



COPYRIGHT: ACCESS TO KNOWLEDGE IN FREE TRADE AGREEMENTS?

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KEY CONCEPTS

□ Access to Knowledge (A2K)

- a) Yale Information Society Project : right to **access** expressions of human inquiry, and the right to **participate** in the creation and manipulation of raw information, knowledge, and knowledge-embedded tools and services.
- b) Vera Franz, Information Society and Intellectual Property Reform, Open Society Information Program: The access to knowledge (A2K) movement first came together in 2004 to respond to a crisis, namely the **increasing imbalance between privatized knowledge** (that which is controlled by the intellectual property rights holder) and the **knowledge commons** (that which is "owned" by the public). This crisis had been precipitated by the advancement by some Northern governments of an economic agenda which has consistently pushed for stronger and broader intellectual property (IP) protection.

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□ Copyright

- a) Protects the *expression* not the *idea* (idea expression dichotomy)
- b) Specific term varies from country to country – minimum 50 years required.
- c) Legal protection – to creators of certain types of content – assigns to them a certain specific set of rights in certain specific works
- d) Why? Encourage innovation, creativity, culture, science. | Monetary benefit to copyright holders | Access to knowledge and information to public |
- e) Standard? Locke and the ‘sweat of the brow’ principle | Higher standard of ‘modicum of creativity’ also applied sometimes

BASIC FRAMEWORK : INTERNATIONAL COPYRIGHT LAW MAKING

World Intellectual
Property
Organization

World Trade
Organization –
TRIPS + Doha
Declaration

Free Trade
Agreements –
Bi/Pluri lateral-
examples include
the TPP, the RCEP
and the Indo-EU
FTA

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WIPO (Formation: 1967)

- Preceded by the United International Bureaux for the Protection of Intellectual Property (1893 – for the Berne and Paris Conventions)
- Multilateral
- Intellectual Property
- Standing Committee on Copyright and Related Rights
- 2004 – Development Agenda adopted

WTO

- Agreement on Trade Related Aspects of Intellectual Property Rights – effective 1995
- [Doha Declaration on the TRIPS Agreement and Public Health, 2001](#)
- Multilateral - WTO Council used by India as a forum to criticize plurilateral negotiations including the ACTA and the TPP (2010, 2011, 2012)

Free Trade Agreements

- Examples include TPP, ACTA, RCEP, Indo – EU FTA
- TPP – (under negotiation) Trans-Pacific Partnership – 12 Pacific Rim countries – does not include China (yet). India to join?
- RCEP – (under negotiation) ASEAN + 6
- ACTA – (signed, 2011 – in force after 6 ratify) Anti-Counterfeiting Trade Agreement – Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, USA, Mexico, European Union
- Typically, TRIPS plus provisions, to reduce applicability of TRIPS flexibilities

INDO-EU FREE TRADE AGREEMENT

1. Compliance is sought with many international instruments, including
 - a) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) – not in force in India
 - b) WIPO Copyright Treaty – WCT (Geneva, 1996) and the WIPO Performance and Phonograms Treaty – WPPT (Geneva, 1996) – India is not a party to either
2. Introduces strict provisions on intermediary liability – beyond the mandate of TRIPS
3. Strong language on IP enforcement, including the use of injunctions
4. Technical Protection Measures – sweeping language + limitations only to persons who have ‘legal access to the protected work or subject matter’
5. Copyright Expansion – photographic works term unclear + author of original work to have a right in perpetuity to receive royalties from downstream sale?
6. Limitations and exceptions to conform to the ‘three-step’ test
 - a) the exceptions and limitations must apply in certain special cases
 - b) must not be in conflict with the normal course of exploitation of the subject matter in question and
 - c) must not unreasonably prejudice the legitimate interests of the right holders

REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP

1. Proposed FTA between the ten member states of ASEAN (Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, Vietnam) and the six other states – Australia, China, India, Japan, Korea and New Zealand
2. Jeremy Malcolm, Electronic Frontier Foundation – RCEP worse than TPP or ACTA!
3. India to reportedly only adopt TRIPS compliant provisions
4. Leaks of Japan/South Korea/India proposals
 - a) Strong border control measures (Japan and South Korea)
 - b) Strong technical protection measures provisions – no limitations or exceptions for fair use (Japan)
 - c) Criminalizing of certain acts that may be copyright infringement including recording of movies (question – how does this reconcile with the ‘personal use’ exception?) (Japan and South Korea)
 - d) Extension in term of copyright protection – 70 years + life of author (South Korea) | India says limit to 50 years.
 - e) Blanket rights to rights holders – including the right to authorize creation of a copy for temporary storage (currently an exception in Indian law) (South Korea)
 - f) Blanket prohibition on re-transmission over the internet (South Korea) – also demanded in the Broadcast Treaty at WIPO

IN SUM: EFFECT OF FREE TRADE AGREEMENTS ON COPYRIGHT?

1. Threat to A2K? – YES!
2. A2K Protected? – Rarely, if at all.
3. Secrecy of negotiations and erosion of the democratic process – Old wine in a new bottle
 - a) Calls for transparency around Indo-EU FTA, RCEP and the TPP; throw-back to the ACTA
 - b) Calls for public input – around Indo-EU FTA, RCEP and the TPP; throw-back to the ACTA
4. Geo- politics eroding the multilateral decision making process – forum shifting – developing/smaller countries disadvantaged in FTA negotiations.

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5. Result in an increase in the levels of IP protection
 - a) TRIPS plus provisions
 - b) Restrict flexibilities offered by TRIPS
6. Copyright owners have an advantage in the knowledge economy : developing countries are typically users of IP and not producers of IP – developing nations at a disadvantage
7. Enhanced copyright protection increases costs for creative industries
8. Disadvantages users who rely on limitations and exceptions including students, academicians, researchers, libraries, archives, teachers, persons with disabilities
9. Solutions? Reverse some of the above, and have positive provisions on limitations and exceptions!

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