

IP AUSTRALIA

DEPARTMENT OF INDUSTRY, SCIENCE AND RESOURCES

AUSTRALIA'S RELATIONSHIP WITH THE WORLD TRADE ORGANISATION

Submission to the Joint Standing Committee on Treaties

EXECUTIVE SUMMARY

- The Trade Related Aspects of Intellectual Property Agreement (TRIPS) negotiated as part of the Uruguay Round that lead to the creation of the World Trade Organisation, is an important component of the international intellectual property (IP) system.
- It complements and strengthens the system developed and promoted through the long-standing work of the World Intellectual Property Organization (WIPO), a specialised UN agency with responsibility for promotion of the protection of intellectual property throughout the world.
- Australia, through IP Australia and other IP agencies, has gained an influential position in the international IP community and uses it to ensure its national IP system is world class, and that the IP systems of its trading partners meet the interests of Australian industry.
- As the TRIPS Council of the WTO reviews the implementation of the TRIPS Agreement this year, Australia should continue to participate actively in the debate, and to promote the productive relationship between the WTO and WIPO.

Preamble

IP Australia is a Division of the Department of Industry, Science and Resources. It administers Australia's patent, trade marks and industrial designs systems, and contributes to national and international intellectual property (IP) policy development. It is the lead government agency for Australia's representation in the World Intellectual Property Organization (WIPO), and also participates actively in other international fora such as the World Trade Organization (WTO) and APEC. IP Australia's main interest in Australia's relationship with the WTO is in respect of that organisation's Agreement on Trade Related Aspects of Intellectual Property (TRIPS). The purpose of this submission is to provide the Committee with relevant information on some aspects of Australia's IP systems and their relationship to the international scene.

Introduction

The WTO is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. The WTO's rules — the agreements — are the result of negotiations between the members. The current set were the outcome of the 1986–94 Uruguay Round negotiations which included a major revision of the original General Agreement on Tariffs and Trade (GATT).

The Uruguay Round also created new rules for dealing with trade in services, relevant aspects of intellectual property, dispute settlement, and trade policy reviews. The WTO's intellectual property agreement, the Trade Related Aspects of Intellectual Property Agreement or TRIPS, amounts to rules for trade and investment in ideas and creativity. The rules state how patents, copyrights, trade marks, geographical names used to identify products, industrial designs, integrated circuit layout-designs and undisclosed information such as trade secrets — "intellectual property" — should be protected when trade is involved. The Intellectual Property (TRIPS) Council reports to the General Council of the WTO.

Nationally, Australia has numerous individuals, groups and organisations with strong intellectual property involvement. In the government sphere, the Attorney-General's (A-G's) Department administers the *Copyright Act 1968* and the *Circuit Layouts Act 1989*. The Department of Communications, Information Technology and the Arts (DCITA) has a key role in the formulation of copyright policy. The Department of Industry, Science and Resources (ISR) also has a close interest in copyright matters, particularly as these affect industry policy. In addition, ISR has prime carriage of patents, trade marks and designs, through its division, IP Australia. IP Australia administers the *Patents Act 1990*, the *Trade Marks Act 1995*, the *Designs Act 1906*, the *Olympic Insignia Protection Act 1987* and the *Sydney 2000 Games (Indicia and Images) Protection Act 1996*. The Plant Breeder's Rights Office of AFFA administers the *Plant Breeder's Rights Act 1994* (formerly the *Plant Variety Rights Act 1987*). In addition, Agriculture, Fisheries and Forestry Australia (AFFA) administers the *Australian Wine and Brandy Corporation Act 1980* as it pertains to Geographical Indications (GIs).

IP Australia works closely with these and other Federal departments and agencies with strong involvement in intellectual property issues including the Department of Foreign Affairs (DFAT), which has its own intellectual property unit concerned with trade negotiations on these matters, the Treasury, the Department of Defence, the Department of Education, Training and Youth Affairs (DETYA), and the Aboriginal and Torres Strait Islanders Commission (ATSIC).

IP Australia's missions and functions

IP Australia is the Commonwealth agency responsible for granting rights in patents, trade marks and designs. As a Division of ISR, IP Australia provides policy and legislative advice on intellectual property that contributes directly to Australian government innovation policy. IP Australia is a fully self-funding agency with annual revenue from its official charges of approximately \$80million.

From an international perspective, IP Australia is a medium sized intellectual property office. IP Australia receives about 80,000 patent applications, 41,000 trade mark applications nominating 68,000 classes and 4,000 design applications each year. The organisation has approximately 750 staff, of whom 180 are patent and design examiners and 180 are trade mark examiners.

IP Australia is a Receiving Office, International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty (PCT) administered by WIPO. It is a searching and examining authority for Singapore, New Zealand, Vietnam and other countries. Patent searches are also conducted for Thailand, Fiji and Singapore under bilateral arrangements.

IP Australia's mission is to ensure Australians benefit from the effective use of IP, particularly through increased innovation, investment and trade. To help Australians make the most of their IP, IP Australia has formed many strategic relationships. Some of the most important include:

- Professional bodies, such as the Institute of Patent and Trade Mark Attorneys. Through this relationship, IP Australia helps to ensure that thorough and effective legal advice is provided to Australian innovators.
- International organisations, such as WIPO, APEC and the WTO. Relationships with these bodies help to ensure that the international intellectual property system meets the needs of Australians. They also ensure that procedures and processes in IP Australia are of a world class standard and harmonised with other nation's intellectual property systems.
- Other areas of Australian federal and state governments responsible for intellectual property such as Attorney-General's and DFAT. Relationships with other departments ensure that IP Australia is aware of changes to legislation that affects other areas of intellectual property such as copyright, plant breeder's rights, circuit layout rights and business names. The Australian Customs Service also works in association with IP Australia, being responsible for the administration of trade mark legislation dealing with the importation of goods.
- Business groups such as the State Chambers of Commerce. IP Australia uses these relationships to ensure that business in Australia is kept informed about the value of their intellectual property.

In addition to its administrative role in fulfilling its mission, IP Australia has an active involvement in the development of the IP system, both domestically and internationally. Within Australia it has consulted widely in the preparation of new patent and trade marks laws, particularly in the context of helping ensure that Australia met its obligations under the TRIPS Agreement. It has represented Australia as a leading participant in the work done by WIPO in the refining of existing international treaties and the negotiation of new ones, such as the PCT and the Trademark Law Treaty. IP Australia played an active role in the conclusion of the WIPO Patent Law Treaty at a Diplomatic Conference in Geneva this year. The Treaty aims to simplify administrative processes associated with obtaining and maintaining patent rights, reducing costs and complexities for users of the patent system world-wide. Most recently, IP Australia has been coordinating the process involved in enabling the Government, through this Committee, to make the decision for Australia to accede to the Madrid Protocol, the WIPO treaty that simplifies

international protection for trade marks. The main focus of all this work has been to modernise, simplify and harmonise IP laws and practice on a national and global basis.

An essential aspect of an effective IP system is the extent to which it is known and understood by the creators of IP rights, so that they can make the most effective use of its elements to protect and promote their IP as a part of their commercial development. As the economy becomes increasingly knowledge-based, this effective use of the IP system is correspondingly becoming more vital to continuing economic growth. IP Australia has addressed this issue by developing and delivering a wide-ranging national public education and awareness program aimed at industry, small business, the research community and the education sector. It has also worked with WIPO, APEC and other IP offices in the region to help expand this activity in other markets, particularly those in which Australian exporters are likely to need IP protection.

International framework

The current international environment is one in which intellectual property systems are becoming more simplified and harmonised. There is an increasing push for the granting of intellectual property rights at a regional or global level rather than at a national level. The increasing globalisation of trade and commerce will undoubtedly lead to greater emphasis being placed on international aspects of intellectual property rights protection.

Laws protecting intellectual property vary between countries as well as between different forms of intellectual property. For example, over 120 countries belong to one or both of the *Berne Convention for the Protection of Literary and Artistic Works* and the *Universal Copyright Convention*, the two major international copyright conventions, which provide reciprocal copyright rights in each member country. In contrast, while many countries are members of TRIPS, most of these countries have their own legislation for the protection of patentable material and, as such, do not offer reciprocal protection rights.

However, the PCT does enable patent applicants to seek registration simultaneously in a number of member countries by filing a single international application. This streamlines the process considerably for applicants, who previously had to file individual applications in each country where they required protection. Under the PCT, an applicant files one application and designates the countries they are interested in. One of the major patent offices carries out an international search to check for prior art and sends a report to the applicant. If the applicant requests, a preliminary examination can be conducted and a report, which gives a non-binding opinion about the registrability of the application, is issued. If the applicant wishes to proceed with the application after these reports are issued the application proceeds independently in each country and is examined according to national patent systems.

The TRIPS Agreement is one of the set of agreements making up the international trade system administered by the WTO. It aims to reduce distortions and impediments to international trade, promote protection of intellectual property rights

and ensure that enforcement of intellectual property rights does not impede legitimate trade. It obliges members to protect a wide range of intellectual property and sets the minimum standards of protection to be provided by each member. Members are free, but not obliged, to provide more extensive protection than is required by the Agreement. Members are also free to determine the means by which they will provide this protection in their own legal systems. The economic significance of intellectual property protection is reflected in TRIPS being a key element of the agreement establishing the WTO.

Industrialised member economies have been bound by TRIPS since 1996, and most developing countries were due to meet TRIPS standards by January 2000. Since TRIPS was established in 1995, reviews of some aspects of the Agreement have begun. The Agreement is also due to be reviewed in its entirety in 2000, and there are a number of issues included in this process of significance to Australia, such as the patenting of biotechnology, the protection of geographical indications, and the protection of traditional knowledge, that impinge on those elements of the IP system for which IP Australia is responsible. Input from IP Australia will be of importance in the preparation of Australia's position on these issues and much work has already been done in close cooperation with DFAT and other relevant agencies.

Apart from TRIPS, most of the international intellectual property agreements are administered solely or jointly by WIPO. The objectives of WIPO are to promote the protection of intellectual property and to ensure administrative cooperation among the Unions established by Conventions on the Protection of Intellectual Property. Through member countries' contributions and its revenue from registration functions, principally under the PCT but more recently under the Madrid system for the international registration of trade marks, WIPO has the resources to promote intellectual property protection on a much greater scale than the relatively small area of the WTO dealing with TRIPS. WIPO's annual budget is in the order of SF 410 million, which is distributed as technical assistance to individual member States, as well as used to support members' work devoted to the continuous improvement of the international treaties it administers and the delivery systems for its services. As member States are generally represented by national IP offices, such as IP Australia, WIPO has access to significant technical expertise to underpin their wide-ranging development cooperation activities.

TRIPS, however, was a major achievement in bringing together protection for most forms of intellectual property, carrying it to a wider range of countries and underpinning it with effective enforcement and dispute resolution.

International role

To enable Australian exporters to protect their goods and services more effectively, IP Australia has worked on two broad and related fronts. Firstly, it has actively participated in a range of international fora to develop the world's IP systems to make them more effective. Secondly, it has provided direct assistance to developing countries, particularly in the Asia-Pacific region, to help them to implement effective intellectual property systems.

Through its involvement with international fora such as the WTO, WIPO and APEC, Australia has been able to influence the development of intellectual property systems throughout the world. This has ranged from agreement to minimum standards that national systems must meet through TRIPS and various WIPO treaties, to endeavours to better harmonise systems and to eliminate duplication of work currently occurring across national intellectual property offices.

IP Australia worked with the Advisory Council on Industrial Property (ACIP), which advises the Minister for Industry, Science and Resources on industrial property issues, to hold a consultation workshop last year, the purpose of which was to obtain industry input on a range of issues relating to TRIPS. This input was provided to the government through the Minister for Trade, for consideration in the context of deciding Australia's approach for the WTO Ministerial Conference held Seattle in November 1999.

Issues discussed at ACIP's consultation workshop included:

- biotechnology, particularly the protection of plant and animal inventions
- biodiversity, farmers' rights and indigenous peoples' rights
- transfer of technology and test data protection
- patent priority and patenting of software
- compulsory licences and competition law
- GIs and traditional expressions (TEs)
- well known trade marks and domain names
- parallel imports and exhaustion of rights.

IP Australia's view is that full implementation of TRIPS standards will bring significant improvements in intellectual property protection for Australian firms in established and emerging overseas markets. Any move to change the existing arrangements under TRIPS brings with it a risk that some of the benefits may be watered down or lost altogether. At the same time, the existing provisions of TRIPS would benefit from some further clarification and elaboration of their intended purpose. In the work associated with the review of the implementation of the Agreement and the consideration of the above issues, IP Australia believes that WIPO's activities in supporting and developing the IP system provide a vital underpinning and complementary function.

Regional role

Australia plays an active role in the intellectual property community in our region, both on bilateral and multilateral bases. For example, IP Australia is actively involved in the activities of WIPO as they relate to the Asia-Pacific region.. During the WIPO-IP Australia Regional Symposium held in Sydney in March, 2000, Dr Kamil Idris, Director General, WIPO, and Federal Government Ministers signed a Joint Statement on Cooperation for IP technical assistance in the Asia-Pacific region. The WIPO-Australia Working Group convened by IP Australia has been set up to carry out relevant activities under the Statement's terms of reference. A major focus

of this work is the South Pacific and IP Australia is currently developing a proposal to deliver assistance in conjunction with WIPO to improve the IP systems of the member countries of the South Pacific Forum. The Group is preparing a draft framework for its work over the next year that will enhance the coordination and effectiveness of technical assistance delivery in our region.

Through WIPO's program of technical assistance IP Australia has provided technical experts for missions to India, Samoa, Fiji, and Brunei. Associated with the program of technical assistance, senior staff regularly participate in regional seminars, most recently in India and China.

In the APEC Intellectual Property Rights Experts Group (IPEG), Australia is the Lead Economy for a number of activities including: a public education project aimed at helping member economies to promote understanding and use of IP as a commercial tool in industry and economic development; the re-development of the APEC IPEG website; training in the development and exploitation of biotechnology, including patenting of biotech inventions; the improvement mechanisms for IP rights through exchange of information and discussion. IP Australia has within these projects played a major role in the public education and awareness activities for the Group, including the re-design of the website and developing a generic product for developing IP awareness material and activities in member economies.

Relationship between WIPO and WTO

Provisions in the TRIPS Agreement concerning copyright and related rights, patents, trademarks, geographical indications, industrial designs, and layout designs of integrated circuits, directly complement international treaties and conventions which the secretariat of WIPO and its predecessor have serviced, in some cases, for more than 100 years.

On January 1, 1996, an Agreement Between the World Intellectual Property Organization and the World Trade Organization entered into force. It provides for cooperation concerning the implementation of the TRIPS Agreement, such as notification of laws and regulations and legal-technical assistance and technical cooperation in favor of developing countries.

In July 1998 a joint initiative to help developing countries meet their TRIPS obligations in the year 2000 was launched. The assistance will continue to be provided post-year 2000 deadline for many developing countries, while attention will be given to those least-developed countries that need to meet their TRIPS obligations by 2006.

The activities are designed to provide:

- advice and expertise in the revision of national legislation - particularly important for those WIPO member States with obligations under the TRIPS Agreement;
- comprehensive education and training programs at national and regional levels for officials dealing with intellectual property, including those concerned with enforcement and; for traditional and new groups of users, on the value of

intellectual property and how to create their own economic assets through better use of the intellectual property system;

- extensive computerization assistance to help developing countries acquire the information technology resources (both in human and material terms) to streamline administrative procedures for managing and administering their own intellectual property resources, and to participate in WIPO's global information network;
- financial assistance to facilitate participation in WIPO activities and meetings, especially those concerned with the progressive development of new international norms and practices.

Conclusion

Given its commitment to strengthening the intellectual property systems of countries in our region, and generally promoting the harmonisation of IP systems globally, as described above, Australia has an interest in maintaining an active presence in the TRIPS Council and its development of the TRIPS Agreement, and in promoting and supporting the cooperative relationship between the WTO and WIPO.