

**THE IMPACT OF TRIPS AGREEMENT ON TRADEMARK
LAW**

**A DISSERTATION TO BE SUBMITTED IN PARTIAL
FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF
DEGREE OF MASTER OF LAWS**

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CERTIFICATE

This is to certify that the dissertation titled “**THE IMPACT OF TRIPS AGREEMENT ON TRADEMARK LAW**” is the work done by **Ritesh Mishra** under my guidance and supervision for the partial fulfilment of the requirement for the Degree of **Master of Law** in School of Legal Studies Babu Banarasi Das University, Lucknow, Uttar Pradesh.

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Corporate & Commercial Law

ABBREVIATIONS

- CBD: Component based development
- DSB: dispute settlement body
- EC: European Community
- ECJ: European Court of Justice
- EMR: exclusive marketing rights
- FIR: First Information Report
- GATT: General Agreement on Tariffs and Trade
- GCMMF: Gujarat Co-operative Milk Marketing Federation
- IP: intellectual property
- IPC: Indian Penal Code
- INTELLECTUAL PROPERTY RIGHTS: intellectual property rights
- LDCs: Least developing countries
- MNCs: Multi-National Companies
- NOC: notice of allegation
- NOA: notice of compliance
- PGR: plant genetic resources
- PRS: Parliamentary Research Service
- R&D: Research & Development
- SMES: Small and Medium Enterprises

- TM: Trade Mark
- TNCs: Transnational Corporations
- TRIPS: trade-related aspects of intellectual property rights
- U.K.: United Kingdom
- UNCTAD: United Nations Conference on Trade and Development
- U.S.: United States
- USITC: United States International Trade Commission
- USPTO: U.S. Patent and Trademark Office
- WIPO: World Intellectual Property Organization
- WTO: World Trade Organization

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2. Manu Kosuri & Ors
3. Amul trademark case
4. Laxmikant v/s. Patel vs. Chetanbhai Shah
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CHAPTER 1

INTRODUCTION

1.1. Introduction

Signed in 1996 by 131 member states of the World Trade Organization (WTO), the TRIPS Agreement was intended to expand and harmonize protection for all intellectual property rights. Generally, the TRIPS Agreement requires WTO member states to extend the same intellectual property rights granted to its own citizens to foreign nationals of other member states. With respect to trademarks, the agreement defined what signs may be protected, minimum terms of protection, and the minimum permissible period of non-use. In addition, the agreement required WTO member states to, inter alia, allow applications to be filed for marks not yet in use; register service marks; enhance protection of well-known marks; provide greater geographical protection for marks; forbid the compulsory licensing of trademarks; bar encumbrances, such as linking, on the use of a trademark; provide for criminal procedures and penalties for wilful trademark infringement; and establish procedures to allow customs authorities to intercept counterfeit goods. Generally, "intellectual property" is any intangible property, such as knowledge of a process, a musical composition or a trademark associated with a product. There are typically four specific areas of intellectual property: patents, copyrights, trademarks and trade secrets. Since there is not actual "physical" property to possess, laws have been specifically created to protect ownership rights and interests in intellectual property.

In the work environment, when an employee conceives of or creates intellectual property that is subsequently used by their employer, the employee may expect to be compensated for the use as the owner of the property. However, if the employee was hired for the specific purpose of creation of the property, the employer may have full property rights to anything that is created.

Classification of Intellectual Property

Intellectual property in general is broken down into two major branches: industrial property and copyright law. A term of French origin, "industrial property" (properties industrial) encompasses patents (technological information), trademarks (symbolic information), and industrial designs. Copyright law and neighbouring rights (expressive information) cover artistic, musical, and literacy works. The term "intellectual property" has been given official

recognition by the international community with the establishment of WIPO, a specialized agency of the United Nations.

Concept of Intellectual Property

In general, the most important feature of property is that the proprietor or owner may use his property as he wishes and that nobody else can lawfully use his property without his authorization. Of course, there are certain recognized limits for the exercise of that right. For example, the owner of a piece of land is not always free to construct a building of whatever dimensions he wishes, but must respect the applicable legal requirement and administrative decisions.

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The term Intellectual Property includes, in the broadest sense, all rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields. The convention establishing the WIPO defines 'Intellectual Property' in a broad sense. According to this definition, Intellectual Property shall include the rights relating to:

1. literary, artistic and scientific works;
2. performances of performing artists, phonograms and broadcasts;
3. inventions in all fields of human endeavour;
4. scientific discoveries;
5. industrial designs;
6. trademarks, service marks, and commercial names and;
7. protection against resulting from intellectual activity in the industrial, scientific literary or artistic fields.

This definition although inclusive in nature, is very comprehensive.

Historical account of IP laws in India

In the year 1856 for the first time, an act as enacted which is titled as Act VI of 1856, through this act certain rights were granted to the inventors or new manufactures or a period of 14 years.

This act was modified and re-enacted as Act XV of 1859. In this act the nomenclature used was “Exclusive privilege, in place of patent monopoly. In the year 1872, two acts were enacted, as

1. Pattern and design protection act 1872
2. Protection of inventions act 1883.

Thus, it is clearly evident that the process of awareness with regard to Intellectual Property Rights was miserably showed in India. One cognizance was not given to the fast-changing global situation. No country can afford to prosper without evolving a sound economic base in the country. The economy of the country largely depends on its positive interaction with the global forum. The market system and market forces play vital role in shaping economic infrastructure in the country. Since last few decades the market system has undergone drastic transformation. The day of closed market and conservative policies are gone. The whole scenario has changed. The concept of globalization has been established and no country can offer to survive in isolation.

The present scenario of Intellectual Property Rights policy, emergence of gradual awareness on the importance of Intellectual Property Rights and their protection shows that it is limited to certain pockets of the society. The government is granting funds to the universities, voluntary organizations for conducting seminars in this regard, but the actual purpose is not being served as it is not reaching the grass roots level of the industry, from where the real share of creativity originates as a result, great potentials remain unexplored and new creations to unnoticed. The original inventors requiring protection are not aware of their rights and the procedure of patenting or registering of their Intellectual Property Rights. It results in counterfeit products which drain the benefits of the real inventors. the lack of awareness at the grass root level is a greater hindrance in the creation of positive climate. Another important factor is the huge expenditure associated with the process and further the IP owners fail to quantify the damages they suffer due to the piracy or infringement.¹

Creation of IP culture and relevant challenges²

The rights of whatever classes they may be, have the meaning only if they can be protected and beneficially implemented by the owner of the right. In the present day context when the trade and market is tending to be free and global, new concepts of property in the form of IP have emerged, and these rights have already been globally recognized, safeguarding and

¹ Ashok Soni, Intellectual Property Laws, Snow White Publication, Mumbai, at p. 171

² Vikas Vashishtha, Law and the Practice Intellectual Property in India, Bharat Law House, New Delhi, at p. 116

protecting these rights is essential. The basic problem in this regard is the lack of awareness at grass root levels. Specifically the situation of small and medium enterprises (SMES) is precarious. These smaller units, which supply the maximum share of their products and services to the industries and people, are finding it difficult to protect their rights. A large sum of amount is lost either for enforcing their rights or by defending their rights. It is essential in the interest of these small enterprises (SMEs) and the economy of the nation, to bring awareness and importance of intellectual property among them, and to utilize their IP for better profits.

We are living in the Era of knowledge driven economy. Knowledge has the potential of influencing economy. All the ingredients of knowledge via the idea, technology know how, innovation and intelligence are the valuable intellectual assets. The knowledge in this particular context, includes technical know-how confidential information comprehensively drafted specification of a product, design or architecture, literacy or artistic creation and many other things. These ingredients of knowledge are essential for the development of new product or designing new process. The traditional concept of business is changing. The idea that finance alone is the prime requisite for business is no more valid. The intellectual capital such as patents, trademarks, design and others are replacing the requirement of physical infrastructure and play vital role in accomplishing the business goal.

The present-day era is an era of globalization and globalization is the integration of local activities with that of international parameter to form a single market for business and to provide for free movements of products and services across the globe without any obstruction whatsoever with no cumbersome regulations. With the liberalization of economy and opening of global markets the activities of business enterprise are not restricted to a certain place and certain class of business. Under such a situation there has to be a tough competition. To withstand this competition, the business enterprise needs to upgrade their quality of goods and service that too at competitive rates. In order to improve quality and credibility, continual research is mandatory. It is essential for the business enterprise to understand the needs of the consumers, to make changes as per changing demands. The research shall be of great help in either modifying the existing goods or inventing new products. Thus, research activity occupies vital place, to be able to withstand global competition. Thus, to produce quality goods research is necessary but research requires huge capital. The government or big industries can afford to set aside capital for research activities, but it becomes strenuous for the small and medium enterprise (SMEs). These SMEs to a greater extent cater to the needs of larger industries for conducting of their day-to-

day business. Hence some mechanism needs to be devised that SMEs are encouraged to undertake research to enhance quality of their goods and services to be able to withstand competition. Larger industries can extend helping hand to the SMEs and for this there is a need to create positive atmosphere of mutual trust. Large number of consumer goods, such as candles, machine, tool, photographic equipments, are manufactured by SMEs. These smaller units are generally fund starved, and their investment flow and earning depends upon their products and services, which in turn depends upon the satisfaction of the consumer. Their investments are phased out not only for undertaking research but also for the purpose of protection of ownership right. thus, Intellectual Property Rights protection influences the investments, product development, market incentives, trade policies, competition laws and other regulations. Thus, in the present day set up, the value of business enterprises assessed upon the IP it possesses. It is being observed, that in the present scenario, survival for SME, is becoming difficult. Although it is recognized beyond doubt that SMEs are playing a vital role in catering to the needs of the market through supply of goods and services, most of these units are suffering losses for not being able to earn required profit because of overflow of pirated goods which are identical to the original goods produced by SMEs. Such a situation is prevailing an account of two reasons one the lack of effective commercialization of their product, and secondly on account of being incapable of preventing others from using them. What they require is a system of protection and awareness, and hence there is a greater need to create Intellectual Property Rights culture and an updated system of protection of Intellectual Property Rights.

That it is now an established fact that changes occurring and trends emerging have got to be adopted. Every change in the initial stages creates hardships. In order to fully adopt to the new emerging norms, it is essential that awareness is created among those who are basically concerned i.e. tradesmen and business entrepreneurs.

Having explained what is intellectual property, now it would be essential to understand what agreement on trade related aspects of intellectual property is.

In this present dissertation the researcher has included a separate chapter on TRIPS agreement in order to understand what TRIPS agreement is and what are the provisions under the TRIPS agreement.

1.2 Research Problem

India joined WTO (World Trade Organization) and became a signatory of the TRIPS (Trade-Related Aspects of Intellectual rights) agreements in the year of 1995. With this, all the

signatories were supposed to align their IP rules in conformation with the TRIPS agreement. However, developing countries like India were granted a window period of 10 years (5-compulsory +5 extended) to comply with the rules put forth by the agreement. Though India had aligned its rule in accordance to TRIPS in the year 2005, still, there are many challenges and issues, that needs to be addressed to maximize the benefits. Thus, getting and granting IP rights in India has become a matter of contention since 2005 and various stakeholders are interested in knowing India address these issues.

This research is an attempt to underline those challenges and issues that India is facing in offering IP rights to companies in Indian jurisdiction. Though, there are many challenges we will list only the top, that are of utmost importance.

1.3 Aims and Objectives of Research

Knowledge is no body's property. It is the property of the intellectual who struggles. The skill and labours of intellectuals dominate and penetrate into the existing knowledge and thus the new knowledge is created. The core concern of IP is the meta-morphosis of traditional and indigenous knowledge into new creation. The new knowledge and invention are not created only by the scientists, academics, but during the real life struggle the industry workers' uneducated traditional cultivators and business entrepreneurs also develop new knowledge, invent new processes and products. The technical knowhow and knowledge which come out or real-life situations and experience have a greater contribution towards the intellectual capital. Sometimes the creativity and invention arising from the unorganized sector is more useful.

The concept of IP and Intellectual Property Rights is not of a recent origin, but it received the due cognizance in the last two decades only. Although large number of international conventions adopted trades entered into, the situation in India remained pathetic. The awareness about IP and Intellectual Property Rights dawned fairly late. We find the changes occurring only after the GATT 1994. Not that the concept of IP and Intellectual Property Rights was unknown to Indians. In the form of patents, copy right and a member of other legislation, Indian were quite familiar with the concept. But in the present-day context, when the entire scenario is undergoing transformation, there is a need to create awareness in the masses and to have a comprehensive network of legislation in consonance with the international scenario, to manage the problem

1.4 Research Hypothesis

The implementation of TRIPS agreement by developing countries like India is full of challenges for these countries as it has serious repercussions on the existing social, moral, ethical, cultural and constitutional values in those countries. The IPR regime under TRIPS is heavily loaded in favour of the developed countries members and creates net economic burden upon the developing countries.

1.5. Review of Literature

Historically, Intellectual Property Rights law resided primarily within the domestic sphere. The Paris Convention for the Protection of Industrial Property (“Paris Convention”), signed in 1883, and the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), signed in 1886, are two of the oldest agreements on the international protection of Intellectual Property Rights. While both conventions provided for equal treatment of foreign and domestic claimants under international intellectual property law, they differed greatly on standards and remedies. The Paris Convention, which protects against trademark and patent infringement, did not set forth any substantive standards for patent protection to which members must adhere. Conversely, the Berne Convention, which protects against copyright infringement, established minimum standards of protection but “fail[ed] to outline clear legal remedies by which copyright holders may enforce their rights against infringers.” Established in 1967, the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, now administers the Paris and Berne Conventions along with other intellectual property treaties. Similar to the Paris Convention, later WIPO treaties and treaty revisions did not establish minimum protection standards. Plagued by weak enforcement and dispute settlement mechanisms, WIPO provided little in the way of coordination during the 1970s and early 1980s. As a result, “despite WIPO efforts to promote international comity with respect to Intellectual Property Rights protection, the level of harmonization across countries achieved by the mid-1980s remained limited.” During this same time, industrialized countries began to articulate an “intellectual property problem,” namely the “unintended transfer of wealth from the industrialized country economies to the developing and newly industrialized country (NIC) economies.”³

³ Through the article –TRIPS and what next ?

During the 1980s, rapid increases in international trade and the drastic shift to high-technology products led businesses, and particularly multinational corporations, to voice concerns about piracy and lax intellectual property protections. A number of developing countries, including Brazil and India, either offered limited patent protection for chemicals and pharmaceuticals or had compulsory licensing schemes for certain technologies, or utilized both practices. In addition, industrialized countries viewed tolerance toward piracy in developing countries as a barrier to exports. Differential treatment, combined with substantial research and development costs inherent in high-tech knowledge production, compelled companies to push for strong minimum standards for international protection of Intellectual Property Rights.

In 1988, the United States Trade Representative (USTR) requested that the United States International Trade Commission (ITC) attempt to quantify financial losses to the United States' worldwide trade as a result of unintended or unauthorized appropriation of intellectual property by developing country enterprises. The ITC sent a questionnaire to 736 U.S. companies. Based on responses to this questionnaire, the Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade Report (ITC Report) estimated that in 1986, U.S. industries faced worldwide trade losses ranging from \$43 billion to \$61 billion and that key U.S. industries lost \$23.8 billion in revenue due to lack of Intellectual Property Rights enforcement in foreign countries. The ITC Report attributed significant losses to particular developing countries and NICs—namely Brazil, India, Mexico, Nigeria, the Republic of Korea, China, Hong Kong, and Taiwan. In addition, “the industries that appeared most affected were chemicals and pharmaceuticals, computer software, and entertainment (audio and video).”

Seeking to establish minimum standards and an effective international mechanism for enforcement, the United States and other developed countries increased global pressure to include Intellectual Property Rights in the General Agreement on Tariffs and Trade (GATT). For those seeking a stronger international mechanism, “the GATT had several advantages over WIPO. Most significantly, in contrast to the voluntary accession of countries to the various WIPO conventions, an agreement within the GATT would commit all signatories to minimum standards.” Strong opposition to the inclusion of intellectual property rights in the GATT by developing countries—India and Brazil in particular—illustrated an emerging North-South debate about the propriety of linking intellectual property rights to the free trade agenda.

.A TRIPS was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994. Its inclusion was the culmination of a program of intense lobbying by the United States, supported by the European Union, Japan and other developed nations. Campaigns of unilateral economic encouragement under the Generalized System of Preferences and coercion under Section 301 of the Trade Act played an important role in defeating competing policy positions that were favored by developing countries, most notably Korea and Brazil, but also including Thailand, India and Caribbean Basin states, In turn, the United States strategy of linking trade policy to intellectual property standards can be traced back to the entrepreneurship of senior management at Pfizer in the early 1980s, who mobilized corporations in the United States and made maximizing intellectual property privileges the number one priority of trade policy in the United States.

After the Uruguay round, the GATT became the basis for the establishment of the World Trade Organization. Because ratification of TRIPS is a compulsory requirement of world Trade Organization membership, any country seeking to obtain easy access to the numerous intellectual markets opened by the World Trade Organization must enact the strict intellectual property laws mandated by TRIPS. For this reasons, TRIPS is the most important multilateral instrument for the globalization of intellectual property laws. States like Russia and China that were very unlikely to join the Berne Convention have found the prospect of WTO membership a powerful enticement.

Furthermore, unlike other treaties on intellectual property, TRIPS has a powerful enforcement mechanism. States can be disciplined through the WTO's dispute settlement mechanism.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property (IP) regulation. It was negotiated at the end of the Uruguay Round of the General Agreement in Tariffs and Trade (GATT) in 1994.

Specifically, TRIPS contains requirements that nations laws must meet for: copyright rights, including the rights of performers, including appellations of origin; industrial designs; integrated circuit layout-designs; patents; monopolies for the developers of new TRIPS also specifies enforcement procedures, remedies, and dispute resolution procedures.

1.6. Research Methodology

In the examination of the Impact of TRIPS agreement on Trade Mark Law, we have adopted the doctrinal method of research which is essentially the collection of material from various sources, like the internet and books from the library, and basing our research on our comprehension of the collected data.

CHAPTER 2

EVOLUTION OF TRADE RELATED ASPECTS OF INTELLECTUAL RIGHTS

2.1 Historical Background

TRIPS were negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994. Its inclusion was the culmination of a program of intense lobbying by the United States, supported by the European Union Japan and other developed nations. Campaigns of unilateral economic encouragement under the Generalized System of Preferences and coercion under Section 301 of the Trade Act played an important role in defeating competing policy positions that were favored by developing countries, most notably Korea and Brazil, but also including Thailand, India and Caribbean Basin states. In turn, the United States strategy of linking trade policy to intellectual property standards can be traced back to the entrepreneurship of senior management at Pfizer in the early 1980s, who mobilized corporations in the United States and made maximizing intellectual property privileges the number one priority of trade policy in the United States.⁴

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⁴ David Banbridge, Intellectual Property Pearson Education Ltd., at p. 526

⁵ Narayan P., Intellectual property law, Eastern Law House, Calcutta, at p. 173

Contents of TRIPS agreement

The TRIPS agreement has seven parts the contents of TRIPS agreement in a nut shell are as follows:

PREAMBLE to the Agreement on Trade-Related Aspects of Intellectual Property Rights

PART I General Provisions and Basic Principles

PART II Standards Concerning the Availability, Scope and Use of Intellectual Property Rights

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 Licences

PART III Enforcement of Intellectual Property Rights

1. General Obligations
2. Civil and Administrative Procedures and Remedies
3. Provisional Measures
4. Special Requirements Related to Border Measures
5. Criminal Procedures

PART IV Acquisition and Maintenance of Intellectual Property Rights and Related *inter parties* Procedures

PART V Dispute Prevention and Settlement

PART VI Transitional Arrangements

PART VII Institutional Arrangements; Final Provisions

2.2 Objectives of TRIPS Agreement

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁷

⁷ www.worldtradelaw.net/uragreements/TRIPSagreement.pdf

Principles of TRIPS Agreement⁸

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

2.3 General Provisions and Basic Principles of TRIPS Agreement

Part –1 of the TRIPS agreement deals with general provisions and basic principles of the TRIPS agreement. In this part –1 the Article 1 states the nature and scope of the member's countries. So accordingly, Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice. For the purposes of this Agreement, the term “intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II. Members shall accord the treatment provided for in this Agreement to the nationals of another Member.⁹

TRIPS and National Treatment that each member must accord with other nationals

Each Member shall accord to the nationals of other Member's treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property,

Article 4 of TRIPS agreement deals with most favored national treatment that is if any member country gives any advantage, privilege or immunity to any of the nationals of any other country then it shall accord the same advantage and privileges to all the other member countries. Thus this provision emphasizes on equal treatment of member countries without any discrimination.

⁸ <http://www4.law.cornell.edu/uscode/35/>,

⁹ <http://www4.law.cornell.edu/uscode/35/>,

Exempted from this obligation is any advantage, favors, privilege or immunity accorded by a member:

- (a) Deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) Granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of National treatment but of the treatment accorded in another country;
- (c) In respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (d) Deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute ¹⁰an arbitrary or unjustifiable discrimination against nationals of other Members.¹¹

In part 2 of TRIPS agreement details of the standards concerning the availability and scope and use of intellectual property rights. in this part there are eight sections in all.

Section 1 deals with copy right issues

Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. As regards copyrights and related rights, countries will be obligated to comply with Articles 1-21 of the Berne Convention for the Protection of Literary and Artistic Works. Article 6^{bis} of the convention is excepted because it concerns an author's "moral rights," not economic rights that are appropriate for an agreement on trade across national borders. TRIPS requires countries to protect computer programs a "literary works" under the Berne Convention and to protect compilations of data and other material that constitute intellectual creations because of the arrangement of their contents.¹²

Under TRIPS, commercial rental of computer programs and cinematographic works is to be prohibited; however, a country may be accepted from this obligation in the case of cinematographic works provided that such rental has not led to material impairment of the reproduction rights of the copyright owners. The exception to the ban on commercial rental for cinematographic works was negotiated by the U.S. because we have thousands of rental

¹⁰ www.worldtradelaw.net/uragreements/TRIPSAgreement.pdf

¹¹ http://www.wto.org/english/tratop-e/com_e/ecom_e.html,

¹² B.L. Wadhwa, Law Relating to Patents, Trade Marks, Copyrights, Design and Geographical indications, Universal Law Publication, New Delhi, at P. 387

outlets in the U.S. which would have made obtaining an exclusive right very difficult and also because rentals of motion picture videos here have not resulted in any widespread copying.¹³

Under TRIPS, performers must be given the right to prevent the unauthorized recording of their performances and, should such recording occur, to prevent reproduction of that recording. They also must have the right to prevent the unauthorized broadcast of their live performance and any other communication of that performance to the public. Sound recording producers must be given the right to prevent unauthorized reproduction of their sound recordings, directly or indirectly, and to prevent rentals of the sound recordings. These rights of performers and sound recording producers are to extend for 50 years from the date on which a performance or fixation occurred.¹⁴

Broadcasters' rights under TRIPS are provided in alternative form. Broadcasters must have the ability to prevent fixation of broadcasts, reproduction of such fixations, rebroadcast by wireless means and any other communication of their broadcasts to the public, or, if a country does not provide rights to broadcast organizations themselves, it must ensure to the owners of the copyright in the subject matter of the broadcasts the possibility of preventing the activities mentioned. Broadcasters' rights will extend for at least 20 years from the date on which the broadcast occurred.

Article 12 of TRIPS agreement deals with the Term of Protection of copyright

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.

Article 13 of TRIPS agreement deals with Limitations and exceptions of copyright protections. Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

B.L. Wadhwa, Law Relating to Patents, Trade Marks, Copyrights, Design and Geographical indications, Universal Law Publication, New Delhi, at P. 387

¹⁴ John Gornsey, Copyright Theft, Aslibgover Hampshire, England, at p. 1056

Section 2 of TRIPS agreement deals in detail about trademark issues

Article 15 of TRIPS agreement deals with *Protectable Subject Matter* of trademarks.

Trademark is 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 colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application. 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. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.¹⁵

Article 16 of TRIPS deals with Rights Conferred on the owners of trademarks

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar

¹⁵ www.wto.org,

to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.¹⁶

Article 18 of TRIPS states the Term of Protection of trademarks

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.

Section 3 of TRIPS agreement deals with protection of geographical indications

Regarding geographical indications, defined as an indication that identifies a good 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 attributable to its geographical origin, TRIPS requires that countries have the legal means for "interested parties" to prevent use of any means in the designation or presentation of a good that indicates or suggests, in a manner that misleads the public, that the good in question comes from a geographical area other than its true place of origin. To prevent confusion when two place names are the same, the provision is applicable even where an indication is literally true, but it implies that the goods come from a different territory. Member countries must also refuse or invalidate the registration of a trademark containing a geographical indication with respect to goods not originating in the territory indicated where the use of the trademark would mislead the public as to the true place or original of the goods.¹⁷

There are special provisions in TRIPS dealing with wines and spirits that prohibit even the use of indications in combination with "kind," "type," "style," "Imitation," or similar words. There are exceptions, however, for terms that have become generic and for marks that have been used on the same goods or services in good faith for 10 years prior to the conclusion of the Uruguay Round. The U.S. Bureau of Tobacco, Alcohol and firearms (BATF) does prohibit use of labels that would mislead consumers as to the origin of alcoholic beverages, so the U.S. is ready in compliance in that regard.

The additional protections are only given to wines and spirits this provisions favors only developed countries, additional protection of geographical indication needs to be provided to

¹⁶ www.wto.org,

¹⁷ Vikas Vashishtha, Law and the Practice of Intellectual Property in India, Bharat Law House, New Delhi, at p. 367

products of developing country India like Basmati rice, tea etc. A famous case on this issue is the Basmati rice case.

In late 1997, an American company Rice Tea Inc was granted a patent by the US patent office to call the aromatic rice grown outside India 'Basmati'. Rice Tec Inc had been trying to enter the international Basmati market with brands like 'Basmati' and 'Texmati' described as Basmati-type rice with minimal success. However, with the Basmati patent rights, Rice Tec will now be able to not only call its aromatic rice Basmati within the US, but also label it Basmati for its exports. This has grave repercussions for India and Pakistan because not only will India lose out on the 45,000 tone US import market, which forms 10 percent of the total Basmati exports, but also its position in crucial markets like the European Union, the United Kingdom, Middle East and West Asia. In addition, the patent on Basmati is believed to be a violation of the fundamental fact that the long grain aromatic rice grown only in Punjab, Haryana and Uttar Pradesh is called Basmati. According to sources from the Indian Newspaper, Economic Times, "Patenting Basmati in the US is like snatching away our history and culture.

Section 4 of TRIPS agreement deals with protection of industrial designs

Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide those designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

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. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties. The duration of protection available shall amount to at least 10 years.

Section 5: Patents

On patents, TRIPS contains some significant benefits for inventors. First, TRIPS requires that product and process patents be available in all fields of technology. The only permissible exceptions to that broad obligation are for diagnostic, therapeutic and surgical methods for treating humans or animals, and for plants and animals, other than microorganisms, and essentially biological processes for producing plants or animals. Countries not providing patent protection for plant varieties must provide that protection through an effective sui generis system.

TRIPS specifies that patent owners must be given the right to prevent others from making, using, offering for sale, selling, or importing products covered by a product patent and from using a process claimed in a patent or using, offering for sale, selling, or importing at least the product obtained directly from use of the process. The right to assign or license rights under the patent is also assured. TRIPS members are permitted to maintain limited exemptions to patent rights so long as those exemptions do not unreasonably conflict with the normal exploitation of the patent by the patent owner, nor prejudice his legitimate interests. This is intended to allow such things as exhaustion within a country after the sale of a patented product and experimental use for purposes of advancing technology.¹⁸

Of particular importance to patent owners are the restrictions that the TRIPS Agreement places on compulsory licensing. First, countries will no longer be allowed to grant compulsory licenses if a patentee does not manufacture the patented invention in the country. Importation will have to be treated as "working," so, only in circumstances in which a patentee makes no provision for marketing his product in a country, would a compulsory license for "non-working" be consistent with TRIPS. TRIPS also imposes conditions on all compulsory licensing to ensure that voluntary licensing is encouraged, that payment for any compulsory license is fair, that rights under a license are non-exclusive and can be transferred only under limited conditions, and that decisions regarding compulsory licenses are appealable. There are special provisions dealing with government use of patent rights and for use in national emergencies. Finally, dependent patent compulsory licenses may still be granted, but only if

1) The second invention represents an important technical advance over the first patent,

¹⁸ Prabhuddha Ganguli, *Gearing up for Patents: The Indian Scenario*, University Press, Hyderabad, at p. 86

2) The owner of the first patent receives a cross-license under the second patent. In addition, a dependent patent compulsory license is assignable only with the assignment of the second patent.¹⁹

2.4 Layout designs

With respect to semiconductor chip layout designs, the TRIPS text incorporates and corrects the deficiencies of the Washington Treaty on Intellectual Property in Respect of Integrated circuits. Unlike the Washington Treaty, TRIPS

- 1) Expressly covers articles incorporating protected chips;
- 2) Assures a reasonable royalty to the right-holder after notice in connection with the
- 3) Extends the term of protection to 10 years (Washington required 8); and
- 4) Prohibits compulsory licensing in connection with semiconductor chip layout designs except as an antitrust remedy or for noncommercial government use.

2.5 Trade secrets

Regarding trade secrets, the TRIPS Agreement speaks of "undisclosed information," but is referring to what we call trade secrets. The obligations look very much like those in our Uniform Trade Secrets Act. Those who control information that is not generally known or readily ascertainable, that has value because it is not known, and that is the subject of efforts to keep it secret, must be given the ability to prevent others from disclosing, acquiring, or using the information in a matter that is contrary to honest commercial practice.²⁰

In addition to providing for the protection of trade secrets, TRIPS also calls for steps to be taken to protect against unfair commercial use of data submitted to government agencies to obtain marketing approval for pharmaceutical and agricultural chemical products containing new chemical entities. In this context, "unfair commercial use" mean other parties relying on the data to obtain marketing approval for their own products, where they have made no financial contribution to the original submitter of the data.²¹

Section 8: of TRIPS agreement deals with control of anti-competitive practices in contractual licenses.

⁴ www.legalservicesindia.com, visited on 11/1/2011

²⁰ P.S. Narayan, Intellectual Property Law in India, Gogia Law Agency, Hyderabad, at p. 493

²¹ Ibid.

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. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a 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. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member. A Member whose nationals or domiciliary are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions.²²

Enforcement of Intellectual Property Rights

Regarding enforcement, members shall ensure fair and equitable and not unnecessarily complicated, costly or lengthy enforcement procedures against any act of infringement, including remedies to prevent and deter infringements. There is no obligation to establish a separate judicial system for enforcing INTELLECTUAL PROPERTY RIGHTS

²² www.wto.org,

Civil and administrative procedures and remedies include: assurance that confidential information will be protected during and after proceedings; authority to discover evidence solely in the hands of another party (refusal to provide evidence may not stand in the way of a decision); conditions under which precautionary measures, such as injunctions, are to be made available; and approaches to damages and other remedies, compelling information regarding other infringers and indemnification of defendants.²³

There are special requirements related to border measures: members shall enable right holders to lodge a request with customs officials to block the importation of infringing goods; precautions against false charges and delays are provided and members shall provide criminal procedures and penalties (imprisonment and/or fines; also, seizure, forfeiture and destructions) at least in cases of trademark counterfeiting and copyright piracy on a commercial scale, possibly also in other cases of willful, commercial-scale infringement.²⁴

Section 5: Criminal Procedures

Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.²⁵

PART V — Dispute Prevention and Settlement

TRIPS also have provisions for "dispute prevention and settlement." For the sake of transparency, members shall publish all relevant laws, regulations, decisions and rulings as well as agreements with other members, furnish these to Council for TRIPS for review and to other members upon request and disputes themselves shall be settled as per Articles XXII and XXIII of GATT 1994. The Understanding on Rules and Procedures Governing the Settlement

²³ Marshall A Leaffer, *International Treaties on Intellectual Property*, The Bureau of National affairs Inc. Washington, at p. 397

Marshall A Leafier, *International Treaties on Intellectual Property*, The Bureau of National affairs Inc. Washington, at p. 398

²⁵ www.wto.org,

of Disputes will apply to all consultations and dispute settlements in the WTO and to all of the agreements under the WTO umbrella.

Time limits are set to ensure that the procedures are not delayed. Parties cannot block adoption of Panel reports by the Dispute Settlement body, which also is made up of all Members of the WTO. A Standing Appellate Body, made up of 7 recognized authorities on law, international trade, and the subject matter of the agreements and who are not associated with any government, will review appeals on issues of law covered in a panel's report and any legal interpretation developed by a panel. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of the Panel. The Appellate Body's report will be adopted by the Dispute Settlement Body unless all of the Members of the Dispute Settlement Body agree not to adopt the report. Thus, the offending country can no longer block the report.

Thus, there are no special arrangements for resolution of intellectual property disputes within the TRIPS Agreement itself. Instead, disputes are to be handled under the general WTO dispute resolution mechanism. This means that after exhaustion of efforts at voluntary settlement, panels are created to hear the parties and make decisions.

Under the old GATT rules, states could block requests for panels and could often dodge a negative decision. Under the WTO rules, creation of a panel can be blocked only once for a short period of time. Once a panel reaches its decision, the result is hard to avoid, again in contrast to the former GATT procedures. Thus, enforcement of WTO rules has teeth. To date, U.S. has been the leading user of the dispute resolution mechanism, obtaining favorable results in the greater number of cases. The U.S. has also lost a few cases.

Dixon gleans has stated the following generally positive trends, inter alia:²⁶

- Initial cases involve de jure violations of specific treaty requirements.
- TRIPS complaints based on Berne Convention violations have increasing appeals.
 - Developing countries will not be the only respondents; developed countries can and will continue to be legitimate targets of TRIPS dispute-resolution complaints.
- The WTO dispute settlement system has proven effective to date in encouraging parties to resolve their disputes without resort to a Panel.
- The Appellate Body's tendencies are towards a strict construction of the Agreement.

²⁶ Jayshri Wattal, *Intellectual Property Rights in WTO and Developing Countries*, Oxford University, New Delhi, at p. 163

- The Appellate Body declines to show uncritical deference to Member States' determinations.
- Previous dispute resolution decisions do not serve as binding precedent.

In light of these disputes and trends, Dixon draws the following preliminary conclusion:

“During its short existence to date, the TRIPS Agreement and the disputes under it have helped both to establish procedures for a wide variety of future cases and to resolve some deeply entrenched problems in a few national enforcement regimes - in many cases through informal consultations.”²⁷

There are indications and reports, however, that little or nothing is being done in some countries to become TRIPS-compliant. One confidential report has it, for example, that in a big Latin American country “no pending bill dealing with IP seeks to achieve TRIPS compliance (and) no one is seriously considering legislative adjustments, even though a few officials are aware of non-compliance.” Hence, it should come as no surprise that developed countries will very likely challenge developing countries' nonexistent or insufficient implementation of TRIPS. In fact, U.S. officials have already announced their intention to bring formal complaints to the WTO against countries that fail to meet this deadline and USTR ambassador Charlene Barshefsky was quoted as saying:

“In December 1999, the USTR will conduct a special out-of-cycle review to assess the progress made by developing countries. The United States will announce at the conclusion of this review in early January the actions it will take where WTO members have failed to implement their obligations, including the possible initiation of dispute settlement cases”. (6 MIP June 1999)

Given this backdrop, former U.S. Commissioner for Patents and Trademarks Bruce Lehman commented at WIPO's Policy Advisory Commission meeting last April that "WIPO's responsibility (now) is to make TRIPS and its legal and commercial principles relevant and positive for the developing country world.”²⁸

PART VI -Transitional Arrangement

Transitional period means the time period granted to member countries to comply with TRIPS agreement. However, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into

²⁷ Jayshri Wattal, Intellectual Property Rights in WTO and Developing Countries, Oxford University, New Delhi, at p. 164

force of the WTO Agreement. A developing country Member is entitled to delay for a further period of four years the date of application, Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay.

To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, , for a period of 10 years from the date of application. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

Monitoring the operations of TRIPS agreement

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

TRIPS agreement is prospective and not retrospective

This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question. This Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement.

Review and Amendment of TRIPS agreement

The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.²⁹

Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

The WTO Secretariat announced the launch of a new TRIPS notification submission system, an optional online tool for members to submit notifications, review materials and reports. The announcement was made at the meeting of the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) on 13 February, where members also discussed incentives for the transfer of technology to respond to the needs identified by least-developed countries (LDCs).

The e-TRIPS Notification Submission System (NSS) is part of the broader e-TRIPS project, which aims at streamlining and bringing up to date the information services the Secretariat provides to members. The project comprises two other elements: a complete Information Management System, now the backbone of the TRIPS information services, and the e-TRIPS gateway, which will be integrated into the WTO website and provide a wide range of opportunities for delegates to access and make use of TRIPS-related information.

²⁹ www.wto.org,

Security Exceptions under TRIPS Agreement

TRIPS Agreement does take into consideration security aspects of the member countries and accordingly it provides some security exceptions Member shall not be required to furnish any information the disclosure of which it considers contrary to its essential security interests; or to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;

- i. Relating to fissionable materials or the materials from which they are derived;
- ii. (ii) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- iii. Taken in time of war or other emergency in international relations; or
- iv. To prevent a member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Criticisms and Controversies of TRIPS Agreement

TRIPS agreement has many broad-brush provisions. Many provisions in the TRIPS agreement are very vague and broad. These provisions are susceptible to different interpretations. At times controversy arises because of such broad provisions. Some of the examples of broad-brush provisions present in the TRIPS agreement are Article 27 of TRIPS agreement about subject matter of patent. Article 27 of TRIPS agreement states as to what is patentable but the provision is very broad and subject to different interpretations. Some of the provisions in TRIPS are also inconsistent to each other, for example Article 27.2 of TRIPS agreement excludes patentability of all life forms however Article 27.3 allows patentability of microorganisms. The microorganisms are also living creature hence these should also be excluded from patentability.

TRIPS agreement is frozen in time. The GATT / WTO agreement on trade related aspects of intellectual property (TRIPS) concluded on April 15th 1994 and entered into force on Jan. 1, 1995. The provision of the TRIPS agreement has been framed in 90's so some of the provisions of TRIPS have become obsolete and needs review and amendment. Since TRIPS has been framed in late 90's so many of the provisions of TRISP do not suit to the socio-economic scenario of present situation.

TRIPS agreement fails to cope-up with new and changing technologies.

TRIPS agreement sets only minimum standards and thus it establishes only a floor and not a ceiling for INTELLECTUAL PROPERTY RIGHTS Protection. The main objective and

principle of TRIPS agreement is to set only minimum standards required for the protection of INTELLECTUAL PROPERTY RIGHTS. Moreover, the minimum standards which it emphasizes does not suit to the socio-economic scenario of each member country, so the member countries need to carefully draft their own legislative frame work for better protection of intellectual property. The TRIPS agreement needs to be reviewed and amended with the changing world.

The implementation of TRIPS agreement is mainly dominated by the lobby of developed countries they pressurize the implementation of that interpretation of the provisions of TRIPS agreement which suit to the developed country's economic benefits. Developing countries are suffered at the hands of developed countries.³⁰

The proper role of Intellectual Property Rights in light of a globalizing economy remains contested. "The difficulty stems from divergent concepts of property and ownership. Different legal principles exist from country to country, stemming from the particular social, political and ideological experiences of each, Prior to the TRIPS Agreement, Intellectual Property Rights protection ranged from totally open regimes that did not protect private Intellectual Property Rights to highly protectionist regimes in which both products and processes could be protected. while views both for and against extensive Intellectual Property Rights protection, as evidenced by the TRIPS agreement are strong, there is little concrete evidence that it is the only incentive for innovation or that it will lead to socio-economic and technological development."³¹

Ultimately, the TRIPS Agreement is the type of global protection of Intellectual Property Rights that developed countries have been seeking. "However, the TRIPS Agreement simultaneously narrows the developing countries' access to technology, discouraging the rapid diffusion of new technology needed for economic growth." Some headway was made at Doha on addressing issues faced by developing countries and LDCs in relation to the TRIPS Agreement, but the balance between creating private incentive and fostering technology transfers and development for the public benefit has not yet been achieved.

³⁰ www.legalservicesindia.com,

³¹ www.worldtradelaw.net/uragreements/TRIPSagreement.pdf

CHAPTER 3

STATUTORY PROVISIONS OF INTELLECTUAL PROPERTY RIGHTS IN INDIA

3.1 Legislative Framework of Intellectual Property Rights Laws in India

Intellectual Property Rights (I.P.R.) is the legal rights governing the use of creations of the human minds. Intellectual property refers to creation of mind, i.e., inventions, industrial designs for article, literary and artistic work, symbols, etc., used in commerce.

The term “Intellectual Property” has been used for almost more than one hundred and fifty years, which refers to the general area of law that includes copyrights, patents, designs and trade mark and the related rights. The intellectual property law regulates the creation, use and exploitation of mental or creative labour. There are number of forms and important differences between the various forms of intellectual property. The single factor that they are in common is that they establish property protection over intangible things such as ideas, inventions, signs and information.

Intellectual property is divided into two categories: industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source: and Copyright, which includes literary and artistic works such as novels, poems, plays, films and musical works, etc. According to the TRIPS Agreement, the intellectual property has been classified into—Patents, Industrial Designs, Trade Marks, Copyright, Geographical Indications, Layout Designs of Integrated Circuits, Protection of Undisclosed Information / Trade Secrets. Different IP Right varies in the protection they provide.

Following are the Acts included in the intellectual property regime.

- (1) The Trade Marks Act, 1999
- (2) The Patents Act, 1970
- (3) The Copyright Act, 1957
- (4) The Designs Act, 2000
- (5) The Geographical Indications of Goods (Registration and Protection) Act, 1999
- (6) The Protection of Plant Varieties and Farmers Rights Act, 2001
- (7) The Semiconductor Integrated Circuits Layout Design Act, 2000

Justification for intellectual property

The question is why legal protection is provided to intellectual property? The general justification for the protection of Intellectual Property Rights is that the intellectual property induces or encourages desirable behaviour. For example, patent system is sometime justified on the basis that it provides inventor with an incentive to disclose valuable technical information to the public, which would have otherwise remained secret. Similarly, the trade mark system is justified because it encourages traders to manufacture and sell high quality products. It prevents third parties from becoming unjustly enriched by “reaping where they have not sown” and it also encourages them to provide information to the public about those attributes. The ethical and moral arguments justify Intellectual Property Rights because the law recognizes an author’s natural rights over the product of their labour.³²

3.2 Law Relating to Patents in India

In India, the national legal regime pertaining to patents is contained in the Patents Act, 1970 as amended by the Patents Amendment Act, 1999. This legislation has been enacted to amend and consolidate the law relating to patents. The object of the patent law has been summed by the Supreme Court of India in *M/s. Bishwanath Prasad Radhey Shyam us. M/s. Hindusthan Metal Industries*, as under, which is self-explanatory.

The object of Patent law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. “The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain.

The fundamental principle of Patent Law is that a patent is granted only for an invention which must be new and useful. That is to say, it must have novelty and utility. It is essential for the validity of a patent that it must be the inventor’s own discovery as opposed to mere verification of what was already known before the date of the patent.

1. Definition of Patent: - The Word Patent originated from the Latin Word “Patene” which means to open. The concept of patent systems is very old one. One of the earliest systems was that originating in England during the reign of Queen Elizabeth. In that country it began to grow in the 12th century and by the 14th Century, grants of special privileges were

³² Raghbir Singh, Law Relating to Intellectual Property, Universal Law Publishing House, New Delhi, at p. 207

being made by the crown to individuals to protect them while they established new industries based on imported technology.³³

A patent is a legal document issued by the Government to an inventor, his heirs, assigns, etc. It defines an “invention” and grants the right to prevent others from making, using, or selling the “invention” in the country. The right exists for a definite period from the date of grant.

The Patent Act, 1970 does not provide for a comprehensive definition. Section 2 (m) of the Act merely says that ‘Patent’ means a patent granted under this Act. The definition therefore is not clear in any sense. In order to understand the concept of patents, one has to refer to the other numerous provisions of the Act and also certain foreign legislations and international instruments.

The word ‘Patent’, at least in some of the some of the European languages, is used in two senses. One of them is the document that is called “Patent” or “letters of Patent”. The other is the content of the Protection that a patent confers. If a person makes what he thinks is an invention, he or if he works for an entity, that entity can ask the Government, by filing an application with the patent office to give him a document in which it is stated what the invention is and that he is the owner of the patent. This document, issued by a government authority, is called a patent or a patent for invention. Therefore the “Patent” is a license given to an inventor to make exclusive use of his invention. The Patent can be correctly defined as the exclusive right to use or exercise an invention granted to a person for a limited period in consideration of the disclosure of the invention. It is the protection assured by the state to use the invention in monopoly.

Therefore, patent is a limited monopoly right granted by the Government to an inventor to use, exploit, and work and sell his invention in respect of either a process or a product. The patent must be in respect of an invention and not of a discovery. The invention must be new useful and industrially applicable.

The growth of the idea of conferring market monopoly as an incentive to innovate has old roots. In England, and other parts of Europe, it emerged as one minor form of state patronage. A Venetian Law of 1474 went so far as to establish a positive system for granting 10-year privileges to inventors of new arts and machines. In England, James I was partial to rewarding his political creditors with trading monopolies granted by letters patent. For this there were precedents enough from the illustrious land of Elizabeth. But James lacked her command. In 1624, the Parliament sought to declare these exercises of royal prerogative void.

³³ G.B. Reddy, Intellectual Property, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 208

This statute suggests not only the growing significance of trade in the country's economy and the beginning of the long political campaign to favour competition at the expense of monopoly. Section 6 of the Statute of Monopolies, which exceptionally allowed a patent monopoly for 14 years, upon "any manner of new manufacture" within the realm to the "true and first inventor", has its own character.³⁴

The Industrial revolution in Britain brought significant changes in the law relating to patents. The need to provide every inventor with an incentive to continue expending his creative energies in producing inventions suddenly gained centre stage and every invention, howsoever insignificant was given due recognition. The New Patents system, introduced by the Patent Law Amendment Act, 1852, was cheap and simple in concept, was designed to attract capital for the small ventures and out-of-the-way ideas being generated on the fringes of industry, as much as its centre. The amount of patenting activity at once increased markedly. The patent system that was evolved in the Patents Act, 1852 was simple. Mere filing of the Patent specification would result in a grant of patent, which led to many fraudulent claims being made to pre-empt genuine inventions from obtaining protection, and also in respect of the pre-existing inventions. Successive governments remained reluctant to create a bureaucracy that would search the prior literature and examine against the search results; and this despite the fact that the United States Patent Office had done so since 1836. It was not until 1901, when the Fry Committee demonstrated that 40% or more of the Patents granted were for inventions already described in earlier British Specifications, that the change became irresistible. The office began to search British specifications of the previous 50 years in 1905, but contrary to the United States example, it was confined to the issue of novelty.³⁵

Under the Patents Act, 1883, two major changes made namely, juries were excluded from trials of patent actions in favour of a single judge and patentees were obliged to include in their specifications at least one claim delineating the scope of their monopoly. The statutory revisions of 1907, 1919, 1932 and above all 1949, put the law more in the form of code and altered it in many details, with the patents Act, 1977; the British Patent system received the largest culture shock in its history. The Act provides machinery for collaborating in three Supra-national ventures viz., the new European Patent Office (EPO) under the European Patent Convention, 1973 (EPC), WIPO and Community Patent Convention, 1975 (CPC).

³⁴ W.R. Cornish, Intellectual Property, Universal Law Publication, New Delhi, at p. 157

³⁵ Sherman and Bentley, The Making of Modern Intellectual Property Law, Cambridge University Press, at p. 338

Evolution of Patent Law in India:

This History of Patent regime in India is a history of legislative enactments. Even during the British Rule, in 1859, the 'Act for granting exclusive privileges to inventors' [Act XV of 1859] was passed. The main aim of this Act was to enable the English Patent holders to acquire control over Indian markets. In 1872, the patent and Designs Protection Act, 1872 was passed followed by Inventions and Designs Act, 1888. While these enactments were ostensibly to honour the inventor's creativity, in effect they sought to protect the industrialist, manufacturer and importer. Arrangement or rearrangement of the already known device does not amount to an invention.³⁶

The Patents and Designs Act, 1911 was a comprehensive piece of legislation. It occupied the field in India, till the passing of the Patent Act of 1970. It provided for an elaborate administrative regime under the management of the controller of Patents and various time bound procedural requirements for processing of applications, filing of objections etc., It was only after several amendments and two committee reports that, the Act of 1970 was passed.

- i. Justice Bakshi Tek Chand Report, 1950: Considered the failure of the Indian Patent system to stimulate invention and encourage exploitation of new inventions for industrial purposes and suggested the following measures.
- ii. Compulsory licenses should be issued;
- iii. An efficient machinery should be evolved to tackle the issue of abuses.

These recommendations were made part of the Indian Patents and Designs (Am) Act, 1950.

(b) Justice Rajagopala Ayyangar's Report, 1959: identified the essential pre-requisites for a nation to assimilate the benefits of a patent system. These features include the technological advancement of the country, need for encouragements of inventors and for rewarding them and the increasing emphasis on technical education in India and the growing number of Quality research institutes together with the rapidly increasing industrialization. The committee believed that the system of patent protection should be modified to suit the Indian environs. After careful deliberation, it suggested a three-pronged strategy viz.

- i. Identification of inventions, which are to be protected;
- ii. Determination either to prevent foreigners from taking patents in India or to make them work the patent in India;

³⁶ Ashok Soni, Intellectual Property Law, Snow White Publication, Mumbai, at p. 109

- iii. Determination to withstand any pressure to sign any international conventions. This was suggested so that India would develop its economy independently without any arm wasting from developed nations.

The Bill proposed by this committee was placed before the Lok Sabha in 1966 but the House was dissolved shortly thereafter and the Bill lapsed. The New Lok Sabha was presented with another Bill in August 1967 and after deliberation by the Joint Committee of the Parliament, the Patents Act, 1970 was passed.

Salient features of the Act of 1970:

This Act reflects the concerns of a developing country, balanced with the interests and needs of the inventors. Under the Act, the patents are granted to encourage inventions and secure that the inventions are worked in India on a commercial scale and fully reasonably practicable, without undue delay; and patents are not granted merely to enable patentees to enjoy a monopoly or the importation of the patented article.

The Patents Act, 1970 recognized two kinds of Patent i.e., product and process patents. A product patent is one where the patent holder has the absolute right to produce and market the product. A process patent is where the exact process of the product is patented. Similarly, a product patentee has the right to make, use, and exercise, sell or distribute such article or in India, while a process patentee has the right to use or exercise the method or process in India. Under the Act, only process patents were granted to vendors relating to food, medicine or drug and substances by chemical process. However, in the context of India the member of WTO accepting TRIPS Agreement, this scheme requires modification before 01.01.2005.

Exclusive Marketing Rights:

The term EMR means the exclusive marketing rights to sell or distribute the article or substance covered in a patent or patent application in the country. The purpose of EMRs is to ensure that the innovator can market free copies of his product.

To comply with the requirements of TRIPS, pending the transition to a full-fledged product patent regime, provisions relating to exclusive marketing rights in the areas of drugs and agro-chemical products were incorporated in the Patents Act, 1970 with effect from January 1, 1995. Chapter IVA incorporated the relevant provisions. Section 24 of the Act stipulates that India has to receive applications for patents containing claims for drugs and agro-chemical products with the condition that such applications can be taken up for consideration of granting EMR if an application is made.

The application for the grant of an EMR can be made for an invention relating to an article or substance intended for use or capable of being used as a drug or medicine, developed after 1.1.2005, which has been claimed in a Black Box application. The Act specifically debars grant of EMR to substance based on traditional system of medicine. Upon getting the EMR, the applicant has the exclusive right to sell or distribute the product of the invention for a period of five years from the date of grant or till the date of grant or rejection of the application for patent, whichever is earlier. The corresponding patent application would be taken up for examination after 1.1.2005, which is the time provided to India to bring a product patent regime in all the fields of science and technology.

Hitherto, four EMRs were granted by the Patent Office:

- Novartis AG for blood anti-cancer medicine, Glivec/Gleevec (beta crystalline form of imatinib mesylate)
- Eli Lilly & Company, USA for erectile dysfunction medicine, Cialis (Tadalafil)
- Wockhardt for 'Nadifloxacin' under the brand name NADOXIN
- United Phosphorus for 'fungicide safe, a combination of carbendazim and mancozeb'

India has entered in the full-fledged product patent regime on 1.1.2005 as per Article 65 of TRIPS agreement. In view of extension of product patent to drugs and food products provisions relating to exclusive marketing rights have been abolished by omitting chapter IVA from the Patents Act. The EMRs granted before 1.1.2005 will continue to enjoy the same terms and conditions on which it was granted.

The patents (Amendment) Act, 1999 added a new chapter i.e., Chapter IV-A consisting of Sections 24-A to 24-F, with retrospective effect from 01.01.1995, which deals with the Exclusive Marketing Rights (EMRs) to sell or distribute an article or substance in India. A claim for patent of an invention for a substance itself intended for use, or capable of being used, as medicine or drug, except

- i. All medicines for internal or external use of human beings or animals,
- ii. All substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals
- iii. All substances intended to be used for or in the maintenance of public health, or the prevention or control of any epidemic disease among human beings or animals and
- iv. Insecticides, germicides, fungicides, weedicides and all other substances intended to be used for the protection or preservation of plants etc., can be made before the controller and the controller shall not refer such an application to the examiner for making a report till the 31st day of December, 2004. Where such application for EMR has been made in

the prescribed form, the controller may directly refer it to an examiner. These provisions have been made with a view to refer it to an examiner. These provisions have been made with a view to give effect to the treaty obligations of WTO and TRIPS agreements.

The Present Regime relating to patents in India therefore is the Act of 1970, as supplemented / amended by

- (1) The Repealing and Amending Act, 1974.
- (2) The Delegated Legislation Provisions (Am) Act;
- (3) The Patents (Amendment) Act, 1999,
- (4) The Patents (Amendment) Act, 2002.
- (5) The Patents (Amendment) Act, 2005.

3.3 Law Relating to Copyrights in India

Only human beings are capable of creativity. They can be authors, composers, artists and designers for creating their original works. Generally, it is they alone, who will be entitled to enjoy the exclusive rights to do or authorize others to do certain acts in relation to

- (i) Literary, dramatic, musical and artistic works;
- (ii) Cinematograph film; and
- (iii) Sound recordings (programmes);

However, this list is not exhaustive and includes the neighbouring rights covering programs, and even computer software also.

Copyright is a unique kind of Intellectual Property the importance of which is increasing day by day. It does not fall in the category of industrial property. The basic areas that are covered under the copyright protection are in the field of printing music, communication, entertainment and computer industries. In fact, 'copyright' was the first Intellectual Property which received legal recognition in the world.³⁷

The right which a person acquires in a work which is the result of his intellectual labour is called his copyright. The primary function of a copyright law is to protect the fruits of a man's work, labour, skill or test from annexation by other people. The law of copyright has to protect a man's copyright irrespective of his status as a family man or saint.

³⁷ Vikas Vashishtha, Law and the Practice of Intellectual Property in India, Bharat Law House, New Delhi, at p. 2

Subject matter of copyright

Generally, copyright protection subsists, in original works of authorizing fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorizing include the following categories:

- i. Literary works e.g.; novel, stories, including fiction and non-fiction
- ii. Musical works, including any accompanying words;
- iii. Dramatic works, including any accompanying music;
- iv. Pantomimes and choreographic works;
- v. Pictorial, graphic, and sculptural works,
- vi. Motion pictures and other audio-visual works;
- vii. Sound recordings; and
- viii. Architectural works.

However, the Copyright protection for an original work of authorizing, in no way extends to any idea, procedure, process, system, method of operation concept, principle, or discovery, regardless of the form in which it is described explained, illustrated or embodies in such work. In other words, copyright protection extends only to the expression in the forms mentioned in the above 8 cases and not to the ideas. In most of the countries including the U.S.A., the Copyright covers, compilations, derivative works, unpublished works (manuscripts) and Government works

National Regime Governing Copyright:

In India, the copyright Act, 1957 is the primary legislation relating to the copyright protection. This Act as amended by the Copyright (Amendment) Act, 1999 contains 79 sections and is supplemented by the Copyright legislation covering almost all the aspects of the copyright protection in India.

Object of the Copyright Act:

The hall mark of any culture is the excellence of arts and literature. In fact the quality of creative of any culture. Any art needs healthy environment and sufficient protection. What the law offers is not the protection of the interest of the artist or the author alone. Enrichment of culture is of vital interest to each society and the copyright law protects this social interest. The copyright Act has been enacted to check the piracy i.e. the infringement of rights under the copyright Act so that the fruits of the labor put by the author or the copyright owner may

be enjoyed by the deserving authors and copyright owners and not the pirates, who indulge in plagiarism and other undesirable and illegal activities of theft of intellectual property.³⁸

Scheme of legislation:

The Copyright Act, 1957 is the primary legislation dealing with the protection of copyright in India. It contains 79 sections and supplemented by the Copyright Rules of 1958. The Act defines various terms like Artistic work, Author, Adaptation, Broadcast, Cinematograph Computer Programme, Copyright society, Dramatic work, exclusive License, Indian work, Infringing copy, Literary work, musical work, Performance, and Sound Recording in the clause contained in Section 2 of the Act. Apart from with the copyright its meaning, ownership of copyright, of the copyright owners, term of copyright its registration Act deals with the other aspects like licenses by owners of copyright, copyrights societies, performers and Broadcasting and organizations rights. The Act provides for a comprehensive scheme to deal with the infringement of copyright and civil for the same.

Meaning of copyright:

Section 14 of the Act gives a apprehensive definition of the terms “Copyright”. The Section ads as under:

Sec 14. Meaning of copyright:

For the purpose of this Act, “Copyright” means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely: -

- (i) In the case of a literary, dramatic or musical work, not being a computer programme,
- (ii) To reproduce the work in any material form including the string of it in any medium by electronic means;
- (iii) To issue copies of the work to the public not being copies already in circulation;
- (iv) To perform the work in public, or communicate it to the public;
- (v) To make any cinematograph film or sound recording in respect of the work;
- (vi) To make any translation of the work;
- (vii) To make any adaptation of the work;
- (viii) To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

³⁸ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 157

- (ix) In the case of a computer programme;
- (x) To do any of the acts specified in clause (a);
- (xi) To sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental; in the case of an artistic work:

- i. To reproduce the work in any material form including depiction in three dimensions of a two-dimensional work or in two dimensions of a three-dimensional work;
- ii. To sell or give on hire, or offer for sale or hire, any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions;”
- iii. To communicate the work to the public,
- iv. To issue copies of the work to the public not being copies already in circulation;
- v. To make any adaptation of the work
- vi. To make any adaptation of work
- vii. To do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv)’
- viii. In the case of a cinematograph film;
 - a. To make a copy of the film, including a photograph of any image forming part thereof;
 - b. To sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
 - c. To communicate the film to the public;

Copyright Law in India³⁹ :

The earliest statute law in India relating to copyright is the Indian Copyright Act of 1847 enacted during the East India Company’s regime. It was passed by Governor General of India in council on 15th December to affirm the applicability of the law that obtained in England to India. Little information is available on how this legislation operated during the period 1847 to 1911. In 1911, the law of copyright was codified in England by the Copyright Act, 1911. The Imperial Copyright Act, 1911 was a “Law in force” in the territory of India immediately

³⁹ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 103

before the commencement of the constitution and along with its modified version continued in force by virtue of Art. 371(1) of the constitution. This Act was made applicable to all the countries under the British Dominion including India. By virtue of the power reserved to the Dominion legislatures to modify or alter its provisional laws, the Governor General of India enacted the Indian Copyright Act, 1914. Apart from the fact that the U.K. Act did not fit in with the changed constitutional status of India, which got its freedom in 1947, it became necessary to enact an independent self-contained law on the subject of the rights and obligations of authors and in the light of experiences gained in the working of the existing law during the few decades. New and advanced means of communications like broadcasting, litho-photography, etc., also called for certain amendments in the existing law.

The 1914 Act⁴⁰

The Indian Copyright Act of 1914 was a modified version of the British Copyright Act of 1911. Some of its important provisions were (i) registration of the author's work was not necessary (ii) the author's right came into existence as soon as work was created (iii) protection was afforded not to ideas but to the material form in which the work was expressed, (iv) only original works attract the protection of copyright law although the general principle applied was that 'all laws which put a restraint upon human activity and enterprise construed in a reasonable and generous spirit. Under the guise of copyright, plaintiff and scholarship and all frontiers of human knowledge' (VI) the term of copyright protection was fixed as the lifetime of the author and 25 years after his death. For certain types of work such as joint works, posthumous works, government publications, engravings etc., and special periods were prescribed.

The 1914 Act was a brief enactment of 15 Sections, to which was added, the text of the British Copyright Act of 1911 (of England) as its first schedule, with a few omissions which were not applicable to India. The two Acts taken together constituted the copyright law in India. The Act 1914 prescribed penalties for infringement of copyright which was not considered a criminal offence. It authorized the destruction of infringing copies or their delivery to the copyright owner. It laid down that non registration of a book for copyright protection was not a bar to filing a suit or starting a civil proceeding against the party who had infringed copyright.

⁴⁰ Ibid, at p. 104

The Copyright Act, 1957

In 1947, India acquired its independence. Apart from the change in the constitutional status, the new developments and technological advances necessitated a comprehensive review of the subject. The result is the copyright Act of 1957. Apart from consolidating and amending the law as suited to India, the Act introduced a number of changes and new provisions.

Salient features of the Draft Bill :- Though the draft Bill follows generally in a rearranged form the main principles of the existing law, it has introduced several new features which are briefly indicated below :

(2) Provision is made for setting up a copyright Board which will determine the reasonableness of the rates of fees, charges or royalties claimed by performing rights societies, consider applications for general license for public performances of works and will assess compensation payable under the Bill in certain circumstances. An appeal will lie to the High Court against the decisions of the copyright Board.

In preparing the Bill, the British Copyright Report, 1952, the suggestions of the various Ministries of the Government of India, the State Governments, the Indian Universities and certain interested industries and associations who were invited to send their comments of the subject have been taken into consideration.

Amendments to the Copyright Act, 1957

The basic features of the copyright Act, 1957 conform to the provisions of the two international conventions on copyright, namely

- i. the Berne convention and
- ii. The Universal copyright convention. India is a member of both the conventions, which were revised at Paris in 1971. The revised Paris text provides for certain special concessions in favour of developing for translation and reproduction of foreign works required for educational purposes in accordance with the prescribed procedure. The revision of the two conventions was the result of a sustained effort on the part of developing countries. India played a leading role in the discussions leading to concession.

1983 Amendment: In August 1983, the parliament of India enacted the copyright (Amendment) Act, 1983 with the specific purposes licenses for translation and reproduction of foreign works required for instructional purposes; (b) providing adequate protection of author's rights; and (c) removing administrative drawbacks and other lacunae experience in the administration of the copyright Act, 1957. The under mentioned objects, mentioned in the

proposed amendment Bills clearly explain the changes sought to be made by the 1983 Amendment Act.

The bill provides, among other things, for the following amendments to the Act to give effect to the above proposals, namely: -

(1) To provides for compulsory licensing for the translation of a foreign work after the expiry of three years from the publication of the work and if the translation of the work is in a language not in general use in any developed country, after the expiry of a period of one year from such publication if such work is required for the purpose of teaching, scholarship or research.

(2) To provide for the compulsory licensing of the reproduction of any edition of a foreign literary, scientific or artistic work for the purposes of systematic instructional activities if, after the expiry of certain periods (which will vary depending on the subject-matter of the works) from the date of the first publication of that edition, the copies are not available in India at a price reasonably related to that normally charged in India for the same or similar work.

(3) It is a proposed to provided that in the case of unpublished works where the author is either dead or unknown or the owners of the copyright cannot be traced, any person wishing to publish the material or a translation thereof may advertise his proposal and thereafter apply to the copyright Board for permission which, while granting such permission, would be fix an appropriate royalty. The royalty could be deposited in the Public Account of India or in any other suitable place for a specific period so that in the event of the owner of the copyright becoming known, he could claim it. It is also proposed that in the case of unpublished Indian the work is desirable in the national interest, a reasonable period would be given to his legal representatives to make necessary arrangements for the publication of the unpublished material. In case they fail to do so, the copyright Board is empowered to give permission to publish the works on payment of royalty.

(4) It is proposed to provide for the manner of assignments of copyright from authors to publishers and to empower the copyright Board to decide dispute arising out of such assignments which may extend to permitting the author to withdraw from the assignment.

(5) It is proposed to prescribe the term of copyright in works owned by bodies corporate as fifty years from the beginning of the calendar year next following the year in which the work is first published as in the case of Government works.

(6) Broadcasting authorities are also being permitted to translate foreign works for broadcasting for the purpose of systematic instructional activities.

(7) To provide for copyright in lectures, addresses, etc. delivered in public and for the publication of the entries made in Copyright Register.

1984 Amendment: - As the piracy has become a global problem due to the rapid advances in technology and has assumed alarming proportion all over the world, all the countries started to make efforts to meet the challenge by taking stringent legislative and enforcement measures. This problem of piracy and necessity for taking sufficient anti-piracy measures were also voiced by members of parliament at the time of the consideration of the Bill to bring in the 1982 Amendment.

In the contemporary world, mainly, there are three types of piracy, namely (i) piracy of the printed work; (ii) piracy of sound recordings, and (iii) piracy of cinematograph films. The object of the pirate in all such cases is to make quick money and void payments of legitimate royalties and taxes. The emergence of new techniques of recording, fixation and reproduction of audio programs, combined with the advent of video technology has greatly helped the pirates. The loss to Governments in terms of tax evasion also amounts to crores of rupees. In addition, because of the recent video boom in the country, it was found that many uncertified video films are being exhibited on a large scale. In view of this circumstance, it was proposed to amend the Copyright Act, 1957 to combat effectively the piracy that is prevalent in the country.

The Bill of the proposed 1984 Amendment contained the following objects:

- i. to increase the punishment provided for the infringement of the copyright, namely, imprisonment of 3 years, with a minimum punishment of imprisonment of 6 months and a fine up to Rs. 2 lakhs, with a minimum of Rs. 50,000/-
- ii. To provide for enhanced punishment in case of second and subsequent convictions.
- iii. To provide for the declaration of the offence of infringement of copyright as an economic offence so that the period of limitation provided in the Code of Criminal Procedure, 1973, for offences will not be applicable to these offences;
- iv. To specifically make the provisions of the Act applicable to video films and computer programmes;
- v. To require to producers of records and video films to display certain information in the record; video films and containers thereof.

This 1984 Amendment came into force on 08.10.1984. Immediately thereafter, several writ petitions seeking a stay of the amending law were filed in a number of High Courts across the country and in the Supreme Court of India. In Madras, a person owing a video library

business filed a writ petition, challenging the constitutional constitutionality of this amendment. While admitting the petition granted a stay of certain provisions of the Amending Act pending disposal of the petition. When the Film Federation of India, the apex body of film producers, distributors, and exhibitors in the country, filed two petitions before the learned judge, one for imp leading themselves as a sporty and other for vacating the stay order, the single judge rejected both the petitions but direct that the applicant could be heard without being imp leaded as a party respondent.

On an appeal filed by the aggrieved applicant in *Film Federation of India v. Union of India*, a Division Bench of the High Court dismissed the appeal and observed:

“A legislative enactment is intended to give effect to some policy and implement it private litigants or persons who happen to be beneficiaries of such a policy enacted in the form of legislation can really have no say in a matter which is exclusively within the domain of the Government activity. It is primarily and wholly for the Government to support own legislation though in case the court wants some assistance the court can permit a party to intervene but that is for the limited purpose, of assistant to the court for deciding the dispute before it”

The court refused to a accept a principle that a beneficiary of a statute is entitled to be heard in addition to the state for union Government as the case may be in support of a statutory enactment.

1994 Amendment

As it was observed that the anti-piracy provisions incorporated in the 1984 Amendment had not worked effectively, a working group was set-up in 1987 by the Government to study the provisions of the Act and to recommend suitable amendments, taking into consideration the advances made in communication technology such as video, satellite and other means of simultaneous communications and to fulfil India’s obligations as a signatory to the Berne Convention and the Universal copyright convention. In July 1992, the copyright (Second Amendment) bill was introduced in the Parliament. The purpose of the proposed legislation was explained as under.

“Effective copyright protection promotes and rewards human creativity and, in modern society, an indispensable support for intellectual, cultural and economic activity. Copyright law promotes the creation of literary, artistic, dramatic and musical works, cinematograph films and sound recordings by providing certain exclusive rights to their authors and creators. The law relating to copyright and related rights has been under comprehensive review of the

Government for some time, taking into account the difficulties expressed by the different groups of copyright owners and others, the experience gained from the administration of the existing law and the situation created by various technological developments that have taken place”.

A joint committee of both Houses of Parliament, consisting of 45 members, examined the Bill taking into consideration the representations received from various organizations and individuals, the memoranda received from the general public and organization concerned in the Bill in its report submitted to the parliament in August, 1993. The Bill was ultimately passed by the Parliament in May, 1994.

Salient features of the 1994 Amendment :- The Amending Act provided for (1) performers’ rights protection covering any visual or artistic presentation made live by one or more performers (ii) copyright societies, seeking to promote collective administration of the rights authors, composers and other creative artists (iii) assignment of copyright by an author or artist to protect the interests of both assignor and assignee; and (iv) computer programmes, cinematograph films and sound recordings; protection.

A large number of the provisions in the amending legislation are self-explanatory and clarificatory in nature.

1999 Amendment

The copyright Act was again amended in 1999 which amended definition of ‘literary work’ meaning of copyright in respect of a computer programme, increased in respect of copyright of performs from 25 to 50 years, inserted certain new provisions pertaining to power of the Central Governmental to apply the provisions relating to Broadcasting organization and performers to broadcasting organization and performers in certain other countries, and power to restrict rights of foreign broadcasting organizations and performers.

CHAPTER 4

LAWS RELATING TO TRADE MARKS IN INDIA

4.1 Introduction

Every intelligent consumer purchases his goods or services from the commercial market only when he is satisfied that the goods or services are of good quality and reliable. The manufacturer, or supplier of goods makes it sure that although the goods produced by him are similar to those manufactured by others, their distinguishing marks are different. This is with a view to identifying the manufacturer brand and quality of the goods or services produced by a particular maker or company. It is in this context that 'trademarks play a very important role in the modern commercial market. The importance of trademarks was recognized only after the industrial revolution which enabled large scale production and distribution of goods and publicity through the printing media. Therefore, trade mark is essentially a product of competitive economy where more than one person competed for the manufacture of the same product which necessitated the marking of each manufacturer's goods by a symbol which distinguished similar goods made by others.

What is a trade mark: - A 'trade mark' means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others. It may include shape of goods, their packaging and combination of colours. 'Mark' includes a device, brand, heading, label, ticket name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof. This meaning and definition is not exhaustive and the definition is such that there is practically no limit to the combination of various types of marks.

A trade mark is a symbol which is applied or attached to goods offered for sale in the market, so as to distinguish them from similar goods and to identify them with a particular trader or with his successor as the owner of a particular trader or with his successors as the owner of a particular business, as being made, worked upon, imported, selected, certified or sold by him or them or, which has been properly registered under the Acts as the trade mark of a particular trader. It is a symbol consisting in general of a picture, label, word or words, which is applied or attached to traders' goods.

A party acquires exclusive right to protect its mark by virtue of priority in adoption, long continuous and exclusive user and any subsequent user of the deceptively similar mark or trade mark which is of confusing nature on account of sound and look is quality of

infringement of the right of the prior user of the mark as his obvious motive is to trade and encash upon the goodwill and reputation of the prior user. Reputation or goodwill is not established in a day. It is gained over the years and at the huge cost of advertisement.

The definition of trade mark is very wide and means, inter alia, a mark capable of being represented graphically and which is capable of distinguishing the goods or service of one person from those of others. Mark includes amongst other things name or word also.

Trade Mark is essentially adopted to advertise one's product and to make it known to the purchaser. It attempts to portray period of time the mark may become popular. It is usually at this stage that other people are tempted to pass off their products as that of the original owner of the mark.

The Trade and Merchandise Marks Act, 1958 for the first time codified the law relating to trademarks and provided for registration of trademarks already in use and even those proposed to be used. Since 1958 it has been amended several times. In view of the developments in trading and commercial practices, increasing globalization of trade and industry, the need to encourage investment flows and transfer of technology and systems, it has been considered by the parliament, necessary to bring out a comprehensive legislation on the subject. Accordingly, the Trade Marks Act, 1999 was passed to replace the Act of 1958.

A look at the statement of objects and Reasons leading to the passing of the Trade Marks Act, 1999 makes the following things clear. The Trade and Merchandise Marks Act, 1958 has served its purpose over the past four decades. It was felt that a comprehensive review of the existing law be made in view of developments in trading and commercial practices, increasing globalization of trade and industry the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management systems to give effect to important judicial decisions. To achieve this purpose, the present Act proposed to incorporate inter alia the following, namely: -

- (a) Providing for registration of trade mark for service in addition to goods. This is a novel feat introduced by the Act of 1999.
- (b) Registration of trademarks which are imitation well known trademarks, not to be permitted, been enlarging the grounds for refusal of registrant consequently, the provision for defending registration of trademarks have been propose be omitted.
- (c) Amplification of factors to be considered for defending a well-known trade mark.
- (d) Doing away with the system of maintain registration of trade-marks in Part-A and Part-B different legal rights, and to provide only a single register with simplified procedure for registrar and with equal rights.

- (e) Simplifying the procedure for registration registered user and enlarging the scope of permitting use.
- (f) Providing for an Appellate Board for speedy disposal of appeals and rectification applications which the Act, of 1958, laid to High Court.
- (g) Providing for registration of “collective marks” owned by associations etc: -
- (h) Transferring the final authority relating registration of certification trademarks to Registrar instead of the Central Government.
- (i) Providing for enhanced punishment for the offers relating to trade-marks on par with the present copyright Act, 1957, to prevent the sale of spurious goods:
- (k) Extension of application of convention countries includes countries which are members of Group Union of Countries and Inter Governed Organization;
- (l) Incorporating the other provisions, like amend the definition of “trade-mark”, providing for filling single application for registration in more than one class, increasing the period of registration and renewal from 7 years to 10 years; making trade-mark offences Cognizable, enlarging the jurisdiction of courts of bring the law in this respect on par with the copyright law, amplifying the powers of the court to grant *ex-parte* injunction in certain cases and other related amendments to simplify and streamline the trade mark law and procedure.

In view of the extensive amendments necessitated in the grade and merchandise marks Act, 1958, it has been thought fit to repeal and re-enact the said Act incorporating the necessary changes.

The Trade Marks Bill, 1999 having passed by both the Houses of Parliament, received the assent of the president, and came on the statute Books as the trademarks Act, 1999. It is an Act to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks.

4.2 Law Relating to Designs in India

An article or goods used in commerce is distinguished not only by its utility but also by its visual appeal which plays an important role in influencing the buyer’s preference for the article. Therefore, the design of an article and even the design of its packaging is important from the commercial view point. A shape, configuration, pattern or ornamentation can be a design, if applied by any industrial process or means. Products that are viewed friendly and which psychologically entice a consumer are said to be well designed.

The Primary object of the Act is to protect the shape not the function, or functional shape. The expression “design” does not include a method or principle of construction or features or shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform. In the instant case, the defendants were restrained from manufacturing selling, or offering for sale of the “pick-n-carry mobile” cranes that the substantial imitation or reproduction of the industrial drawings of the plaintiff or from using in any other manner whatsoever the technical know-how, specifications or drawings of the plaintiffs till disposal of the suit.

Position In India

A design is necessarily a part and parcel of the article manufactured. Unless design is new and original registration cannot be deemed to be effective. The mere difference in appearance of product may not be sufficient to hold that it is a different or new design.

Design means only the nature of shape, configuration, pattern or ornament, which in a finished article appeal to and judged solely by the eye. However, it does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trademark or property mark, as defined by the Indian Penal Code on Sections 478 and 479. During ancient days design patents were not contrasted with utility patents but they nowadays considered as different from each other. This is so, even though they equally involve the exercise of the inventive or originate faculty.

Design is that characteristic of a physical substance more particularly in respect of goods or articles, which by means of lines, images, configuration and the like taken as a whole makes an impression, through the eye, upon the mind of observer. The essence of a design resides not in the elements individually, nor in their methods or arrangement but whatever the impression, there is attached in the mind of the observer, a result of phenomenal development in Science and Technology the importance of designs has increased significantly. The purpose of any design law is protecting new and novel designs made with the object of applying to particular articles to be manufactured and marketed commercially.

Historical Perspectives: -

Great Britain was the first country in the world to offer protection to designs. The textile designs were the first to receive legal protection. In 1787, the first enactment for the protection of designs was made in U.K., cotton, calicoes and muslins by vesting their properties in the designers, printers and proprietors for a limited period. However shortly thereafter the life of the design was extended and soon it was made perpetual. In 1839, the protection was enlarged to cover designs for printing woven fabrics. Soon followed another law to protect designs of other articles of manufacture generally. Thereafter the process to protect designs took rapid strides. A consolidating and updating measure was taken in 1842 when an Act to consolidate and amend the laws relating to the copyright of design for ornamenting of designs of manufacture, which repealed all the earlier statutes. The statutes relating to Patents, Designs and Trademarks remained separate till in 1883, in which year the patents, Designs and Trade Marks Act, 1883 was passed. Again there was a separation of trademark law when the Trade Marks Act of 1905 was enacted. After 1905, the Patents and Designs law remained together.

In so far as India is concerned, the first legislation on the subject was the Patents and Designs Act, 1872. This law was passed to supplement the 1859 Act passed by Governor-General of India in Council which for the first time made provision for granting to inventors or “new manufacture”, the exclusive privilege of making, selling and using the invention in India and for authorizing others to do so. This 1872 Act was passed to extend similar privileges to the inventors of new patterns and designs in British India, though for a much shorter duration. It included the new term “new manufacture”, “any new and original pattern or design, or the application of such pattern or design to any substance or article of manufacture”. The Inventions and Designs Act, 1888 which consolidated and amended the law relating to the protection of inventions and designs contained in a separate part. Ultimately the British Patents and Designs Act, 1907 had become the basis of the Indian Patents and Designs Act, 1911. In 1970, the Patents Act, 1970 repealed the provisions with respect to the patents law from the patents and Designs Act, 1911. Thereafter the Designs Act, 1911 continued to be the only enactment dealing with industrial designs in India till the Designs Act, 2000 has been passed. This new Act has come into force from 11.05.2001. This new legislation contains substantially the similar provisions as were contained in the Designs Act, 1911 except some minor changes in definitions of article and design, and also the terms of protection of a registered design etc.

Meaning of Design: -

Design, generally means purpose of intention, combined with the plan in the mind, aim, purpose, object, and end in view, intention to be carried out into effect. The design includes the thing that is to be brought about; the plan includes of a design resides not in the elements of individuality, nor in their method of arrangement but in the total impression. Design is a conception, suggestion or idea of a shape and not an article. If it has already been anticipated, it is not new or original. If it has been pre-published, it cannot claim protection to protect under the Act. In this context the word ‘published’ has not been defined under the Act. It is published if a design is no longer a secret. There is a publication if a design is no longer a secret. There is a publication if the design has been disclosed to the public or public has been put in possession of the design.

The Designs Act of 2000

Change made: The Parliament of India has recently passed the Designs Act, 2000 to consolidate and amend the law relating to protection of designs. The Legislature in its wisdom by enacting the Designs Act, 2000 does not want to stop the progress in industrial products as that would amount to pin down the competitors and in the process the technology would be blocked same would result in clogging the economic growth. This Act has a total of 48 Sections that deal with the various definitions, registration of designs, copyright in registered designs, exhibition of designs at Industrial and Industrial exhibitions, and powers and duties of the Controller and the Central Government. Since the enactment of the Designs Act, 1911 considerable progress has been made in the field of science and technology. The legal system of the efficient in order to ensure effective protection to registered designs. It is also required to promote design activity in order to promote design element in an article of production. This Act is essentially aimed to balance these interests. It is also intended to ensure that the law does not unnecessarily extend protection beyond what is necessary to create the required incentive for design activity while removing impediments to the free use of available designs. To achieve this purpose the new Act incorporated inter alia, the following namely: -

- a. It enlarges the scope of definition of “article” and “design” and introduces definition of “original”;
- b. It amplifies the scope of prior publication
- c. It incorporates the provisions for delegation of powers of the Controller to other officers and duties of examiners;

- d. It contains provisions for identification of non-register able designs
- e. It contains provision for substitution of application before registration of a design;
- f. It introduces internationally followed system of classification in the place of Indian classification
- g. It contains provision or maintaining the Register of design on computer;
- h. It contains provision for restoration of lapsed designs;
- i. It contains provision for appeal against order of the Controller before the High Court instead of Central Government as existing
- j. It revokes the period of secrecy of two years of a registered design;
- k. It provides for compulsory registration of any document for transfer of right in the registered design;
- l. It introduces additional grounds in cancellation proceedings and makes provision for initiating the cancellation proceedings before the controller in place of High Court.
- m. It enhances the quantum of penalty imposed for infringement of registered design;
- n. It contains provisions grounds of cancellation to be taken as defence in the infringement proceedings to be initiated in any court not below the court of the District Judge;
- o. It enhance initial period of registration from 5 to 10 years to be followed by a further extension of a period of five years.
- p. It contains provisions for allowing of priority to other convention countries and countries belonging to the group of countries or inter-governmental organizations apart from untied Kingdom and other Commonwealth countries.
- q. It contains provision for avoidance of certain restrictive conditions for the control of anti-competitive practices in contractual licenses; and
- r. It contains specific provisions to protect the security of India.

In view of the extensive amendments necessitated in the Designs Act, 1911, it has been thought fit to repeal and re-enact the said Act incorporating the necessary changes.

This act repealed the designs act of 1911.

Application of the new law

The Calcutta High Court has held that in terms of Section 48(2) of the 2000 Act, an existing registration under the 1911 Act (old law) will have the force and effect as if it has been registered under the corresponding provisions of the 2000 Act. In I.A.G. Co. Ltd. Vs. Triveni Glass Ltd., the court held that, a design registered under the old Act can be cancelled under

the new Act, as the registration is deemed to have been done under the new Act. It was also held that any new ground available under the new Act can be invoked for cancellation of any design registered under the old Act.

The Geographical Indications of Goods (Registration and Protection) Act, 1999⁴¹

Certain geographical names have acquired a lot of importance in the commercial market, particularly with regard to the goods peculiarly or unequally associated with such name. In respect of any agricultural goods, natural goods or manufactured goods or any goods of handicraft or goods of industry including food-stuff, generally bears the geographical indications to attract the attention of the consumers. There is every possibility of misusing such geographical names and wrongly applying to even those goods or products, not associated with such names. To prevent unauthorized person from misusing geographical indications, protection should be provided. Such protection helps the consumers from deception. It also adds to economic prosperity of the producers of such goods. Hence, the international community and “appellations of origin”, i.e. geographical indication. TRIPS Agreement also provided the protection of geographical indications.

The law on geographical indication in India is new and it is termed as Geographical Indication of Goods (Registration and Protection) Act which was passed in the year 1999. This Act is made in the fulfilment of the obligations under GATT to which India is signatory. The purpose of the Act is to prevent the person from misusing geographical indication and to protect the consumers against deception by passing off goods not related to any geographical area as those of such area with a few to gain wrongful advantage and profit. This purpose is sought to be achieved by granting protection for the local names and also for the names abroad which have gained reputation and goodwill.

The geographical indication means an indication which identifies goods as originating in certain territory and having a given quality, reputation or other characteristics essentially attributable to their geographical origin. The geographical indication can have a reference to the agricultural produce, natural products or products manufactured or processed. Such goods must have a reputation and quality which are attributable to the place of origin, environment and other inherent natural and human factors. The indication here may mean, the name of the geographical area or any figurative representation suggesting the geographical origin of the produce and goods. It is not necessary, therefore, that the geographical indication shall contain the name of the territory where the goods are produced. It can be a word or

⁴¹ Avinash Shivade, Intellectual Property Manual, Butterworth’s Lexis, New Delhi, at p.151

combination of words as for instance “Basmati”, “Darjeeling Tea”, “Assam Tea”, etc. The geographical indication is not a right like trade mark and patent conferred on the individuals. If a geographical indication is registered, it amounts to a public notice stating that a given product originates its geographical area. The protection is granted to geographical indication is not granted to any individual. It is a national property it is granted to associations of persons or producers or an organization or authority representing the interest of the producers of goods such as Coffee Board, Tea Board or Indian Council of Agricultural Research and who are desirous of registering geographical indication in relation to such goods. After a geographical indication is first registered in the name of association of persons, separate and individual registration granted in the names of actual users of geographical indication.

The immediate reason for the legislation on geographical indication in India was the result of the situation created by WTO in the matter of Basmati rice case. Basmati rice, the special variety of rice with fragrance is grown in the foot hills of the Himalayan Mountains. The issue became contentious when it was found that a US company had identified the molecules which given fragrance to the rice. Thus, Basmati rice was grown in the US in green houses. The particular seed developed by biotechnology was patented in the US. The Indian Government took up the matter with the US Patent office and managed to stop the patenting of a geographical indication. The US Government too supported India on the Basmati rice issue. But India could not get help from WTO on the issue of violation of geographical indications. The reason for this was that India does not have its own legislation providing for registration of geographical indications. Therefore, Geographical Indications of Goods (Registration and Protection) Act, 1999 was enacted in India.

4.3 The protection of plant varieties and farmers ‘Rights Act, 2001

The Agreement on TRIPS which has been ratified by India required to make provision for giving effect to sub-paragraph (b) of paragraph 3 of Article 27 in Part II under section 5 of the Agreement in TRIPS relating to protection of plant varieties which reads “Members may also exclude from patentability plants and animals other than micro-organism and essentially biological and microbiological process. However, members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this paragraph shall be renewed four years after the date of entry into force of the WTO Agreement”. To give effect to Article 27(3)(b), it is considered necessary to undertake measures for the protection of the rights of the plant

breeders and farmers and to encourage the development of new varieties of plant, Indian Parliament enacted the Protection of Plant Varieties and Farmers Rights Act, 2001.

The Act intended to achieve the following three objectives: (1) to protect and benefit the breeders of new plant varieties (2) to protect and benefit the farmers as cultivators and conservers of traditional local plant varieties which may be used in the development of new varieties and (3) to encourage the growth of seed industry through domestic and foreign investments so as to ensure supply of high-quality seeds and planting material to the farmers. The rights of the breeders are protected by granting them a monopoly to use and sell the seeds and planting material of the new plant varieties involved by them through a system by which they are granted registration. Such registration is equivalent to a patent granted to the inventor in respect of manufacturability goods. They are also granted the facility to save for their own consumption and use of the seeds and planting material for successive new plant varieties. Those who use the new plant varieties for purpose of business, i.e., for the production and sale of seeds and other planting material, have to take a license from the breeder by paying him fees which may be treated as royalty.

The “Breeder” means a person or group persons or a farmer or group of farmers of any institution which has bred, evolved or developed any variety. The breeder by using skills of research discovers a new plant variety. Here it should be noted that the registration in the case of plants is granted not only to a new and novel variety evolved through laborious research but also to new plants discovered, may be by a chance or intelligent search or selection out of plants already existing. This is so because, registration is proposed to be granted to conservers of plants also in addition to scientists.

The registration of plant varieties is permissible only in respect of Plants of the genera and species notified by the Central Government. An application for registration cannot be made in respect of the genera and species which are excluded from the protection by a notification by the Central Government on the ground that prevention of commercial exploitation of such variety is necessary to protect public order or public morality or to preserve human, animal and plant life and their health or to avoid serious prejudice to the environment.⁴²

The Semiconductor Integrated Circuits Layout-Design Act, 2000

The Government of India ratified the TRIPS Agreement which provides for layout design (topographies) of integrated service. In order to fulfil these obligations, the Semiconductor Integrated Circuits Layout-Design Bill was introduced in the Parliament. The Bill was passed

⁴² G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 155

by both the Houses of Parliament and received the assent of President of 4th September, 2000. It came on the statutory books as Semiconductor Integrated Circuits Layout – Design Act, 2000.

This Act is to provide the protection of semiconductor integrated circuit layout designs and the other connected or incidental matters. Section 2® of the Act defines “Semiconductor Integrated Circuit” as a product having transistors and other circuitry elements insulating materials or inside the semiconductor material and designed to perform an electronic circuitry function. Under section, 2(h) layout includes lead wires connecting such elements and expressed in any manner in a semiconductor integrated circuit. In other words, it means a computer having circulatory elements inseparably formed on a semiconductor intended to perform capable to being distinguished from any other layout design. Thus, the registrable layout design must be the result of creators own intellectual efforts. The subject of semiconductor integrated circuit layout design has two parts, namely: (1) Semiconductor integrated circuit; and (2) layout-design.

The rights conferred by registration on the creator of layout-design are the exclusive right to use a layout-design by him and obtain relief in respect of infringement of his rights by any other person. The principle offence which is made punishable under this Act is the infringement which consist of any act of reproducing whether by incorporating in a semiconductor the registered integrated circuit or otherwise the registered layout – design in its entirety or any part thereof in a semiconductor. The punishment provided under the Act is an imprisonment for a term which may extend to three years or with fine which shall not be than Rs. 50,000 and which may extend to Rs. 10 lakhs.

India has enacted sufficient intellectual property laws for giving protection to Intellectual Property Rights. India has provided minimum standards required for the protection of Intellectual Property Rights. However, some areas are left upon which sufficient laws needs to be enacted like for the protection of trade secrets, owner legislative laws need to be

The additional protections are only given to wines and spirits these provisions favours only developed countries, additional protection of geographical indication needs to be provided to products of developing country India like Basmati rice, tea etc. A famous case on this issue is the Basmati rice case.

In late 1997, an American company Rice Tea Inc was granted a patent by the US patent office to call the aromatic rice grown outside India ‘Basmati’. Rice Tec Inc had been trying to enter the international Basmati market with brands like ‘Kasmati’ and ‘Texmati’ described as Basmati-type rice with minimal success. However, with the Basmati patent rights, Rice Tec

will now be able to not only call its aromatic rice Basmati within the US, but also label it Basmati for its exports. This has grave repercussions for India and Pakistan because not only will India lose out on the 45,000 tone US import market, which forms 10 percent of the total Basmati exports, but also its position in crucial markets like the European Union, the United Kingdom, Middle East and West Asia. In addition, the patent on Basmati is believed to be a violation of the fundamental fact that the long grain aromatic rice grown only in Punjab, Haryana and Uttar Pradesh is called Basmati. According to sources from the Indian Newspaper, Economic Times, “Patenting Basmati in the US is like snatching away our history and culture.”⁴³

⁴³ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 159

CHAPTER 5

LEGISLATIVE FRAMEWORK OF TRIPS AGREEMENT IN RELATION TO TRADEMARK LAWS IN INDIA

5.1 Legislative Framework of Intellectual Property Rights Laws in India

First of all ,the researcher want to make aware the people about the reasons for the presence of law and limits in the gate-up of various legislations and enactments as well, for making it more clear here researcher quote an example which is existing are traffic signals everybody is aware about the traffic signals ,its use and its limits we know that the red light stops us for seconds and allows other people to cross in that specific time and further allow other lane for the next session and by doing that it regulates the peoples conduct on street but imagine if there are no signals in such places the occurrence of accidents are more likely in comparison with the squares where signal exists so same is the condition about laws and legislation .

As it is the individualistic tendency of selfishness which provoke the folk to do which is immoral and therefore there must present the body to make regulations on all the matters, issues according to the changing situation and here how the executive body of the government indulge in making the legislative e framework for each of the different section of law because every matter varies and the need of its protection too.

As the result of the above facts the enactments are formed for regulating and providing necessary guidelines to the people about the related aspect and therefore the legislation is framed in India to guide the people and provide protection to on the matters related to Intellectual Property Rights and for that purpose intellectual property is the following things Intellectual Property Rights (I.P.R.) is the legal rights governing the use of creations of the human minds. Intellectual property refers to creation of mind, i.e., inventions, industrial designs for article, literary and artistic work, symbols, etc., used in commerce.

The term “Intellectual Property” has been used for almost more than one hundred and fifty years, which refers to the general area of law that includes copyrights, patents, designs and trade mark and the related rights. The intellectual property law regulates the creation, use and exploitation of mental or creative labour. There are number of forms and important differences between the various forms of intellectual property. The single factor that they are

in common is that they establish property protection over intangible things such as ideas, inventions, signs and information.⁴⁴

Intellectual property is divided into two categories: industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source: and Copyright, which includes literary and artistic works such as novels, poems, plays, films and musical works, etc. According to the TRIPS Agreement, the intellectual property has been classified into—Patents, Industrial Designs, Trade Marks, Copyright, Geographical Indications, Layout Designs of Integrated Circuits, Protection of Undisclosed Information / Trade Secrets. Different IP Right varies in the protection they provide.

Following are the Acts included in the intellectual property regime:

- (1) The Trade Marks Act, 1999
- (2) The Patents Act, 1970
- (3) The Copyright Act, 1957
- (4) The Designs Act, 2000
- (5) The Geographical Indications of Goods (Registration and Protection) Act, 1999
- (6) The Protection of Plant Varieties and Farmers Rights Act, 2001
- (7) The Semiconductor Integrated Circuits Layout Design Act, 2000

Justification for Intellectual Property

The question is why legal protection is provided to intellectual property? The general justification for the protection of Intellectual Property Rights is that the intellectual property induces or encourages desirable behavior. For example, patent system is sometime justified on the basis that it provides inventor with an incentive to disclose valuable technical information to the public, which would have otherwise remained secret. Similarly, the trade mark system is justified because it encourages traders to manufacture and sell high quality products. It prevents third parties from becoming unjustly enriched by “reaping where they have not sown” and it also encourages them to provide information to the public about those attributes. The ethical and moral arguments justify Intellectual Property Rights because the law recognizes an author’s natural rights over the product of their labour.⁴⁵

⁴⁴ G.B Reddy, Intellectual property law, Gogia Law Agency, Hyderabad, at p. 197

⁴⁵ Raghbir Singh, Law Relating to Intellectual Property, Universal Law Publishing House, New Delhi, at p. 207

5.2 Law relating to patents in India

In India, the national legal regime pertaining to patents is contained in the Patents Act, 1970 as amended by the Patents Amendment Act, 1999. This legislation has been enacted to amend and consolidate the law relating to patents. The object of the patent law has been summed by the Supreme Court of India in *M/s. Bishwanath Prasad Radhey Shyam vs. M/s. Hindusthan Metal Industries*, as under, which is self-explanatory.

The object of Patent law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. “The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain.”⁴⁶

The fundamental principle of Patent Law is that a patent is granted only for an invention which must be new and useful. That is to say, it must have novelty and utility. It is essential for the validity of a patent that it must be the inventor’s own discovery as opposed to mere verification of what was already known before the date of the patent.

Definition of Patent: - The Word Patent originated from the Latin Word “Patene” which means to open. The concept of patent systems is very old one. One of the earliest systems was that originating in England during the reign of Queen Elizabeth. In that country it began to grow in the 12th century and by the 14th Century, grants of special privileges were being made by the crown to individuals to protect them while they established new industries based on imported technology.⁴⁷

A patent is a legal document issued by the Government to an inventor, his heirs, assigns, etc. It defines an “invention” and grants the right to prevent others from making, using, or selling the “invention” in the country. The right exists for a definite period from the date of grant. The Patent Act, 1970 does not provide for a comprehensive definition. Section 2 (m) of the Act merely says that ‘Patent’ means a patent granted under this Act. The definition therefore is not clear in any sense. In order to understand the concept of patents, one has to refer to the other numerous provisions of the Act and also certain foreign legislations and international instruments.

⁴⁶ Avinash Shivade, Intellectual Property Law Manual, Butterworths Lexis, New Delhi, at p. 137

⁴⁷ G.B. Reddy, Intellectual Property, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 208

The word 'Patent', at least in some of the some of the European languages, is used in two senses. One of them is the document that is called "Patent" or "letters of Patent". The other is the content of the Protection that a patent confers. If a person makes what he thinks is an invention, he or if he works for an entity, that entity can ask the Government, by filing an application with the patent office to give him a document in which it is stated what the invention is and that he is the owner of the patent. This document, issued by a government authority, is called a patent or a patent for invention. Therefore the "Patent" is a license given to an inventor to make exclusive use of his invention. The Patent can be correctly defined as the exclusive right to use or exercise an invention granted to a person for a limited period in consideration of the disclosure of the invention. It is the protection assured by the state to use the invention in monopoly.

Therefore, patent is a limited monopoly right granted by the Government to an inventor to use, exploit, and work and sell his invention in respect of either a process or a product. The patent must be in respect of an invention and not of a discovery. The invention must be new useful and industrially applicable.

The growth of the idea of conferring market monopoly as an incentive to innovate has old roots. In England, and other parts of Europe, it emerged as one minor form of state patronage. A Venetian Law of 1474 went so far as to establish a positive system for granting 10-year privileges to inventors of new arts and machines. In England, James I was partial to rewarding his political creditors with trading monopolies granted by letters patent. For this there were precedents enough from the illustrious land of Elizabeth. But James lacked her command. In 1624, the Parliament sought to declare these exercises of royal prerogative void. This statute suggests not only the growing significance of trade in the country's economy and the beginning of the long political campaign to favor competition at the expense of monopoly. Section 6 of the Statute of Monopolies, which exceptionally allowed patent monopolies for 14 years, upon "any manner of new manufacture" within the realm to the "true and first inventor", has its own character.⁴⁸

The Industrial revolution in Britain brought significant changes in the law relating to patents. The need to provide every inventor with an incentive to continue expending his creative energies in producing inventions suddenly gained centre stage and every invention, howsoever insignificant was given due recognition. The New Patents system, introduced by the Patent Law Amendment Act, 1852, was cheap and simple in concept, was designed to

⁴⁸ W.R. Cornish, Intellectual Property, Universal Law Publication, New Delhi, at p. 157

attract capital for the small ventures and out-of-the-way ideas being generated on the fringes of industry, as much as its centre. The amount of patenting activity at once increased markedly. The patent system that was evolved in the Patents Act, 1852 was simple. Mere filing of the Patent specification would result in a grant of patent, which led to many fraudulent claims being made to pre-empt genuine inventions from obtaining protection, and also in respect of the pre-existing inventions. Successive governments remained reluctant to create a bureaucracy that would search the prior literature and examine against the search results; and this despite the fact that the United States Patent Office had done so since 1836. It was not until 1901, when the Fry Committee demonstrated that 40% or more of the Patents granted were for inventions already described in earlier British Specifications, that the change became irresistible. The office began to search British specifications of the previous 50 years in 1905, but contrary to the United States example, it was confined to the issue of novelty.⁴⁹ Under the Patents Act, 1883, two major changes made namely, juries were excluded from trials of patent actions in favour of a single judge and patentees were obliged to include in their specifications at least one claim delineating the scope of their monopoly. The statutory revisions of 1907, 1919, 1932 and above all 1949, put the law more in the form of code and altered it in many details, with the patents Act, 1977; the British Patent system received the largest culture shock in its history. The Act provides machinery for collaborating in three Supra-national ventures viz., the new European Patent Office (EPO) under the European Patent Convention, 1973 (EPC), WIPO and Community Patent Convention, 1975 (CPC).

Evolution of Patent Law in India:

This History of Patent regime in India is a history of legislative enactments. Even during the British Rule, in 1859, the 'Act for granting exclusive privileges to inventors' [Act XV of 1859] was passed. The main aim of this Act was to enable the English Patent holders to acquire control over Indian markets. In 1872, the patent and Designs Protection Act, 1872 was passed followed by Inventions and Designs Act, 1888. While these enactments were ostensibly to honor the inventor's creativity, in effect they sought to protect the industrialist, manufacturer and importer. Arrangement or rearrangement of the already known device does not amount to an invention.⁵⁰

⁴⁹ Sherman and Bentley, *The Making of Modern Intellectual Property Law*, Cambridge University Press, at p. 338

⁵⁰ Ashok Soni, *Intellectual Property Law*, Snow White Publication, Mumbai, at p. 109

The Patents and Designs Act, 1911 was a comprehensive piece of legislation. It occupied the field in India, till the passing of the Patent Act of 1970. It provided for an elaborate administrative regime under the management of the controller of Patents and various time bound procedural requirements for processing of applications, filing of objections etc., It was only after several amendments and two committee reports that, the Act of 1970 was passed.

(a) Justice Bakshi Tek Chand Report, 1950: Considered the failure of the Indian Patent system to stimulate invention and encourage exploitation of new inventions for industrial purposes and suggested the following measures.

- (i) Compulsory licenses should be issued;
- (ii) An efficient machinery should be evolved to tackle the issue of abuses.

These recommendations were made part of the Indian Patents and Designs (Am) Act, 1950.

(b) Justice Rajagopala Ayyangar's Report, 1959: identified the essential pre-requisites for a nation to assimilate the benefits of a patent system. These features include the technological advancement of the country, need for encouragements of inventors and for rewarding them and the increasing emphasis on technical education in India and the growing number of Quality research institutes together with the rapidly increasing industrialization. The committee believed that the system of patent protection should be modified to suit the Indian environs. After careful deliberation, it suggested a three-pronged strategy viz.

- (i) Identification of inventions, which are to be protected;
- (ii) Determination either to prevent foreigners from taking patents in India or to make them work the patent in India;
- (iii) Determination to withstand any pressure to sign any international conventions. This was suggested so that India would develop its economy independently without any arm wasting from developed nations.

The Bill proposed by this committee was placed before the Lok Sabha in 1966 but the House was dissolved shortly thereafter and the Bill lapsed. The New Lok Sabha was presented with another Bill in August 1967 and after deliberation by the Joint Committee of the Parliament, the Patents Act, 1970 was passed.

Salient features of the Act of 1970:

This Act reflects the concerns of a developing country, balanced with the interests and needs of the inventors. Under the Act, the patents are granted to encourage inventions and secure that the inventions are worked in India on a commercial scale and fully reasonably practicable,

without undue delay; and patents are not granted merely to enable patentees to enjoy a monopoly or the importation of the patented article.

The Patents Act, 1970 recognized two kinds of Patent i.e., product and process patents. A product patent is one where the patent holder has the absolute right to produce and market the product. A process patent is where the exact process of the product is patented. Similarly, a product patentee has the right to make, use, and exercise, sell or distribute such article or in India, while a process patentee has the right to use or exercise the method or process in India.

Under the Act, only process patents were granted to vendors relating to food, medicine or drug and substances by chemical process. However, in the context of India the member of WTO accepting TRIPS Agreement, this scheme requires modification before 01.01.2005.

Exclusive Marketing Rights:

The Patents (Amendment) Act, 1999 added a new chapter i.e., Chapter IV-A consisting of Sections 24-A to 24-F, with retrospective effect from 01.01.1995, which deals with the Exclusive Marketing Rights (EMRs) to sell or distribute an article or substance in India. A claim for patent of an invention for a substance itself intended for use, or capable of being used, as medicine or drug,

Except (i) all medicines for internal or external use of human beings or animals, (ii) all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals

(iii) all substances intended to be used for or in the maintenance of public health, or the prevention or control of any epidemic disease among human beings or animals and

(iv) Insecticides, germicides, fungicides, weedicides and all other substances intended to be used for the protection or preservation of plants etc., can be made before the controller and the controller shall not refer such an application to the examiner for making a report till the 31st day of December, 2004. Where such application for EMR has been made in the prescribed form, the controller may directly refer it to an examiner. These provisions have been made with a view to an examiner. These provisions have been made with a view to give effect to the treaty obligations of WTO and TRIPS agreements.

The Present Regime relating to patents in India therefore is the Act of 1970, as supplemented / amended by

- (1) The Repealing and Amending Act, 1974.
- (2) The Delegated Legislation Provisions (Am) Act;

- (3) The Patents (Amendment) Act, 1999,
- (4) The Patents (Amendment) Act, 2002.
- (5) The Patents (Amendment) Act, 2005.

5.3 Law Relating to Copyrights in India

Only human beings are capable of creativity. They can be authors, composers, artists and designers for creating their original works. Generally, it is they alone, who will be entitled to enjoy the exclusive rights to do or authorize others to do certain acts in relation to

- (i) Literary, dramatic, musical and artistic works;
- (ii) Cinematograph film; and
- (iii) Sound recordings (programmes);

However, this list is not exhaustive and includes the neighbouring rights covering programs, and even computer software also.

Copyright is a unique kind of Intellectual Property the importance of which is increasing day by day. It does not fall in the category of industrial property. The basic areas that are covered under the copyright protection are in the field of printing music, communication, entertainment and computer industries. In fact, 'copyright' was the first Intellectual Property which received legal recognition in the world.⁵¹

The right which a person acquires in a work which is the result of his intellectual labour is called his copyright. The primary function of a copyright law is to protect the fruits of a man's work, labour, skill or test from annexation by other people. The law of copyright has to protect a man's copyright irrespective of his status as a family man or saint.

Subject matter of copyright

Generally, copyright protection subsists, in original works of authorizing fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorizing include the following categories:

- (i) Literary works e.g.; novel, stories, including fiction and non-fiction
- (ii) Musical works, including any accompanying words;
- (iii) Dramatic works, including any accompanying music;
- (iv) Pantomimes and choreographic works;

⁵¹ Vikas Vashishtha, Law and the Practice of Intellectual Property in India, Bharat Law House, New Delhi, at p. 203

- (v) Pictorial, graphic, and sculptural works,
- (vi) Motion pictures and other audio-visual works;
- (vii) Sound recordings; and
- (viii) Architectural works.

However, the Copyright protection for an original work of authorizing, in no way extends to any idea, procedure, process, system, method of operation concept, principle, or discovery, regardless of the form in which it is described explained, illustrated or embodied in such work. In other words, copyright protection extends only to the expression in the forms mentioned in the above 8 cases and not to the ideas. In most of the countries including the U.S.A., the Copyright covers, compilations, derivative works, unpublished works (manuscripts) and Government works.

National Regime Governing Copyright:

In India, the copyright Act, 1957 is the primary legislation relating to the copyright protection. This Act as amended by the Copyright (Amendment) Act, 1999 contains 79 sections and is supplemented by the Copyright legislation covering almost all the aspects of the copyright protection in India.

Object of the Copyright Act:

The hall mark of any culture is the excellence of arts and literature. In fact the quality of creative of any culture. Any art needs healthy environment and sufficient protection. What the law offers is not the protection of the interest of the artist or the author alone. Enrichment of culture is of vital interest to each society and the copyright law protects this social interest. The copyright Act has been enacted to check the piracy i.e. the infringement of rights under the copyright Act so that the fruits of the labour put by the author or the copyright owner may be enjoyed by the deserving authors and copyright owners and not the pirates, who indulge in plagiarism and other undesirable and illegal activities of theft of intellectual property.⁵²

Scheme of legislation:

The Copyright Act, 1957 is the primary legislation dealing with the protection of copyright in India. It contains 79 sections and supplemented by the Copyright Rules of 1958. The Act defines various terms like Artistic work, Author, Adaptation, Broadcast, Cinematograph

⁵² G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 157

Computer Programme, Copyright society, Dramatic work, exclusive Licence, Indian work, Infringing copy, Literary work, musical work, Performance, and Sound Recording in the clause contained in Section 2 of the Act. Apart from with the copyright its meaning, ownership of copyright, of the copyright owners, term of copyright its registration Act deals with the other aspects like licenses by owners of copyright, copyrights societies, performers and Broadcasting and organizations rights. The Act provides for a comprehensive scheme to deal with the infringement of copyright and civil for the same.

Copyright Law in India⁵³ :

The earliest statute law in India relating to copyright is the Indian Copyright Act of 1847 enacted during the East India Company's regime. It was passed by Governor General of India in council on 15th December to affirm the applicability of the law that obtained in England to India. Little information is available on how this legislation operated during the period 1847 to 1911. In 1911, the law of copyright was codified in England by the Copyright Act, 1911. The Imperial Copyright Act, 1911 was a "Law in force" in the territory of India immediately before the commencement of the constitution and along with its modified version continued in force by virtue of Art. 371(1) of the constitution. This Act was made applicable to all the countries under the British Dominion including India. By virtue of the power reserved to the Dominion legislatures to modify or alter its provisional laws, the Governor General of India enacted the Indian Copyright Act, 1914. Apart from the fact that the U.K. Act did not fit in with the changed constitutional status of India, which got its freedom in 1947, it became necessary to enact an independent self-contained law on the subject of the rights and obligations of authors and in the light of experiences gained in the working of the existing law during the few decades. New and advanced means of communications like broadcasting, litho-photography, etc., also called for certain amendments in the existing law.

The 1914 Act⁵⁴

The Indian copyright Act of 1914 was a modified version of the British Copyright Act of 1911. Some of its important provisions were (i) registration of the author's work was not necessary (ii) the author's right came into existence as soon as work was created (iii) protection was afforded not to ideas but to the material form in which the work was expressed, (iv) only original works attract the protection of copyright law although the

⁵³ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 103

⁵⁴ Ibid, at p. 104

general principle applied was that 'all laws which put a restraint upon human activity and enterprise construed in a reasonable and generous spirit. Under the guise of copyright, plaintiff and scholarship and all frontiers of human knowledge' (VI) the term of copyright protection was fixed as the lifetime of the author and 25 years after his death. For certain types of work such as joint works, posthumous works, government publications, engravings etc., and special periods were prescribed.

The 1914 Act was a brief enactment of 15 Sections, to which was added, the text of the British Copyright Act of 1911 (of England) as its first schedule, with a few omissions which were not applicable to India. The two Acts taken together constituted the copyright law in India. The Act 1914 prescribed penalties for infringement of copyright which was not considered a criminal offence. It authorized the destruction of infringing copies or their delivery to the copyright owner. It laid down that non registration of a book for copyright protection was not a bar to filing a suit or starting a civil proceeding against the party who had infringed copyright.

The Copyright Act, 1957⁵⁵

In 1947, India acquired its independence. Apart from the change in the constitutional status, the new developments and technological advances necessitated a comprehensive review of the subject. The result is the copyright Act of 1957. Apart from consolidating and amending the law as suited to India, the Act introduced a number of changes and new provisions.

Salient features of the Draft Bill: - Though the draft Bill follows generally in a rearranged form the main principles of the existing law, it has introduced several new features which are briefly indicated below:

(1) A copyright office is sought to be established under the immediate control of a Registrar of Copyright who shall act under the superintendence and direction of the Central Government. The principal function of the copyright office will be to maintain a Register of copyright in which may be entered, at the option of the authors, the names or titles of works the names and addresses of authors and owners of copyright for the time being, and other relevant particulars. Such Register will easily make available useful information to interested members of the public in regard to copyrighted works. In order to encourage registration of copyright, provisions made that no proceeding regarding infringement of copyright shall be instituted unless the copyright is registered in the copyright office. In addition to being in

⁵⁵ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 105

charge of the copyright office, the duties of the Registrar of Copyrights will be to entertain and dispose of applications for compulsory licenses and to inquire complaints of importation of infringing copies. An appeal to the copyright Boards is provided for against orders of the Registrar of Copyrights.

(2) Provision is made for setting up a copyright Board which will determine the reasonableness of the rates of fees, charges or royalties claimed by performing rights societies, consider applications for general licensee for public performances of works and will assess compensation payable under the Bill in certain circumstances. An appeal will lie to the High Court against the decisions of the copyright Board.

(3) The definition of “copyright” is enlarged to include the exclusive right to communicate works by radio-diffusion.

(4) A cinematograph film will have a separate copyright apart from its various components, namely, story, music etc.

(5) An author assigning copyright in his work allowed the option to reacquire the copyright after seven years but before ten years of the assignment on condition that he returns the amount received by him at the time of the assignment with interest thereon.

(6) The normal term of copyright is fixed to be the life of the author and a period 25 years after his death as against the existing term of the life of the author and a period of 50 years after his death. Shorter terms are fixed for anonymous or pseudonymous works, cinematograph films, mechanical contrivances, photographs, etc.

(7) Under the existing law, the sole right to produce a translation of a work first published in India is extinguished after ten years, unless a translation thereof is produced within that period. The draft Bill makes the right co-extensive with other rights arising out of copyright.

(8) Provision is made for the issue of general or special license for public performance of any work by means of a radio receiving set or a mechanical contrivance.

(9) A license may be issued to any library to make or cause to be made one copy of any book in which copyright subsists and which is not available for sale.

(10) Provision is made for regulating the activities of performing rights societies and also for controlling the fees, charges or royalties to be collected by them.

(11) Certain rights akin to copyright are conferred on Broadcasting authorities in respect of programmes broadcast by them.

(12) International copyright relations which are based on international treaties, will be regulated by specific orders to be made by the Central Government.

(13) A fair dealing with any work for the purpose of radio summary or judicial proceedings will not hereafter constitute an infringement of copyright.

In preparing the Bill, the British Copyright Report, 1952, the suggestions of the various Ministries of the Government of India, the State Governments, the Indian Universities and certain interested industries and associations who were invited to send their comments of the subject have been taken into consideration.

Amendments to the Copyright Act, 1957⁵⁶

The basic features of the copyright Act, 1957 conform to the provisions of the two international conventions on copyright, namely (i) the Berne convention and (ii) the Universal copyright convention. India is a member of both the conventions, which were revised at Paris in 1971. The revised Paris text provides for certain special concessions in favour of developing for translation and reproduction of foreign works required for educational purposes in accordance with the prescribed procedure. The revision of the two conventions was the result of a sustained effort on the part of developing countries. India played a leading role in the discussions leading to concession.

(a) 1983 Amendment: In August 1983, the parliament of India enacted the copyright (Amendment) Act, 1983 with the specific purposes licenses for translation and reproduction of foreign works required for instructional purposes; (b) providing adequate protection of author's rights; and (c) removing administrative drawbacks and other lacunae experience in the administration of the copyright Act, 1957. The under mentioned objects, mentioned in the proposed amendment Bills clearly explain the changes sought to be made by the 1983 Amendment Act.

The bill provides, among other things, for the following amendments to the Act to give effect to the above proposals, namely: -

(1) To provides for compulsory licensing for the translation of a foreign work after the expiry of three years from the publication of the work and if the translation of the work is in a language not in general use in any developed country, after the expiry of a period of one year from such publication if such work is required for the purpose of teaching, scholarship or research.

⁵⁶ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 110

(2) To provide for the compulsory licensing of the reproduction of any edition of a foreign literary, scientific or artistic work for the purposes of systematic instructional activities if, after the expiry of certain periods (which will vary depending on the subject-matter of the works) from the date of the first publication of that edition, the copies are not available in India at a price reasonably related to that normally charged in India for the same or similar work.

(3) It is proposed to provide that in the case of unpublished works where the author is either dead or unknown or the owners of the copyright cannot be traced, any person wishing to publish the material or a translation thereof may advertise his proposal and thereafter apply to the copyright Board for permission which, while granting such permission, would be fix an appropriate royalty. The royalty could be deposited in the Public Account of India or in any other suitable place for a specific period so that in the event of the owner of the copyright becoming known, he could claim it. It is also proposed that in the case of unpublished Indian the work is desirable in the national interest; a reasonable period would be given to his legal representatives to make necessary arrangements for the publication of the unpublished material. In case they fail to do so, the copyright Board is empowered to give permission to publish the works on payment of royalty.

(4) It is proposed to provide for the manner of assignments of copyright from authors to publishers and to empower the copyright Board to decide dispute arising out of such assignments which may extend to permitting the author to withdraw from the assignment.

(5) It is proposed to prescribe the term of copyright in works owned by bodies corporate as fifty years from the beginning of the calendar year next following the year in which the work is first published as in the case of Government works.

(6) Broadcasting authorities are also being permitted to translate foreign works for broadcasting for the purpose of systematic instructional activities.

(7) To provide for copyright in lectures, addresses, etc. delivered in public and for the publication of the entries made in Copyright Register.

(b) 1984 Amendment: - As the piracy has become a global problem due to the rapid advances in technology and has assumed alarming proportion all over the world, all the countries started to make efforts to meet the challenge by taking stringent legislative and enforcement measures. This problem of piracy and necessity for taking sufficient anti-piracy measures were also voiced by members of parliament at the time of the consideration of the Bill to bring in the 1982 Amendment.

In the contemporary world, mainly, there are three types of piracy, namely (i) piracy of the printed work; (ii) piracy of sound recordings, and (iii) piracy of cinematograph films. The object of the pirate in all such cases is to make quick money and void payments of legitimate royalties and taxes. The emergence of new techniques of recording, fixation and reproduction of audio programs, combined with the advent of video technology has greatly helped the pirates. The loss to Governments in terms of tax evasion also amounts to crores of rupees. In addition, because of the recent video boom in the country, it was found that many uncertified video films are being exhibited on a large. In view of this circumstance, it was proposed to amend the Copyright Act, 1957 to combat effectively the piracy that is prevalent in the country.

The Bill of the proposed 1984 Amendment contained the following objects:

- (i) To increase the punishment provided for the infringement of the copyright, namely, imprisonment of 3 years, with a minimum punishment of imprisonment of 6 months and a fine up to Rs. 2 lakhs, with a minimum of Rs. 50,000/-
- (ii) To provide for enhanced punishment in case of second and subsequent convictions.
- (iii) To provide for the declaration of the offence of infringement of copyright as an economic offence so that the period of limitation provided in the Code of Criminal Procedure, 1973, for offences will not be applicable to this offences;
- (iv) To specifically make the provisions of the Act applicable to video films and computer programmes;
- (v) To require to producers of records and video films to display certain information in the record; video films and containers thereof.

This 1984 Amendment came into force on 08.10.1984. Immediately thereafter, several with petitions seeking a stay of the amending law were filed in a number of High Courts across the country and in the Supreme Court of India. In Madras, a person owing a video library business filed a writ petition, challenging the constitutional constitutionality of this amendment. While admitting the petition granted a stay of certain provisions of the Amending Act pending disposal of the petition. When the Film Federation of India, the apex body of film producers, distributors, and exhibitors in the country, filed two petitions before the learned judge, one for imp leading themselves as a sporty and other for vacating the stay order, the single judge rejected both the petitions but direct that the applicant could be heard without being imp led as a party respondent.

On an appeal filed by the aggrieved applicant in *Film Federation of India v. Union of India*, a Division Bench of the High Court dismissed the appeal and observed:

“A legislative enactment is intended to give effect to some policy and implement it private litigants or persons who happen to be beneficiaries of such a policy enacted in the form of legislation can really have no say in a matter which is exclusively within the domain of the Government activity. It is primarily and wholly for the Government to support own legislation though in case the court wants some assistance the court can permit a party to intervene but that is for the limited purpose, of assistant to the court for deciding the dispute before it....”

Where the validity of a statute is challenged a private litigant, who happened to be the beneficiary of the policy envisaged under the Act cannot be allowed to put the law in motion but to make an attempt to defend a legislation, to which Government alone was necessary party to support its own legislation.

The court refused to accept a principle that a beneficiary of a statute is entitled to be heard in addition to the state for union Government as the case may be in support of a statutory enactment.

(c) 1994 Amendment⁵⁷

As it was observed that the anti-piracy provisions incorporated in the 1984 Amendment had not worked effectively, a working group was set-up in 1987 by the Government to study the provisions of the Act and to recommend suitable amendments, taking into consideration the advances made in communication technology such as video, satellite and other means of simultaneous communications and to fulfil India's obligations as a signatory to the Berne Convention and the Universal copyright convention. In July 1992, the copyright (Second Amendment) bill was introduced in the Parliament. The purpose of the proposed legislation was explained as under.

A joint committee of both Houses of Parliament, consisting of 45 members, examined the Bill taking into consideration the representations received from various organizations and individuals, the memoranda received from the general public and organization concerned in the Bill in its report submitted to the parliament in August, 1993. The Bill was ultimately passed by the Parliament in May, 1994.

⁵⁷ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 120

Salient features of the 1994 Amendment :- The Amending Act provided for (1) performers' rights protection covering any visual or artistic presentation made live by one or more performers (ii) copyright societies, seeking to promote collective administration of the rights authors, composers and other creative artists (iii) assignment of copyright by an author or artist to protect the interests of both assignor and assignee; and (iv) computer programmes, cinematograph films and sound recordings; protection.

A large number of the provisions in the amending legislation are self-explanatory and clarificatory in nature.

(d) 1999 Amendment⁵⁸

The copyright Act was again amended in 1999 which amended definition of 'literary work' meaning of copyright in respect of a computer programme, increased in respect of copyright of performs from 25 to 50 years, inserted certain new provisions pertaining to power of the Central Governmental to apply the provisions relating to Broadcasting organization and performers to broadcasting organization and performers in certain other countries, and power to restrict rights of foreign broadcasting organizations and performers.

5.4 Law Relating to Trade Marks in India⁵⁹

Every intelligent consumer purchases his goods or services from the commercial market only when he is satisfaction that the goods or services are of good quality and rheumatic. The manufactures, or supplier of goods makes it sure the although the goods produced by him are similar to the manufactured by others, their distinguishing marks a different. This is with a view to identifying the manufacture brand and quality of the goods or services produced by a particular maker or company. It is in this context that Trade marks play a very important role in the modern commercial market. The importance of Trademarks was recognized only after the Industrial revolution which enabled large scale production and distribution of goods and publicity through the printing media. Therefore, trade mark is essentially a product of competitive economy where more than one person competed for the manufacture of the same product which necessitated the marking of each manufacturer's goods by a symbol which distinguished similar goods made by others.

⁵⁸ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 121

⁵⁹ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 256

What is a trade mark: - A 'trade mark' means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others any may include shape of goods, their packaging and combination of colors.

Mark' includes a device, brand, heading, label, ticket name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof. This meaning and definition is not exhaustive and the definition is such that there is practically no limit to the combination of various types of marks.

A trade mark is a symbol which is applied or attached to goods offered for sale in the market, so as to distinguish them from similar goods and to identify them with a particular trader or with his successor as the owner of a particular trader or with his successors as the owner of a particular business, as being made, worked upon, imported, selected, certified or sold by him or them or, which has been properly registered under the Acts as the trade mark of a particular traders. It is a symbol consisting in general of a picture, label, word or words, which is applied or attached to traders' goods.

A party acquires exclusive right to protect its mark by virtue of priority in adoption, long continuous and exclusive user and any subsequent user of the deceptively similar mark or trade mark which is of confusing nature on account of sound and look is quality of infringement of the right of the prior user of the mark as his obvious motive is to trade and encash upon the goodwill and reputation of the prior user. Reputation or goodwill is not established in a day. It is gained over the years and at the huge cost of advertisement.

The definition of trade mark is very wide and means, inter alia, a mark capable of being represented graphically and which is capable of distinguishing the goods or service of one person from those of others. Mark includes amongst other things name or word also.

Trade Mark is essentially adopted to advertise one's product and to make it known to the purchaser. It attempts to portray period of time the mark may become popular. It is usually at this stage that other people are tempted to pass off their products as that of the original owner of the mark.

The Trade and Merchandise Marks Act, 1958 for the first time codified the law relating to trademarks and provided for registration of trademarks already in use and even those proposed to be used. Since 1958 it has been amended several times. In view of the developments in trading and commercial practices, increasing Globalization of trade and industry, the need to encourage investment flows and transfer of technology and systems, it has been considered by the parliament, necessary to bring out a comprehensive legislation on the subject. Accordingly, the Trade Marks Act, 1999 was passed to replace the Act of 1958.

A look at the statement of objects and Reasons leading to the passing of the Trade Marks Act, 1999 makes the following things clear. The Trade and Merchandise Marks Act, 1958 has served its purpose over the past four decades. It was felt that a comprehensive review of the existing law be made in view of developments in trading and commercial practices, increasing Globalization of trade and industry the need to encourage investment flows and transfer of technology, need for simplification and harmonization of trade mark management systems to give effect to important judicial decisions. To achieve these purpose, the present Act proposed to incorporate inter alia the following, namely:-

- (a) Providing for registration of trade mark for service in addition to goods. This is a novel feat introduced by the Act of 1999.
- (b) Registration of trademarks which are imitation well known trademarks, not to be permitted, been enlarging the grounds for refusal of registrant consequently, the provision for defending registration of trademarks have been propose be omitted.
- (c) Amplification of factors to be considered for defending a well-known trade mark.
- (d) Doing away with the system of maintain registration of trade-marks in Part-A and Part-B different legal rights, and to provide only a single register with simplified procedure for registrar and with equal rights.
- (e) Simplifying the procedure for registration registered user and enlarging the scope of permitting use.
- (f) Providing for an Appellate Board for speedy disposal of appeals and rectification applications which the Act, of 1958, lay to High Court.
- (g) Providing for registration of “collective marks” owned by associations etc: -
- (h) Transferring the final authority relating registration of certification trademarks to Registrar instead of the Central Government.
- (i) Providing for enhanced punishment for the offers relating to trade-marks on par with the present copyright Act, 1957, to prevent the sale of spurious goods:
- (j) Extension of application of convention countries include countries which are members of Group Union of Countries and Inter Governed Organization;

Law Relating to Designs in India⁶⁰

An article or goods used in commerce is distinguished not only by its utility but also by its visual appeal which plays an important role in influencing the buyer’s preference for the

⁶⁰ G.B. Reddy, Intellectual Property Rights and the Law, Gogia Law Agency, Hyderabad, at p. 343

article. Therefore, the design of an article and even the design of its packaging is important from the commercial view point. A shape, configuration, pattern or ornamentation can be a design, if applied by any industrial process or means. Products that are viewed friendly and which psychologically entice a consumer are said to be well designed.

The Primary object of the Act is to protect the shape not the function, or functional shape. The expression “design” does not include a method or principle of construction or features or shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform. In the instant case, the defendants were restrained from manufacturing selling, or offering for sale of the “pick-n-carry mobile” cranes that the substantial imitation or reproduction of the industrial drawings of the plaintiff or from using in any other manner whatsoever the technical know-how, specifications or drawings of the plaintiffs till disposal of the suit.

5.5 TRIPS Impact on Trademark in India

After the coming and enforcement of TRIPS agreement on universal level there are many changes made in the domestic legislation, out o that some of the significant changes are registration of unconventional trademark –now it is the duty of the researcher to make awareness through this research about the concept ,meaning and provisions of unconventional mark ..

Imagine you are on the Internet, visiting the website of ‘Starbucks Coffee’ and you can smell the aroma of freshly roasted coffee beans. Everyone, who thinks that these are just dreams of the future, is not quite aware of the latest state of engineering. By now, scientists work on the calculated use of smells and there is already a prototype called I-Smell that spreads fragrances and smells on the Internet.⁶¹Such technologies are being continually developed to gain an edge over others in the market and are being protected by Intellectual Property.

In the late 1990’s unconventional trade mark forms such as sounds (audible), tastes (gustatory), touches (tactile) and smells (olfactory) have become more important. The industry seeks to invent new products in order to present more sensory consumer goods to the overwrought customers. Although these possible trademarks have not yet reached a high acceptance among lawyers, jurists and the courts, but they are of common use in marketing and practitioners are familiar with the sensorial as an essential part of an innovative trademark and product strategy. Such new trademarks bear a high potential of economic

⁶¹ <http://www.inter-lawyer.com/lex-e-scripta/articles/trademarks-registration-smell- EU.htm>.

assets and of innovative creations, which are necessary for a growing and competitive market⁶²

A trademark is conventionally a distinctive sign of some kind, whether that sign comprises a name, word, phrase, symbol, design, picture, styling or a combination of one or more of these elements. A trademark is used by a business to identify itself and its products or services to consumers, and to set itself and its products or services apart from other businesses. The essential function of a trademark is to uniquely identify the commercial source or origin of products or services⁶³

In the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS') "any sign or combination of signs" may be registered as a trademark, although a condition may be imposed that the mark be visually perceptible. With the amendment in The Trade and Merchandise Marks Act, 1958 the Patents and Trademark Office now allows the registration of Unconventional Trade Marks in accordance with the provisions of The Trademarks Act, 1999 which is in accordance with TRIPS.

The Unconventional Trade Marks have acquired the recognition, which they hold today mainly due to two factors viz. International Conventions (like Trademark Law Treaty, TRIPS etc.) and low literacy area due to which the illiterates relate more and recognize goods by shape, colour etc⁶⁴

Unconventional Trade Marks should be inherently distinctive. The other requirements for registration of an Unconventional Trade Mark under the Act are:

- (i) It should be capable of being graphically represented⁶⁵
- (ii) It should be capable of distinguishing the good from other goods⁶⁶

Kinds of Unconventional Marks: -

(1) Colour Marks:

Colours are an important tool for marketers and, for many years, colours were considered almost impossible to protect as trademarks. While there continues to be a substantial amount of uncertainty on how to protect colours in particular in Europe, the more recent view expressed by the European Court of Justice (ECJ) does finally appear to recognize that colours can function properly as trademarks and can therefore be registered as such. This has

⁶² bid

⁶³ http://www.4th-media.net/legal/what_is_a_trademark.php.

⁶⁴ www.syamlaw.ac.in/doc/avantika.pdf

⁶⁵ Section 2(1)(zb); Trademarks Act, 1999.

⁶⁶ Section 9(1)(a); Trademarks Act, 1999.

brought the European law closer to the U.S. approach, which was laid down by the U.S. Supreme Court in its decision in the *Qualitex* case in 1995⁶⁷

There have been various instances where colour has been registered as a trademark. Textile World reports that Link Industrial Fabrics has registered the color blue which covers synthetic resinous fabrics for use in the manufacturer of bulk container in the nature of bags and wraps for industrial use⁶⁸

In the case of colours, the issue of distinctiveness is particularly complex, as colours by their very nature are limited in number and can seldom be said to refer to a product characteristic. Hence, one of the main arguments against the protection of colours is the fact that no trader should be able to monopolize for his own benefit the use of a single colour. This argument known in the U.S. as the ‘Theory of Depletion of Colours’ was until 1995 the main stumbling block under U.S. law to grant protection for colours and, although not referred to as such in Europe has influenced many European decisions at least until recently⁶⁹

On the argument that by protecting colours as trademarks there would be a risk of depletion of usable colours by competitors, the Supreme Court rejected once and for all this argument finding it too remote a possibility to justify a complete ban on the registration of colours. However, if in specific circumstances an issue of colour depletion did arise, the registration of a colour mark could be attacked on the basis of functionality, and this should be sufficient to protect competition⁷⁰

‘Single colour’ as a trademark -*Libertel Group BV v Benelux Markenbureau [2003] ETMR 63* In the *Libertel* case⁷¹ decided in 2003, the ECJ had to consider whether an application by *Libertel*, a Dutch provider of mobile telecommunication services, to register the colour orange as a mark for goods and services in association with various items of telecommunication equipment and services could be allowed. The application by *Libertel* simply claimed the colour orange without any reference to any colour code

In *Libertel* the court decided that colour, per se, may have a distinctive character and may be capable of distinguishing the goods and services of one undertaking from those of other undertakings. However, in general practice as traders generally use words as a means of brand identification, consumers are not in the habit of identifying the goods and services of

⁶⁷ www.iam-magazine.com.

⁶⁸ www.textileworld.com/news.htm

⁶⁹ *Supra* at fn 3.

⁷⁰ *Ibid*.

⁷¹ *Libertel Group BV v Benelux Markenbureau [2003] ETMR 63*

brands based solely on the basis of the product colour or their packaging. It follows therefore that colours are only in exceptional circumstances capable of denoting the origin of a product or service marks consisting of colour alone⁷²

In *Libertel*, the European Court of Justice has decided that to be represented graphically, colour marks must be presented in a way that is “clear, precise, self-contained, easily accessible, durable and objective”. This is commonly known as the ‘Sieckmann Criteria’ laid down in the *Sieckmann* case, which dealt with the possibility of registering smells as marks⁷³

Colours can be graphically represented if they are filed in the form of a written description of the colour(s) (e.g. dark blue) and are accompanied by the relevant code(s) from an internationally recognized colour identification system for e.g. Pantone®, RAL and Focoltone®. This is not an exhaustive list and the choice of which system to use is one for the applicant⁷⁴

As far as the Indian position is concerned only a combination of colours can be registered as a trademark and a single colour cannot be registered as a trademark.⁷⁵ This is primarily because they lack innate uniqueness and registration of a single colour as a trademark can lead to the exhaustion of that colour in a particular trade. For instance if Cadbury registers the colour purple as its trademark it will lead to the depletion of the colour from that particular trade.

A trademark may be limited wholly or in part to any combination of colours and any such limitation shall be taken into consideration by the tribunal having to decide on the distinctive character of the trademark. So far as a trademark is registered without limitation of colour, it shall be deemed to be registered for all colours⁷⁶

‘Combination of colors’ as a trademark

By and large buyers more readily identify combination of colours as a trademark and therefore they usually work better as a mark than a single colour. Distinctiveness in a particular colour is rarely found and granting one trader a monopoly in a colour puts other honest traders at a significant competitive disadvantage.

⁷² www.ipo.gov.uk/prevunconvent.pdf.

⁷³ *Ibid.*

⁷⁴ *Supra* at fn 12.

⁷⁵ Section 2(1)(m); Trademarks Act, 1999

⁷⁶ Section 10; Trademarks Act, 1999.

(2) Shape Marks:

The shape of any good cannot be registered as a trademark if it consists exclusively of the shape of goods which results from the nature of the goods themselves; or the shape of goods which is necessary to obtain a technical result; or the shape which gives substantial value to the goods⁷⁷

However, the word ‘Shape of Goods’ forms a part of the definition of the term ‘Mark’ under Section 2(1)(m) and ‘Trade Mark’ under Section 2(1)(zb) of the Trademark Act, 1999 and thus the shape of any good can be registered as a trademark provided it is not functional. This is based upon the ‘Doctrine of Functionality’, according to which features that are functional cannot be protected under trademark law and thus if a particular shape is such that it can achieve a technical result then it cannot be registered as a trademark. But, if an unlimited number of alternative configurations of shapes remain in the market, a feature with the functionality may still be protected as a trademark or trade dress⁷⁸

(3) Sound Marks:

Sound marks have been in practical use since the first drum signal was sent from village to village. The U.S. Patent and Trademark Office (USPTO) began registering unconventional sound marks more than 50 years ago. In 1950, the National Broadcasting Company (NBC) obtained a sound mark, for radio broadcast services in United States. The mark subsequently expired, and in 1971, NBC obtained registration of a sound mark for “3 chime like notes” to identify broadcasting services. The mark is used between television shows to identify the station⁷⁹

The 1999 Act defines trademarks in the following terms: “trade mark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.” The 2002 Rules define graphical representation to mean the representation of a trade mark for goods or services in paper form. Thus, it can safely be asserted that graphical representation is a sine qua non for TM Registration in India. Another important criterion to be satisfied is distinctiveness. The proviso to section 9 (1) of the Trade Marks Act, 1999, recognizing this concept of “acquired distinctiveness” inter alia provides that “a trade mark shall not be refused registration if before the date of application for

⁷⁷ Section 9(3); Trademarks Act, 1999.

⁷⁸ Supra at fn 4.

⁷⁹ Supra at fn 7

registration it has acquired a distinctive character as a result of the use made of it...". Similarly, Section 32 of the Act states that a mark which is wrongly registered (because it lacks inherent distinctiveness) shall not be declared invalid if the mark has acquired distinctiveness after registration and before commencement of any legal proceedings challenging the validity of such registration.

It is pertinent to note that with some of the TM Registries in India, amongst the various unconventional TMs, sound marks have found most favour. For instance, the Yahoo "yodel" and the sound mark for Allianz Aktiengesellschaft have been registered in India in the last two years. Though there has not been a determination on whether sonograms would qualify as graphical representation envisaged under the 1999 Act, the arguments that expert opinion is required for both forms of representation subsists, thus validating the use of sonograms. It has been reported that Yahoo had in fact submitted a notational reproduction of the sound along with its digital copy, which practice if adopted would constitute a constructive step towards effective TM protection, provided the same are made available on the TM Registry websites to give constructive notice to the public.

Although sound mark registration is not available globally, international branding for companies such as Deutsch Telekom, Nokia, Yahoo! and Intel includes registration of sound marks in multiple jurisdictions. Deutsche Telekom AG of Germany has registered its "five note musical score" in the United States, New Zealand and Germany. The "five-tone" Intel Corporation sound is registered in the United States, Australia and New Zealand⁸⁰

However, sound mark registration is problematic in two areas. First, reduction of a sensory mark to a written description is not very viable, as the simple listing of names of musical notes does not provide enough sensory information to experience the mark. Second, some registries accept a musical score of the mark and provide an image of the score in the database in addition to, or instead of, a written description of the mark. If a sound mark has been registered by music notation without a listing of the note pattern, the mark lacks meaning, particularly if the mark is not famous.⁸¹

With the technological developments the prospective trademark owners are getting increased opportunities to use sound marks. Perhaps the expanded use of unconventional sound marks in wireless technology and the Internet will increase the demand for global registration of sound marks as intellectual property.

⁸⁰ Ibid.

⁸¹ Ibid.

The Trademarks Act, 1999 neither recognizes nor restricts the registration of sound as a trademark. Thus, the Indian position with regard to sound, as a trademark is not very clear. But sound trademarks are now commonplace in the U.S., where Metro-Goldwyn-Mayer's mark of "a lion roaring" has long been registered for movies. Further, the Trademark law treaty also provides for recognition of sound as a trademark. However, TRIPS, EU directives, Community Trademark Regulation are all silent upon recognition of sound as a Trademark⁸² But for inclusion of sound as a trademark the definition of Trademark can be interpreted broadly and it does not exclude the possibility of sound being considered as a trademark provided, they are represented graphically and are capable of distinguishing the good from others. Generally, to meet the criteria for the registration of sound as a trademark its musical notations along with its sound recording is provided⁸³

(4) Olfactory/Smell/Scent Marks:

A scent mark was first recognized in 1990 in United States when plumeria scent added to sewing thread was registered as a trademark. Shortly after the U.S. plumeria case, the scent of fresh cut grass for tennis balls was registered as a European trademark, and the odour of beer for dart flights and the scent of roses for tyres were registered in the U.K. The second application was lodged by Sumitomo Rubber Co., which applied to register "a floral fragrance/smell reminiscent of roses as applied to tyres". This request was successful and became known as the first UK's olfactory trademark⁸⁴

However, TRIPS, EU Directive and Community Trademark Regulation do not address the issue of protection of scent marks. The Indian position is also similar and the Act does not expressly prohibit the recognition of olfactory marks, but if a smell is to be registered as a trademark it should be capable of graphical representation and should be distinctive of goods. To meet this requirement the chemical formula and sample of the smell is generally provided⁸⁵ The 2002 Rules also emphasize on the need for graphical representation. The 2002 Rules provide for registration of 3D marks by means of graphical representation of a maximum of eight views and a specimen, but is silent on other untraditional TMs. The Revised Trade Mark Manual (here-in-after 'the Manual') has welcomed the progress in the development of unconventional trademarks making distinctiveness a prerequisite for registration. Taking a balanced view, it has clarified that while untraditional marks such as

⁸² Supra at fn 4.

⁸³ Ibid.

⁸⁴ <http://law.nus.edu.sg/sjls/articles/SJLS-2005j-1.pdf>.

⁸⁵ Supra at fn 4.

colour and sound constitute categories capable of trademarks registration, registration may be granted only in cases where the use of the mark is exceptional and has acquired secondary meaning.

Though graphical representation and secondary meaning associated with untraditional trademarks are sine qua non, the principle of representation imposes the greater handicap for the registration of smell marks and analogously, taste marks. The Manual leaves ends loose with respect to smell marks, simply stating the possible affliction. In the event a practical and cost-effective solution is devised, eliminating the impediment to graphical representation, olfactory marks shall be registrable, obviously propped up with distinctiveness. Further, the TM forms presently do not provide clear indication of the nature of the mark purported to be protected since different standards have to be satisfied by traditional and untraditional TMs. Although the categories such as colour combinations and 3D marks have been provided in the forms, the unconventional marks are conspicuous in their absence in such categorization.

The Indian system has definitely garnered a lot from the experiences of the European Union and the United States, and while its decision to not grant trademark-ability status to olfactory and gustatory marks is based on practical impediments of today, the same may be subject to change, considering the growing commercial and advertising trends coupled with the leaps that technology is taking.

(5) Moving Image:

The Trademarks Act, 1999 has neither expressly excluded nor included the recognition of moving images as a trademark. However, like other trademarks, it should also fulfil the criteria that it should be capable of being graphically represented and should be distinctive of goods. UK has recognized the registration of a moving image, which was accompanied by a single photograph, described in words⁸⁶

Though the features of a product for which Unconventional Trademarks are provided are merely the secondary identifiers of origin but granting exclusivity for such features by providing for their registration prevents the rival traders from making their product similarly attractive. It is to grant a limited, but nevertheless quite significant, form of monopoly over a selling feature. Additionally, the new trademark forms bear a high potential of innovative goods and services. Therefore, a growing market also needs an innovative interpretation of the law. to the meaning and concept of unconventional trademark

⁸⁶ Ibid.

Domain name

As a result of the internet's popularity, Indian courts have dealt with a large number of domain name disputes in the last few years and the Courts have consistently applied the law relating to passing off to domain name disputes.

Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd

In a recent case, the Supreme Court of India held that domain names are subject to the legal norms applicable to other intellectual properties such as trademarks. While restraining a subsequent proprietor from using another proprietor's registered domain name, the Supreme Court considered various definitions under the TM Act and held that a domain name can be said to be a word or name which is capable of distinguishing the subject of trade or service made available to potential users of the internet. The facts of the case were that Satyam Infoway Ltd, a leading information technology services company and one of India's largest internet services providers is the registered proprietor of several domain names like www.sifynet, www.sifymall.com, www.sifyrealestate.com etc since June 1999. It claimed that the word 'Sify' was a coined word invented by using the elements of its corporate name, Satyam Infoway. However, another company, Sifynet, which started internet marketing business under the domain names, www.siffynet.net and www.siffynet.com from 5th June 2001 was restrained from. Permanent injunction granted against the defendants from using the domain names jrdtata.com, ratantata.com, tatahoneywell.com, tatayodogawa.com, tatateleservices.com, tatassl.com, tatapowerco.com, tatahydro.com, tatawestside.com, tatatimken.com or using any mark which comprises Tata or any other identical or deceptively similar mark. Permanent injunction granted on March 9, 2001.

Amul wins trademark case in Gujarat HC

Utterly Butterly Amul's name cannot be used by any other proprietor even if the company is selling goods other than that sold by the proprietor, who has registered the trademark. In a significant judgment, the Gujarat High Court has ruled that a registered trademark user has the right to restrict others using their trademark for different class or goods.

HC's judgment was in connection with a case where the Kaira District Co-operative Milk Producers' Union popularly Amul Dairy and the Gujarat Co-operative Milk Marketing Federation (GCMMF) had filed trademark infringement cases against two local shop owners, Amul Chasmaghar and Amul Cut Piece Stores in the district court. While Kaira Union owns brand Amul, GCMMF manages the brand.

It was on April 25, this year that the district court had passed an order that it was a clear case of infringement and restrained the two from using Amul trademark. Amul Chasmaghar however had challenged the district court's interim injunction in the HC, where justice D N Patel upheld ruling of the district court.⁸⁷

Yahoo Inc. V. Aakash Arora & Anr.

The first case that came up before the Indian Courts probably was the case of Yahoo! Inc. v. Akash Arora in which an attempt was made to use the domain name (yahooindia.com) for Internet related services. Yahoo alleged that by using a quite similar domain name and format to their domain name i.e. (yahoo.com), there must be a charge of deceit and "Passing off". Thus, by looking at the passing off doctrine, the court granted an injunction restraining the domain users from dealing in service or goods on the Internet or under the trademark/domain name (yahooindia.com).⁸⁸

Laxmikant V. Patel vs. Chetanbhai Shah

Facts: - Piramal Healthcare Ltd. is one of India's largest Pharma companies, has filed trademark infringement suit against Indore-based Endolabs Pharma marketing group in Bombay High Court. The defendants have infringed the products by name Agepyrine, Zypyrine, Elgipyrin and Easipyrin respectively which are the trademark of Piramal.

Analysis: - Piramal is a registered proprietor of mark "ESGIPYRIN" and the trade mark has been registered on January 22, 1974. The defendant is engaged in a deliberate, dishonest and fraudulent act of, counterfeiting and is passing of their products as that of the plaintiff. In case of *Laxmikant V. Patel vs. Chetanbhai Shah* reported in (2002) 3 SCC page 65 in paragraph 14 it was specifically held that "it is the usual practice to grant ad-interim relief in the nature of injunction once a case of infringement of trade mark is made out".

Judgment: - The Mumbai High Court has ordered an ex parte injunction against the defendant for infringing Plaintiff's trade mark for arthritic pain reliever Esgipyr⁸⁹

Novartis Case

On August 5, the Madras High Court rejected the claim of the multinational drug company Novartis, for a patent on a life-saving drug for leukaemia, or blood cancer. This chemical

⁸⁷ TNN, Sep 26, 2007, 12.28am IST

⁸⁸ Yahoo!, Inc. vs Akash Arora & Anr. on 19/2/1999

⁸⁹ Laxmikant V. Patel Vs. Chetanbhai Shah 2002(3 SCC Pg 65, Para 14

compound (imatinib mesylate) is marketed by Novartis as Gleevec in Europe and Glivec in India, and is used to treat chronic myeloid leukaemia. Novartis has already patented the drug in 35 countries.

At the heart of the case was the question of whether this drug is actually a new invention or simply a minor modification of an older, off-patent drug. TRIPS requires that patentable inventions be new and involve an "inventive step." Thanks to the active intervention of the Left parties at the time of the amendments to the Indian Patent Act, this Act also contains provisions ensure that only truly innovative advances will be patented. For example, section 3(d) of the act forbids the patenting of derivative forms of known substances unless they are substantially more effective than the known substance.

These provisions are intended as safeguards against well-known anti-competitive practices of patent holders. The exploitation of minor and insignificant changes to ask for a new patent is a very common practice among large drug companies, who frequently use this as a method of prolonging monopoly control over products that would otherwise move off the patent list, in a practice known as "ever greening" or "spurious patenting".

It was this provision in the Indian Patent Act which was challenged by Novartis. Indian drug companies, NGOs and other stakeholders have been arguing that the drug Glivec is simply another version of an old drug invented before 1995, which cannot be patented anymore and is now made generically in India. However, Novartis had argued that Gleevec is a major improvement on the older version and therefore "new" because it is supposedly more easily absorbed by the body.

A huge difference in price (and therefore profits) was at stake in this. Novartis sells Gleevec in India and similar countries at a price of 26,000 dollars per year per patient. Indian generic drug manufacturers offer the drug at less than one tenth of that price – and even that is considered far too expensive for the majority of leukaemia patients in a poor country.

Fortunately, the Madras High Court has rejected Novartis' claim to novelty, and thereby validated the decision of the Indian Patent Office not to grant a patent for Gleevec. So this is a significant victory for leukaemia patients in India, hospitals treating the poor with this drug, and other stakeholders.

CONCLUSION & SUGGESTIONS

CONCLUSION

The present-day scenario, the concept of intellectual property has assumed recognition and importance. Intellectual Property Rights has crossed national barriers and the issue has universal dimension. It is now unanimously agreed that the issue of Intellectual Property Rights shall be governed by an international code. Of late it has been recognized by community that science and technology need to be used for constructive and purpose and these developments need to be linked to the social and welfare of the masses.

In order to govern the issue pertaining to intellectual property, number of laws enacted but Indian experience with IP has not been satisfactory. The legal regime of IP in India has been deputation of the British laws and most of the Indian laws are virtual copies of the British legislation which have been passed from time to time.

The advent of globalization and emergence of the concept of free trade, the entire complex of trade relation between countries has undergone sea change. An understanding has emerged that for a better and progressive economy, trade needs to be free and national barriers should impediment. There is a need for international agreement on Intellectual Property Rights TRIPS agreement is indeed a very important international agreement which is laid down to provide minimum level of protection to intellectual property rights at international level.

The provisions of the TRIPS agreement are very broad and vague. Since many of the provisions are very broad and vague, they are subject to different interpretations. Different member countries make different interpretations of the TRIPS agreement. The TRIPS agreement is dominated by the lobby of developed countries, so the developed countries emphasize on the implementation of those interpretations, which suit to their economic benefits.

The socio-economic scenario of developed and developing countries are quite different. There are some provisions in the TRIPS agreement which does not suit to the Socio-economic scenario of the developing country like India, but still under pressure of developed countries, the developing country have to implement the provisions of TRIPS agreement, even if it does not suit to their socio-economic scenario.

TRIPS agreement enforces upon setting of only minimum standards of Intellectual Property Rights protection regime. However, the lobby of developed countries is trying to enforce strong Intellectual Property Rights protection regime. Developing countries need maximum

access to Western Technology to increase development. Technological information's should be provided with minimal restrictions. Strong Intellectual Property Rights protection would hamper economic development by forcing developing countries to pay for the use of intellectual property, which is held predominantly by individuals and co-operations in developed countries.

The patenting of pharmaceutical products is an example of the dominance of the lobby of developed countries upon the implementation of TRIPS agreement.

There is ambiguity in the TRIPS agreement regarding the patentability of medicines and drugs, because Article 27.2 of TRIPS excludes patentability of those products which affects the life and health of animals, plants and human beings. So, patentability of medicines and drugs is inconsistent to Article 27.2 of TRIPS agreement. The patentability of medicines and drugs has been imposed for the benefits of developed countries on the pretext of research and development of medicines and drugs issues. Pharmaceutical industries are one of the most profitable industries in the world. They spend more on advertisement rather than on research and development purposes. Patenting of Pharmaceutical Products certainly results in rise of prices of drugs and medicines. Such policies make life saving drugs very expensive which strikes at the Fundamental right to life and health as guaranteed under the Constitution of India.

Allowing patenting of seeds is yet another example of dominance of developed countries over the implementation of TRIPS agreement, product patenting of seeds strikes at the hearts of Fundamental right of livelihood of farmers.

Even patenting of microorganisms which is very useful creature for keeping pollution free environment affects fundamental right of healthy environment.

The provisions in TRIPS agreement for excluding patenting of life forms and other products affecting environment is not being implemented in totality. In fact, such provisions are being interpreted narrowly which could prove to be very averse to the existing environment. Some other scholars harbour apprehensions and express doubts in the intentions powerful tycoons and consider the new scheme of regulations as a mask legitimize imperialism and tool of exploitation of third world countries.

Some experts argue that in the name globalization a new global institutionalism is being introduced through WTO. Former national economies are replaced by a single world economy. The new set of regulations is being imposed binding multi-lateral instruments of the GATT, TRIPS, and Agreement under the umbrella of WTO their own enforcement

mechanism. These contain a pre-commitment strategy that binds present and future governments predetermined institutional and policies.

According to some scholars, this scheme of globalization and internationalism has major proportion of our people alienated from the main stream and helped a few become more richer, this widening the gaps between haves and have

Analytical study reveals that the newly emerging system has the tendency of empowering transnational corporations. In these system key decisions such as, what to wear to produce and where to market are all decided by the exigencies of the market. Hence the decisions are made by the transnational corporations, not national but global perspective. Raw materials are procured from the cheapest around the world, goods are produced in the countries which offer low cost of and they are marketed in the affluent markets around the world. It ultimately the transnational corporations and its owner have the best of all worlds.

SUGGESTIONS

There is a broad consensus that the TRIPS in its present form is not acceptable on grounds. It is not only detrimental to the interest of developing and the least developed countries but it violates the fundamental of people. Civil society across the world is mobilizing opinions to intervene in the TRIPS review. Even the United Nation has taken a strong position The August 2000, resolution sub, commission for protecting human rights states that ‘actual and potential exist between the implementation of the TRIPS agreement and the realization of social and cultural rights in relation to inter-alia, impediments to the transfer technology to developing countries, the consequences for the enjoyment of the right variety rights and the patenting of genetically modified organism, bio-piracy, reduction of communities (specially indigenous communities) control over their and natural resources and cultural values, and restriction on access to pharmaceutical and their implication for the enjoyment of the right to health. It is humbly submitted that by signing TRIPS agreement without sufficient in the parliament, and with no reservation clause, the government of India has committed a great blunder.

It is therefore necessary to review the whole issue in the light of experts and scholars’ opinions and if possible, at least some worked out at home and mobilize the contained discontent in the civil societies across the globe to intervene and apply diplomatic pressure to review the TRIPS clauses to suit the developing countries in general and Indian conditions in specific. The researcher therefore proposes the following suggestions

It is necessary to launch public campaign to organize public workshops and give signals that consensus is building up and civil society is gearing up for creating pressure for a meaningful change and modification one in the TRIPS clauses.

Members of the civil society, pressure groups NGOS and concerted citizens from all walks of life should be encouraged to come together to demand equality and justice from WTO. The specific demand should be on overhaul of the chapter which has provision that strike at the very heart of the fundamental rights of every citizen.

India should play a leading role in organizing a global review session and the TRIPS agreement along with other like-minded developing countries and workout a compressive document identifying the areas of strums, and claim changes to be negotiated. In the opinion of scholars and experts, following changes can be negotiated during such a review session.

The exceptions to patent ability under Article 27.3(b) need to be expanded. Members must have the discretion not to grant plant and animal patents that the current language of the article 27.3(b) allows. This discretion to refuse patents over life is essential to give members who are also CBD parties, the flexibility required to experiment with for implementing CBD. The human Rights, concerns have already been raised with respect to TRIPS Indian forum should take it on board and claim that the TRIPS clauses should be modified so that it does not violate the rights of ordinary citizens.

At national level the government should come forward with the innovative and favorable interpretation of the TRIPS provisions. It should question the legality of inconsistent provisions under the respective international laws and treaties; the government should be proactive in adopting the existing TRIPS flexibilities and also try to incorporate the other possible flexibilities surfaced due to stereoscope interpretation of the TRIPS provision keeping the supremacy of the human rights above business priorities.

Justice Krishna Iyer feels that in the guise of free trade our freedom is being traded. He feels that by passing the patent amendment bill to provide for exclusive marketing fights, EMRs, and consequently to provide for product patenting. India would be surrendering and succumbing to hidden agenda in the form of a corporate bill of rights to the detriment economic interest of the country

Justice B.P. Jeevan Reddy, feels that TRIPS agreement favors only multinational corporation (MNCH) and that the Indian government has not done enough home work to outer their onslaught. He further that the same western lobby which pushes for liberal entry of MNCs into the markets of developing countries is following a policy in the matter of entry of refugees and foreigners into the western he cites the case of wide difference between the

prices of medicines produced by Indian companies and those produced by MNCs and warns us that EMRs termite by the 1999 amendment and product pattering to be propertied from 2005 should be detrimental to the common man.

The arguments of justice Krishna and justice Reddy and justified arguments have a sound basis. It is sincerely hoped that certain steps would be taken by to protect the interests of the local industry and the common man in future associations.

It is gratifying to know that the India won its case against m/s Rice Tea Inc. of USA with regard to the patenting of Basmati Rice in USA. However American Company still continues to market the Basmati Rice, under the trade name Basmati, and Basmati, It is therefore expected that Indian government would take appropriate steps to protect its geographical indications from being exploited eleven the world.

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