

Piracy in paradise

As Antigua considers ignoring US intellectual property rights, **Glenn G Pudelka** and **Kelly Donahue** examine the implications for rightsholders everywhere

How does a small island country with a gross domestic product of approximately \$1bn get the attention of a world superpower?

Answer: Obtain a decision in the international trade arena that allows for the suspension of its enforcement of intellectual property rights. On 28 January 2013, the World Trade Organization (WTO) granted Antigua and Barbuda the right to do just that – in the amount of \$21m annually¹ – to recover losses that Antigua claims it has suffered from a US ban on cross-border gambling services.

Since the mid-1990s, Antigua has focused on creating an internet-based, remote gaming industry as part of its economic development strategy. At its height, the industry was worth over \$3.4bn to Antigua and employed over 4,000 people,² with much of the revenues coming from US consumers. Under the General Agreement on Trade in Services (GATS), the US made specific commitments to permit cross-border gambling and betting services with other GATS signatories. The Wire Act, the Travel Act, the Illegal Gambling Act and several state regulations, however, prohibit cross-border or online gambling in the US. Without US consumers, the gambling industry in Antigua significantly deteriorated.

In March 2003, Antigua and Barbuda began negotiations with the US regarding its prohibition on cross-border gambling. When those discussions failed, a WTO panel was established and found that the US was violating its GATS obligations. In 2007, when the US had still failed to meet its GATS obligations, Antigua requested authorisation to suspend application of the US' obligations under GATS.

While WTO dispute remedies typically involve raising import tariffs on similar goods from the offending country, in certain situations the WTO may authorise cross-market retaliation. Since Antigua relies heavily on US imports, Antigua argued (and the panel agreed) that an increase in import tariffs would not provide a proper remedy. Instead, Antigua requested relief by suspending the application to the US of concessions and related obligations of Antigua under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). On 13 December 2012, the Dispute Settlement Body of the WTO granted this request, allowing Antigua to suspend its protection of US trademarks, patents and copyrights until the US complies with the decision. In particular, Antigua has suggested that it could recover damages through the operation of a copyright haven.

Obviously, the suspension of intellectual property rights in Antigua is distressing news to US content providers, especially those in the entertainment and software industries. For example, Antigua has suggested developing a government sanctioned website that permits downloading movies, software and music at a fraction of the normal price. Similarly, merchandise bearing the trademarks and logos of famous brands such as Coca-Cola, Disney or Batman could be sold in Antigua or on the website with no compensation to the rights holders. Unlike with other 'pirate' sites, a rights holder would not be able to take legal action against the website itself in order to shut down such infringing activity.

At the same time, however, setting up a copyright haven in Antigua

does not mean that cheap or free downloading will skyrocket out of control across the world. While citizens of Antigua (current population approximately 88,000³) may be allowed to download and buy cheap or free movies and music, other countries and their citizens will still be subject to applicable laws that prevent such infringing activities (eg TRIPS obligations would still apply to other signatory countries). The problem for content providers, however, is that such free goods and downloads can cause broader distribution problems or quality control issues, hurting their brands. Further, in order to enforce their rights in such countries content owners may need to go after content users, which can cause public relations problems.

The potentially larger ramifications of the WTO's decision on the US, Europe or other countries, however, is how it may affect future trade disputes with other WTO members. While creation of a copyright haven in a small country is certainly problematic to intellectual property owners, it may not have a material economic effect. If, on the other hand, a country with a substantially larger market and population attempts to obtain the same type of remedy from the WTO in the future, the impact on content industries could be significant.

If Antigua decides to follow through with its implementation of a copyright haven, there will certainly be a response from the US and other countries. This could result in less foreign investment in Antigua and could undermine Antigua's plans for increasing its presence in the ecommerce industry. Such a gamble, however, has worked in the past. In May 2000, the WTO granted Ecuador the right to ignore intellectual property rights in a dispute with European Communities over the importation of bananas, but the matter was settled before Ecuador enacted the WTO's proposed remedy.⁴ Antigua is certainly betting that its actions with the WTO will result in a similar settlement with the US.

Footnotes

1. Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/ARB (Dec. 21, 2007).
2. Phil Elwood, *Antigua to Pursue Sanctions Against the United States in Decade-Long Trade Dispute*, Official Website for the Government of Antigua and Barbuda, (Mar. 8, 2013 11:23 AM), http://ab.gov.ag/article_details.php?id=3846&category=38.
3. *World Statistics Pocketbook: Antigua and Barbuda*, *supra* note 1.
4. Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/54 (May 8, 2000).

Authors



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