other analogous instrument. Article 11(1) of the same Convention grants the authors of musical works the exclusive right of authorizing the public performance of their works, including such public performance by any means or process, and any communication to the public of the performance of their works.

[9] Note 7, p.65.

Article 9(2) of the Berne Convention bans the imposition of limitations on, or exceptions to, the reproduction right except in special cases when such limits or exceptions do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Article 13 of the TRIPS Agreement, makes this provision applicable to all other exclusive rights in copyright and related rights.

The US asserted that Article 13 clarified and articulated the "minor exceptions" doctrine of the Berne Convention, and that the Fairness in Music Licensing Act fell within these parameters. The European Communities argued they did not.

The WTO panel decision - which ran to more than 250 pages – offers a detailed review of these and other elements of US copyright law against the benchmark of WTO and Berne obligations. When the smoke of this lengthy and esoteric analysis finally cleared, we learned that the panel has created a saw-off, finding some, but not all, of the exceptions set out in US copyright law to be in breach of US obligations under the WTO. While the panel found the most important and commercial exemptions of this US law to be in breach of WTO rules it also concluded that as far as:

> the playing of dramatic works through homestyle apparatus [was concerned] the panel failed to see how these would "acquire such economic or practical importance that it could cause an unreasonable prejudice to the legitimate interests of rights holders. [10]

However, the most significant aspects of the case are not its conclusions, but rather how the panel arrives at them. Of particular concern are the panel's views about the issue of non-commercial use within the TRIPs Agreement. There are two preliminary issues that are also noteworthy, because they consider the rights of third parties, and the burden of proof when allegations are made about non-compliance with WTO obligations. I will briefly touch on these before examining how the panel dealt with the difficult and complex issues of resolving the competing policy goals that underlie all intellectual property requires.

Third Party Interventions and WTO Panel Practice

As had occurred once before in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*,[11] (the Shrimp Turtle dispute), the panel was confronted with unsolicited submissions from a third party. In this case the supplicant was the American Society of Composers, Authors and Publishers, whose clientele obviously had a rather

[10] Note7, p 84.

[11] Appellate Body Report on *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/AB/R, paragraphs 99-110.

considerable interest in the outcome of the trade dispute.[12] ASCAP didn't concur with the position being taken by its government and wanted to make its position known to the panel.

The EC objected. The authority of panels was limited, it argued, to the consideration of factual information and technical advice from non parties and therefore precluded any consideration of the views of individuals and groups on legal or policy issues. While the United States supported the right of private parties to make their views known to WTO dispute panels, at least in principle – it was not keen to have ASCAP's views considered in this particular instance.

Conscious of concerns about the secrecy of WTO processes, panels have been somewhat circumspect in dealing with third party submissions, but to this date have steered clear of actually taking them into account. Thus, as it had in another WTO dispute, the Panel decided to skirt the issue by indicating that it would "not reject outright the information contained in the letter from the law firm representing ASCAP," but added. "while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings."

The Burden of Proof in WTO Cases

The other preliminary issue that the Panel addressed concerned where the burden of proof would lie for establishing whether the US was in breach of its obligations. The EC contended that it merely had to establish that US copyright reforms were inconsistent with any provision of the TRIPS Agreement (including those of the Berne Convention (1971) incorporated into it). Once such inconsistency was established (or admitted), the burden would rest with the US to invoke and prove the applicability of an exception.[13]

Following earlier precedent, the panel agreed, placing the burden of proof on the EC for establishing a *prima facie* violation of the basic rights provided by the copyright provisions of the TRIPS Agreement. If it did so, the burden of proof would then shift to the United States to establish that its domestic law was nevertheless justified as an allowable exception to its obligations under the TRIPS Agreement.

However, quite apart from allocating the burden of proof in this way, a review of panel jurisprudence suggests less than even-handedness when it comes to judging whether these respective burdens have been discharged. As for purported violations of WTO requirements, panels have been quick to judgment, often demonstrating a liberal and

[12] In this case the letter from a law firm representing ASCAP was actually written to the United States Trade Representative and only copied to the Panel, a point it notes.

[13] First written submission by the European Communities, paragraph 74; and the second written submission by the European Communities, paragraph 34.

expansive interpretation of WTO rules. But the same can't be said of the approach panels have taken to the exclusionary provisions of this trade regime that might otherwise have allowed nations some latitude in fashioning their national policies and laws. This explains why it has been virtually impossible for countries to claim the benefit of any exception to WTO requirements.[14] The US copyright case would be no exception.

Non-commercial Purposes and the Public Interest.

However what may be the most important aspect of this WTO decision barely consumed a moment of the panel's attention, because in the 250 plus pages of this judgement, very little is said about the scope for making non-commercial use of intellectual property. And yet it is the need to balance private proprietary claims and the broader public interest – or, in other words, to reconcile commercial and non-commercial values, that lies at the heart of public policy concerning the protection of intellectual property.

Thus, having quickly found the US to be in breach of its obligations under Article 9 of the TRIPs Agreement, the panel turned its attention to US claims that its copyright reforms should be considered a minor and permissible exception under both the rules of the Berne Convention and WTO disciplines. The EC objected, arguing that any exceptions to the copyright claims of authors and composers would have to be of a non-commercial nature. As it submitted, minor reservations should be:

> limited to public performances of works for religious ceremonies, military bands and the needs of the child and adult education. All these uses are characterised by their non-commercial character….. But even if one were to argue that these three instances were only illustrative, their common features consist in being for non-commercial activities and for a well-defined social purpose. Given that Section 110(5) Copyright Act is directly intended to serve commercial interests by the use of the copyright works in commercial establishments for the enjoyment of customers with the objective to enhance turnover and profit neither of these common characteristics can be found in Section 110(5) Copyright Act.

In support of its argument, reference was made to WIPO materials that offered guidance to developing countries about how to provide for free and non-voluntary licenses within the limits of the Berne Convention.[15] According to this model free uses could include:

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[14] The cases that illustrate this apparent bias involve attempts by nations to rely upon the exceptions set out in Article XX of the GATT concerning the protection of animal, plant and human life, and the conservation of natural resources. There is a yet no reporting decision sustaining such a defence. See this author, "A Citizen's Guide to the WTO," Lorimer and the Canadian Centre for Policy Alternatives, 1999.

[15] Tunis Model Law on Copyright, which has been adopted in 1976 (i.e. after the last reference to "minor reservations" at the diplomatic conference in 1967).

(a) use of a work for one's own personal and private requirement;

(b) quotations compatible with fair practice and to the extent not exceeding that justified by the purpose;

(c) the use of a work for illustration in publications, broadcast or sound or visual recordings for teaching, provided that such use is again compatible with fair practice and that the source and the name of the author are mentioned by the user;

(d) the reproduction in the press or communication to the public of articles on current economic, political or religious topics published in newspapers or periodicals and broadcast works of the same character, provided that the source is indicated by the user and such uses were not expressly prohibited when the work was originally made accessible;

(e) the use of a work that can be seen or heard in the course of a current event for reporting on that event;

(f) the reproduction of works of art and architecture in a film or television broadcast, if their use is incidental or if the said work is located in a public place;

(g) the reprographic reproduction of protected work, when it is made by public libraries, non-commercial documentation centres, scientific institutions and educational establishments, provided that the number of copies made is limited to the needs of their activities and the reproduction does not unreasonably prejudice the legitimate interest of the author;

(g) the reproduction in the press or communication to the public of political speeches, speeches delivered during legal proceedings, or any lecture or sermon delivered in public, etc, provided that the use is exclusively for the purpose of current information and does not mean publishing a collection of such works.

Unfortunately the panel expressed little interest in this crucial point, dealing with it almost summarily and concluding that it was:

> …. not in a position to determine that the minor exceptions doctrine justifies only exclusively non-commercial use of works and that it may under no circumstances justify exceptions to uses with a more than negligible economic impact on copyright holders. On the other hand, <u>non-commercial uses of works, e.g., in</u>

> adult and child education, may reach a level that has a major economic impact on the right holder. At any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed *minor*.[16]

While it may have had a point with respect to the significance of economic impacts associated with certain non-commercial uses – there are some obvious questions, and answers, which should have followed:

- At what point would economic impacts for a copyright owner be so great as to negate the societal benefits associated with making information freely available for such non-commercial purposes as adult and childhood education?

- Should the balance of these competing interests shift with the character of either the rights holder, or the beneficiaries of making certain IP freely available. For example should the line be drawn in the same place when the rights holder is a large media corporation and the users, students in a developing country. Conversely, where the balance lie between the competing interests of an individual author and a wealthy US university?

- Do the types of users suggested by the Tunis Model Law reflect those, that at least for developing countries – the WTO would be willing to accept?

At the heart of these questions is the balance that must be preserved between private right and public interest – a balance so fundamental to the basic character of a civil society that they have been given expression in the **UN Universal Declaration of Human Rights:**

> 27(i) Everyone has the right freely to participate in the cultural life of the Community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> 27(ii) Everyone has the right to protection of the moral and material interests resulting from scientific, literary and artistic production of which he is an author.

EC submissions clearly invited the panel to address the challenge of balancing the competing claims of proprietary rights and the public interest. Regrettably the panel showed scant awareness of the policy framework which should have at least informed, if not guided, it deliberations. Rather it ignored the public interest dimension of arguments made by the EC and supported by other intervening nations, choosing instead to simply

[16] Note 7, p. 58.

reduce the issues before it - to ones involving the competing claims among private commercial users. Thus less than two paragraphs of its very lengthy decision are devoted to addressing the issue of non-commercial use.

Thus the WTO's first opportunity to consider trade disciplines incorporating one of the most important WIPO conventions, devolved quickly to a technocratic exercise of measuring the physical characteristics of the environment and the loudspeaker technology used in the unlicensed broadcasts that were at issue. As has now become the pattern with trade dispute resolution under the WTO – panels have shown such a myopic preoccupation with the trade liberalization goals of the regime, that all other competing policy perspectives are scarcely considered.

Beyond missing a critical opportunity to demonstrate some sensitivity to the broader policy context within which WIPO conventions reside, the implication of the panel's approach is that exemptions to the rights of copyright holders will be viewed by the WTO entirely in terms of the economic impact such unlicensed use may have. Once that use reaches a certain economic threshold, no exemption will be permitted to the exclusive rights of a copyright holder. It will matter not whether that use is being offered as a public service by a not-for-profit provider, or for entirely commercial reasons. Neither would the relative needs, or wealth of the potential beneficiaries of such free access, enter the equation.

As we know, judicial institutions play a fundamental role in shaping the policies and laws of most societies. What we can observe in the US Copyrights case, a dramatic shift in decision making authority from WIPO to the WTO with respect to matters of intellectual property protection. As can be seen from the panel's response to this challenge, a great deal of the public policy complexity that should inform decisions about intellectual property protection is likely to be lost in the transition. In their stead will be the dollars and cents of competing commercial interests, as increasingly large corporations consolidate their dominion over global information resources.

Conclusion

I have taken the time to relate the details of these two WTO disputes because they provide the most persuasive evidence of the enormous influence this regime will have in shaping national and international policies and law as these relate to intellectual property protection. WTO rulings will not be ignored, because of the costs of doing, even for the wealthiest nations will be too high.[17]

[17] It is not unusual for the WTO to assess trade sanctions in the hundreds of $millions. In the split-run magazine case, when Canada was too slow the implement the WTO ruling, the US threatened to

Unfortunately the rules of the TRIP s and other WTO Agreements were the product of highly secretive negotiations processes informed almost exclusively by the views of large corporations with a significant stake in global markets. Not surprisingly trade rules often reflect an unleavened corporate agenda. In the area of intellectual property protection these include: (1) the establishment of a comprehensive, universal and enforceable regime for the protection of intellectual property rights in accordance with US legal norms, and (2) the elimination of competing – read public – information service delivery systems.

Of these two objectives, the first has to a significant degree already been accomplished. This is clear from the cases described here. In the Canadian Periodicals case we have seen how WTO rules have been invoked to transform information, and other forms of cultural expression into commodities to be regulated like any other product or good. In the case of US Copyright law we see the WTO dispute process reveal the same indifference to non-commercial values or policy perspectives.

As the goal of privatising the delivery of information services, which will obviously be of great interest to public libraries, work is still in progress and now being pursued as one aspect of efforts to complete the rudimentary framework of the General Agreement on Trade in Services (the GATS) which has already been incorporated within the WTO framework. In choosing a topic for today's talk I was torn: should I talk about the damage already done by WTO rules, or talk about the challenges which are now only unfolding. I chose the former, on the assumption that many of you might still be unfamiliar with the WTO, or know little of the trade disputes I described.

For some time, I have considered these disputes to be a mixed blessing, because without this tangible evidence, a critique of WTO policies and disciplines often seems far-fetched. How could nation states willingly cede sovereignty to the extent WTO rules require? Why would they empower unaccountable international tribunals staffed by experts in international trade (but with few if any other qualifications), to sit in judgment of a diverse array of domestic policies that may only tangentially effect international trade? Why would WTO rules take precedent when conflicts arise with other international conventions and protocols, such as those dealing with environmental protection, or basic human rights?

There is no better proof of these admittedly astonishing propositions than to recount the decisions of WTO trade dispute bodies. While the cases I relate here, have attracted less notoriety than challenges to US marine mammal protection laws, or European food safety standards, their implications are obviously just as far reaching.

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impose retaliatory sanctions in the order of $300 million, and applied strategically to exports from key Canadian political constituencies, such as steel from the riding of its Minister of Culture and Heritage.

The TRIPs and GATS Agreements represent the embodiment of a corporate vision of globalization that: offers no space for communal or public ownership; regards diversity as unwanted competition that must either be acquired, or eliminated; and, dismisses the notion of public service delivery as a quaint anachronism that must give way to the corporate imperatives of growth, and profit maximization.

The GATS Agreement represents a critical dimension of this corporate enterprise and is only now in the works. Because the GATS defines services in such an expansive way to include almost anything you can't drop on your foot, and because its essential objectives are to de-regulate and privatise all services – current GATS negotiations must become a priority for everyone with doubts about the wisdom of this corporate agenda.

It seems to me that there is particular role for librarians to play as well, and not just as the defenders of public libraries, although without your determined intervention I fear the era of such public institutions, which emerged only a little more than a century ago, will not survive very much longer. But there is another and equally important service you can provide, which would be to provide effective public access to the complex, obscure and often secretive reports, submissions, studies, and negotiating texts which comprise the record of contemporary trade negotiations and dispute resolution. There is great need to find ways to reveal this vital information which far too often has been shrouded from public view.

Finally, I will conclude by saying that I believe there is a need for an international rules based system of trade – for international agreements as well, about intellectual property, culture, biodiversity, human rights, food security and climate change. But these agreements must reflect the views and interests of all in society, and not simply the priorities of the world's largest corporations. If this is to occur, it is up to all of us to impress upon our governments that the dynamics of international trade negotiation and dispute resolution must now be fundamentally overhauled.