

## CHALLENGES OF INTELLECTUAL PROPERTY LAWS IN INDIA AND IMPACT OF TRIPS AGREEMENT

Dr. Syed Sadiq Husain Abidi

Assistant Professor, Faculty of Law, Shia P.G. College, Sitapur Road, Lucknow

### Introduction

Crime tremendously changed its forms and nature but has ever haunted the society irrespective of time, age and place it has always been attempted to create such tendency, puzzling the society since time immemorial which some times affects individual by deprivation from the lawful authority or sometimes affects the whole society. Here our concern is focussed upon the offences relating to the incorporeal property and other neighbouring rights. Copyright protects intellectual property since the product, over which the right is granted for example a literary work is the result of the utilization and investment of intellect.

Every enterprise needs capital infrastructure managerial supervision, manpower to produce a valuable item and make it available to the ultimate consumer through outlet in the market, employing *pari passu* principle in case of intellectual property and outcome (production) in the form of literary work is the result of utilization of intellectual power in the form of writing, composing and artistic expression and presentation. Copyright grants a monopolistic right over the created work of the author of the work. Copyright under the provisions of the Copyright Act, 1957 refrains these from the use of the work as such for their own gain and credibility. Misappropriation of the labour skill and investment in the form of money and infrastructure pressed into service to bring out such creative original work.

It is immaterial whether the work is wise, foolish, accurate or inaccurate or whether it has not any literary merit.<sup>1</sup> Copyright, protects the skill and labour employed by the author in the production of his work.<sup>2</sup> Monopoly, has been used in the Copyright Act, 1957 in restricted sense. It should not

<sup>1</sup> Walter». Lane 1990 A. C. 539

<sup>2</sup> Raven Craft v. Herbert 1980 R.P.C. 103



lead to misconception and misleading conclusion that no other can contribute to the same subject but it should be independently authored by one's own labour and industry bestowed upon it<sup>3</sup>.

Copyright does not exclude from sharing and contributing the same motion protects the form to which the ideas are crafted. In order to protect the interest of the genuine authors after independence the Indian legislation enacted the laws to discourage illegal infiltration in the literary field. Enacted laws meant to encourage and protect authors, composers and artists propriety rights from such apprehended threat to their rights. Original works must be rewarded with the exclusive right for specified period. To reproduce the works for beneficial enjoyment of one's own labour and skill undisputedly. Copyright is not a single right, it is inclusive of form as well as the contents of the work as right of reproduction in the form of translation, adaptation, abridgement and the right of public performance. It would be justifiable enfold the implicit objects of copyright not only provides right of reproduction but this right has been extended to public performance, recording, broadcasting and publishing such rights related and collateral to neighboring rights.

### TRIPS AGREEMENT AND ITS IMPACT ON INTELLECTUAL PROPERTY

The contemporary world can be characterized by fast moving scientific and technological advancements. The present world, dominated by Intellectual Capital? that claims to hold the key to socio-economic changes of the society. The human society can be broadly divided into people who have knowledge and those who have-nots.

The most significant dimension of the World Trade Organization (W.T.O.) is the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The agreement of W. I.O. containing provisions for Intellectual Property is the agreement on Trade Related Aspect of Intellectual Property Rights which constitutes Annexure Ic of the Marakkesh Agreement binding on all the members of the W.T.O. The TRIPS Agreement is

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<sup>3</sup> Ibid.

not a new for the world, neither it contains anything new but merely a consolidated form of Paris Convention, the Berne Convention and the World Intellectual Property Organisation (W.I.P.O.).

The Paris Convention of 1883 consists of provisions regarding Patents, Trademarks, Industrial Designs and Trade Names. The registration process was solely based on the doctrine of \* first to register is first to protest". The Berne Convention (1886-1971) includes the subjects of copyright and literary broadcast, media related and creative types of Intellectual Property. The minimum standard of protection was till Authors life plus 50 years.

In the year 1996, World Intellectual Property Organisation (WIPO) performance and phonograms treaty was adopted. This treaty through its provisions attempted to meet the challenges of digital technology particularly the Internet. Under WIPO, a nation is free to maintain its own intellectual property standards of protection.

First time the Director General of General Agreement on Tariff and Trade (GATT) endeavoured to draft a proposal, for the purpose to link Intellectual Property with Trade.

The developing country stoutly opposed this step, but Dunkel Draft, finalized in the year 1993 which was signed by 117 countries at Marrakesh on April 15, 1994. Consequently, such draft became a Treaty and in such a way GATT was succeeded by the creation of W.T.O.

The scope of W.T.O. is much wider than the scope of WIPO, because WIPO never considered Intellectual Property as a part of International Trade. W.T.O. serves as an umbrella organization for three multilateral agreements, which is binding on all W.T.O. member states these are General Agreement on Tariff and Trade (GATT), The General Agreement on Trade in Services (GATS) and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

### **OBJECTS OF TRIPS AGREEMENT:**

The TRIPS Agreement has the following pivotal objects.

1. To reduce distortion and impediments to International Trade by taking into account the need to promote effective and adequate protection of Intellectual Property Rights.

2. To provide multilateral framework of principles, rules in respect of International Trade in counterfeit goods.
3. To cater the special needs of the vast developed countries in respect of maximum flexibility in the domestic implementation of laws in order to enable men to create a sound and viable technological base.
4. To settle disputes on trade related intellectual property issues through multilateral procedures.

TRIPS Agreement came into force in developed countries w.e.f. 1.1. 1996 i.e. Just after one year of the enforcement of W.T.O.

Developed countries were provided period of one year i.e. upto 1.1.1997 where as developing countries four years i.e. upto 1.1.2000 to implement the provision of W.T.O.

Those developing nations who have not provided for product patents in certain areas such as food, pharmaceuticals and chemicals etc. were given an additional five year period for providing these patents.

TRIPS Agreement provided for minimum protection to the below-enumerated forms of intellectual property. However, the creativity in the field of Science and Arts is covered under copyright laws. Trademark laws deal with Goodwill and measures to meet out the illegal business practices while discoveries and inventions are protected under patent laws.

Further TRIPS agreement also covers integrated circuits<sup>1</sup>, geographical indication<sup>2</sup>, undisclosed informations<sup>3</sup> and industrial design<sup>4</sup>.

TRIPS Agreement was one of the most controversial agreement and it was offered as a package either to accept or reject it in totality. It imposes an obligation

<sup>1</sup> Article 36, 37 and 38 of TRIPS

<sup>2</sup> Article 22 of TRIPS

<sup>3</sup> Article 29(2) of TRIPS

<sup>4</sup> Article 4 of TRIPS

on its participant states to apply the Paris Convention standards relating to Trade Mark<sup>5</sup>.

TRIPS Agreement also cross-refer to those provisions at number of points, supplements some of them in significant aspect and imposes its an obligation in addition. Therefore, in adopting abroad definition of the signs capable of being mark it require Trademark registration to extend to marks for services<sup>6</sup>.

It strikes out on its own in defining the right in a registered mark is the exclusive right to prevent unauthorized third party from using in the course of trade, similar or identical to those respect of which the mark is registered and there is a likelihood of conclusion, this likelihood will be resumed where both marks and goods or services or identical<sup>7</sup> as well as TRIPS extends the Paris Convention Provision or production of well known marks to service marks and to cases of dilution by use of different goods and services where that use is damaging<sup>8</sup>.

## INDIAN POSITION

India, being a member of W.T.O has to implement the TRIPS Agreement in totality irrespective of the distinct local conditions.

The Indian intellectual property laws inclusive of trademarks, copyrights, design, are almost conformity with the provisions of TRIPS Agreements.

Prior to Independence, the British Rulers, to protect the very interests of the inventor enacted the Indian Patent and Design Act, 1911 that was quite limited in the sphere of its application. It was felt desirable to enact comprehensive law. The Patents Bill, 1953 was introduced in the Lok Sabha on 7 December, 1953 which elapsed due to dissolution of Lok Sabha.

In 1965 another Bill was moved but it met with the same fate. Finally Patents Bill was brought in 1970 that could see the light of the day as The Patents Act, 1970. The Patents Act, 1970 has been frequently amended by the repealing and

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<sup>5</sup> Article 2(1) of TRIPS

<sup>6</sup> Article 15 of TRIPS

<sup>7</sup> Ibid. Article 16(1)

<sup>8</sup> Article 16 of TRIPS

Amending Act, 1974 the Delegated Legislation Provision (Amendment) Act, 1985 and the Patents (Amendment) Act, 1999.

The TRIPS Agreement, which came into force w.e.f. 1<sup>st</sup> January 1996 till date is the most comprehensive multilateral agreement entered into as one of the new areas under the GATT and TRIPS Agreement, have the far reaching provisions on intellectual property

While the laws on Trade Marks, Copyrights, Designs are almost in conformity with the provisions of TRIPS Agreement, while the Patent law is a cause of concern.

Trips Agreement affecting Patent laws which would certainly over-burden the Indian economy and endanger the indigenous economic structure.

As per the preamble of the Constitution, India is welfare state and thus, the Indian Patent Act was designed in conformity with the national economy, political and social values. The Patents Act, 1970 excluded agricultural product from patentibility but now, India as a developing country by virtue of Article 65 (1) (2) and (3) of TRIPS agreement has to provide within ten years effective patent in agriculture and pharmaceuticals industries. Being signatory, India has to follow TRIPS in toto, it is imperative on the part of the India being a member country to implement TRIPS in its absolutivity.

Though each and every country developing or developed would be put under the same umbrella of equal application, but not the equitable, because every country categorized as developing or developed has its own distinct reservation, convictions and variable conditions, treat alike with certain concession in terms of time of embracing the TRIPS Agreement.

## CONCLUSION

The Indian patent law has to be amended to serve our national interest besides conforming to the TRIPS Agreement. It is vexed question of jurisprudential explanation that WTO like organization and their regulatory legal system to control the member countries in their own territorial limits.

There are challenges and threats to the indivisible sovereignty of the state. India has federal constitution and polity.

The same threat is for India too. How far Parliament can not legislate in a certain way for the future? And to what extent, can a sovereign Parliament effectively define its own structure, so as to constrain itself to comply with particular procedure for legislative purposes.

Since, United Kingdom has become a member of European Economic Community and under the terms of Rome Treaty certain parts of Treaty as well as regulations made there under are made directly applicable in each member state<sup>1</sup> and all questions of legal interpretation are subject to the final decision of European Court in Lexemburg,<sup>2</sup> hence a problem of sovereignty has arisen for instance.

Following the orthodox Austinian view that no external legislator can make laws without the sanction of the State Parliament<sup>3</sup>. Following this approach by the sanction of the Parliament Intrusion into the sovereign power is possible and has been welcomed by Indian Parliament.

A moderate approach is suggested, at the time of implementation of TRIPS agreement, so that the indigenous socio-economic structure of India could be protected. No compromise could be made on the question of indigenous heritage specially in the Agriculture and Pharmaceutical fields.

The impact of TRIPS Agreement on India Economy that would fortify the monopolistic behaviour while Indian recognizes Welfare Society a situation could not be over sighted where both way collided and hamper the Indian Economic Structure.

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<sup>1</sup> See EEC Treaty Article 189 and European Communities Act, 1972 Sec. 2 (1)

<sup>2</sup> Ibid,

<sup>3</sup> L. Loyd'd Introduction to Jurisprudence 1985-261.