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TRIPS standards and 'new public' theory as European copyright acquis

Abstract:

TRIPS standard in copyright protection is Berne plus. Berne Convention does not make the enforcement of right to communicate to the public dependent on a criterium of 'new public'. The Court of Justice of the European Union introduced a rule – contrary to the Berne Article 11 bis (1) - that the right of communication to the public applies where the communication is made to a new public: a work is communicated to a new public, if it reaches a public that the right holder had not contemplated when authorizing the initial communication to the public. The CJEU has created a new definition with a number of differences from earlier national definitions and this new definition is now the European acquis. This 'new public' doctrine is however in conflict with Berne Convention and as the result with TRIPS and WIPO Treaties. The question arises which consequences result from the above mentioned incompatibility the 'new public' theory with international norms, in particular with TRIPS.