International Research Journal of Commerce and Law
Volume 5 Issue 10, October 2018 ISSN: 2349-705X Impact Factor: 4.616
Journal Homepage: http://ijmr.net.in, Email: irjmss@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal

INTELLECTUAL PROPERTY RIGHTS

UNDER

THE UMBRELLA OF INTERNATIONAL CONVENTION

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INTRODUCTION:

IPR are legal rights granted by governments to encourage innovation and creative output by ensuring that creators reap the benefits of their inventions or works and they may take the form of patents, trade secrets, copyrights, trademarks, or geographical indications.

The plight of the gifted and rich usually fails to elicit much sympathy. But perhaps what is easily overlooked is that success is hard to win, and often harder to retain. This is very much the case for the products of human inventiveness and creativity. Intangible assets that can be quite costly to obtain, that may be extremely valuable to society at large, but that can be copied and or imitated very easily. Intellectual property rights such as patents, Copyrights and trademarks are quite relevant in that context, allowing the producers of new and or original work to assert partial legal ownership on the outcome of their efforts.[1] The notion of Intellectual property rights is a quintessential product of western civilization, rooted in its individualistic view of creativity. Both patents and copyrights appear to have been first used in Renaissance Italy and Intellectual property rights in general have evolved into a mainstay of western legal tradition. For most European countries and the United States, a systematic legal framework was first achieved in the nineteenth century. Because Intellectual property rights are rooted in the law, they have traditionally been the prerogative of national jurisdictions, although international cooperation in this area, through multilateral treaties and conventions, has a long history. But the internationalization of Intellectual property rights got a tremendous boost by the TRIPS (trade-related aspects of intellectual property rights) Agreement, which was incorporated as one of the core agreements constituting the World Trade Organization (WTO) that came into effect on 1 January 1995.[2]

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[1] Dutfield, G. (2000), Intellectual Property Rights, Trade and Biodiversity, London, UK: Earthscan Publications Ltd.
[2] THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, World Trade Organization (1995)

Indian industries that rely on Intellectual property rights contribute significantly to Indian economic growth, employment, and trade with other countries.

Counterfeiting and piracy in other countries may result in the loss of billions of currency of revenue for India firms as well as the loss of jobs. Responsibility for developing Intellectual property rights policy, engaging in Intellectual property rights-related international negotiations, and enforcing Intellectual property laws cuts across several different Indian Government agencies. Promoting the enforcement of Intellectual property rights is an important component of Indian international trade policy. Since the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) at the World Trade Organization (WTO), trade policy has been used to enforce Intellectual property rights abroad. The India and several trading partners recently announced plans to pursue a multilateral anti-counterfeiting agreement that would surpass TRIPS Agreement commitments.[3]

TRIPS is remarkable from both the viewpoint of past trade liberalization efforts undertaken under the support of the General Agreement on Tariffs and Trade (GATT), the precursor to the WTO, and from the perspective of international coordination of Intellectual property rights as pursued by numerous previous treaties and agreements in the context of the World Intellectual Property Organization (WIPO). From the perspective of trade institutions and traditions, TRIPS broke from the past by attacking the somewhat arcane issues of Intellectual property rights, an entirely new subject matter. In so doing the agreement reaches beyond the border measures that had been, up to that point, the almost exclusive domain of trade liberalization efforts. The need to justify such a less-than-obvious extension of the reach of GATT was very much emphasized by the carefully worded prefix 'trade-related' that was used to characterize the new subject matter. From the perspective of previous international efforts at coordinating national Intellectual property rights rules, TRIPS is remarkable because it bundled together the main provisions of the major international Intellectual property right agreements, because it strengthened the requirements of existing agreements in some crucial areas, and because it included the final package as a required element for participation in the WTO.[4]

Furthermore, enforcement of international Intellectual property rights, essentially nonexistent under WIPO, under TRIPS can rely on the WTO dispute settlement mechanism and on the threat of trade sanctions for noncompliance. This expansion of the scope of WTO activities is likely to have important long-run consequences. As one observer put it soon after the conclusion of the Uruguay round, "The farmers and the issues of agricultural subsidies have the limelight. TRIPS, however, will over time play a bigger role in the global economic drama"

A number of sound arguments can be marshaled to explain why Intellectual property rights play an increasingly critical role in international economic relations.[5]

[3] Dhavan, Rajeev, and Maya Prabhu. 1995. Patent Monopolies and Free Trade: Basic Contradiction in Dunkel Draft. Journal of the Indian Law Institute 37 : 194.

[4] Moore, Michael. 2000. "WTO's Unique System of Settling Disputes Nears 200 Cases in 2000." PRESS/180. Geneva: World Trade Organization.

[5] Castel, Jean-Gabriel. 1989. "The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures." 38 International and Comparative Law Quarterly (October): 834-849.

The purpose of this Artical is to provide a prospective view and a tentative assessment of the role of Intellectual property rights under the garb of current round of multilateral trade negotiations.

INTELLECTUAL PROPERTY:

A brief description of intellectual property as its name illustrates, Intellectual property has to do with some sort of property right in relation to intellectual achievements. Generally speaking, Intellectual property is understood to cover the results of intellectual activity in the industrial, scientific, literary, and artistic fields. Intellectual property rights are traditionally divided into two branches, "industrial property" and "copyright." As one source for a possible definition of Intellectual property rights , the "Convention Establishing the World Intellectual Property Organization" ("WIPO"), concluded in Stockholm on July 14, 1967, provides that Intellectual property shall include rights relating to literary, artistic, and scientific works; performances of performing artists; phonograms and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks; service marks and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields. This definition is by no means exhaustive, and the "WTO Agreement on Trade-Related Aspects of Intellectual Property Rights" ("TRIPs Agreement") is but one example of the evolving scope of Intellectual property, for example, with respect to the inclusion of the protection of undisclosed information. Intellectual property consists of intangible elements which can be incorporated in, or associated with, goods or services, thereby adding value to them, and Intellectual property rights extend to the intellectual component as such, rather than to a single physical object in which that component is embodied. The main rationale underlying the Intellectual property rights system is that it acts as an incentive encouraging development of, and innovation in, new products and services for the benefit of society. The system is based on the principle that private rights are granted in order to serve the public good, but increasingly some question whether the private interests are not being privileged to the detriment of the public interest. Indeed, and perhaps precisely due to the increasing use and success of the Intellectual property system, its public image has been characterized by growing criticism. This bad press stems in part from concerns about the perceived primacy of IPRs over public interests, thus forming an obstacle for countries wishing to pursue other urgent policy goals, but also from fears that protection is sometimes obtained for undesired developments as well as for matter which is believed to be in the public domain.[6]

In addition, there is no unanimity among developing countries as to whether the adoption of certain levels of IP protection would result in real benefits for them, as has been the expectation raised in a number of international negotiations.

[6] Dutfield, G. (2003), Intellectual Property Rights and Development, UNCTAD/ICTDS, Draft, Geneva, Switzerland.

INTELLECTUAL PROPERTY AND PROPERTY

Since the expression "intellectual property" refers to the term "property," a brief summary is given here on the common features of and differences between property in tangible objects and Intellectual Property. One common element relates to the fact that both tangible and intangible property confers an exclusive right permitting the exclusion of third parties from the use of the object of the property right. Neither tangible and unlimited use of the protected object, but both consider the owners' rights as part of, and subject to, the general legal framework, thus providing for important exceptions to rights based on legal provisions dealing with other matters or on the rights of third parties. These imitations range from intrinsic limitations on the one hand to more drastic measures such as the expropriation of land for public constructions or compulsory licenses in patent law. Finally, both types of rights can be fully or partially assigned, transferred, or licensed.

There are, however, also some differences between the two types of protection, the main ones being the following:

Intellectual Property is of a ubiquitous nature, in the sense that the non-tangible Intellectual Property component can be incorporated in or associated with many objects, and the objects may be in different places, thus adding an international dimension to this form of protection.

Rights in tangible property, on the other hand, are generally dependent solely on the law of the country where the object is located. Finally, in general, Intellectual Property Rights are subject to many restrictions, perhaps more so than is the case in the area of tangible property.

Intellectual Property Rights are property rights defined over intangible assets that are the result of human inventiveness and creativity. Patents, copyrights, trademarks and trade secrets are the most common forms of Intellectual Property Rights, although related but distinct forms of intellectual protection exist to deal explicitly with specific types of innovations.[7]

Patents are arguably the strongest form of IPRs. A patent typically is issued by a government agency – in the United States, for example, the Patent and Trademark Office (PTO) – upon successful evaluation of an application. It confers to the inventor the sole right to exclude others from economically exploiting the innovation (by making it, using it, selling it, etc.) for a limited time (20 years from the date of filing, for most countries). To be patentable, an innovation must be novel in the sense of not constituting part of the prior art. The innovation must also involve an inventive step (it must be non-obvious to a person with ordinary skills in the particular field of application), and it must be useful (the innovation must permit the solution of a particular problem in at least one application). A major requirement of a patent application is disclosure: the patent application must describe the invention in sufficient detail to enable those skilled in the particular field to practice it. The foregoing describes so-called 'utility patents,' the most important and common kind. The subject matter of such patents encompasses machines, industrial processes, composition of matter and articles of manufacture. Other patents that can be

[7] Jodha, N. S. 1995. Common Property Resources and the Environmental Context. Economic and Political Weekly 30 (51): 3278–3283.

obtained concern 'industrial design,' which protects visual aspects of a product (as opposed to its technical features), and 'utility model' (petty) patents.[8]

Copyrights apply to original works of authorship, such as books, photographs, sound recordings, motion pictures, and other artistic works in general. An explicit condition for such creative expressions to claim protection by copyrights is that they be fixed in a tangible medium (because copyrights protect the form of expression rather than the subject matter). Unlike patents, there is no novelty or usefulness requirement, although there are conditions of originality (the work has not been copied) and authorship. Registration may be possible, but typically property rights under copyright statutes exist independently of such a formality. Protection under copyrights typically extends for the lifetime of the owner plus 50 years (lifetime of the owner plus 70 years in the United States and the European Union).[9]

A trademark is a sign, word, symbol or device (which may include or combine letters, numbers, pictures, emblems, etc.) that distinguishes the goods or services of an enterprise from those of others. No novelty or originality is necessary, but the main requirement is distinctiveness (a mark cannot be a generic description). For trademarks to be valid they typically have to be registered (in the United States, for example, with the PTO). Any unauthorized use of a mark identical (or confusingly similar) to a valid trademark is prohibited. Protection of trademarks does not have a time limit, provided the trademarks are used and renewed periodically.

Trade secrets cover any confidential business information – including formulae, devices, methods, techniques and processes – that may confer an advantage over competitors from the fact that it is not generally known. For trade secret protection to apply, the general requirement is that reasonable efforts be undertaken to maintain secrecy. More specifically, protection is extended against another party's discovery by inappropriate means, but a trade secret offers no protection against independent discovery or reverse engineering.[10]

Specific IPR instruments suited to particular types of innovations (sui generis systems) have been developed. Of interest to agriculture is the protection of plant innovations through so-called Plant Breeder's Rights (PBRs). For example in the United States such rights are defined by the 1970 Plant Variety Protection Act, whereby the US Department of Agriculture (USDA) can issue Plant Variety Protection (PVP) certificates. Varieties claiming a protection certificate must be new and must satisfy requirements of distinctiveness, uniformity and stability. The protection offered by PVP certificates is similar to that provided by patents (including a standard 20-year term) with two qualifications. First, there is a 'research exemption,' meaning that protected varieties may be used by others for research purposes (e.g., to develop other new varieties). Second, there is a 'farmer's privilege,' that is, seed of protected varieties can be saved by farmers for their own replanting (but farmers are prohibited from reselling protected seeds). Other important sui generis IPRs include integrated computer circuit rights, which protect the layout design of integrated computer circuits (chips). Unlike patents, novelty and nonobviousness are

[8] Deardorff, A.V. (1990), 'Should patent protection be extended to all developing countries?', The World Economy, **13** (4), 497–507.

[9] Chin, J. and G.M. Grossman (1990), 'Intellectual property rights and North–South trade',in: R. Jones and A.O. Krueger (eds), The Political Economy of International Trade, Oxford, UK: Basil Blackwell.

[10] Dutfield, G. (2003), Intellectual Property Rights and Development, UNCTAD/ICTDS, Draft, Geneva, Switzerland.

not required here (originality suffices). Geographical indications (as applying for example to wine and spirits in TRIPS) are meant to protect reputation about quality that is associated with a particular region of origin. It is similar to a trademark, but it is not privately owned. Database rights are meant to prevent unauthorized use of database compilations (but do not confer exclusive rights to the data themselves). At present such rights are available in the European Union but not in the United States.[11]

INTELLECTUAL PROPERTY RIGHTS IN AN INTERNATIONAL SETTING

As noted earlier, although IPR protection is rooted in the law and as such is the prerogative of national jurisdictions, international cooperation in this area, through multilateral treaties and conventions, has a long tradition dating back to the nineteenth century. Prior to TRIPS virtually all international treaties and conventions dealing with IPRs were administered by WIPO, a United Nations agency with headquarters in Geneva, Switzerland. A cornerstone of this system is the 1883 Paris Convention for the Protection of Industrial Property, the most recent substantive version being the 1967 Stockholm revision (164 countries are currently party to this convention). This convention provides that each country extends to the citizens of other countries the same patent rights available to its own citizens (the principle of 'national treatment'). It also allows for a right of priority, such that upon filing in a member nation an inventor can, within one year, seek protection in other countries with the original filing date applying.

The 1979 Patent Cooperation Treaty (PCT) is meant to facilitate filing for patent protection for the same invention in member countries by providing centralized filing and standardized application procedures. In connection with patents, WIPO also administers the 1977 Budapest Treaty, which governs the deposit of microorganisms or biotechnology products as required for patent filing.

The 1886 Berne Convention for the Protection of Literary and Artistic Works (its last main revision was in 1971) is the major international treaty that applies to works protected by copyrights. Signatories are required to afford foreign authors the same rights available to their own nationals, including the right of enforcement, and to establish a minimum copyright term (the life of the author plus 50 years). The 1961 Rome Convention extends copyrights protection to sound recording, performers of music, and radio and television broadcasts. Trademarks are protected by several international treaties, including the aforementioned Paris Convention, which assure national treatment as well as protection of well-known marks worldwide. There are many other conventions and treaties that apply to IPRs; International coordination of PBRs is an exception in that it is not the prerogative of WIPO. Instead, PBRs are managed by the International Union for the Protection of New Varieties of Plants (UPOV, after its French acronym), an intergovernmental organization with headquarters in Geneva.

UPOV was established in 1961, and later revisions to its convention (1972, 1978 and 1991) tightened the characterization of the rights involved. The latest UPOV convention (1991) allows

[11] Schrijver, Nico. 1997. Sovereignty over Natural Resources—Balancing Rights and Duties.Cambridge, UK: Cambridge University Press.

countries to provide protection for new varieties with both PVP certificates and utility patents, and allows (but does not require) countries to permit farmers to save protected seeds for replanting.

THE TRIPS AGREEMENT

A detailed study of the text of WTO agreement makes it clear that the scope of TRIPS is quite extensive, as it covers copyright and related rights (i.e., the rights of performers, producers of sound recordings and broadcasting organizations); trademarks, including service marks; geographical indications, including appellations of origin; industrial designs; patents, including the protection of new varieties of plants; the layout designs of integrated circuits; and undisclosed information, including trade secrets and test data. Perhaps more important are the main principles enshrined in TRIPS: national treatment, most-favored-nation and minimum standards. National treatment requires that the same rights be equally available to nationals and foreigners, and it has been a cardinal element of virtually all the previous efforts at coordinating international IPRs. But the other two principles are new to the international arena concerning IPRs. The most-favored-nation (MFN) clause (equal treatment for nationals of all trading partners in the WTO) is, of course, central to other WTO agreements, and it has the potential to amplify increased IPR protection that may result from bilateral negotiations.

It is in the setting of minimum standards, however, that TRIPS provides perhaps the most ambitious departures from existing international IPR coordination. In particular, the agreement mandates that minimum standards of IPR protection be provided by each member in each of the main areas of intellectual property that it covers. This is achieved by spelling out the subject matter to be protected, the rights to be conferred (and what the permissible exceptions to those rights are), and the minimum duration of protection. The main obligations of the Paris Convention and of the Berne Convention are incorporated by reference and must be complied with.[12] Except for the Berne Convention provisions on moral rights, all the main provisions of these conventions became obligations under the TRIPS Agreement between WTO member countries because of the 'single undertaking' approach of the WTO (there is no opt-out choice).

The TRIPS Agreement also adds a number of additional new obligations not contemplated by previous conventions. Patent protection must be accorded for both products and processes, for at least 20 years, in almost all fields of technology. Plant varieties must be protected, either by patents or by a sui generis protection system (such as PBRs). Domestic production of a patented product cannot be required in order to enjoy the rights of a patent holder. With respect to trademarks, the requirement that foreign marks be used in conjunction with local marks is prohibited, and cancellation of a mark on the grounds of nonuse is restricted. A TRIP departs from pre-existing norms by ensuring that computer programs be protected by copyrights under the provisions of the Berne Convention. It also introduces provisions on rental rights (e.g., authors of computer programs and producers of sound recordings have the right to authorize or prohibit the commercial rental of their works). With respect to geographical indications, a higher

[12] Scotchmer, S. (2002), 'The political economy of intellectual property treaties', NBER Working Paper 9114, Cambridge, MA.

level of protection is provided for wines and spirits (which are protected even when there is no danger of the public's being misled). With respect to the protection of layout designs of integrated circuits, TRIPS extends the incorporated treaty provisions by requiring a minimum protection period of 10 years, and that the rights must extend to articles incorporating infringing layout designs. Trade secret protection is explicitly imparted by TRIPS. In particular, test data submitted to governments in order to obtain marketing approval for pharmaceutical or agricultural chemicals must be protected against unfair commercial use.

In addition to spelling out the rights on intellectual property to be provided by members, TRIPS also addresses obligations related to the enforcements of those rights. Member governments must provide procedures and remedies under their domestic law to ensure that IPRs can be effectively enforced. The procedures provided must be fair and equitable, should not discriminate against foreigners and must not be unnecessarily complicated, costly or subject to unreasonable time delays. Notable enforcement obligations include rules for obtaining evidence (in some cases reversing the burden of proof), and the availability of provisional measures, injunctions, damages and other penalties.

Also, willful trademark counterfeiting or copyright piracy on a commercial scale must be treated as a criminal offense. Governments must also ensure that the assistance of customs authorities be made available to prevent imports of counterfeit and pirated goods.

A fundamental feature of TRIPS is that, by taking IPR protection under the aegis of the WTO, international enforcement of IPRs can be pursued within the structure available to enforce compliance with trade rules. A Council for TRIPS was established to monitor the operation of the agreement and governments' compliance with it. Perceived failures by member governments can be pursued under the integrated WTO dispute-settlement procedures. In particular, the threat of trade sanctions is expected to considerably strengthen the international enforcement of IPRs.

TRIPS envisioned a differentiated phase-in period for WTO member states compliance. Specifically, relative to its January 1995 date of birth, TRIPS allowed for a one-year transition period for developed countries to bring their legislation and practices into compliance. Developing countries and (under certain conditions) transition economies were given five years, whereas least developed countries (LDCs) were allowed an 11-year transition period.

Theoretically, therefore, all WTO contracting parties should be in full compliance with TRIPS as of January 2006. But LDCs are allowed, under article 66, to seek postponement of their obligations to implement TRIPS. In addition, in the 2001 Doha Declaration on the TRIPS Agreement and public health, LDCs were given an extension (until January 2016) for implementing their obligations related to pharmaceuticals.

CONCLUSION

Intellectual property' refers to various legal forms that confer rights of ownership over 'ideal, immaterial, or intangible objects'. Some of these legal forms are centuries old, others quite new. In the globalizing knowledge-based economy of high-tech capitalism,
IPRs have become central to accumulation. Accumulated knowledge in the sense of general labour is appropriated by private capital in and through IPRs In addition to the outstanding implementation issues; there are opportunities for potential extensions and refinements of the TRIPS Agreement. What is in doubt is whether any consensus is likely to emerge given the diverging agendas of developed and developing countries. Although developed countries cannot be assumed to have a unified agenda, broadly speaking what they would like is a tightening of the existing TRIPS, the closing of loopholes, and an extension of the scope of protection under the agreement. TRIPS provide considerable flexibility in a number of areas, especially for IPRs related to newer technologies. No provision is included in TRIPS, for example, about IPRs related to Internet data transmission and e-commerce. Indeed, two treaties in this area have been completed under WIPO after the conclusion of the Uruguay Round (the Copyright Treaty and the Performances and Phonogram Treaties), and developed countries would like to see the substantial provisions of those treaties brought into TRIPS. There is also interest in clarifying the protection by patents for biotechnology innovations, and possibly in revisiting the provision that allows members to exclude plants and animals from patentability (TRIPS actually contemplates a built-in mandatory review One of the distinguishing features of TRIPS is that of having taken the WTO into new territory, beyond the border measures that had been the almost exclusive domain of prior trade liberalization efforts. Whether the WTO is ready for further expansions of its influence in nontraditional areas, as pioneered by the TRIPS agreement, remains to be seen. But the failure of the Cancun ministerial meeting on precisely the so-called Singapore issues (competition, investment, transparency in government procurement and trade facilitation measures) suggests that, if this is the road to be traveled, it will be a slow and rocky voyage.