The Emergence of IPRs and the Global Environment for IPRs

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Abstract:
This study is about how the IPRs emerged and spread all over the world. It attempts to show what forces were involved in bringing up the TRIPs agreement followed by the standard provisions in the TRIPs agreement. Further it takes up three important issues related to IPRs at the international level- 1.Adverse impact and inadequacy of implementing TRIPs agreement on less developed and developing countries; 2.Impact and inadequacy of implementing TRIPs agreement on less developed and developing countries; and 3.Global politics and differences over the implementation of TRIPs agreements that determines the global environment for the intellectual property rights in today's world.

Keywords: *Copyrights, Indigenous knowledge, IPRs, Patents, Patent Life, Trademarks, TRIPs*

1. Introduction

Intellectual Property refers to the creations of human mind and human intellect. In other words we can say that intellectual property is a set of the intangible product of human creative activity, mainly protected by sets of enforceable legal rights granted to the owners or holders. Thus IPRs are a bundle of exclusive legal rights over creations of the mind, both artistic and commercial.

2. Brief History of IPRs

Particular history of the development of IPRs initially is directly related to Europe. The first formal quasi-patent system was developed in Venice in the second half of the 15th century. It was the first attempt to legalize and give institutional framework to IPRs. On 19th March 1474 the Venetian Govt. enacted the first patent statue and made its practices unique in Europe. Later on Germany granted patents linked to mining in 1484. Between 1530-1630 German govt. at various levels granted around one hundred patents. Then French Crown awarded its grant for Venetian glass making techniques. Govt. of Netherlands also started awarding privileges in second half of 16th century to Italians. Two acts namely State of Monopolies of 1624 (for patents) and State of Anne of 1709 (for copyrights) were passed by the Parliament of England, these were acts considered as "the birth of modern Intellectual Property."

3. Emergence of TRIPS

In the late1970s US industrialists started concerning the need for stronger protection of their intellectual property. In mid 1980s Advisory Committee on Trade Policy and Negotiations (ACPTN) of US made up of members from large organizations' top officials formed alliance with: Confederation of British Industries(CBI) in UK, Federation of German Industries in Germany,

Patronat of France, the most important with UNICE(Union of Employers` Confederation of Europe) and Keidanren in Japan. All these business associations and federations in their respective countries influenced their national policy makers to exert pressure for building the support of multilateral agreement on IPRs. Thus was born the GATT Uruguay Round Negotiations on the subject of TRIPs. Without the support of Europe and Japan the proposal for the TRIPs agreement would never been included in the agenda for Uruguay Round. Agreement finally came into effect on January1, 1995.

4. Standards Concerning the Availability, Scope and Use of Intellectual Property Rights Under TRIPS Agreement

1. Copyright and Related Rights
2. Trademarks
3. Geographical Indications
4. Industrial Designs
5. Patents
6. Layout-Designs (Topographies) of Integrated Circuits
7. Protection of Undisclosed Information
8. Control of Anti-Competitive Practices in Contractual Licenses

4.1. Copyright and Related Rights

Copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such.

4.1.1 Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.

4.1.2 Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

4.2. Trademarks

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration.

4.2.1 Terms of Protection

Initial registration and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

4.3. Geographical Indications

Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:
(a) The use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
(b) Any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

4.4. Industrial Designs

Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.
The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

4.4.1 Term of Protection

The duration of protection available shall amount to at least 10 years.

4.5. Patents

Patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.
Members may also exclude from patentability:
(a) Diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
(b) Plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.
A patent shall confer on its owner the following exclusive rights:
(a) Where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;
(b) Where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.
The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.

4.6. Layout-Designs (topographies) of Integrated Circuits

Members shall consider unlawful the following acts if performed without the authorization of the right holder: Importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.

4.6.1 Terms of Protection

In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

4.7. Protection of Undisclosed Information

In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

4.8. Control of Anti-Competitive Practices in Contractual Licenses

Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

4.9. General Obligations

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

5. Objectives/Issues

- Adverse impact and inadequacy of implementing TRIPs agreement on less developed and developing countries.
- Impact of TRIPs agreement on: availability of drugs in poor countries and traditional knowledge-resources in LDCs and developing countries.
- Global politics and differences over the implementation of TRIPs agreements.

6. Literature Review Based on the Above Issues

6.1 Adverse impact and inadequacy of implementing TRIPs agreement on less developed and developing countries.

Lea (2007), referred to implications of IPRs for the developing world, his period of study extends from second half of 19th century to 2006, concentrated his study on US, Europe, developing countries of Asia, Latin America and Africa. According to him IPRs created in the developed world function as a tax on the productive activities of the developing countries. There is a substantial increase in the flow of royalty and license fee from developing countries to the developed world. Increased legal protection IPRs under TRIPs is not driven by recognition of legitimate moral claims but by political and economic pressure. In 1998 only 10 countries control 94% of technological output as patents and 91% of global cross border royalties. The developing countries are the basic target because of the potential of replicating foreign technology.

Kumar (2003), referred to the adverse effects of current provisions of TRIPs agreement on developing countries considering the period from the late 19th century to 2001, he covered East Asia including India, Taiwan, Japan and South Korea in his study. As per Kumar Provisions and regimes of TRIPs agreement made it very difficult for the developing countries to enhance their R&D efforts and capability by restricting R&D spillovers thereby adversely affecting follow on innovations in developing countries. East Asian countries – Japan, South Korea and Taiwan absorbed substantial amount of technological learning under weak IPR protection regime during the early phase. Only after developing strong technological capability, they adopted stronger IPR regime. Weaker IPR regime witnessed the rapid evolution of Indian pharmaceutical industry since 1970 and also highlights the fact that weaker IPR regime could be instrumental in building capabilities.

Perelman (2003), referred to the weakness and inadequacy of IPRs, took the period from second half of 19th century to 2001, mainly concentrated on developed countries from the western part and developing country members of WTO. According to the author international regime for the protection of intellectual property is hindering the process of setting efficient standards of protection for IPRs in their economies. Further strengthening of IPRs has adversely affected progress in developing countries. Stronger intellectual property rights resulting from adopting higher standards in developing countries has contributed to unequal distribution of income and property and has destructive consequences for science and technology.

Shi (2004), referred to the relationship between TRIPs and the protection of public interest and social development, period of study was 1995 to 2003, concentrated on developing nations in WTO. As per the author TRIPs reduces competition and increases the prices of patented products by conferring monopoly power. It impedes developing countries to realize their long term development goals because TRIPs makes learning of the technology through imitation become not possible and unaffordable. TRIPs agreement is acting as impediment to technology capacity building in developing countries. The protection of intellectual property rights creates numerous impediments to the development of new technology especially in the developing countries.

6.2 Impact of TRIPs Agreements on: Availability of drugs in poor countries and Traditional Knowledge-Resources in LDCs and developing Countries

Lanoszka (2003) referred Intellectual Property Rights and its impact on pharmaceutical drug policies, considering the period from late 1980s to 2003, countries covered include US, Canada, UK, India, Argentina and South Africa. She referred TRIPs as a tool that helps to create powerful monopolies that control the market for essential life-saving drugs, by enabling pharmaceutical firms to keep prices much higher than their marginal costs of production by discouraging the emergence of new competitors. Provisions of TRIPs agreements made it very difficult for the developing and their people to have access and afford life saving drugs by pushing up their prices. Some developing countries are using compulsory licensing in order to create a strong domestic generic drug industry so that generic drugs and medicines become affordable to their citizens.

Lanjouw (2003) referred to intellectual property and the availability of pharmaceutical in poor countries, taken the period from late 1970s to 2001, covered Europe, Japan, China, some parts of Latin America, Pakistan, India, Uruguay, Egypt, Guatemala and Malawi. In this study author found that pharmaceutical products patents offer benefits and costs that differ with the characteristics of the diseases. Encouraging investment by the private sector with globally available and well defined patent rights along with greater financing would end the acute shortage of pharmaceutical products in the developing countries. Protection in rich country markets provides enormous incentives to invest in research on global major diseases like AIDS, cancer. The benefits of patents protection could be varied across types of drugs by defining some as non-patentable subject matter by selectively issuing compulsory licenses or by controlling certain prices more tightly. It would allow the implementation of a global patent regime that is more sensitive to the development level of countries.

Outterson (2008) took the issue of access to medicines and TRIPS flexibilities be limited to specific diseases, considering the period from late 1990s to 2007, he covered US, South Africa, India, Thailand and LMIC WTO members in his study. As per the author, regions where purchasing power is low i.e., in less developed and developing countries where diseases affecting millions of poor people, the current system of patents are not effective in stimulating R&D and bringing new products to markets. According to him several attempts have been made to limit the access initiatives and TRIPs flexibilities to particular diseases, namely AIDS, tuberculosis and malaria, or more generally to infectious public health emergencies. From the perspective of public health, limiting access programs and TRIPs flexibilities to particular diseases would be quite dangerous and unnecessary. Radically cheaper drugs for these conditions could be significantly helpful in improving health in LMICs. The pharmaceutical IP system does not work well for the poor in LMICs. For market for medicines and drugs government should fully utilize all the available TRIPs flexibilities in order to protect the health of their citizens, without regard to the type of disease.

Ismail and Fakir (2004) referred to the flaws in the global IPR system benefitting MNEs as they are appropriating indigenous knowledge and products from developing countries, study extends from early 1990s to 2003. According to the authors less developed nations account for 90% of the world's bio-diversity. According to them MNE's and their governments stand accused of callously pirating ancient, indigenous products and knowledge of developing and developed countries. They mentioned two famous cases of bio-piracy: (a) Rosy Periwinkle of Madagascar, which was developed into a highly effective cancer drug by Eli Lilly & Co.; (b) Hoodia Cactus of San, which is being developed into anti-obesity drug by Pfizer. In India no attempt has been made to acquire patents or proprietary ownership of neem or neem based products as well as of haldi and its medicinal properties. Neem oil production process was patented by WR Grace in 1990, later it was revoked in 2001 after lengthy legal battle. Similarly, University of Mississippi Medical

Centre was granted a patent on healing properties of turmeric and later on the patent was revoked in 1997.

Oguamanam (2004) referred to the inadequacy of current IPR system for the protection of indigenous knowledge and resources, period of study from late 1980s to 2002. The inability of western IPRs in addressing the differences and dichotomy between the western system and the indigenous knowledge as one of the main cause for indigenous people's failure to preserve their knowledge and cultural integrity. From the 1990s onwards there has been escalation in the number of cases where patents and trademarks are misused to acquire monopoly rights to indigenous resources at the expense of the source country. Conventional IPRs inadequacy to protect indigenous knowledge has compelled to look for a sui-generis regime for the protection of local knowledge. He also suggested that, in order to give legal protection to traditional knowledge legitimate powers should be given to national governments.

6.3 Global politics and differences over the implementation of TRIPs agreements

Deere (2009) took the issue of international politics over the implementation of TRIPs agreement. Period of study, from 1994 to 2007, focused WTO member counties including developed, developing and LDCs. Developing countries opposed the TRIPs as they argued that stronger IP standards would harm their development prospects and they are ill equipped to harness any purported benefits. TRIPs ignore the diversity of national needs and forces them to sacrifice the policy space that richer countries harnessed in early stages of their growth. The politics within developing countries made a difference to TRIPs implementation. Many developing countries missed their deadlines for bringing conformity to TRIPs Agreements. Surprisingly a number of developing country WTO members implemented even higher IP standards than those required by TRIPs. The final TRIPs deal left both proponents and detractors dissatisfied, provoking post-agreement efforts from both sides to revise the contested text.

Mittelstaedt and Mittelstaedt (1997) had taken the issue of differences in laws and enforcement of IPRs in the global market. There are major differences in the nature of protection policies, and the enforcement of IPRs, from county to country, and on occasion, these differences become international disputes. Only few countries recognize the patents of other nations and generally, protecting a patentable idea in another country requires the holder to file for a patent in that country. The discovery/invention distinction is more complicated, and over the years, categories that were previously considered to be non-patentable as they were considered discoveries now have been added to the list of patentable subject matter in many industrialized nations. In spite of similarities of laws, which can result from regional or international agreements, differences and enforcements among nations seem to continue for long.

Matthews (2002) referred to the erosion of consensus that emerged in Uruguay round as a result of ongoing disputes in the western world; his study is confined to the early 1980s to 2000, covering US, Europe, Britain, Japan. The cracks in the Uruguay Round consensus became apparent between business and policy makers in the US and Europe as early as 1997. There were disputes between US and countries from Europe regarding IPR infringement in 1998 and 2000, which were later on resolved. There are implications that the consensus is now beginning to fragment. But to a large extent, the common interest that made possible Uruguay Round consensus still exists. Developed countries remain of the opinion that the provisions of the TRIPs agreement should not be tampered with. They want to see revision in TRIPs agreements in terms of a tightening up of the provisions.

May (2004) attempted to show that the capacity building programmes designed to help in establishing domestic legislation to enforce IPRs is a political strategy to strengthen and reproduce IPRs in developing and less developed countries, from 1995 to 2003. Developing countries

compliance with TRIPs is considerable more difficult and expensive to achieve. In view of these difficulties developing countries have been offered exclusive technical support.
The World Bank, WTO, WIPO and a number of other multilateral, national and private agencies are expending significant effort to help developing countries establish TRIPs. WIPO has encouraged developing countries to adopt legislation that goes beyond the formal requirements of the TRIPs agreement. In the wake of bilateral trade agreements with USA several developing countries have been aided to write far more stringent IPR-related laws than TRIPs actually requires. Generally, considerable political effort is being expended to (re)produce the globalised norms that are at the heart of the TRIPs agreement.

7. Conclusion/ Findings

IPRs in the legal form originated in Europe through granting of patents, subsequently spread in many parts of the region. TRIPS Agreements were the result of powerful lobbying mainly from US with the support of Europe and Japan. As the TRIPs Agreements were designed and influenced by the developed world, it ignores the national needs of developing countries and forces them to sacrifice policy space. Developing countries in their early stages of development didn't followed strict IPR regime, many of them even didn't have such system, it was only after reaching a certain stage of development and achieving technological capability that they oriented themselves towards strong IPR regimes and wanted others to follow. So, developing countries should be allowed flexibility to implement the provisions of the agreement as and when their level of development has reached a certain stage.

TRIPs Agreements making learning of the technology through imitation not possible and unaffordable, thereby impeding the developing and least developed nations to realize or achieve their long term development goals. TRIPs agreement made it very difficult for developing countries to enhance their R&D efforts by restricting foreign R&D spillovers which is adversely affecting follow on innovations in the developing nations. R&D and innovation in developing countries cannot be stimulated by the current IPRs as these nations lack in pre-requisite human and technical capacity which are needed.

Global firms are exploiting and attempting to pirate the ancient and indigenous knowledge and resources of the developing countries and LDCs. The implementation of IPRs at multilateral level is mainly designed to the secure the future of western world and corporations; it is a part of a long term strategy to have control and dominance in the industries in future. The TRIPs agreement has changed the focus of intellectual property protection from inventors to corporations which are designed to protect the selected interest.

Developing countries should identify areas in which they see problem with current TRIPs rules and provisions in order to find out what modification could be made in it to reduce its damage to the process of their development. Developing countries can make use of the various flexibilities offered in the TRIPs agreement which are in the form of compulsory licensing and parallel importing and should make appropriate legislative changes in existing laws. The provisions regarding compulsory licensing should be strengthened and exceptions for granting access to patented information for research purposes can be introduced. Developing nations must ensure that they do not accept new international IP rules & provisions that further limit their freedom to design appropriate patent policies in future regional or bilateral trade negotiations.

References

1. Deere, Carolyn (2008). The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries, Oxford University Press.

10. May, Christopher (2007). The Hypocrisy of Forgetfulness: The Contemporary Significance of Early Innovations in Intellectual Property, Review of International Political Economy, 14(1): 1-25.
11. Mercurio, Bryan (2006). TRIPS-PLUS Provisions in FTAs: recent Trends, Ch. 9, Lorand Bartels and Federico Ortino, (ed.), Regional Trade Agreements and the WTO LEGAL SYSTEM, Oxford University Press, 215-237.
12. Mittlestaedt, Albert A. and Mittlestaedt John D. (1997). The Protection of Intellectual Property: Issues of Origination and Ownership, Journal of Public Policy & Marketing, 16(1): 14-25.
13. Outterson, Kevin (2008). Should access to Medicines And TRIPS Flexibilities Be Limited to Specific Diseases? , American Journal of law & Medicine, 34: 317-338.
14. Perelman, Michael (2003). The Weakness in Strong Intellectual Property Rights, Challenge, 46(6): 32-61.
15. Robbins, Lionel Charles (1939). The Economic Basis of conflict and Other Essays. Macmillan, London.
16. Shi, Jacylyn (2004). "TRIPS and Development – A Dilemma Facing International Trade Law", URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=897437, retrieved on 11/01/13.
17. Srinivas, Krishna Ravi (2008). Traditional Knowledge and Intellectual Property Rights: A Note on Issue, Some Solutions and Some Suggestions, Asian Journal of WTO and International Health Law and Policy, 3(1): 81-120.
2. Drahos, Peter (2005). An Alternative Framework for the Global Regulation of Intellectual Property Rights, Working Paper No.1, October 2005.
3. Ismail, Zenobia and Fakir, Tashil (2004). Trademarks or Trade Barriers?:Indigenous Knowledge and the Flaws in the Global IPR System, International Journal of Social Science Economics, 31(1): 173-194.
4. Kumar, Nagesh (2003), Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries, Economic and Political Weekly, 38: 209-215 and 217-216.
5. Lanjouw, Jean O. (2003). Intellectual Property and the Availability of Pharmaceuticals in Poor Countries, Innovation and the Economy, 3: 91-129.
6. Lanoszka, Anna (2003). The Global Politics of Intellectual Property Rights and Pharmaceutical Drug policies in Developing Countries, International Political Science Review, 24(2): 181-197.
7. Lea, David (2008). The Expansion and Restructuring of Intellectual Property and Its Implications for the developing World, Ethical Theory and Moral Practice, 11(1): 37-60.
8. Matthews, Duncan (2002). Trade-Related Aspects of Intellectual Property Rights: Will the Uruguay Round Consensus Hold? , CSR Working Paper.
9. May, Christopher (2004). Capacity Building and the (Re) Production of Intellectual Rights, Third World Quarterly, 25: 821-837.