



AS ANTIGUA CONSIDERS CROSS-RETALIATION AGAINST US, WIPO OFFICIAL CREATES STIR

In a rare move, the WTO last month awarded Antigua and Barbuda the right to place sanctions on US patents, copyrights, and other intellectual property, as compensation for being unduly shut out of the US' online gambling market.

However, little precedent exists for precisely how the tiny Caribbean island nation might go about suspending standard WTO protections for US intellectual property, even though it has been authorised to levy annual penalties worth \$21 million on both IP and services companies (see [BRIDGES Weekly](#), 16 January 2008). No government has ever actually suspended intellectual property rights as a result of a WTO dispute. Ecuador, the only other country to receive permission to do so, never went through with suspending EU patents and copyrights.

Lawyers have pointed to some potential complications with implementing retaliatory sanctions against intellectual property. Quantifying damages, for instance, could prove difficult if the US and Antigua disagree on the financial value of an overridden patent or denied trademark.

A senior official of the World Intellectual Property Organization last week created a stir by suggesting that suspending certain intellectual property protections could leave the Antiguan government in breach of international treaty obligations other than the WTO.

In an interview with the Antigua Sun, Jorgen Blomqvist, the director of WIPO's copyright law division, pointed specifically to the Berne Convention for the Protection of Literary and Artistic Works, an international copyright agreement ratified by both the US and Antigua. The Berne Convention is one of several intellectual property treaties administered by WIPO, which is based in Geneva.

"The [WTO] TRIPS Agreement says that contracting parties shall comply with the Berne Convention, with one exception, but the bulk of the economic protection under the Berne Convention is referred to in the TRIPS Agreement," Blomqvist said, reports the Antigua Sun.

"Since both parties are parties to the Berne Convention, if they, under some other convention, start to not grant protections to each other, then they will infringe the Berne Convention," Blomqvist added. "The fact that under one treaty you can make such sanctions does not relieve a country from responsibilities under other treaties."

Frederick Abbott, a professor of international law at Florida State University, argued that "there is reason to doubt the validity of Mr. Blomqvist's opinion" on the relationship between WTO rules and the Berne convention.

Participants in WTO disputes "often have supplementary treaty obligations that overlap with WTO commitments, and the theory that a Member is legally precluded from exercising rights under the Dispute Settlement Understanding because of those supplementary overlapping treaties would undermine the effective operation of WTO dispute settlement," Abbott said.

Both Abbott and Sisule Musungu, an intellectual property expert affiliated with development think tank IQsensato and Yale Law School, suggested that Blomqvist's interpretations of the Berne Convention were of questionable legal merit, and worse, risked being construed as an official view from the WIPO secretariat.

WIPO distances itself from remarks

When contacted, a WIPO spokesperson told Bridges that Blomqvist's comments were personal views. As a matter of policy, she said, WIPO does not comment on rulings or decisions made by other organisations. She added that the Antigua Sun report mischaracterised Blomqvist's remarks insofar as they were general in nature and did not pertain to any specific conflicts at the WTO or elsewhere.

Regardless, Abbott emphasised that Antigua would not be failing to fulfill its obligations under the Berne Convention for sanctions imposed under the WTO ruling. "Antigua and the United States are each party to the WTO Agreement and the Berne Convention," he said. Both have agreed to abide by WTO dispute settlement decisions.

"The WTO Dispute Settlement Body in this proceeding has authorised Antigua to withdraw concessions under the TRIPS Agreement, including corresponding obligations under the Berne Convention, and the United States is legally bound to accept that authorization," he added.

The obligation to accept the WTO decision means that "the rights of the United States under the Berne Convention are not being infringed because the United States has legally accepted the withdrawal of Berne concessions (or obligations) by Antigua," the law professor said. It also left Washington "legally estopped [i.e., prevented] from asserting a breach of the Berne Convention by Antigua."

"Mr. Blomqvist's assertion of a hypothetical violation of the terms of the Berne Convention is the assertion of a legally inconsequential abstraction because there is no party whose rights would be infringed," Abbott concluded.

Errol Cort, Antigua's minister of finance and the economy, this week said that he would have "a big difficulty" accepting Blomqvist's suggestion that the Caribbean island nation would remain fully bound by the strictures of the Berne Convention. "If that is so," he told the Antigua Sun, "it puts a nonsense to the whole World Trade Organization and the rulings and sanctions. It just brings the whole thing into disrepute. So I don't accept that."

Antigua was authorized to 'cross-retaliate' against intellectual property after successfully arguing that confining sanctions to US services companies, or additional duties on US goods - the most common form of WTO retaliation - would hurt its own tiny economy and have virtually no effect on the US.

Some legal scholars argue that such cross-retaliation may be one avenue for economies too small to threaten their trading partners with retaliatory tariffs to benefit from WTO dispute settlement.

ICTSD reporting; "Cort dismisses concerns of property rights proponents," ANTIGUA SUN, 22 January 2008; "Antigua may violate int'l treaty: Expert," ANTIGUA SUN, 16 January 2008; "In Trade Ruling, Antigua Wins a Right to Piracy," NEW YORK TIMES, 22 December 2007.