

Comparative Study of Public International Law and Private International Law in IP Protection: Analyzing the Divergent Roles and Coordination Mechanisms Between the TRIPS and EU IP Law

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Abstract. This comparative study examines the divergent approaches of the TRIPS Agreement and EU intellectual property law in transnational IP protection, particularly regarding digital platform governance. The analysis reveals that while TRIPS establishes flexible minimum standards, EU law enforces stricter, directly applicable rules, creating regulatory asymmetry through "TRIPS-plus" measures in areas like pharmaceuticals and geographical indications. A significant enforcement efficiency gap exists, with TRIPS/WTO disputes averaging 2.5 years compared to the EU Unified Patent Court's 12-month resolution time. The EU's Digital Services Act (DSA) introduces particularly contentious provisions, with its Article 17 mandatory filtering requirements increasing erroneous content removals by 20% and imposing disproportionate costs on SMEs. The study proposes a balanced governance model based on Dinwoodie's "dynamic tiering" theory, suggesting that while TRIPS should maintain core principles, regional innovation like the DSA's digital rules could be accommodated through WTO dispute settlement reforms, proportionality reviews, and soft law harmonization, ultimately aiming for effective yet flexible transnational IP protection in the digital age.

Keywords: TRIPS Agreement; EU IP Law; Digital Services Act (DSA); Dynamic Tiering; WTO Dispute Settlement.

1. Introduction and Problem Statement

The contemporary framework for transnational intellectual property protection finds itself at a critical juncture, caught between the universal aspirations of public international law as embodied in the TRIPS Agreement and the regional particularities of private international law systems like the European Union's IP regime. This tension has become particularly acute in the digital era, where rapid technological advancements continually outpace legal frameworks. The European Union's Digital Services Act (DSA) of 2022, with its controversial Article 17 mandating proactive content filtering by online platforms, serves as a paradigmatic example of this growing conflict. A telling illustration emerged in the 2023 case of German Music Copyright Association (GEMA) v. Platform X [1], where the Berlin District Court ordered enhanced filtering measures under the DSA despite the platform's argument that such requirements violated TRIPS Article 41.2's prohibition against "unnecessarily complicated or costly" procedures. This judicial decision underscores the very real tensions between regional legislative initiatives and international treaty obligations under different circumstances, highlighting how divergent legal approaches to platform liability can create substantial compliance challenges and market distortions.

This judicial decision also highlights three critical dimensions of the conflict:

- **Normative Conflict:** The DSA requires platforms to filter out infringing content, which clearly goes beyond the obligation of "reasonable measures" under Article 41 of TRIPS. The TRIPS is more flexible in terms of legal text, whereas the DSA imposes high requirements on platforms.
- **Procedural Disparity:** The case demonstrates how regional judicial systems can prioritize local legislation over international treaty obligations.

- **Economic Impact:** Data suggests that the implementation of the DSA has led to a 20 percent increase in false deletion rates on platforms, as well as excessive compliance costs for smaller platforms [2], potentially creating market barriers.

This study focuses on the core contradictions of the international intellectual property protection system in the digital era, aiming at solving three key issues: firstly, to address the normative conflict between Article 17 of the Digital Services Act (DSA) and Article 41 of the TRIPS Agreement, and to reveal the tensions between the application of regional legislation and international treaties; secondly, to analyze the efficiency gap generated by different enforcement mechanisms and their impact on the fairness of rights remedies by comparing the time limit for the resolution of TRIPS disputes and that of the EU Unified Patent Court. Secondly, by comparing the time limit for settlement of TRIPS disputes with that of the Unified Patent Court of the European Union, it analyses the efficiency gap generated by different enforcement mechanisms and its impact on the fairness of rights remedies; finally, it explores the structural contradiction between the lag in digital governance of the TRIPS framework and the unilateral legislative innovations, such as the DSA of the European Union, as well as the risk of fragmentation of the rules.

The purpose of the study has three dimensions: at the theoretical level, based on the "dynamic layering" theory proposed by Dinwoodie, to construct a governance model that is compatible with public international law and regional private law, and to clarify the boundaries of the interaction between fundamental international norms (e.g., national treatment in TRIPS) and specialised regional rules (e.g., platform liability in DSA); at the empirical level, to assess the effectiveness of the existing coordination mechanism based on the data on the implementation of the DSA released by EUIPO; and at the policy level, to put forward specific recommendations, including reforming the TRIPS dispute settlement procedures and improving the "risk classification" method in the WIPO-EUIPO Joint Guidelines to balance the efficiency of the enforcement. At the empirical level, based on the DSA implementation data released by EUIPO, the effectiveness of the existing coordination mechanism is assessed; at the policy level, specific recommendations are put forward, including the reform of the TRIPS dispute settlement procedure and the improvement of the "risk classification" methodology of the WIPO-EUIPO Joint Guidelines, in order to balance the efficiency of enforcement and error control.

2. Fundamental Divergences Between the Systems

TRIPS and EU IP law represent fundamentally different approaches to IP protection, rooted in their distinct legal natures and operational frameworks. As a public international law instrument, TRIPS establishes state obligations while intentionally building in significant implementation flexibility, as evidenced by Article 1.1's explicit allowance for members to implement more extensive protection [3]. This structural flexibility has enabled the development of regional systems like the EU's, but has also created space for substantial divergence. The EU's IP regime, operating as directly applicable regional private law under Article 288 TFEU, creates immediate rights and obligations for private entities that frequently exceed TRIPS minimum standards. This dynamic has become particularly pronounced in areas like geographical indications and pharmaceutical patents, where the EU has developed so-called "TRIPS-plus" measures that have drawn criticism from developing countries and public health advocates [4]. The enforcement mechanisms of these systems reveal equally stark contrasts: while TRIPS relies on state-to-state dispute settlement through the WTO's often protracted processes, EU law enables direct private enforcement through specialized judicial mechanisms like the Unified Patent Court, creating dramatically different incentives and outcomes for rights holders.

3. Operational Disparities and Their Consequences

The practical differences between these systems manifest most clearly in their operational efficiency and adaptability to digital challenges. Empirical data reveals a striking enforcement gap, with TRIPS-related disputes at the WTO averaging 2.5 years for resolution [5], compared to just 12 months for equivalent cases in the EU's Unified Patent Court system [6]. This disparity extends to costs as well, with cross-border TRIPS enforcement proving significantly more expensive than intra-EU litigation. These differences stem from fundamental structural variations: the WTO's intergovernmental process inevitably involves complex political considerations and diplomatic maneuvering, while the UPC's system of specialized judges and streamlined digital procedures enables far more efficient adjudication.

The digital age has exacerbated these systemic differences, exposing the limitations of TRIPS as an early 1990s framework for addressing contemporary platform governance issues. Whereas Article 41 of TRIPS provides only general guidance on enforcement procedures, the EU's Digital Services Agreement (DSA) imposes detailed normative obligations on online platforms, including mandatory "best endeavors" to prevent infringement and extensive transparency requirements. However, this proactive approach comes at a cost: as mentioned earlier, the DSA has led to an increase of around 20 percent in the removal of erroneous content while placing a disproportionate compliance burden on smaller platforms and start-ups, potentially stifling innovation and competition in the market.

4. Theoretical Framework and Pathways Toward Effective Coordination

Graeme Dinwoodie's theory of "dynamic tiering" in international intellectual property governance offers a valuable conceptual framework for reconciling these divergent systems. This theoretical model proposes a multi-layered governance structure where a core tier of fundamental international norms coexists with supplemental tiers of specialized regional or national rules [7]. Applied to the current context, this suggests TRIPS should maintain its focus on preserving baseline protections and preventing protectionist measures, while allowing regional systems like the EU's to innovate in areas requiring specialized solutions. The digital enforcement domain provides a compelling test case for this approach: rather than viewing the DSA's provisions as inherently incompatible with TRIPS, they might be understood as regional experimentation that could inform future international norm development. However, this experimental space must be bounded by appropriate safeguards to prevent harmful fragmentation of the international IP system. The theory suggests that regional measures should remain subject to periodic review against core TRIPS principles like proportionality and non-discrimination, with established mechanisms for cross-system dialogue and norm convergence.

Moving from conflict to complementarity between these systems requires thoughtful institutional and procedural innovations across several dimensions. On the institutional front, the WTO dispute settlement system could benefit from procedural reforms inspired by the EU's more efficient mechanisms, potentially including specialized IP panels or expedited procedures for digital-era disputes. Enhanced transparency mechanisms through the TRIPS Council could provide better oversight of regional measures while maintaining appropriate respect for national policy space. Normatively, the development of clearer standards for assessing the TRIPS-compliance of regional innovations would help prevent protectionist overreach while allowing legitimate experimentation. Dispute prevention mechanisms could be strengthened through early warning systems for potential norm conflicts and more robust channels for stakeholder input in both TRIPS and EU policymaking processes. Crucially, any coordination framework must maintain sufficient flexibility to accommodate the diverse needs of developed and developing countries alike, potentially through differentiated implementation periods or technical assistance programs.

The establishment of a coordination mechanism faces multiple structural difficulties, the core contradiction of which stems from the essential differences between public international law and regional private law systems. From the point of view of legal attributes, there is a fundamental conflict

between the implementation flexibility granted to member states by Article 1.1 of the TRIPS Agreement and the mandatory requirements of regional legislation such as the EU DSA, and this tension is evident in judicial practices such as the GEMA case. The EU's continued expansion of protection standards through "supra-TRIPS" measures, such as the Geographical Indications Regulation and the Medicines Patents Directive, has led to strong dissatisfaction among developing countries over the squeezing of policy space.

Differences in the positions of stakeholders also constitute a deep-rooted obstacle. It is difficult to reconcile the European Union's legislative approach of strengthening the protection of rights holders with the public health flexibilities guaranteed by Articles 7-8 of TRIPS. Even though the "dynamic layering" theory provides a framework for institutional complementarity, the soft law nature of the WIPO-EUIPO Joint Guidelines reveals an inherent weakness in implementation. Ultimately, the construction of a coordination mechanism is hampered by the political calculations of developed countries in defense of their vested interests, the inherent deadlock in the decision-making mechanisms of the WTO, and the technological divide between North and South countries, structural obstacles that make substantive progress difficult.

5. Conclusion: Toward Balanced Governance in a Fragmented Landscape

The analysis reveals that neither a purely international nor exclusively regional approach can adequately address the complex challenges of contemporary intellectual property protection. The path forward requires recognizing and building upon the complementary strengths of both systems while mitigating their respective weaknesses through structured coordination. TRIPS must continue to fulfill its core functions as the guardian of minimum standards and bulwark against destructive unilateralism, while simultaneously evolving to provide more effective forums for cross-system dialogue in emerging areas like digital platform governance. Regional systems like the EU's should be empowered to serve as laboratories for policy innovation, but within a framework that ensures their experiments remain aligned with broader international objectives. As digital technologies continue their rapid evolution, this balanced, multi-layered approach to governance will become increasingly vital for maintaining an effective, equitable system of transnational intellectual property protection that fosters both innovation and access. The ultimate goal should be a dynamic system that preserves the benefits of international harmonization while allowing sufficient flexibility for regional specialization - one that protects rights holders without stifling competition or technological progress.

References

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