



Trade Related Aspects Of Intellectual Property Rights: Its Implications On Indian Ip System

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ABSTRACT

The Intellectual Property Rights (IPRs) was one of the most controversial issues involving altercation between the developed and the developing countries. Since then, the question of IPRs has been an important part of multilateral trade negotiations. The TRIPS introduced intellectual property rules into the multilateral trading system anticipating somewhat homogenous trade rules for the IPRs, which were expected to cross the border trade and investment and quicken the process of trade related disputes settlement.

I. Introduction

The Uruguay Round of the GATT¹ negotiations from 1986-94 resulted into the establishment of the World Trade Organization (WTO) and consequently adoption of an agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) by its Member States. The Intellectual Property Rights (IPRs) was one of the most controversial issues involving altercation between the developed and the developing countries. Since then, the question of IPRs has been an important part of multilateral trade negotiations. The TRIPS introduced intellectual property (hereinafter, "IP") rules into the multilateral trading system anticipating somewhat homogenous trade rules for the IPRs, which were expected to cross the border trade and investment and quicken the process of trade related disputes settlement.² The WTO is a common forum to administer and implement various agreements, besides the TRIPS. The TRIPS is a baby of the developed nations devised to safeguard their works, innovations, etc. They emphasized upon the need of having more protective and strictly controlled agreement due to the lack of implementing capacity of various earlier conventions and agreements. Globalization had a great impact upon the developed economies. As the world markets got flooded with different brands of products and articles, thereby promoting competition between the manufacturing and marketing competition, at the same time, yet the irony was that before many such foreign brands even entered the border of a country, counterfeited versions already had entrenched the market.³ The growth of counterfeit menace led to the evolution of a more stringent and closely controlled multilateral agreement i.e. TRIPS.

By its very nature the intellectual property requires protection at an international level. As we know that who sows, has a right to reap. Thus the fruits of one's hard work should not be allowed to be garnered by those who have invested no labour. So the interests of the creators or innovators need to be protected not only at the national level but also across the borders. Moreover, the economic benefits associated with such works or inventions require pervasive control over the unauthorized copycat versions. For example, the author Alice Walker, an American national, whose work is produced in the United States of America and is popular in other countries. Thus affording protection in the United States alone would do a little benefit and therefore, there arises the need of protection at an international level so as to prevent copying of the work of the original author without his consent, which further has a tendency to affect the sales of that work.⁴

Intellectual property is all about human creativity.⁵ Intellectual Property is the result of human mind or intellect which when manifested in some legible form becomes the subject matter of protection and confers right to the author, inventor, or pro-

ducer of the work to exploit it exclusively for certain period of time. Intellectual Property Rights (IPRs) can take a variety of forms as copyrights, patent, trademarks, industrial designs, geographical indications, etc. The essence of the TRIPS is protection of the intellectual property and giving exclusivity to the person who originally had the idea. To become eligible for protection, the idea must be expressed in some discernible form, besides fulfilling the minimum requirements set out by the statute affording protection to that property, which further has to be in compliance with the minimum standards specified by the TRIPS.

This article attempts to focus on the historical context of the Trade Related Aspects of Intellectual Property Rights (TRIPS) with a view to work out implications of each of these rights on the intellectual property laws in India and its obligation to produce TRIPS compliant laws. The likely effects of the TRIPS on various intellectual property regimes like Copyrights, Patents, Trade Marks, Geographical Indications and Industrial Designs etc have been discussed in detail.

II. Historical Perspective

The original GATT agreement hardly mentioned intellectual property at all.⁶ The first attempt, however, was made about thirty years after entering into force of the GATT, for protecting the IPRs under the aegis of GATT. This was in 1978-79, when at the end of Tokyo Round a Code against counterfeiting goods was proposed, but ultimately failed.⁷ At the start of the final round of the GATT, that is, the Uruguay Round, in 1986, the intellectual property appeared as a footnote on a crowded agenda.⁸ It was not sure that the IP issue would find any place at the end of the round as protection of intellectual property rights in the international trade was essentially the concern of the World Intellectual Property Organization (WIPO) and various international conventions and agreements. However, the Uruguay Round, the most controversial one, resulted into the WTO TRIPS Agreement with a purpose to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare."⁹ During the early negotiations of TRIPS in the Uruguay Round, the north-south drift reflected different interests. The developed countries, on one hand, insisted upon the increased IPR protection for new innovations resulting from the R&D, to promote foreign direct investment and had an interest in the transfer and dissemination to technology. On the other hand, the developing countries opposed its strong protection on the premise that the stronger IPR protection does not go well with their economic interests, was inappropriate for their social and economic and technological needs and would make them worse off in the aggregate benefits of stronger IPR pro-

tections, which ultimately would benefit the developed countries.¹⁰ Especially, in the Montreal Midterm meeting India and Brazil opposed any significant role for GATT in dealing with the IPR issue, although they supported the fact that counterfeiting could be discussed in the negotiations.¹¹ Nonetheless, the United States initiative resulted in the inclusion of IPRs in the ministerial mandate of Punta Del Este which coined, in terms of a political compromise, the notion of Trade Related Aspects of Intellectual Property Rights (TRIPS).¹²

Additionally, the protection of intellectual property has emerged as one of the key issues in trade relations between the countries. This is due to the appreciation of the importance of creativity and inventiveness as fillip to technological development for global competitiveness.¹³

The international dimension of intellectual property is not altogether new; however, there were various international conventions and agreements on the intellectual property prior to the Uruguay Round of Multilateral Trade Negotiations (MTNs). The Paris Convention for Protection of Industrial Property, 1883 and the Berne Convention for Protection of Literary and Artistic Works, 1886 together may be termed as Magna Carta of IPRs.¹⁴ The Madrid Agreement, 1891 concerning International Registration of Marks simplified the procedure for filing of the trade marks and service marks in different countries. The Universal Copyright Convention, 1952 (UCC), the Rome Convention, 1961, the Patent Cooperation Treaty, 1970 (PCT) etc. also afforded protection in various fields of intellectual property. Additionally, the World Intellectual Property Organization (WIPO), established in 1967, acknowledged the promotion and protection of intellectual property rights at a global level as its foremost job. All these treaties, conventions, and organizations provided permissive regulatory protection based upon the reciprocity of national treatment. Nevertheless, the growing interdependence of national economies in the increasing globalization and rationalization of markets signified insufficiencies in the international regulatory framework.¹⁵ Consequently, in an attempt to slender the gaps in the IPR regimes across the countries and keeping in view their interdependence and counterfeiting, and to bring uniformity of the rules, the TRIPS Agreement establishes minimum standards of protection that each government has to grant to its trading counterpart under the WTO. In doing so, the long term benefits over the short term costs to society were taken care of while devising the TRIPS Agreement. The underlying logic is when the intellectuals get protection for their creation or innovation, it generates long - term benefit for the society. At the same time, the conferment of an exclusive right especially, in case of life saving drugs can have adverse effects on the public health system. The TRIPS system thus, allows the governments to reduce any short term costs through various exceptions, for example, to tackle public health problem. Conversely, attainment of minimum level of protection to intellectual property, do not impose any condition restricting the member countries from providing for higher standards of protection, if they deemed necessary to do so. The TRIPS Agreement simply provides for minimum level of protection to every work covered by it provided such work fulfills the other criteria provided by the TRIPS.

III. Basic Principles of TRIPS

The TRIPS Agreement is based on three principles:

1. To establish minimum standards of protection and enforcement of intellectual property rights in all Member States.
2. Each country must protect interest of the nationals of other Member States by granting the rights set out in Agreement.
3. Members are required to provide the nationals of other States with protection that is 'no less favourable (National Treatment)¹⁶ than that provided to their own nationals. Added to this is the 'Most Favoured Nation Principle (MFN).¹⁷

The TRIPS Agreement is administered by the World Trade

Organization. In case a country fails to offer intellectual property protection, than it is the sovereign States rather than the individual intellectual property owners who can complain about its infringement before the WTO's Dispute Settlement Body. Whereas, the infringement inside the country is within the ambit of national or municipal courts, as the intellectual property law is mainly codified and each regime of intellectual property is dealt in by the statute and supported by delegated legislations in the form of rules, regulations, etc.

IV. Intellectual Property Rights: Different Types

Different works involving intellectual or mental labour often require protection especially; those having commercial value. Thus depending upon the nature of the intellectual work and field of application, intellectual property rights have been classified into different kinds viz; intellectual efforts in science, technology, engineering or agriculture find protection under the patent system, those in the field of art, literature drama, music, photography, computer programs, etc. are afforded protection under copyrights, those appealing to eye under designs system etc.¹⁸ However, the TRIPS Agreement has classified Intellectual Property Rights (IPRs) into two main categories viz;

1. Industrial Property
2. Copyrights and Related Rights

1. Industrial Property: Industrial property may be divided into two main sub-categories:¹⁹

- a. Protection of distinctive signs, trademarks in particular and also geographical indications and
- b. Protection primarily to encourage innovation, design and the creation of technology. This sub-category thus includes inventions protected by patents, industrial designs and trade secrets.

Trademarks:

A trademark²⁰ can be described as a sign or symbol placed on, or used in relation to, one trader's goods or services to distinguish them from similar goods or services supplied by other traders. The trademark may be thus, a word, phrase, symbol, design, sound, smell, colour, product, configuration, letters, number or combination of any of them.²¹ Trademark is a product of competitive trade practices which requires separate and distinct identification of various products, which ultimately benefit the traders in their dealing in the world market, as the trademark gives an indication to the buyer or possible buyer of the manufacture or quality of the goods. Moreover, it gives the buyer a satisfactory assurance of the make and quality of the article he is buying.²² Thus trademark serves following functions:²³

- i. Identification of product and its origin for e.g. trade name "Samsung" signifies the consumer electronic devices produced by Samsung India Electronics Pvt. Ltd.
- ii. Indicates the established quality, for e.g. the quality of Dove soap. A purchaser of "Dove" soap is assured of its quality.
- iii. Advertisement of product. For example: Nokia popular name for cell phones.
- iv. Creation of an image of product to the public, for e.g., Britannia creates an impression and image about the quality of confectionary and biscuits sold by the company.

In Philips electronics NV v. Remington consumer products²⁴, the European Court of Justice c stated: "The function of a trademark is to identify the trade origin of goods and services. That function is important to protect both traders and consumers. It is a requirement of trade mark under European law just as much as it has been under UK law."

Trademarks constitute protectable subject matter under the provisions of TRIPS Agreement and it provides for its registration and each renewal for a term of not less than 7 years.²⁵ Further it provides for indefinite terms of renewal of the trademarks.²⁶ However, the agreement does not stipulate for compulsory licensing as in case of the patents. Trademark law is not only a branch of intellectual property law but also an important branch of commercial law. It is about commercial

symbols and the significance and power that they represent in the market. Moreover, with the advent of e-commerce, market entities use trademark as domain name to show their existence in the cyberspace. Consequently, Trademarks have become important for trading on the Internet.

Impact on Trade Marks Law in India:

In India, the field of trademarks was governed by Trademarks Act, 1958. However, the incorporation of TRIPS Agreement into the World Trade Organization mandated for changes in the existing trademark law in India thereby making the 1958 Act as outdated. The TRIPS Agreement declares that the trademarks could be registered for both goods as well as services. Consequently, services were brought within the ambit of the trademarks and registration of trademarks for services was made compulsory. Thus in order to conform to TRIPS, Trade Marks Act, 1999 was enacted, thereby providing for equal protection to service marks. The Trade Marks Act, 1999 introduced protection of well known trade marks and also collective marks²⁷ and service marks.²⁸ The Trade mark law, whether statutory or common law is based broadly on three principles viz, distinctiveness, deceptive similarity of marks and similarity of goods. The scope of the Act was also enlarged to include figurative elements such as shape of goods, packing and also combination of colours.²⁹ Further establishment of an Appellate Board to decide appeals against the decision of Registrar was also established. Enforcement of trademark owner's rights had been weak in the past, but now are showing an improvement due to involvement of administrative and judicial machinery to curb the menace of piracy of Indian right's holders. Additionally, the protection for a period of ten years is also in consonance with the TRIPS Agreement.³⁰

Geographical Indications

Geographical indications are defined as indications which identify a good as originating in the territory of a Member, or a region or a locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.³¹ Thus like trademark GIs are the indications as to source. But unlike trademarks, they are not exclusionary propriety right, nevertheless are collective rights enjoyed by the producers or manufacturers of such GI originating or produced in that region.³² Geographical indications entered into the international field with its inclusion in the TRIPS Agreement under Articles 22 to 24. The scope of protection for GIs is based on the principles that use of indications in a manner that might either mislead the public or could be construed as deceptive and could amount to the acts of unfair competition, thus require protection. The TRIPS Agreement mandates the prohibition of misleading indications. In a way, the protection of GIs in all respects is in the interest of consumers and producers of goods or authorized users.³³

The TRIPS Agreement provides two basic protection standards for Geographical indications.³⁴

The issue has been of particular interest to India, especially after the grant of US patent to Ricetec Inc, a US multinational company, in the name of Basmati. This necessitated the urgency of enacting law for protection of geographical indications in India³⁵. Consequently, the Geographical Indication of Goods (Registration and Protection) Act, 1999 was enacted.³⁶ This is the first specific law which provides for the registration and protection of geographical indications.³⁷

Patents:

Patents provide property rights to inventions. It is a monopoly right conferred to the inventor who has invented a new product or process through his intellectual efforts capable of industrial application. Ibuprofen, DVDs, Cat's Eyes and bagless vacuum cleaners are examples of well known inventions. In return for sharing the information about their ideas, the inventors are rewarded with patents by the state³⁸. A patent gives the owner (the patentee) an exclusive right of exploitation of the invention for a period of 20 years whereby for this

period the patentee enjoys the legal right to stop others from producing the patented goods or applying the patented process without the patentee's permission. Thus grant of patent confers a monopoly right for a specified period³⁹.

The justification for the grant of patent lies in the fact that the patentee has disclosed or publicized his invention, which though cannot be used by others during the patent period, yet can be looked upon by the others so far the details of the invention are concerned consequently learn from the technological advances made. The inventor must get a reward for sharing such knowledge regarding his invention in the form of a monopoly right or patent. Furthermore, patent is an incentive to be creative and an encouragement to make other useful inventions. Patents also contribute in stimulating the economy of a nation as there are more products for consumers to buy⁴⁰. Moreover, the grant is justified on the ground that the money spent on research and development of the product in question must be composed with. Thus monopoly right affords such opportunity to recoup the investment made for that product.

Impact on Patent Law:

In India the concept of patents has prevailed since 1856⁴¹, followed by the patents Act, 1970 that provided protection for invention of process but there was no product patenting⁴². However, with the advent of TRIPS Agreement, protection has also been extended to products⁴³. Consequently, new legislations thereby amending 1970 Act were pass by further allowing process as well as product patenting⁴⁴. The changes in the patent law to bring it in conformity with TRIPS Agreement can be visualized in the patent Amendment Acts of 1999, 2002 and 2005. TRIPS affected the most, the pharmaceutical sector as the product patenting was required to be introduced to bring the patent regime in line with the TRIPS Agreement⁴⁵. The critics of India becoming member to WTO, were of the opinion that implementation of TRIPS would affect the drug prices seriously⁴⁶. Hence, the implications of TRIPS for the pharmaceutical sector are⁴⁷:

- i. Patents will be granted both for products and processes for all inventions in all fields of technology.
- ii. The term of patent will be twenty years from the date of application⁴⁸.
- iii. Patents will be granted irrespective of the fact whether the drugs were produced locally or imported from another country.
- iv. On infringement, the responsibility to prove that a process other than the one used in patented product has actually been used in the disputed product lies with the accused rather than patent holder.

The other important provision added to Indian Patent Act in 1999 included the facility of mail box to receive and hold product patent applications in the field of pharmaceuticals, agriculture and chemicals. Such applications were not to be processed for the grant until the end of 2004. However, exclusive marketing rights (EMRs) for such products, where patent protection has not been provided viz, pharmaceutical and agro chemical products could be obtained for such application.

All such applications in mailbox were to be examined from January 1, 2005. The controller has power to grant exclusive marketing rights (EMRs) for a period of 5 years for inventions made in India on or after Jan. 1, 1995 and for which a claim of process patent has been made and granted in India⁴⁹. But in case of substances to be used as medicines or drugs, the prior publication before the filing of claim for patent by applicant either in India or in a convention country would not constitute EMR infringement⁵⁰.

"Inventiveness" linked with the word "novelty" has been set up as new criteria for grant of patent⁵¹. Earlier the criteria followed was laid down by the jurisprudence in the case of Bishwanath Prasad Radhy Shyman V. Hindustan Meta Industries⁵² in which the Supreme Court of India a held that the invention must be the inventors own creation/invention as

opposed to a mere verification of what was already known before the date of the patent.

The EMR system was finally replaced by the introduction of product patent protection⁵³ finally, with the passing of the Patent (Amendment) Act, 2005. India has product patents for pharmaceuticals, agro-chemicals and special food products. The changes in the definition of patentability, restoration of pre-grant opposition and automatic license of right would help to maintain supply and prices of medicines currently manufactured in India and also allay fears of developing countries about the continuity of supply of low cost medicines from India⁵⁴.

Industrial Designs:

The industrial designs that are new and original become the subject matter of protection. Such artistically produced designs immediately attract the attention of customers. A design gives aesthetic sense and appearance to the product which becomes the focal point of attraction. Thus, a great deal of attention is desired while designing of any product. This creative originality of a design needs legal protection against copying whereby the right holder after getting his design registered becomes entitled to prevent third parties, not having his consent, from making, selling or importing articles being or embodying such design for commercial purposes. The TRIPS Agreement provides for protection of designs⁵⁵. The term of protection to such registered designs is to be not less than 10 years⁵⁶.

In India, the designs Act, 2000 defines 'design' as the feature of shape, configuration, pattern, ornament or composition of lines or colour applied to any article, whether in two dimensional or three dimensional or both forms by any industrial process or means, whether manual, mechanical or chemical separate or combined, which in the finished article appeals to and judged solely by eye⁵⁷.

The Act has enlarged the scope of definition the term 'article' and 'design' and also introduced the definition of the term 'original'. It also has amplified the scope of 'prior publication'. Further it also has provided certain provisions to identify the non-register able designs⁵⁸ of buildings and structures, any mode or principle of construction, or trademark or property mark any artistic work as defined under section 2 (C) of copyright Act, 1957 or the designs having functional utility. It also contains remedies pertaining to infringement of designs. Further it has also enhanced the initial period of registration from 5 to 10 years, to be followed by a further extension of period of 5 years. Thus India, being a signatory to Washington Treaty and TRIPS Agreement of the WTO has adopted on approach towards effective protection of industrial designs.

Conclusion:

Despite much criticism against the implementation of the TRIPS Agreement, it is true that India has made a lot of development in the field of intellectual property. India is in a position to share the knowledge of new scientific world. By becoming a party to the WTO and consequently TRIPS Agreement, it can also protect its new inventions, creations and heritage. In the field of patents, especially, pharmaceuticals, it can produce generic versions after the completion of term of such patents, thereby giving opportunity to the generic industries to grow and produce the products to be readily available to the people at affordable prices. Besides, it can also give impetus to research and development. Though, India faced certain problems in the new fields, as Geographical Indications, but after updating of the laws on IP eventually led to the growth of GIs and awareness among their producers to get them registered for availing protection not only at national level but internationally as well. Nonetheless, the time after the Uruguay Round has shown that TRIPS is not a bad deal.

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Ltd., 2007] at 264. | Dr. M.K. Bhandari, Law Relating to Intellectual Property Rights [Allahabad: Central Law Publications, 2008] at 5. | A Subbain, Intellectual Property Rights: Heritage, Science and Society under International Treaties, [New Delhi: Deep and Deep Publications Pvt. Ltd., 2007] at 305. | See Article 3 of the TRIPS Agreement | Art 4(1) of the TRIPS Agreement provides: 'with regard to the protection of intellectual property, any advantage, favour privilege or immunity granted by a Member to the nationals of other country shall be accorded immediately and unconditionally to the nationals of other members' | Dr. N.S. Sreenivasulu, "Intellectual Property Rights: Conceptualization" in Dr. N.S. 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Further Article 15 of the TRIPS Agreement states, ".....Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors' as well as many combinations of signs, shall be eligible for registration as trademarks..." | Supra, note 14 at 127. | Id. | [1999] R.P.C 809 at 815 | Article 18 of the TRIPS Agreement | Id. | S. 2(g) of Trade Mark Act, 1999 defines 'collective mark' as a trade mark distinguishing the goods or services of members of an association of persons not being a partnership firm, which is proprietor of mark from those of others. | S. 2(z) of Trade Marks Act, 1999 defines 'Service' "as service of any description, which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising". However, the concept of service marks was not available under the Trade 8 Merchandise Marks Act, 1958. | See Article 15 of TRIPS Agreement. | See Article 18 of TRIPS Agreement. Also see Section 25 of Trade Marks Act of 1999. | See, Article 22 of TRIPS Agreement, Also the Indian Parliament enacted Geographical Indications (Registration and Protection) Act in 1999 to implement the TRIPS provisions. Section 2 (1) (e) defines GI as: GI in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in the case where such goods are manufactured goods, one of the activities of either the production or of processing or preparation of goods concerned takes place in such territory, region or locality, as the case may be. Explanation: For the purpose of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as GI if it relates to a special geographical area and is used upon and in relation to particular goods originating from that country, region or locality as the case may be See P.S. 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[See note 1 at Page 2] | Ibid | Ibid | The Act VI of 1856 on Protection of Inventions based on the British patent law of 1852, wherein certain exclusive privileges had been granted to inventors of new manufacturers for a period of 14 years. It was followed by Act of 1859 modified as Act XV. The patents and followed by Act of 1859 modified as Act XV. 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Ltd., 2007] at 544-545. | The patent term was seven years under 1970 Act. | See Section 24a of the patent (Amendment) Act, 1999. | Id, Section 24 b (2) | S. 2(1) (j) of patent (Amendment) Act, 2000 defines the term 'invention' as 'a new product or process involving inventive step and capable of industrial application'. | AIR 1982 SCC 144 | The provision of EMR was abolished through the Third Amendment Bill of December, 2004 by including new definition of drugs and provision for patenting of new use and embedded use. Also See M. 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