

INTERNATIONAL JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (IJIPR)

ISSN 0976-6529 (Print)

ISSN 0976-6537 (Online)

Volume 4, Issue 1, January - December (2013), pp. 16-21

© IAEME: <http://www.iaeme.com/IJIPR.asp>



COPYRIGHT PROTECTION UNDER TRIPS

Unanza Gulzar

Lecturer, Kashmir Law College, Nowshera, Srinagar-190006

ABSTRACT

The Berne, Universal copyright Convention, Rome and Phonogram convention's did not contain any provisions obliging the member states to introduce enforcement mechanism or assisting in settlement of disputes which arose as to the application of these convention's particularly related to copyright. Moreover these conventions did not deal with newer technical developments like in making and use of computer programs and databases. Therefore, an important initiative was taken at international level in the form of Trade Related Aspect of Intellectual Property Rights (TRIPS) agreement, which established minimum standards for Intellectual property protection (including copyright) both in its substantive and enforcement mechanism. The TRIP now sets forth the so called "Berne-Plus" minima for substantive protection. But this agreement related to Copyright does not cover certain areas, which is necessary in the context of fulfilling the demands of developing and least developed countries. Accordingly there is a need to address those issues.

Key words: Copyright, Intellectual Property Rights, Moral Rights.

1. INTRODUCTION

Two developments during seventies deeply affected the perceptions of the importance of the international protection of intellectual property rights, and in particular copyright and related rights. First, due to advent of new technological means, such as satellite transmission internationally connected computer data bases and the development of the computer technologies. There was the great development in international dissemination of protected materials. Secondly, there was the growth of piracy of sounds recordings, films and books, which involved the formation of new industries internationally disseminating unlawfully produced copies of protected material. These developments frightened the rightful owners.

During the Uruguay round negotiations, it was recognized that the existing international conventions (Berne, UCC, Rome, Phonograms) required their member states to provide certain rights, but these conventions did not contain any provisions obliging members to introduce specific enforcement measures, or to assist in resolution of disputes which arose as to the application of the convention's. Further, these conventions did not specifically deal with the new technical developments in relations to the making and use of computer program, databases and satellite transmission.

Countries which were the major suppliers of material covered by copyright and related rights saw the effects of these new developments as detrimental to their interests, particularly in the context of trading relations, since in many countries these rights represent an important part of the gross domestic product, and are important in relation to exports. To overcome these hurdles an important initiative was taken at international level in the form of an agreement on Trade related aspects of intellectual property rights (TRIPS). The TRIPS establishes international minimum standards for intellectual property protection both in its substantive and enforcement measures. The TRIPS provides extremely important linkage between intellectual property rights protection and the trade portions of the Uruguay round agreements (establishing the world trade organization) in the copyright area. The TRIPS sets forth the so called "Berne- Plus" minima for substantive protection. A key feature of TRIPS is the obligation it places on WTO members to adequately and effectively enforce intellectual property rights, including copyright (Section III of TRIPS , Articles 41-61). While previous international agreement on harmonizing standards for Copyright protection contained provisions on enforcement, it is the strength of the dispute settlement mechanism under the WTO that sets TRIPS apart.

2. AGREEMENT ON TRADE RELATED ASPECTS ON INTELLECTUAL PROPERTY RIGHTS, 1995

The Berne convention for the protection of the Literary and Artistic works, as revised upto 1971, provided the highest level of international legal protection for copyright, prior to TRIPS. However, there was a feeling that the Berne convention and subsequent treaties lacked sufficient enforcement mechanisms or teeth and it was this need which was addressed by WTO by finalizing the TRIPS agreement in 1995, which had binding standards and dispute resolution procedures. As a consequence of TRIPS, the WTO members had to update municipal laws to give effect to its international commitments under TRIPS.

The agreement on TRIPS took birth when WTO came alive after a decade of conferences and meetings that took place between 1986-1994. It was as a result of the failure of the states to establish new intellectual property standards in the GATT (General Agreement in Tariffs and Trade), that a regime with enforcement mechanism and dispute settlement body was required. An Agreement between WIPO and WTO, concluded in December 1995, and entered into force on Jan 1st, 1996, which provided for the co-operation in the implementation of the TRIPS agreement including technical assistance.

The TRIPS agreement is by far, the most comprehensive treaty of the protection of intellectual property rights and covers copyright and neighboring rights. Copyright related provisions are contained in section I of Part II of the TRIPS. The agreement is a minimum rights agreement that leaves a fair amount of leeway to member countries to implement its provisions with their own legal system and practice and fine tune the balance in the light of domestic public policy considerations. It Incorporates the substantive provisions of the Berne

Convention (Except Article 6 bis on moral rights). Further, unlike Berne under TRIPS author includes both natural and legal persons.

The TRIPS agreement bears great significance protection of copyright and related rights and incorporates all the provisions of the Berne convention with the exception of moral rights clause by reference and makes all the provision of the Berne Convention binding upon its members. The agreement is also set to promote “Berne- Plus” standards as it goes beyond the protection afforded by the Berne convention.

3. NATIONAL TREATMENT

The agreement envisages the principle of National Treatment which means that foreign states shall provide the same protections as they accord to their own national. However, if the term of copyright protection in two countries varies in duration (seventy v. fifty years the latter being a minimum standard under Article 12, TRIPS agreement), the principle of national treatment generally would not allow the country with the longer term to accord only the shorter term to the other nationals.

The position was different under the Berne convention. The Berne convention, accords the national treatment to foreign works to be governed by the legislation of the country where protection is claimed, however, unless the legislation of that country otherwise provides, the term shall not exceed the term of the country of the origin of the work. Under this rule of national treatment a Berne member faced with an author of work protected by another member that has a shorter term of protection in its copyright law (but the minimum required under Berne), would have to apply the shorter of the two terms to such works, however, it cannot be shortest than the global minimum 50 years of copyright protection P.m.a (after the death of the author). This is known as the rule of shorter term, however, the application of this rule is not mandatory and any country may “provide otherwise” in its legislation by way of introducing an explicit exception in the domestic copyright law.

However, the TRIPS Agreement accords the same treatment to foreign works falling under the same class of works as provided by the national laws. The common denominator of fifty years p.m.a is their indeed, however if the copyright protection in the country Z in conferred for fifty years and copyright protection in country Y is accorded for seventy years, country Z shall provide protection to works of country Y for a term of fifty years only, whereas the same work of country Z shall be protected for Seventy years in country Y.

4. MOST FAVOURED NATION TREATMENT

TRIPS Agreement also accords the principle of the most favoured national (MFN) treatment, by virtue of which all foreign right holders shall be treated at par and there would not be any discrimination between any foreign national copyright holders, all being entitled to equal treatment. It is a rule to prevent discrimination between foreigners so as to prohibit a favorable treatment to IP owners of one country as against exceptions the rest of the world. This provision has been rightly incorporated in Article 4 of TRIPS because it would help to harmonize the copyright law at international level. There are, however, four exceptions to the principle. These exceptions are set out in Article 4 (a)-(d).

5. COPYRIGHT AND RELATED RIGHTS UNDER TRIPS

The provisions regarding Copyright and related rights are contained in section I of part II of TRIPS (Article 9-14) as far as Copyright and related rights are concerned, there are four categories of beneficiaries of protection. These are

- a) Authors of literary and artistic works (within the meaning of the Berne convention)
- b) Performers
- c) Producers of Phonograms and
- d) Broadcasting organizations

None of these categories of beneficiaries are defined in the agreement, but it thought that, on the one hand, “authors” is to be understood by reference to the terminology of the Berne convention, and “performers”, “producers of the phonogram” and “broadcasting organization” by reference to the terminology of the Rome Convention.

5.1 Exclusive right- The control mechanism of copyright

Article 13 of the TRIPS agreement provides that members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict within normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. On perusal of the said provision, it becomes evident that TRIPS Agreement permits unauthorized reproduction of copyright works in certain special cases and goes on to incorporate in a boarder sense, what is referred as the” three step test” which finds its genesis in the very first multilateral treaty on the subject of the copyright that is the Berne Convention. However, Article 13 of the TRIPS agreement is boarder in its scope and application vis-à-vis Article 9.2 of the Berne convention which only deals with the right of reproduction. The former addresses limitations or exception to any of the exclusive rights subject to the meeting conditions prescribed there in as differentiated from the lateral which concerns a limit itself to just one of the exclusive rights that a holder of a copyright enjoys that is the right of reproduction.

Secondly, where as the Berne convention only referred to the “Author” the TRIPS agreement uses the word “the right holder” which includes not only the author but other as well whose labour though not necessarily in the intellectual sense to bring out the work for instance, the publishers or authorized licensees.

6. SUBJECT MATTER OF PROTECTION

As regards Copyright and related rights under the agreement, the subject matters of protection are:

- a) Literacy and artistic works (in the sense of this term as used in the Berne convention, including reference to computer programs and compilations of data or other materials).
- b) Performances
- c) Phonograms and
- d) Broadcasts

7. THE ENFORCEMENT PROVISION OF THE TRIPS AGREEMENT

The distinguishing feature of the TRIPS agreement which have not been present in previous IP treaties is that it has an enforcement mechanism to make sure that member state are honoring their treaty obligations and contains an inbuilt dispute settlement mechanism. Part III of the TRIPS Agreement (Article 41-61 of TRIPS) provides the basis under the WTO regime for determining whether individual countries are adequately able to fight Copyright piracy within and at their borders. These provisions obliges the WTO member countries to provide enforcement procedure, including civil or administrative remedies as well as criminal penalties that permit effective action against any act of Copyright infringement (including acts of Copyright infringement that occur in the online environment) and that constitutes a deterrent to further infringements. In addition, enforcement provisions on Copyright, crime, custom, tax and communications must effectively reduce high levels of commercial Copyright piracy both domestically and at the borders of the all WTO member countries.

8. PROBLEMS AND CONCERS OF COPYRIGHT UNDER TRIPS

The coming into being of TRIPS agreement at international level ushered a new era in the world intellectual property rights. This agreement was formulated after decades of deliberation. But this agreement did not fulfill the demands of the developing and least developed countries. It is one of the most controversial international intellectual property agreements that have entered into force. Its negotiations were highly contentious, and the perspectives of developed and less developed countries on the role of intellectual property protection and enforcement remains far apart.

Further, exclusion of the Moral rights from this agreement came as a rude shock to the creative community all over the world. This exclusion created uproar in the world and it gave rise to vital concerns and debates as to the assertion of such rights of the creator which are so intrinsically associated with the work. Moreover the Moral right in a Copyright is the only “exclusive right” which is exclusive to the creator of the work in the sense that it cannot be transferred or conferred upon another as distinguished from other rights in the bundle of rights which copyright confers which though of “exclusive nature” yet can be assigned or licensed. That Moral right has been excluded at the insistence of US shows the hegemony of the most powerful states of the world. By excluding these rights from the agreement we can say that TRIPS has committed “*Moral Rites of Moral Rights.*”

Further TRIPS does not contains specific provisions regarding assignment or licensing of Copyright or related rights, the argument advanced is that such provisions will adversely affect the trade and may impede the transfer and dissemination of technology. The agreement contains extensive provisions regarding procedure and remedies in the case of infringement but the agreement is silent about what constitutes infringement. Further, the TRIPS agreement has not made any fundamental change in the already existent conventions in the field while dealing with the properly related rights that is the rights of performers, producers of the phonograms and broadcasting organizations. This agreement has extending the scope of the rights already available and covers the areas which were not covered under the Rome convention.

9. CONCLUSION AND SUGGESTIONS

The Previous Convention's before TRIPS does not contain any enforcement measures or assistance in settlement of disputes which arose as to the application of these conventions related to Copyright. Moreover these conventions did not deal with newer technologies. Therefore, an important initiative at International level was taken in the form of TRIPS agreement, which established minimum standards for intellectual property protection both in its substantive and enforcement mechanism.

TRIPS now sets Forth the so called "Berne –Plus" minima for substantive protection. But the TRIPS agreement related to Copyright does not cover certain areas which are necessary in the context of fulfilling the demands of developing and least developed countries. According following recommendations are suggested:-

- 1) Like Economic rights, Moral right should also be incorporated into the TRIPS, which will grant an exclusive right to the creator of the work in the sense that it can be transferred or conferred upon another.
- 2) Provisions relating to assignment or licensing of Copyright or related right shall also be incorporated into TRIPS. Otherwise trade may be affected and their may be impediment in the transfer and dissemination of technology.
- 3) The meaning of the term Infringement shall also be defined under TRIPS, because the agreement contains an extensive provision regarding procedures and remedies in case of infringement, but it is silent about as to what constitutes an Infringement.

REFERENCES

1. Dr. V.K. Ahuja (2007), "Law of Copyright and Neighbouring Rights", pp. 95.
2. Trips Agreement on Copyright, Part II, Article 9-14.
3. Guy Trito (2002), "Intellectual Property in Europe", pp.46.
4. Shahid Alikhan and Raghunath Mashelkar (2004), "Intellectual Property and Competitive Strategies in the 21st Century", Kluwer Law International, pp.53.
5. C F. Jayashree (2004), "Intellectual Property Rights in the WTO and developing Countries", Kluwer Law International, pp.207.
6. Fredrick Abbot, Thomas Cottier and Francis Gurry, (2009), "The International Intellectual Property System – A Commentary material" Part I, pp. 590.
7. L.ChandraSekaran and Dr.S.Balasubramanian, "Initiative for Strengthening Technology Commercialization and the Intellectual Property Rights Systems in Southeast Asia and India", International Journal of Intellectual Property Rights (IJIPR), Volume 1, Issue 1, 2010, pp. 25 - 47, ISSN Print: 0976-6529, ISSN Online: 0976-6537.
8. Dr. L. Chandra Sekaran and Dr. N. Shani, "Copyright - Online Archives and Intellectual Property Rights", International Journal of Management (IJM), Volume 3, Issue 2, 2012, pp. 158 - 167, ISSN Print: 0976-6502, ISSN Online: 0976-6510.
9. Dr. N. Kannan, "Importance of Intellectual Property Rights", International Journal of Intellectual Property Rights (IJIPR), Volume 1, Issue 1, 2010, pp. 1 - 5, ISSN Print: 0976-6529, ISSN Online: 0976-6537.