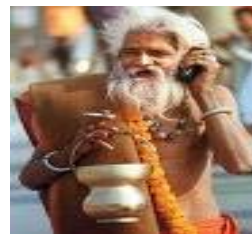


## Int'l IP

- Module 1
- Introduction

## Introductory topics and course themes

- Commercial piracy?
- Biopiracy?
- Why has IP gone “Int'l”?
- “System”(s) of Int'l IP
  - Institutions (WTO; WIPO)
  - Treaties (related to institutions)
  - States (territoriality)
  - Substantive law similarities & differences



### Illustrative Works – 17 U.S.C. § 102

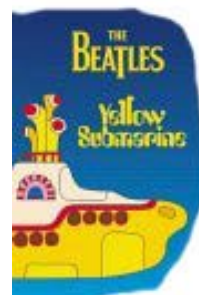
- 1) literary works
- 2) musical works, including any accompanying words
  - Work must be original in its melody, harmony or rhythm, individually or in combination.
    - But, rhythm is the least likely aspect in which originality may be manifested
  - Non-dramatic musical compositions are subject to a compulsory license once released to the public – “cover license” under § 115
- 3) dramatic works, including any accompanying music
- 4) pantomimes and choreographic works
- 5) pictorial, graphic, and sculptural works
- 6) motion pictures and other audiovisual works
- 7) sound recordings
  - Since 1972, sound recordings are protectable independently of the musical, dramatic, or literary works which are recorded; they are a separate work; does not include sounds accompanying a motion picture or audiovisual work; no mechanism such as the “cover license;” embodied in a “phonorecord”
  - No general public performance right
  - Sometimes not clear who the “author” of a sound recording is; singer, band, studio engineer? – typically handled by contract
- 8) architectural works

### Exclusive Rights in © Works - 17 U.S.C. § 106

- Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
  - (1) to **reproduce** the copyrighted work in copies or phonorecords [material object in which sound is fixated . . .];
  - (2) to prepare **derivative works** based upon the copyrighted work;
  - (3) to **distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
  - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform** the copyrighted work publicly;
  - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display** the copyrighted work publicly; and
  - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission

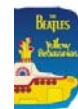
### Extraterritorial Application – Subafilms v. MGM (9<sup>th</sup> 1994) (en banc)

- U.S. Copyright Act infringement claim when the U.S. conduct is only authorization of foreign acts?
- Hearst Corp., the Producer, developed animated movie
- United Artists (UA) distributed in 1967-68
- Early 1980s – UA refused licensee offers to distribute videocassettes
  - UA was unsure as to whether the 1967 agreements gave it videocassette rights
- Later, in 1987, MGM/UA began distribution via subsidiaries/licensees against the Producer's objections
  - UA authorized Warner to undertake international videocassette distribution pursuant to earlier agreements between the two

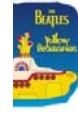


### Subafilms

- District court and 9<sup>th</sup> Circuit panel judgments for Subafilms
  - Basis – “acts of infringement” in the U.S. include authorization of foreign acts
  - The “authorization” consisted solely of entering into licensing agreements
- En banc court's view?
  - Infringing actions that take place entirely outside the U.S. are not actionable
    - The U.S. copyright laws do not have extraterritorial effect
- The word “authorize” in section 106 does not create a separate form of liability, but is meant to trigger the contributory infringement inquiry
  - Contributory liability requires a base act of direct liability
  - The Peter Starr court overlooked this requirement



### Subafilms



- Does it, or should it, matter whether the foreign acts are illegal in the foreign jurisdiction?
- Adverse effect doctrine to argue for extraterritorial reach
  - Even if true, it would be for Congress to make this change
  - There is a presumption against extraterritorial effect of Congress' acts
  - Congress made some small extensions of extraterritorial effect in the 1976 act
    - It knew how to do more if it wanted to
    - It legislated the 1976 Act against the backdrop of the presumption against extraterritorial effect

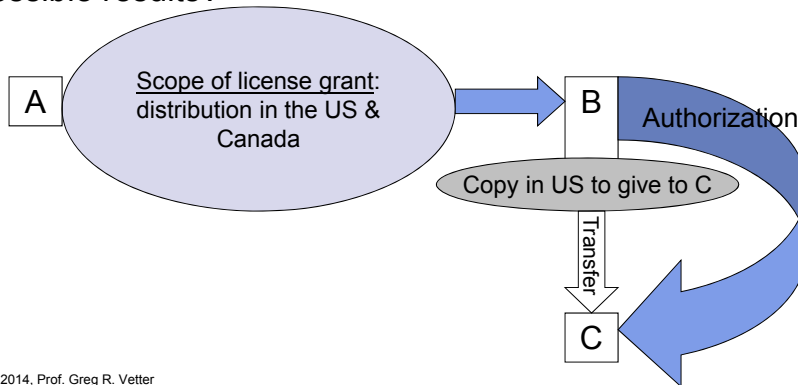
### Subafilms



- Even with “adverse effects” – the touchstone is Congressional intent
  - Just after the unauthorized distribution, the US acceded to Berne and its national treatment principle is based on territoriality
  - Extraterritorial application of U.S. copyright law might disrupt Congress' efforts to secure a more stable int'l IP regime
  - An additional problem is that extraterritorial effect might permit U.S. law to apply to foreign nationals undertaking acts exclusively in foreign jurisdictions
  - Prohibition against extraterritorial application avoids difficult choice of law questions
    - Effects of the action in the U.S.
    - Contacts by the offender with the U.S.
- Subafilms' additional arguments . . .
  - damages
  - “negative” made in the U.S.
  - conspiracy

### Subafilms - hypo

- A licenses to distributor B the right to make and sell for purposes of distribution in the U.S. and Canada
- B makes copies for the purpose of sending to the Philippines
- B sends the copies to the Philippines to a company (C) who will make and sell copies in the Philippines
- B authorizes C to make and sell the copies
- Possible results?



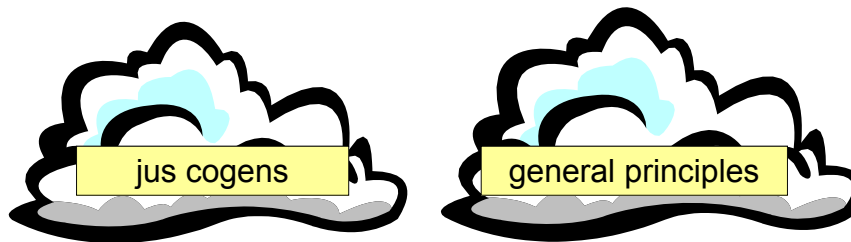
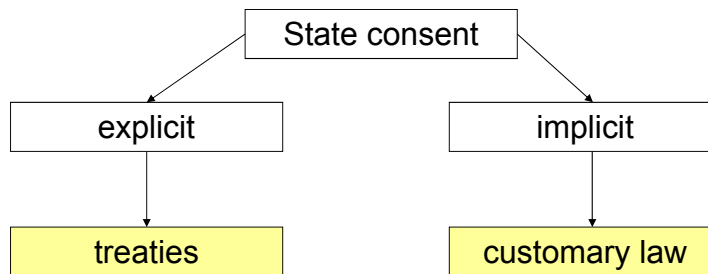
### Themes

- International law and sources of international law
- Territoriality
- Geo-political trade relations
- Traditional divisions of IP law
  - Industrial property
  - Literary and artistic property
- Public/private distinction
- Comparative analysis
  - Between and among jurisdictions
  - Instruments (mostly treaties) versus implementation
- Extent of and forces driving **harmonization** & limits of these forces



## A way to think about the basis of Int'l law

(vastly oversimplified, but hopefully illustrative)



## Int'l Law & Institutions

- “International Law” versus “law of nations” versus “customary international law”
- Restatement of Foreign Relations Law
  - (1) A **rule of international law** is one that has been accepted as such by the international community of states
    - (a) in the form of customary law;
    - (b) by international agreement; or
    - (c) by derivation from general principles common to the major legal systems of the world.
  - (2) **Customary international law** results from a general and consistent practice of states followed by them from a sense of legal obligation.
  - (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.
  - (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as **supplementary rules of international law** where appropriate.

## Restatement of Foreign Relations §102

- Practice as customary law (Type 2: RS §102(1)(a) & §102(2))
  - Duration? How widespread? Effect of declared dissent?
  - **Opinio juris**
    - For practice to become customary law, states must follow it from a sense of legal obligation
  - Dissenting views and new states
  - General and special custom
- Peremptory norms – jus cogens (Type 4: RS §102, comment k)
  - permitting no derogation
  
- Conflict between int'l agreement and customary law
  - equal authority as int'l law, unless customary law is jus cogens

## Restatement of Foreign Relations §102

- Int'l agreements as a source of law (Type 1: RS §102(1)(b))
  - multilateral agreements open to all states are increasingly used for general legislation, or to codify developing customary law
  - Bindings resolutions of international organizations
  - Int'l agreements codifying or contributing to customary law
    - Some multinational agreements may come to be law for non-parties that do not actively dissent
- General principles as a secondary source of law (Type 3: RS §102(1)(c) & §102(4))

## Venues for Int'l IP Treaties

- WIPO
  - Treaty subject matter “peculates” at WIPO
    - Standing committees of experts for three areas of IP
  - Private sector role via NGO participation
- WTO
  - IP agreements part of general “round” of trade talks
  - No NGOs, documents cloistered
- Effect of treaties on Int'l IP?
- How does Int'l IP lawmaking process differ within each institution?
- Role of national law?

## Multilateral Agreements – Int'l IP Instruments

- Multilateral Agreements replacing bilateral agreements
  - Why?
- Joining a treaty
  - Administering a treaty
- Process of updating multilateral agreements via “Acts”
  - Creation of different requirements to which states have agreed to be bound
  - Effect of TRIPS on this?
- Influences driving multilateral treaty membership
  - Balance of trade considerations
  - “Most Favored Nation” status



## IP in other International Treaties

### The Universal Declaration of Human Right:

**Article 27. 9(...)** Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

**The International Covenant on Economic, Social, and Cultural Rights:** The language in article 15.1 (c) imposes an obligation on states parties to protect the moral and material interest of an author and inventor.

## Treaties Under US Law

- Int'l meaning of "treaty"
  - any "international agreement concluded between two States in written form and governed by international law"
  - From Report to Senate Committee:
    - (1) The parties intend the agreement to be legally binding and the agreement is subject to international law;
    - (2) The agreement deals with significant matters;
    - (3) The agreement clearly and specifically describes the legal obligations of the parties; and
    - (4) The form indicates an intention to conclude a treaty, although the substance of the agreement rather than the form is the governing factor.
- US law meaning of "treaty"
  - one kind of international agreement that becomes law within the US because it is an agreement that is made "by and with the advice and consent of the Senate"
  - Self-executing or not?
    - Sometimes not clear on the face of the treaty
    - An interpretation issue for executive branch or courts
    - If self-executing, supremacy clause means that it overrides state law

## Vienna Convention on the Law of Treaties

- Article 26 – performed in good faith
- Article 27 – don't invoke internal law as justification for failure to perform a treaty
- Article 31 – interpretative rules
  - Ordinary meaning of terms in light of object and purpose
  - Context for interpretation includes preambles, annexes, and other agreements/instruments under certain conditions in connection with the conclusion of the treaty
  - In addition to context, interpretative meaning comes from subsequent
    - Agreement on interpretation
    - Practice in application
    - Relevant rules of int'l law applicable to the parties' relation
- Article 32 – supplementary means of interpretation (preparatory work & circumstances) to be used when under Article 31 the meaning is
  - ambiguous, obscure
  - manifestly absurd or unreasonable

## Executive Agreements

- Three types:
  - Congressional – Executive Agreements
    - Explicitly or implicitly authorized by Congress, or submitted to it for approval
  - Agreements pursuant to treaties
    - Express authorization or reasonably inferred
  - Presidential or Sole Executive Agreements
    - Five areas: general executive authority; commander in chief; treaty clause for agreements that are part of negotiating a treaty; authority to receive ambassadors; duty to “take care” that the laws are faithfully executed
    - Executive agreements in the President's independent constitutional authority can supersede conflicting state law
    - Opinions differ as to superceding a prior act of Congress
- Increasing use
  - In 1980s, US entered into 300-400 Executive Agreements per year as opposed to 8-26 treaties
- Trade Agreements
  - Tariff related treaties must be in the form of legislation passed by both houses
  - These are not eligible for “advice and consent” of the Senate
- Fast Track

## Civil Law Systems

- code-based system of law
- Lack of formal stari decisis
  - Prior decisions have influence, especially as the same principle is expressed in many court opinions
  - Some systems have “jurisprudence constante”
    - which means that they try to decide like cases alike
- Judge Cooper on the differences between the two systems
  - “A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?" The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematize. The working rule of the common lawyer is solvitur ambulando.”

## Comparative IP Law

### Common Law Vision

1. Utilitarian Theory U.S  
Constitution I, § 8, cl.  
8.
2. American  
Jurisprudence

### Civil Law Vision

1. Natural Law theory
2. George Hegel and  
Immanuel Kant
3. Constitutional  
recognition of DPI

## National Treatment & MFN

- Bilateral reciprocity approach
  - Burdensome to apply (must determine other country's law)
  - Discrimination against foreign rights holders
  - Scope of protection for same type of IP in a particular country became a function of its source country
- National treatment
  - Solved reciprocity problems – substitutes “non-discrimination”
  - Give nationals of other member countries same treatment as your own nationals
    - Cornerstone of Paris and Berne; used in NAFTA and TRIPS
    - Byproduct of national treatment is a desire for some minimum standards of protection in member countries

## National Treatment & MFN

- Two general non-discrimination principles
  - National treatment
  - “Most Favored Nation” treatment
    - Benefits extended to even one in the trade system will be extended to all
      - Classic application is with tariff rates – for example, once a country offers a specific tariff rate to one country in the trade system (say, GATT) then that country must offer the same rate to all countries in the system
  - Unconditional and immediate MFN is cornerstone modern multilateral trading system, starting with GATT in 1948
- Until 1986, IP not included in GATT's requirement of immediate and unconditional extension of MFN status to all nations in the system
- GATT Article XX(d) allows some discriminatory treatment in order to “secure compliance” with IP laws
- However, TRIPS incorporated MFN principle for certain aspects of Int'l IP system

## National Treatment & MFN

- TRIPS implementation of MFN
  - Applies at least to enumerated types of IP in TRIPS
  - May apply more broadly depending on interpretation of “intellectual property” in TRIPS
  - For example, will EU regime to protect databases fall within the “IP” definition?
- Besides MFN and national treatment, TRIPS members must meet minimum IP protection standards

## The Most Favored Nation Principle

**TRIPS Article 4**(...) any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

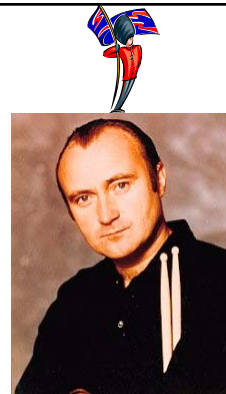
**Exceptions:** (i) items expressly not subject to national treatment under Berne and Rome (ii) obligation in prior international IP agreements rights of performers, producer and broadcaster not specifically provided under TRIPS (iii) international agreements on judicial assistance

### Non-Discrimination – Related Rights

- From the WIPO Website:
  - **Related rights are the rights that belong to the performers, the producers of phonograms and broadcasting organizations in relation to their performances, phonograms and broadcasts respectively.**
- Related rights differ from copyright in that they belong to owners regarded as intermediaries in the production, recording or diffusion of works. The link with copyright is due to the fact that the three categories of related rights owners are auxiliaries in the intellectual creation process since they lend their assistance to authors in the communication of the latter's works to the public. A musician performs a musical work written by a composer; an actor performs a role in a play written by a playwright; producers of phonograms -- or more commonly "the record industry" -- record and produce songs and music written by authors and composers, played by musicians or sung by performers; broadcasting organizations broadcast works and phonograms on their stations.
  - At the **international level**, related rights are conferred by the **International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**, better known as the "Rome Convention". This Convention was adopted in 1961 and has not been revised since. It is jointly administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization (ILO) and WIPO.
- The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (or TRIPS Agreement), which is administered by the World Trade Organization (WTO), incorporates or refers to this international protection.

### Non-Discrimination – Collins v. Imtrat (ECJ 1993)

- Mr. Collins
  - Imtrat sold copies of "bootlegged" California concert in Germany
    - US not a member of Rome Convention
  - §75 UrhG – (i) performance may not be recorded w/out consent, (ii) recordings may not be reproduced w/out consent
  - §125 UrhG – subsection (1), German nationals protected by §75, but under subsections (2) & (5), foreign nationals are only protected for performances in Germany or covered by an international treaty
  - §96 UrhG – subsection (1), German nationals protected for all performances



### Non-Discrimination – Collins v. Imtrat (ECJ 1993)

- Questions
  - Is copyright subject to Art. 7(1) EEC?
    - Any discrimination on grounds of nationality shall be prohibited (current Art. 6)
  - If so
    - Does it require the same protection regardless of the place of performance?
    - Is it compatible to attach further conditions?
- Anti-discrimination principle reinforced by EEC treaty
  - Art. 36 – certain prohibitions or restrictions allowed, so long as they are not **arbitrary discrimination or a disguised restriction**
  - Art. 52(2) – self-employment freedom - “right of establishment”
  - Art. 60(3) – temporary service activity in a member State
- Recourse to Art. 7 as “gap-filler” only when none of the more specific provisions prohibiting discrimination is applicable

### Non-Discrimination – Collins v. Imtrat (ECJ 1993)

- The fundamental purpose of the [EEC] Treaty is to achieve an integrated economy in which the factors of production, as well as the fruits of production, may move freely and without distortion, thus bringing about a more efficient allocation of resources and a more perfect division of labour. The greatest obstacle to the realisation of that objective was the host of discriminatory rules and practices whereby the national governments traditionally protected their own producers and workers from foreign competition. Although the abolition of discriminatory rules and practices may not be sufficient in itself to achieve the high level of economic integration envisaged by the Treaty, it is clearly an essential prerequisite.

### Non-Discrimination – Collins v. Imtrat (ECJ 1993)

- On the strength of the anti-discrimination principle, “whichever way a performing artist chooses to exploit his performances for commercial gain in another member State” the artist is covered by Community law
  - Consistent with other types of anti-discrimination cases
- Harms to artist of unauthorized sale of recordings
  - Loss or royalty revenue
  - Loss of power to control the quality of the recordings
    - Which, if technically inferior, may adversely affect his reputation
    - Also a harm to the consumer – performer’s rights operating like a mark
- Thus, this reasoning supports that Germany’s differing treatment is in violation of EEC Art. 7

### Non-Discrimination – Collins v. Imtrat (ECJ 1993)

- Imtrat’s counter-arguments
  - Collin’s performance took place outside of Germany
  - rhetoric of property argument
    - “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership” EEC Art. 222
      - Court retorts - this article does not authorize granting rights on a discriminatory basis
  - The court finds the first argument irrelevant, and the second overbroad
- Patricia’s counter-arguments
  - Effect of alleged absence of harmonization of EC as to IP?
    - Court says that this absence increases the need for antidiscrimination principle
  - Rome convention should control – in effect between UK and Germany before EEC treaty



### **Non-Discrimination – Collins v. Imtrat (ECJ 1993)**

- Court's role in a "preliminary reference procedure" EEC Art. 234 (old Art. 177) [not available to CFI]
  - Under EEC Art. 117, not interpreting German UrhG law, nor assessing its compatibility with Community law
  - Only providing guidance for national court to apply law to parties
- Copyright and related rights affect trade in goods and services, as well as competition in the Community, and thus fall within the EEC treaty
- There has been sufficient EC activity in the area of IP harmonization
- "differences and distortions" as a result of differing member law are allowable as long as they apply according to objective criteria and without regard to nationality
- There is "direct effect" for EEC Art. 7(1) Antidiscrimination
  - Legislatively, EU Regulations are the "Federal Law of Europe"
  - EU Directives are mandatory commands to implement a law in the member
  - The "direct effect" doctrine is an ECJ doctrine that certain provisions of the treaty and Directives may be treated as directly creating rights in member states, notwithstanding no "transposition"

### **MFN - Havana Club (WTO Appeal 2002)**

- CubaExport
  - Cuba filing for HavanaClub mark in 1974
  - US Sec. 44 filing for HavanaClub w/ registration in 1976 to CubaExport
  - In 1993, CubaExport J/V w/ French Company
- Bacardi
  - 1996, begin exports of Bermuda HavanaClub rum to US
  - 1997, buys original rights of mark from family unable to produce since 1960
  - 1998 – Sec. 211 Omnibus Appropriations Act
- WTO on Sec. 211(a)(2) and (b)
  - MFN issue



### Choice of Law – ITAR-TASS v. Russian Kurier (2nd 1998)

- Kurier’s NY distribution of ITAR-TASS articles
  - Unauthorized copies, made in U.S.
  - ITAR-TASS newspapers have copyright under Russian law in Russia as “compilers”
- Dist. Ct. grants ITAR-TASS a preliminary injunction
  - Analyzes with translating experts and others the issue of who has sufficient ownership rights to have standing in the U.S. by reference to Russian copyright law because that is the origin location of the individual works (newspaper articles) and the compiled work (newspaper)
- Art. 11(1)
- Art. 11(2)
  - The exclusive right to exploit encyclopedias, encyclopedic dictionaries, collections of scientific works-published in either one or several installments-newspapers, reviews and other periodical publications shall belong to the editor [publisher] thereof. The editor shall have the right to mention his name or to demand such mention whenever the said publications are exploited. The authors of the works included in the said publications shall retain the exclusive rights to exploit their works independently of the publication of the whole work [independently from the publication as a whole].
- Art. 14 – Russian version of Work for Hire inapplicable to newspapers

### Choice of Law – ITAR-TASS v. Russian Kurier (2nd 1998)

- Appellate court on ownership issue
  - Law to apply?
    - What jurisdiction has the most significant relationship with the “property” at issue in this case?
  - Outcome?
- Appellate court on infringement issue
  - Law to apply?
    - Where is the location of the infringing acts?
  - Outcome?
- Processing the ownership issue through U.S. copyright law’s suit requirement (501(b) – “exclusive right”)
- Other avenues for relief by ITAR-TASS
  - What is potentially being copied by Kurier?

## Aspirations of the world trading system

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,

[GATT 1947]



## Leading Institutions & Actors

- WIPO: Paris & Berne and many others
  - Mission: “promoting the protection of [IP] . . . through cooperation among states . . .”
  - Specialized agency of UN
  - drafting, discussion, revision and conclusion of new IP treaties, and less formal norm building
- WTO: TRIPS
  - TRIPS agreement is an annex to the agreement establishing WTO
  - GATT (Uruguay) -> WTO -> TRIPS
  - “non-IP related incentives for certain states to join the community of IP respecting nations”
  - WTO dispute resolution system
  - TRIPS Council
    - Operate TRIPS agreement
    - Monitoring compliance
      - Members can raise an issue of another member’s compliance
      - Systemic review of member’s implementing legislation, obligation to “notify” (Art. 63.2) of implementing law to facilitate review (avoids some formal dispute resolution, beneficial ex ante effects, identifies deficiencies and differences in interpretation)

## International Legal Institutions



**WIPO:** The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible International IP System

1. Developing international IP laws and standards
2. Delivering global IP protection services
3. Encouraging the use of IP for economic development
4. Promoting better understanding of IP
5. Providing a forum for debate

## International Legal Institutions



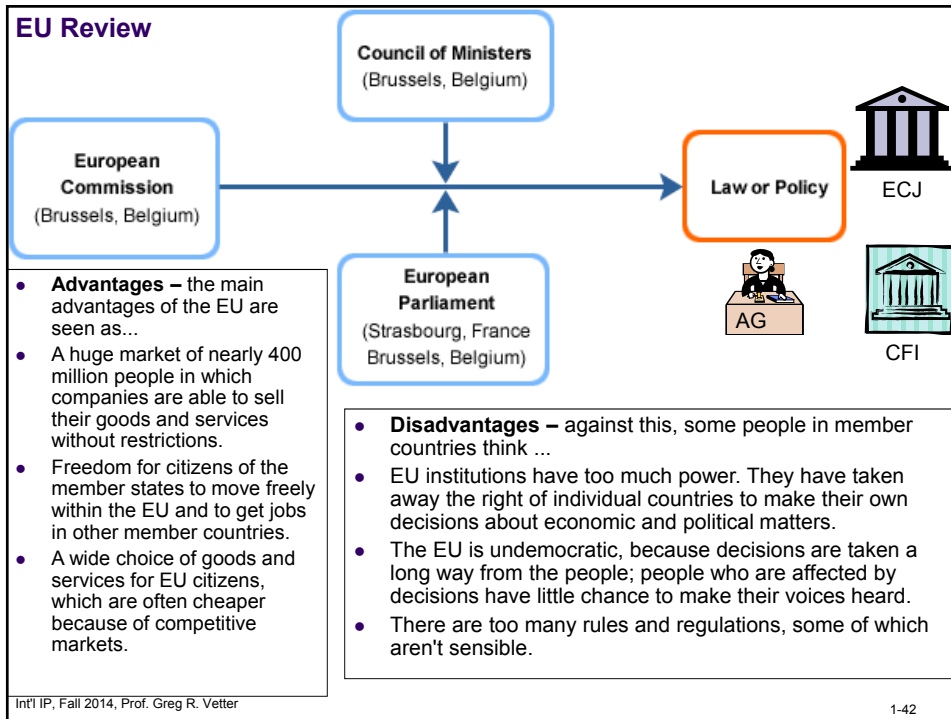
**WTO:** World Trade Organization (WTO) deals with the rules of trade between nations at a global or near-global level.

- 1.) The WTO is a negotiating forum
- 2.) The WTO sets of rules
- 3.) The WTO settles disputes

## EU

- Growing importance as a player in Int'l IP debate and implementation
- Future growth of EU
- Influence on member states and multinational organizations
- Directives
  - Drive harmonization effort within EU
  - Influence debate elsewhere (database directive)
  - Echoed in other countries systems (CTEA)
    - Commentator on this “echo” effect in US:
      - Congress needs to investigate to “free US innovation law from the grip of unelected [captured?] foreign bureaucrats . . . ”

## EU Review



## EU - Commission

- Administrative branch of EU
- Propose legislation
- Appointed, 20 members
- Divided into “directorates-general”
- Two are particularly relevant for Int'l IP

## EU – Other Institutions & Items

- Council(s)
  - Membership depends on subject matter
  - Twenty-five subject matter areas
    - IP dealt with by the Internal Market Council
- Parliament
  - Sits in France, not Brussels
- Legislative Instruments
  - Regulation (federal law of Europe)
  - Directive
    - Binding in result to be achieved
    - Requires “transposition”
- Legislative Process
  - Consultation Procedure
  - Codecision (joint legislative) Procedure

<http://www.uc.pt/CDEUC/CDEUC19.HTM>  
(this web address contains links to the flowcharts on the next two slides)

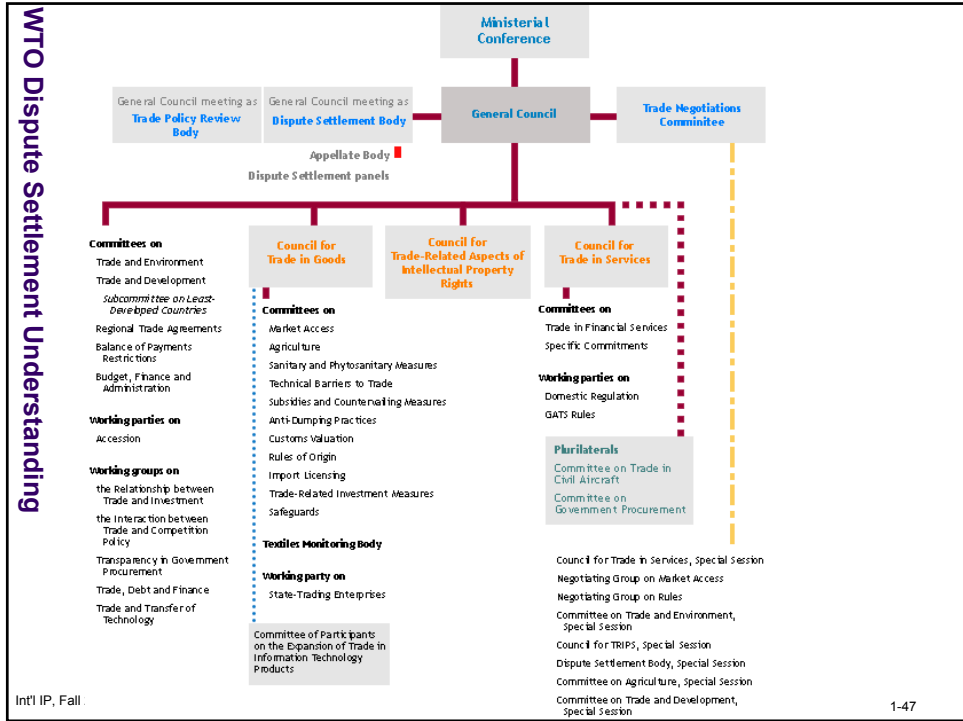
## EU – Judicial Process

- EJC
  - CFI
  - Advocates-general
    - Opinion in advance of court decision
- No stare decisis
  - Jurisprudence constante for uniformity in the application of the law
- Important jurisdiction for IP
  - Enforcement actions
  - Preliminary Reference Procedure
    - Analogous to “certifying” a state law question from federal court to a state supreme court
- Relationship w/ national law of member states
  - Early jurisprudence suspicious of broad IP rights because the hindered free movement of goods among member states
  - Strictly speaking, jurisprudence arises from conflict of “supreme” Community law and national implementation
  - Increasing case load to assist national courts in implementing directives

## Other Players

- UNESCO
  - Administers the Universal Copyright Convention
- OECD
  - As to IP, primarily focused on e-commerce
- Hague Conference on Private Int'l Law
  - draft convention on enforcement of foreign judgments contains provisions targeted particularly at Int'l IP litigation

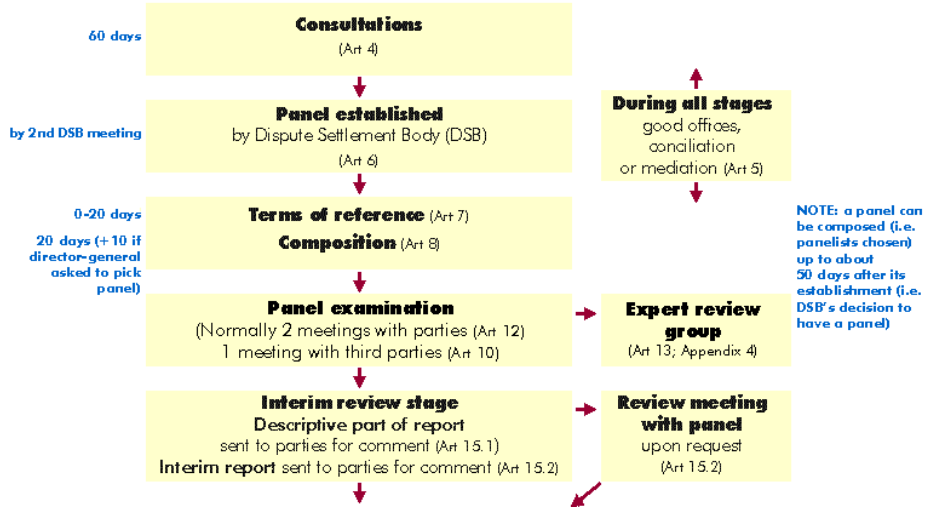
**WTO Dispute Settlement Understanding**



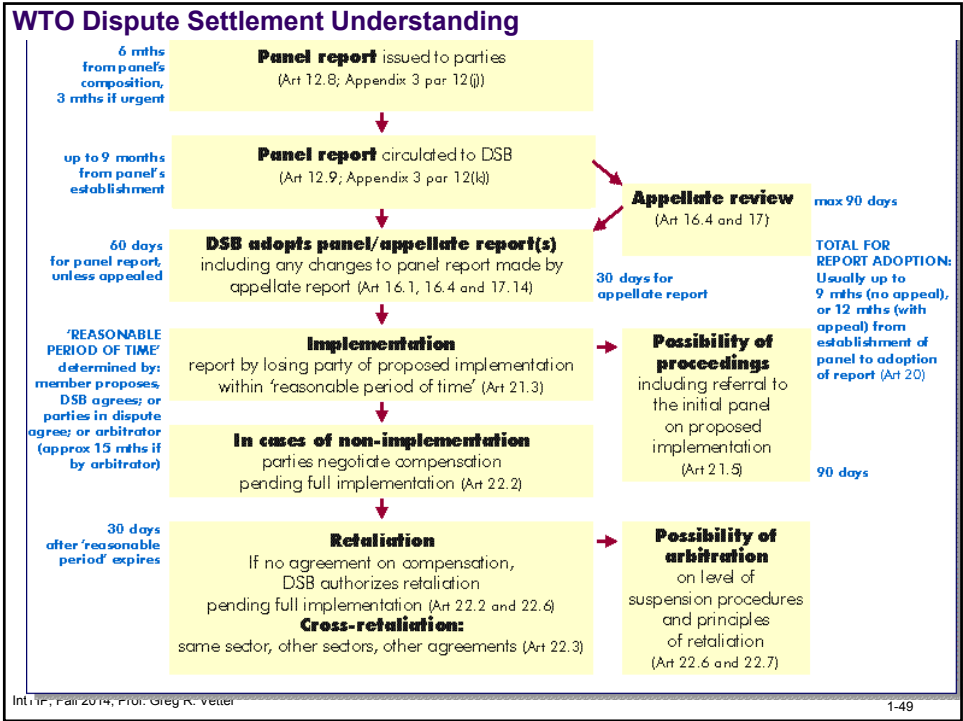
**WTO Dispute Settlement Understanding**

**The panel process**

**NOTE: some times are maximums, some minimums, some binding, some not** The various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consult each other in order to settle 'out of court'. At all stages, the WTO director-general is available to offer his good offices, to mediate or to help achieve a conciliation.







**WTO Dispute Settlement Understanding**

**How long to settle a dispute?**

These approximate periods for each stage of a dispute settlement procedure are target figures – the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointment
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
<b>Total = 1 year</b>	<b>(without appeal)</b>
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
<b>Total = 1y 3m</b>	<b>(with appeal)</b>

Int'l IP, Fall 2014, Prof. Greg R. Vetter 1-50

### DSU & TRIPS - Introduction

- Uruguay Round – a miracle
- DSU, to the extent it was “designed,” was designed for traditional import/export disputes
- Potential issues - the differences between
  - rights in intellectual property and other forms of property,
  - between tangible and intangible goods,
  - between disputes that arise among countries and among firms, and
  - between disputes that arise as a result of judicial, as contrasted with legislative, decision making
- Dispute Settlement Board
  - Representatives of the member state
  - Different chairman and secretariat
  - Standing Appellate Body

### DSU & TRIPS - Introduction

- Berne and Paris
  - No free riding!
- Differences between IP and other trade issues means that pre-Uruguay Round dispute experience is of limited value
- “The Uruguay Round succeeded where WIPO failed for a variety of reasons. One of the reasons, it seems, was that the architects of the TRIPS Agreement used words - and a concept of minimum standards - that allowed each state to read into the Agreement what it wished to see.”
- Nuanced nature of IP laws
  - Implement a balance – so difficult to draft



## DSU & TRIPS - Introduction

- De jure TRIPS compliance
  - But de facto noncompliance?
- GATT Art. XXIII(1) [retained in WTO in 1947 form]
  - Dispute resolution for
    - Violation complaint - - Art. XXIII(1)(a)
      - Benefit nullified or impaired
      - Most common, easy to bring, presumed harm
    - Non-violation complaint - Art. XXIII(1)(b)-(c)
      - An objective of the Agreement is being impaired by a member's measure whether or not the measure violates the Agreement
      - Rare, 5 year moratorium, need to show reliance and injury

### Article XXIII

#### Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
  - (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
  - (c) the existence of any other situation,

## Recent Developments section

- “upward harmonization” versus development agenda
- “TRIPS Plus”
  - Bilateral FTAs
  - ACTA