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A US Perspective on Copyright and Free Trade Agreements

Marketa Trimble

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ALAI Congress 2024 | 25 October 2024



Office U. S. Military Telegraph,
WAR DEPARTMENT.

The following Telegram received at Washington, _____ M. _____ 1864.

From _____ 175 _____ 1864.

The seal of these Territory
of Nevada this Twentieth
day, of October Eighteen hundred
& sixty four 1864

James M. Nye
Gov of the Territory of
Nevada

Attest

Orion Clemens
Secy of the Territory
of Nevada

(Seal)

6543, rds
Paid #4303.27

Office U. S. Military Telegraph,
WAR DEPARTMENT.

The following Telegram received at Washington, 220 AM. _____ 1864.

From Carson City _____ Oct 30 _____ 1864.

W. H. Semard

The entire Constitution Nevada
with Certificate under section five of
enabling act has been telegraphed to
President so as to avoid possibility of
not being received by mail - Have
President issue this proclamation
admitting us a State immediately
as the opposition are seeking to make
Political Capital against us on account
of our non admission Notify us when done

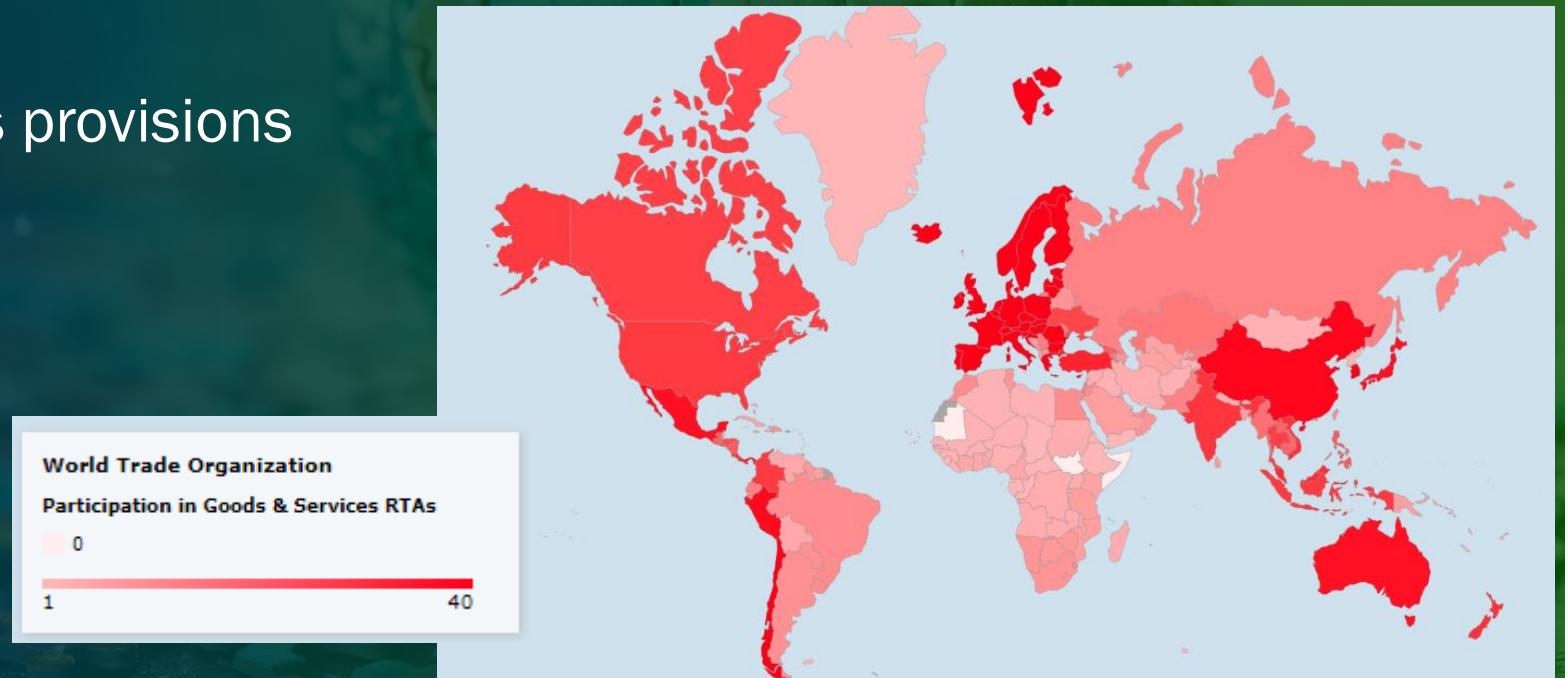
J. W. Nye Gov of Nevada Territory
J. Keely Johnson

late Pres of Constitutional Convention
& Chairman Union Club Am Nevada

64 Col 3222 Call

FTAs AND COPYRIGHT LAW

- 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
- 373 FTAs in force as of 23 October 2024
- 150 FTAs in force with copyright/neighbors rights provisions



FTAs AND IP LAW

- A range of IP law provisions in FTAs:
 - A single article on IP law
 - E.g., Israel-U.S. FTA (1985)
 - Or a “rendez-vous clause”
 - About 50% of FTAs with IP provisions
 - Sections (several articles) on IP law
 - About 20% of FTAs with IP provisions
 - A chapter on IP law
 - E.g., NAFTA, USMCA
 - About 30% of FTAs with IP provisions
- Evolution of IP chapters in FTAs
 - NAFTA: 10,000 words
 - TRIPS: 12,500 words
 - USMCA: 22,500 words
 - CPTPP: 25,000 words

ROLES OF FTAs IN IP LAW

- Detailed IP provisions going beyond TRIPS
- A template for future FTAs
- A standard for future international negotiations
- Signaling of future positions in multinational negotiations
- Weaponization of IP (through investor-state disputes)
- Extension of the FTA effects through most-favored-nation treatment principle
- Cumulation of IP commitments, overlapping obligations
- FTA “inflation”

U.S. FTAs AND IP LAW

- 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
- 14 U.S. FTAs with 20 countries
 - Israel (1985)
 - USMCA (NAFTA 2.0; Canada 1989, NAFTA 1994)
 - Jordan (2001)
 - Chile (2004)
 - Singapore (2004)
 - CAFTA-DR (Dominican Republic-Central America FTA - Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras & Nicaragua (2004))
 - Australia (2005)
 - Morocco (2006)
 - Bahrain (2006)
 - Peru (2009)
 - Oman (2009)
 - Colombia (2012)
 - Panama (2012)
 - South Korea (2012)

19 USC 3809 Trade negotiating objectives (introduced by the Trade Act of 2002)

The principal negotiating objectives of the United States regarding trade-related intellectual property are--

(A) to further promote **adequate and effective protection** of intellectual property rights, including through--

(i)(I) ensuring **accelerated and full implementation of the TRIPS Agreement** ..., particularly with respect to meeting enforcement obligations under that agreement; and

(II) ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect **a standard of protection similar to that found in United States law**;

(ii) providing strong protection for **new and emerging technologies and new methods of transmitting and distributing** products embodying intellectual property;

(iii) **preventing or eliminating discrimination** with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights;

(iv) ensuring that standards of protection and enforcement keep **pace with technological developments**, and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works; and

(v) providing **strong enforcement** of intellectual property rights, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms;

(B) to secure **fair, equitable, and nondiscriminatory market access opportunities** for United States persons that rely upon intellectual property protection; and

(C) to respect the **Declaration on the TRIPS Agreement and Public Health** [Doha, 2001].

TRIPS-PLUS COPYRIGHT LAW IN U.S. FTAs

- Right of reproduction, permanent or temporary (including temporary storage in electronic form)
- Publication of national laws, regulations, and procedures
- Life + 70 for a work (incl. photographic work), performance, and phonogram
- Transferability of economic rights by contract, incl. in the employment context
- TPM/DRM protection, incl. remedies and a definition of an effective technological measure and of rights management information, and limitations on exceptions from the protection
- Rights to performs and producers of phonograms
- Country's agencies top use only authorized software
- Limitation of liability of ISPs
- Enforcement of IP, incl. remedies, border measures
- Recognition of collective management societies' role (transparency) (CO, PE), including practices that are fair, efficient, transparent, and accountable (USMCA)
- Online piracy prevention (KR Confirmation Letter)

FUTURE OF COPYRIGHT AND FTAs

- TRIPS-plus versus TRIPS-minus provisions
- Emphasis on flexibilities
- Evolution of U.S. copyright law
 - International exhaustion, *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016)
 - Fair use and AI training and deployment
- Evolution of international copyright law and negotiations
- IP-like protections
- Compatibility with other related FTA chapters

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