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PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE IMPACT OF TRIPS

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by

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CHAPTER I

INTRODUCTION

Over the last 25 years, the international marketplace has witnessed the growing presence of high technology products and the development of new forms of technology.[1] In many ways, the global economy is becoming more dependent on technology. The intellectual property of these technologies is emerging as one of the most valuable commodities in the global market. The value of intellectual property lies in its exclusive use and licensing by the owner. Because intellectual property is essentially information, it has become very hard to protect in the current global economy as information transfer and communications have reached very high levels of accessibility and sophistication. Intellectual property protection involves a critical sector of the world economy in both developing and developed countries.[2]

This thesis focuses on the importance of intellectual property rights and its protection in the international arena. Coming from a developing country - India, I have always been fascinated with the area of international intellectual property rights protection because of its severe ramification on the economy and the social structure of developing countries. The impact of heightened protection of intellectual property rights has been a controversial issue between developed and developing countries for

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[1] Doriane Lambelet, *Internationalizing the Copyright Code; An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention,* 76 Geo. L. J. 467, 470 (1987)

[2] L. Peter Farkas, *Trade-Related Aspects of Intellectual Property: What Problems with Transition Rules, What Changes to U.S. Law, How Has Congress Salvaged 337?,* in The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation 463, 463 (Terence P. Stewart ed., 1996).

many years. In this paper, I have examined intellectual property rights, need for its protection, conventions, treaties and agreements present for the protection of intellectual property including the Trade Related aspects of Intellectual Property Rights (TRIPS) agreement that was introduced in 1995 and administered by the World Trade Organization. It also discusses some of the areas that has been significantly affected by TRIPS in the past five years and analyzes the impact of TRIPS on a specific industry - the recording industry.

Chapter I of this thesis defines intellectual property, intellectual piracy, intellectual property right's importance in international trade, and the need to protect intellectual property.

Chapter II deals with the conventions and treaties that existed prior to 1994 to protect various forms of intellectual property. It outlines their shortcomings and inadequacies, which demanded the need for a more comprehensive set of rules and regulations and an enforcing agency.

Chapter III deals with the outcome of the Uruguay round of GATT negotiations, i.e., the TRIPS (Trade Related aspects of Intellectual Property Rights) agreement. It examines the provisions of the agreements and the creation of the WTO (World Trade Organization). I have also examined couple of issues that show the difference of opinion between developed and developing countries and the significant hurdles in the implementation of TRIPS.

Chapter IV deals with intellectual property piracy and the impact of TRIPS in the recording industry. The piracy in the recording industry has traditionally been the most tangible and visible form of abuse of intellectual property protection. Therefore I have chosen to examine the impact of TRIPS on the piracy issue of this industry.

On conclusion, I have analyzed the shortcomings of the TRIPS agreement and provided a brief synopsis of the progress made in the area of compliance by developing countries as mandated (January 1, 2000) by the agreement.

CHAPTER II

INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS AND THE NEED FOR PROTECTION

A) Intellectual Property

Human creativity, the development and use of new ideas and new technologies, is now recognized as a primary element in the growth of modern economies.[3] The fruits of this creativity that are the new ideas and technologies are termed as Intellectual Property[4] which is a form of property and is as valuable as land or capital. When we talk of property the picture that comes to mind is the familiar tangible property that has existence and can occupy space[5].

Now, in this age of information[6] we talk of property that does not have an existence. Property that is intangible in nature is a product of the mind[7] like a piece of music or the art of making steel.[8] It is knowledge and information. It is the state-created legal right in knowledge, technology and innovation.[9] It is intangible personal

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[3]. Michael R. Gadbaw and Timothy J. Richards, *International Property Rights, Global Consensus, Global Conflict?,* 1. (1988)

[4] Id.

[5] Marshall A. Leaffer, *Protecting United States Intellectual Property abroad: Toward a New Multilateralism,* 76 Iowa L. Rev, 275 (Jan. 1991).

[6] Id.

[7] Id. at 279.

[8] Id.

[9] Alan S. Gutterman, *The North South Debate regarding the Protection of Intellectual Property Rights,* 28 Wake Forest L. Rev. 89 (spring 1993)

property.[10] It is an asset created by the discovery of new information that has commercial or artistic usefulness to society.[11] Its economic value depends on the quality and amount of the information supplied together with the demand for its services.[12]

An Intellectual Property right is defined as "Any right existing that is recognized under, inter alia, patent, trademark, copyright, trade secret or mask work regimes"[13]

The inventors and developers of such intellectual property are given exclusive rights to use that property for a particular period of time[14]. These rights "Protect the innovations which are the result of extensive research, development and marketing efforts and of artistic and intellectual creativity".[15]

Intellectual property law refers to a specialized body of law that protects original ideas, creative forms of expression, new discoveries, inventions and trade secrets. It encourages innovation by rewarding the persons responsible for such discoveries[16].

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[10] See Marshall A. Leaffer, supra note 5.

[11] Id.

[12] Id.

[13] Clark W. Lackert, *International Efforts Against Trademark Counterfeiting,* COLUM. BUS. L. REV. 161, 162 n.1 (1988).

14 For a review of the history of intellectual property protection see the chapter "Economic Theory and Intellectual Property Rights" in Robert P. Benko, Protecting Intellectual Property Rights (Washington: American Enterprise Institute for Public Policy Research, 1987)

[15] U.S. Council for International Business, *A New MTN: Priorities for Intellectual Property.* (New York, 1985), page 3.

[16] See Marshall A. Leaffer, supra note 5.

The three basic bodies of intellectual property laws are trademark law which confers rights on symbolic information[17] and prohibits product imitators from passing off goods of another as theirs, patent law confers rights on scientific information[18] and provides a limited monopoly for new and inventive products and processes[19] and copyright law confers rights on expressive information[20], and protects a broad range of artistic, literary and musical works of authorship.

Over the last several years there has been a lot of activities taking place in the field of intellectual property. The world is developing at an extremely fast pace. The distance between nations had been reduced to a large extent through communication and technology. This and advanced transportation facilities have made it possible for data and information to spread at the speed of light to the different parts of the world. Though intellectual property rights are intangible, they are among the most contentiously debated subjects in international trade today.

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[17] Trademark law protects words, names, symbols and devices that distinguish goods and services from other, similar goods and services. In the United States, trademark rights are acquired upon use of the mark. In many other countries, trademark rights are established by registration. Infringement of trademark occurs when a third party uses a mark on the same or similar goods or services when the consumer would be confused about the origin of these goods or services. See Leaffer, supra note 5 at 22.

[18] Patent law confers rights on new, useful and obvious processes and products. It excludes others from making, using or selling the patented invention for 17 years. Patent law provides a more exclusive monopoly than copyright law. Unlike a copyright and a trademark, patent is more difficult to obtain. To be patented, an invention must only be new and original, but it must also be an improvement over the prior art such that one with ordinary skill in that art could consider the invention obvious. For the general requirements of patentability, see 35 U.S.C. §§ 101, 103 (1984).

[19] Id.

[20] Copyright law protects original expression. It does not extent to the ideas that the creator expresses. 17 U.S.C. § 102(b) (1976). Nor does copyrights protect expression when the idea and expression have merged. See Marshall A. Leaffer, supra note 5, Understanding Copyright Law §§ 2.12-13 (1989).

B) Intellectual Property Rights and International Trade

Until a few years ago the international protection of intellectual property rights was mainly of concern to only a few lawyers trained in the field. But now, this issue has risen up to the top of the economic and trade policy agendas.[21] For a long time international trade and intellectual property issues were relegated to distinct and separate spheres. Each was based upon its own set of domestic laws and international agreements.[22] In recent years there have been a lot of discussions and debates on the issue of the linkage between intellectual property and international trade. There are several reasons for this linkage. Technology and innovation have become the order of the day and it has become a major source of revenue to the technologically advanced and information producing countries such as the United States. There has been an increase in the export of intellectual property protected products from ten percent to well over 25% and also through the licensing of intellectual property.[23] Transfer of technology through the licensing of information constitutes a major part of world trade and has become vital to developed nations whose economies are dependent on products of the mind[24]. For example intellectual property is one of the few areas in which the United States has a trade surplus in terms of world trade[25]. It has a comparative advantage over the rest of the world in this field. Comparative

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[21] See Robert P. Benko, supra note 14.

[22] R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 226 (1988).

[23] See the comments made by Mr. David Beier, Counsel, Committee on the Judiciary, United States House of Representatives, International Trade & Intellectual Property: Promise, Risks and Reality, 22 VAND. J. TRANSNAT'L L. 333 (1989).

[24] Tara Kalagher Giunta, *Ownership of information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327 (1993-94).

[25] Janet Hamilton, *What's going on in Intellectual Property Law, American Society of International Law Proceedings*, March 23-31, 1990.

advantage has been the cornerstone of free trade theory and it enables certain countries to do certain things better than most other nations[26].

Along with the increasing importance of intellectual property, technology has improved to such an extent that it allows for easy reproduction and copying of works protected by intellectual property rights. In addition, the cost of research and development necessary for the production and innovation of technology has created an interest in the producing countries to obtain higher levels of return.[27]

All of the above mentioned reasons have contributed to the linkage of intellectual property issues with international trade. More importantly, however, the US and some other industrialized countries that have significant comparative advantage in technology believe their retention of the major share of the global market in the 21st century depends not only on their ability to stimulate technology and innovation, but also on efforts to ensure an orderly diffusion of that technology through appropriate international legal machinery.

C) Intellectual Property Rights and Piracy

The term intellectual piracy has no settled meaning in customary international law. It is a very vague term and has no definite legal definition[28]. In the broadest

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[26] Professor Wood provides an interesting analysis of the comparative advantage theory in the context of antidumping and countervailing duty laws in her recent article. Wood, *"Unfair" Trade Injury: A competition-Based Approach*, STAN. L. REV. 1153 (1989)

[27] Id.

[28] Simone, *Protection of American Copyrights on Books in Taiwan*, 35 J. COPYRIGHT SOC'Y 115, 116 n.1 (1988)

sense it can be used to mean the unauthorized and uncompensated duplication of another person's intellectual efforts for commercial purposes[29].

The incidence of intellectual piracy in the world has increased exponentially in the past decade[30]. This can be attributed to several reasons, the major ones being that the reproduction technology has improved and the cost of reproducing something is much less expensive than the cost of producing it. This results in the creator of the product being put in a severe disadvantage having to compete with a third party user who has not borne the cost of research, development and marketing of than product[31].

Piracy can also threaten the health and safety of people, since defective copies of chemicals, pharmaceuticals, and parts for transportation vehicles have caused physical harm[32].

The most important issue regarding piracy is the fact that while piracy is viewed as a legal wrong and unlawful act by most countries, it is not considered so by some others. In fact in some countries, especially the developing countries, the government and the laws allow for the copying and selling of products[33]. Therefore even the usage of the word piracy with respect to certain countries would be a misnomer since their laws allow for such activities. For example, the Indian patent

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[29] See J.H. Reichman, *Intellectual Property in International Trade: Opportunities & Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L. 747, 775 (1989)

[30] See Robert P. Benko, *Protecting Intellectual Property Rights, Issues & Controversies* (1987)

[31] See Marshall A. Leaffer, supra note 5 at 278.

[32] Natalicchio & Michael McAtee, The Piracy of Ideas (Summer 1989) GEN. ACCT. OFF. J. 38, 41 (1989)

[33] Janet H. MacLaughlin, Timothy J. Richards & Leigh A. Kenny, The Economic Significance of Piracy, 89.

law excludes pharmaceutical products from patent protection[34] and therefore authorizes the sale of which, according to US terminology is illegal. In this context the country most affected by the illegal use of intellectual property is perhaps the United States.

The United States in its progressive shift to an information based economy[35] and being one of the largest producers of information, has become increasingly vulnerable to piracy and otherwise inadequate protection of its intellectual property in foreign countries[36]. Thus the protection of intellectual property rights is imperative in order to protect wide range of US exports which are dependent upon some form of intellectual property and which are vital to maintain the competitive edge that the US holds with respect to other countries[37].

Today, a US company spends a lot of money developing an innovative product and before it can get the returns for its investment, it has to helplessly watch pirated copies of its product (such as the latest Hollywood blockbusters) flood the market[38].

The problem of piracy has also cost the United States economy billions of dollars and thousands of jobs each year[39]. The United States, being the most affected

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[34] See Indian Patent Act, 1970, section 5.

[35] See Reichman, supra note 29 at 775.

[36] See Giunta, supra note 24.

[37] See generally John T. Masterson, Jr., *Protection of Intellectual Property Rights in International Transactions*, Corporate law and Practice Course Handbook Series, (October 1994)

[38] Louis A. Schapiro, *The Role of Intellectual Property Protection and International Competitiveness*, 58 ANTITRUST L. J. 569, (1989)

[39] See generally Hoffman, Marcou & Murray, *Commercial Piracy of Intellectual Property*, 71, J. PAT. TRADEMARK OFF. SOC'Y 556 (1989)

as a result of piracy and inadequate protection of intellectual property, has set out to remedy the situation. Though it realizes that this is not an easy task, the fact that it is one of the highly developed countries and that a lot of other countries depend on it for their international trade, is a factor that weighs in its favor.

D) The Need for Protection of Intellectual Property Rights

Today the intellectual property system is being challenged by the rapidly increasing new information and communication technologies, which demand that stronger and improved protection be afforded in order to allocate both rights and rewards[40].

Intellectual property protection involves a critical sector of the world economy in both developing and developed countries.[41] If intellectual property rights were not protected, a research or pharmaceutical company – typically based in developed countries, for example, which has invested large sums of money for developing new products, would eventually loose money, because there would be nothing preventing other companies/countries from pirating that research company's new product. As a result, the pirating company/country would reap the monetary rewards from marketing the new product while not incurring research and development costs.[42] With such a high capital risk environment, research companies would not have any incentive to create and develop new products.[43] Therefore, to guarantee the continued

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[40] Id at 35

[41] Id.

[42] Myles Getlan, TRIPS and the Future of Section 301: *A Comparative Study in Trade Dispute Resolution*, 34 Colum. J. Transnat'l L. 173, 175-76 (1995).

[43] Farkas, supra note 2, at 463.

production of new products, it is necessary for international and multinational agreements to protect intellectual property rights, ensuring that the entrepreneurs receive the monetary rewards associated with the distribution and sale of their products.[44]

In developing nations, intellectual property protection is a necessary element to achieve developed status.[45] For instance, in developing countries, well known indigenous methods and plant species have been patented by US corporations causing the developing countries and its businesses to lose a great share of the international market. In developed countries, intellectual property laws are necessary to ensure that piracy and other infringements on intellectual property rights do not undermine a developed country's business expenditures on research and development.[46]

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[44] Id.

[45] Id.

[46] See Getlan, supra note 42, at 175-76

CHAPTER III

PRE-TRIPS AGREEMENTS AND CONVENTIONS FOR PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

Recognizing the important of protection of intellectual property rights, since World War II, many multilateral conventions and international organizations have been created in recognition of international trade interdependence in an effort to manage that interdependence and protection of intellectual property rights. These mechanisms have not always been successful in attaining their stated objectives, largely because of problems created by cultural, political, and economic differences, issues of state sovereignty, and shortsighted self-interest. The value of the conventions and organizations should not be discounted, however, for they have established a focal point for negotiations, which have often yielded beneficial results to the international community.

A) The Paris Convention

The Paris Convention[47] concluded in 1883 for the Protection of Industrial Property is the first major international treaty designed to help the people of one country obtain protection in other countries for their intellectual creations in the form of industrial property rights, known as, inventions (patents), trademarks and industrial designs. The Paris Convention entered into force in 1884 with 14 member States, set

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[47] Paris Convention for the protection of Industrial Property, opened for signature, March 20, 1883, T.S. No. 379, as revised at Stockholm, July 14, 1967, 24 U.S.T. 2140, 828 U.N.T.S. 305 (hereinafter Paris Convention).

up an International Bureau to carry out administrative tasks, such as organizing meetings of the member States.

The Paris Convention on the Protection of Industrial Property is the oldest and most important treaty with respect to industrial property rights[48]. It contains two basic principles of international law that members must enforce in their reciprocal relations. The first is the national treatment principle, discussed generally in Article 2 and specifically as it relates to trademarks in Article 6, sections 1 and 2.[49] The second is the principle of independence of rights, as embodied in Article 6, section 3.[50]

i) National Treatment Principle

The principle of national treatment is applicable to all industrial property rights.[51] The principle generally states that a member state may not subject foreigners benefiting from the Paris Convention to higher industrial property protection standards than those applicable to its own citizens.[52] In addition, it is not necessary to justify that a trademark has been registered in the country of origin prior to registering it in another member state.[53] The national treatment principle was the first elementary and efficient rule aimed at facilitating the international protection of industrial property rights.[54]

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[48] Annette Kur, *TRIPs and Trademark Law, in GATT to TRIPs, The Agreement on Trade-Related Aspects of Intellectual Property Rights* 93, 96 (Fredrich-Karl Beier and Gerhard Schricker eds. 1996).

[49] See Paris Convention, supra note 47, arts. 2, 6(1)-(2).

[50] Id. art. 6(3).

[51] Stephen P. Ladas, Patents, Trademarks and Related Rights: National and International Protection (1975), page 269.

[52] See Paris Convention, supra note 47, art. 2.

[53] Id. art. 6(2).

[54] See J.H. Reichman, supra note 29 at 844.

ii) The Principle of Independence of Rights

Under the principle of independence of rights, a trademark granted in a member state is independent from those that already exist in other member states for the same object, including in the country where it was first protected.[55] The nullification, refusal, or transfer, for example, of the trademark in one member state has no influence on the rights protected in another member state.[56]

B) The Berne Convention

The Berne Convention[57] for the Protection of Literary and Artistic Works is the primary international treaty providing international protection for copyrights.

The Berne Convention is the international intellectual property treaty with the longest history, the greatest number of adherents, and the highest level of protection.[58] It strives to protect the rights of authors in their literary and artistic works, including books, pamphlets, writings, musical compositions, designs and scientific works.[59] The Berne Convention has been periodically modernized through six

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[55] See Paris Convention, supra note 47, art. 6(3). Article 6(3) of the Paris Convention states: "A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin."

[56] Joanna Schmidt-Szalewski, *The International Protection of Trademarks After the TRIPS Agreement*, Fall, 1998, 9 Duke J. Comp. & Int'l L. 189.

[57] Berne Convention for the Protection of Literary and Artistic Works, Berne Copyright Union Item A-1 Berne Convention, Additional Articles and Final Protocol, Sept. 9, 1886, 3 UNESCO Copyright Law & Treaties of the World (hereinafter Berne Convention).

[58] Ralph Oman, *The Impact of the Berne Convention on U.S. Copyright*, 455 PLI/Pat 233, 237 (1996).

[59] Joseph Greenwald & Charles Levy, *Introduction to Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, Paris Text -- July 24, 1971, as amended* (1989), *in* Basic Doc. Int'l Econ. L. I. 711 (Zamora & Brand eds., 1990).

revisions, and was last amended in 1979.[60] To date there are over 115 member states, and the last three important countries to accede to the Berne Convention, more than 100 years after its enactment, were the United States, China, and Russia. Protection against the widespread piracy of foreign works was the underlying cause of the enactment of the Berne Convention at the end of the 19th century.[61]

There are 3 concepts set forth in copyright protection under this convention, which are the recognition of national treatment[62], providing of automatic protection for other members without any preconditions[63]. The United States requires certain formalities to be met before granting copyright, such as notice and registration,[64] but since the Berne Convention the United States may not require foreigners to meet those formalities. The third concept is the independent of National Protection in the sense that an author does not have to meet the formal requirements in his country in order to get protection in another Berne Union state.[65]

The convention establishes a system of rights and obligations that protects and furthers the dissemination of intellectual works in the international arena. The Convention requires minimum standards of protection in addition to national treatment. The minimum term of protection is the author's life plus 50 years.

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[60] The Berne Convention was revised in Paris in 1896, Berlin in 1908, Rome in 1928, Brussels in 1948, Stockholm in 1967 and Paris in 1971 and amended in 1979 (amendment in 1979 concerned only administrative matters and did not address procedural or substantive aspects of protection).

[61] Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS. 9, 17 at 13 (1986).

[62] Berne Convention, supra note 57 art. 5(3).

[63] Id art. 5(2).

[64] 17 U.S.C. §401-411 (1982).

[65] Susan B. Stanton, *Development of the Berne International copyright Convention and Implications of United States Adherence*, 13 Hous. J. Int'l.L. 168(1990).

Throughout its century of existence, Berne has proven to be a remarkably dynamic agreement capable of adapting to the dramatic changes in the world's economy and technological innovations. The Convention was originally adopted in the era before radio, television, motion pictures, word processing, and computers, but it has kept pace with these new developments. The advances make new creative works possible, but they also provide a broader ability to copy, modify, and use creative works without the consent of the copyright proprietor.[66] One expert noted that: "Berne offers the double advantage of high minimum standards of protection combined with flexibility in the interpretation and application of copyright principles -- both matters of especial importance for new uses of works and for works of new technology generally."[67]

C) Rome Convention

The Rome Convention came into force on April 1, 1991,[68] and currently has 67 members. The Rome Convention was formally known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. The Rome Convention protects sound recordings and performers' rights, for a minimum of twenty years counted from end of the year in which fixation, the performance, or the broadcast took place.[69] "The provisions of the

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[66] Senator Patrick Leahy, End Note: *Time for the United States to Join the Berne Copyright Convention,* Winter 1988, 3 J.L. & TECH. 197.

[67] See U.S. Adherence to the *Berne Convention:* Hearings Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 99th Cong., 1st & 2nd Sess. (1985-1986) at 306 (statement of Morton Goldberg, Information Industry Association).

[68] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961, 496 U.N.T.S. 44 (hereinafter Rome Convention).

[69] Id at 52.

Rome Convention are self-executing, with international disputes to be decided by the ICJ unless the parties involved in the dispute agree to another mode of settlement".[70]

Other conventions, treaties and agreements include the Geneva conventions, for the protection of producers of phonograms against unauthorized duplication of their phonograms, the Madrid Agreement for the repression of false and deceptive indications of source on goods etc.

All the above-mentioned conventions and agreements provide only the minimum standards of protection guaranteed in the international arena. Individual countries can, and often do, provide for higher levels of protection within their borders.[71] The logic behind this approach lies in the fact that wide disparities existed among the various national standards that predated the conventions. Thus, these treaties represent the most basic level of protection, which all members could agree to respect.[72]

These treaties and conventions and many others operated independently and without any institutional oversight. A necessary consequence of this independence was that, in order to enforce their convention-based rights, intellectual property holders had to seek redress in the national court system of a contracting party.[73]Despite these difficulties, membership in international conventions grew steadily

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[70] Susan M. Deas, *Jazzing Up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law*, 20 Hastings Comm. & Ent. L.J. 568 (1998).

[71] Susan A. Mort, *The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights*, Fall 1997 8 Fordham I. P., Media & Ent. L.J. 173.

[72] Id.

[73] Id.

throughout the twentieth century, in large part due to the reciprocal benefits gained through participation.[74]

D) World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization (WIPO)[75] is an intergovernmental organization and was established on July 14, 1967, by a convention, which entered into force on April 26, 1970, and was made a specialized agency of the United Nations[76] in 1974[77] with headquarters in Geneva, Switzerland. The United Nations created WIPO as a specialized agency designed to promote the protection of intellectual property worldwide and to administer the major international conventions under the leadership of the United Nations Director General and Secretariat.[78] WIPO administers 21 treaties. The current membership in WIPO is 175 as of September 1, 2000, [79] which represents almost 90 per cent of the world's

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[74] See Contracting Parties of Treaties Administered by WIPO (visited November 1, 2000) < http://www.wipo.int/treaties/index.html >.

[75] For an overview of WIPO, see Frank Emmert, Intellectual Property in the Uruguay Round - Negotiating Strategies of the Western Industrialized Countries, 11, MICH. J. INT'L L. 1337-393; Michael K. Kirk, WIPO's Involvement in International Developments, 50, ALB. L. REV. 601 (1986).

[76] WIPO's General Assembly is a representative body having delegates from each of its 116 member states.

[77] See WIPO, General Information www.wipo.int.

[78] Monique Cordray, *GATT v. WIPO*, 76 J. Pat. & Trademark Off. Soc'y 121, 122 (1994).

[79] Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos,

countries. This reflects the increasing importance and relevance attached to the work of the Organization.[80]

Since intellectual property is territorial in nature and scope, like other forms of property, the use, sale or production of a product in one country, which is protected in another, does not necessarily violate the intellectual property laws in the second country. Therefore the innovators are required to file for protection in every product. The international conventions administered by WIPO help in such filing procedures.

i) Objectives of WIPO

The main objects of WIPO are to promote the protection of intellectual property throughout the world, and to administer the international intellectual property unions such as the Berne Convention and the Paris Convention[81]

The WIPO is mainly concentrated on specialized areas of patent, copyright and trademark protection. It is most ideally suited for standardizing and regulating

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Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, Zimbabwe.

[80] World Intellectual Property Organization: http://www.wipo.int/about-wipo/en/index.html?wipo_content_frame=/about-wipo/en/gib.htm (visited November 1, 2000)

[81] Convention establishing the WIPO, opened for signature July 14, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3, A3(iii) ("WIPO Convention")

international definitions of intellectual property rights.[82] It provides assistance to the developing countries in gaining access to patented foreign technology and locating technological information.

WIPO being the secretariat for major international intellectual property agreements[83] monitors adherence to these agreements, which include the Berne Convention[84] (protecting copyright), the Paris Convention[85] (protecting patents and trademarks), the Rome Convention and the Madrid Convention.[86]

ii) Shortcomings of WIPO

Though the main objective of the WIPO is to promote the protection of intellectual property rights, it fails to provide adequate norms covering important subject matter areas and flexible dispute resolution mechanisms when member states do not meet their treaty obligations.[87] In addition to the incompetence of WIPO to provide for effective dispute settlement procedures and enforcement mechanism there were many other areas where WIPO was not effective in the context of newly emerging technologies. The existing Intellectual property laws did not provide protection for them (for example semi-conductor chips). Thus these intellectual property goods could be very easily copied and sold without the permission of the

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[82] See Monique Cordray, supra note 78.

[83] See generally WIPO Treaty, supra note 77 for a detailed list of agreements under the authority of WIPO; see Frank Emmert, *Intellectual Property in the Uruguay Round - Negotiating Strategies of the Western Industrialized Countries*, 11, Mich. J. Int'l L. 1338-39.

[84] See Berne Convention, supra note 57.

[85] See Paris Convention, supra note 47.

[86] WIPO administers 21 international treaties. (two of those jointly with other international organizations).

[87] See Marshall A. Leaffer, supra note 5.

owner, since there was no protection. The conventions have failed to keep pace with the technological advances.[88]

Finally, not all countries are members of WIPO or the conventions that it administers and therefore are not subject to the convention rules. Thus, disenchantment with the WIPO by the US and other developed countries led to the shift of focus for intellectual property rights protection turned towards the General Agreement on Tariffs and Trade (GATT).[89] GATT was believed to provide the most logical and promising vehicle for change.[90] After much debate and effort from the industrialized countries, the issue of intellectual property protection was placed on the agenda for the Uruguay Round[91] of negotiations in September 1986.

E) General Agreement on Tariffs and Trade (GATT)

The GATT is an international arrangement in which more than 90 countries participate in multilateral trade negotiations involving ways to encourage free trade among nations. It refers to both an international institution concerned with trade between nations and a legal document of the same name.[92]

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[88] Robert P. Benko, *Intellectual Property Rights and the Uruguay Round*, 11 World Econ. 217,221 (1988).

[89] General Agreement On Tariffs and Trade, GATT, Oct. 30, 1947 61 Stat. pt. 5, A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (Hereinafter GATT).

[90] See generally J. Gorlin, *A Trade Based Approach for the International Copyright Protection for Computer Software,* (1985).

[91] See GATT, "Ministerial Declaration on the Uruguay Round", GATT MIN. DEC. of 20 Sept. 1986, pp.

[92] See GATT, supra note 89, reprinted in 4 General Agreement on Tariff and Trade, Basic Instruments and selected Documents (1969).

The GATT was formed after the Second World War in the Havana Charter and came into effect on Jan. 1, 1948.

The objective of GATT is to provide a framework of "certainty and predictability about the conditions in which traders conduct their transactions in the world market".[93] It is the only multilateral instrument that lays down agreed upon rules for the conduct of international trade. The GATT also is a forum for negotiations as well as a code of rules.[94]

GATT has five main principals[95], which are the most favored nation principle[96], the national treatment principle[97], the tariff concession principle[98], the principle against non-tariff barriers[99] and the fair trade principle[100]. The GATT is supposed to have certain advantages over the other multinational remedies in solving the problem of intellectual property piracy. It provides a forum for negotiations as well as an enforcement mechanism.[101]

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[93] See Marshall A. Leaffer, supra note 5.

[94] S. Golt, *The GATT Negotiations 1986-90*: Origins, Issues, and Prospects, 2 (1988).

[95] See generally, K. Dam, *the GATT: Law and International Economic Organization* 17, 22 (1970)

[96] Contracting parties must give unconditional most favored nation treatment to the product of other contracting parties.

[97] Contracting parties may not impose more onerous internal taxes or regulations on imported products than on similar domestic products.

[98] Contracting parties must maintain customs duties on imported products at levels not more than those specified in the latest applicable schedules that the party has filed.

[99] Contracting parties should not use quantitative and other non-tariff barriers to restrict trade.

[100] Contracting parties should not promote exports through subsidies or dumping and may defend domestic industries from such unfair practices only through the use of reasonable, proportionate tariff measures.

[101] See generally, Marshall A. Leaffer, supra note 5.

Integrating intellectual property into the GATT perhaps constitutes a positive step towards promoting the adequate worldwide protection of intellectual property. The latest round of GATT negotiations, the Uruguay round, had placed the intellectual property issue prominently on the agenda.[102] The Uruguay round of GATT negotiations is not the first time where the issue of intellectual property protection was introduced. In fact the issue of commercial counterfeiting came forth in 1978 at the end of the Tokyo Round[103]. The issue again surfaced in 1982, when the Ministerial Declaration of the GATT contracting parties sought to determine whether to take action on the trade aspects of commercial counterfeiting.[104]

F) The Uruguay Round of Negotiations:

Initiated at Punta del Este, Uruguay, in September 1986, the Uruguay round of negotiations is the latest in the series of eight trade liberalization negotiations that have been held since the beginning of GATT in 1947.[105] The declarations adopted at the ministers meeting were to explain and clarify the GATT provisions and to elaborate new rules on intellectual property rights[106]. Negotiations were aimed to develop a multilateral framework of principles, rules and disciplines dealing with

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[102] Article XX(d) of the GATT has placed the protection of Intellectual Property among the exceptions to the agreement.

[103] Diane E. Prebluda, *Countering International trade in Counterfeit Goods*, 12 Brooklyn J. Int'l L. 339, 350 (1986).

[104] See, Thirty-Eighth Session at Ministerial Level: Ministerial Declaration: Adopted on 29 Nov. 1982 (L/5424), GATT, BISD: Twenty-Ninth Supp. 9, 19 (1983), Reprinted in 22 I.L.M. 449 (1983). Signatories to the GATT are referred to as contracting parties.

[105] Mc Diygal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence,* 8 VA. J. INT'L L. 188-94 (1968)

[106] Practicing Law Institute, The New GATT Round Preliminary Developments and Future Plans: A Report From The Administration 59 (1987).

international trade in counterfeit goods, while taking into consideration work that had already been undertaken in the GATT in this area. These negotiations shall be without prejudice to the other initiatives that may be taken in the World Intellectual Property Organization and elsewhere which deal with the same issues.[107] During the Mid-Term Review (the Montreal Mid-Term Review) in December 1988, agreement was reached on eleven of the fifteen subjects that where initially under negotiation One of the four subjects on which the ministers failed to agree upon was the trade-related aspect of intellectual property rights, including trade in counterfeit goods[108]. The United States and many developed and developing countries supported introduction of substantive intellectual property rules in the GATT that was opposed by many other nations. A compromise was reached in April 1989. The compromise basically noted that the future negotiations would include adequate standards and principles for the availability, scope and use of trade-related intellectual property rights and means of enforcing them. Thus the Trade related aspects of intellectual property rights[109] came to be included within the GATT framework.

The TRIPS negotiations constitute a comprehensive effort to establish minimum international codes or standards for intellectual property protection. The agreement attempts to reglobalize the international regime in a lot of ways. "It is

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[107] Id.

[108] David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 2 (1989)

[109] Agreement on Trade Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguary Round of Trade Negotiations, April 15, 1994, 33 I.L.M. 1125, Annex 1C (hereinafter TRIPs Agreement)

intended to bind most countries, cover much of the field of intellectual property and mandate sanctions for failure to meet its terms".[110]

There was a lot of opposition towards the inclusion of the TRIPS code in the GATT, arguing that a new set of codes for the protection of intellectual property rights is unnecessary,[111] since Articles III[112] and XX[113] of the GATT already adequately protect intellectual property rights by forcing national treatment of property rights on member countries.[114] But if the infringing countries do not provide adequate protection within their own borders then national treatment does not become substantive or meaningful. Whereas if minimum standards are set under the GATT the parties to the GATT would be forced to protect intellectual property rights at least to the extent provided in the minimum standards. In addition there are a lot more areas where there existed heavy discrepancies and opposition between developed and developing countries regarding the proposal set forth in the TRIPS negotiations.

The negotiations have been taking place amidst all the discussions and disputes for the past almost 9 years and finally the Uruguay round of GATT concluded in December of 94 and the Final Act included the Agreement on Trade Related Aspects of Intellectual Property.[115]

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[110] Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements*, 29 Int'l Law 99 (1995).

[111] Address by DR. Petersmann, Legal Officer to the GATT, on the Legal Aspects of the Uruguay Round at California State Bar-Int'l Law Weekend in San Francisco, California (Nov. 19, 1988) (notes available in a memorandum written on Nov. 21, 1988 in the SANTA CLARA LAW REVIEW Office).

[112] Article III of the GATT provides for national treatment. GATT, supra note 150, art III, 61 Stat. pt. A3, A18-A19, T.I.A.S. No. 1700, at 48-49, 55 U.N.T.S. 188, 205-208.

[113] Article XX(d) regulates barriers to legitimate trade. GATT, supra note 150, art XX(d).

[114] See address by Dr. Petersmann, supra note 111.

[115] See Paul Edward Geller, supra note 110.

CHAPTER IV

TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

A) World Trade Organization (WTO)

The World Trade Organization came into being in 1995 as a result of the Uruguay Round of Negotiations in 1994[116]. One of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established in the wake of the Second World War.[117] WTO is the only international organization dealing with and administering the global rules of international trade between nations.[118] Its main function is to ensure that trade flows as smoothly, predictably and freely as possible, settling trade disputes among governments, and organizing trade negotiations.[119] "It does this by administering trade agreements, acting as a forum for trade negotiations, settling trade disputes, reviewing national trade policies, assisting developing countries in trade policy issues, through technical assistance and training programs and cooperating with other international organizations".[120] The WTO acts as both a forum for negotiating international trade agreements and the monitoring and regulating body for enforcing the agreements. WTO has a membership count of 136 countries currently. Decisions

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[116] See generally World Trade Organization www.wto.org (visited November 1, 2000).

[117] Id.

[118] Id

[119] Asif H. Qureshi, The World Trade Organization 5 (1996).

[120] See World Trade Organization, supra note 116.

are made by the entire membership and are typically achieved by consensus. A majority vote is also possible but it has never been used in the WTO, and was extremely rare under the WTO's predecessor, GATT. The WTO's agreements have been ratified in all members' parliaments.[121]

i) The three main purposes of the WTO

The WTO as mentioned above has three main purposes. The first one is to help trade flow as freely as possible. This entails ensuring that individuals, companies and governments know the trade rules present around the world, and ensuring that there will be no sudden changes of policy.[122]

The second purposes is to serve as a forum for trade negotiations for agreements drafted and signed by the community of trading nations, after considerable debate and controversy.[123]

The third and most important purpose of the WTO's work is dispute settlement.[124] "Trade relations often involve conflicting interests. Contracts and agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements."[125]

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[121] Id.

[122] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (visited on November 1, 2000)

[123] Id.

[124] Id.

[125] Id.

TRIPS is one of the annexes to the agreement establishing the WTO. Almost all of the WTO agreements apply to all WTO members. The members each accept the agreements as a single package with a single signature making it, in other words as a "single undertaking". Since The TRIPS Agreement is part of that package, it applies to all WTO members.[126]

B) The TRIPS Agreement

The TRIPS Agreement came into effect on January 1, 1995. It was one of the outcomes from the Uruguay Round of Multilateral trade negotiations that led to the establishment of the WTO (World Trade Organization). The WTO monitors the administration of TRIPS.

While the international conventions and agreements discussed in previous chapters provide intellectual property protection, they were not comprehensive in their reach. One of the main reasons was, developing countries that were advancing technologically were unwilling to join the international agreements or were not enforcing intellectual property rights.[127] With the increase in technological advancements, developing countries realized that stronger intellectual property protection would serve their economic interests by providing greater access to foreign technologies. In addition, the threat of trade sanctions by developed countries also provided an incentive for many developing countries to accept a multilateral intellectual property rights agreement. [128]

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[126] See World Trade Organization, supra note 116.

[127] Id.

[128] Id.

The official reasons stated in the TRIPS agreement for GATT member countries to ratify the agreement include, to aid in the effective and adequate protection of intellectual property rights in order to minimize international trade distortions and impediments, and to ensure that the measures and procedures used to enforce intellectual property rights do not themselves become barriers to legitimate trade. They also desired new set of rules and procedures for the applicability of the basic principles of GATT 1994 and other international intellectual property agreements and conventions.

The reasons include a need for effective means of negotiation and enforcement of trade-related intellectual property rights, taking into account differences in national legal systems and the quick settlement of disputes arising among nations. There was also a general desire to establish a relationship between the WTO and the WIPO as well as other relevant international organizations.[129]

The TRIPS agreements have most of the provisions of the Paris, Berne and Rome conventions and the Washington Treaty. While it is largely based on the above-mentioned international agreements, there are major additions also. TRIPS sets minimum standards for intellectual property protection and members are given the liberty to set stricter standards.[130] Developed country members of the WTO have to comply with the TRIPS from January 1, 1996 and developing countries were given a transitional period of five years until January 1, 2000. For least developed countries the period is eleven years.

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[129] See http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (visited November 1, 2000).

[130] See John Revesz, Trade Related Aspects of Intellectual Property Rights, Staff Research Paper, May 1999.

Some of the main requirements embodied in TRIPS include the national treatment principle,[131] most favored nation treatment,[132] and parts of the Berne Convention.[133] It contains provisions protecting a wide range of intellectual property rights including copyrights,[134] computer software,[135] trademarks,[136] geographical indications,[137] industrial designs,[138] patents,[139] layout-designs of integrated circuits,[140] trade secrets,[141] and controls on anti-competitive practices.[142] It contains provisions that strengthen the enforcement of intellectual property rights,[143] and measures for settlement and prevention of disputes.[144] It also contains transitional arrangement explaining the periods within which developing countries and least developed countries have to adhere to the TRIPs provisions.[145]

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[131] See TRIPs Agreement, supra note 109, arts. 3, 33 I.L.M. at 1199.

[132] Id. arts. 4, 33 I.L.M. at 1200.

[133] Id. art. 9(1), 33 I.L.M. at 1201.

[134] Id. arts. 9-14, I.L.M. at 1201-3.

[135] Id. art,10, 33 I.L.M. at 1201.

[136] Id. arts 15-21, 33 I.L.M. at 1203-05.

[137] Id. arts. 22-24, 33 I.L.M. at 1205-07.

[138] Id. arts. 25-26, 33 I.L.M. at 1207.

[139] Id. arts. 27-34, 33 I.L.M. at 1208-11.

[140] Id. arts. 35-28, 33 I.L.M. at 1211-12.

[141] Id. arts. 39, 33 I.L.M. at 1212.

[142] Id. arts 40, 33 I.L.M. at 1213.

[143] Id. arts. 41-61, 33 I.L.M. at 1213-20.

[144] Id. arts. 63-64, 33 I.L.M. at 1221.

[145] Id. arts. 66-67, 33 I.L.M. at 1222-23.

i) Main features of TRIPS

The TRIPS agreement sets forth three mail features. They are minimum standards of protection, enforcement rights and settlement of disputes.

a) Minimum Standards of Protection

The TRIPs agreement sets out minimum standards of protection that each member should provide for each of the main areas of intellectual property covered under the agreement.[146] It defines the subject matter to be protected, rights conferred along with exceptions to those rights, and the duration of protection to be provided. It incorporates all the main provision of the WIPO administered conventions (the Paris Convention and the Berne Convention) with a few exceptions, and provides that TRIPs member countries must adhere to the substantive obligations. In addition to these, there are a number of other obligations (not present in the previous conventions) that are incorporated in the agreement.[147]

b) Enforcement

Since some of the important international agreements and conventions such as Berne and Paris conventions did not specify in detail how intellectual property rights protection should be enforced, the enforcement provisions of TRIPS are very significant. The enforcement provision has two aspects, one provides guidelines for

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[146] WTO, Intellectual Property, An overview of the Agreement on Trade-Related Aspects of Intellectual Property Rights, http://www.wto.org/wto/intellec/intell2.htm

[147] Id.

effective domestic enforcement, and the other deals with the dispute settlement between members countries[148].

Under the agreement, member states have an obligation to provide effective remedies to prevent infringements. These measures should be fair and equitable, simple and inexpensive, be available to both foreign and domestic right holders, not create obstacles to legitimate trade and be open to judicial review.
Even though member countries have to provide remedies to prevent infringement, they do not have an obligation to provide a means to enforce these remedies[149]. Article 41.5 of TRIPS limits the obligations of developing countries to invest resources in IP enforcement.[150]

c) Dispute settlement

The Agreement makes disputes between WTO Members subject to the WTO's dispute settlement procedures[151]. These procedures are faster because of strict time limits, and there are provisions for cross-retaliation, subject to certain conditions. A country could impose trade sanctions on another country for violation of TRIPS obligations, provided multilateral authorization has been obtained. The WTO dispute settlement mechanism might prove beneficial for some developing countries, because it effectively eliminates the more uncertain and unmanageable dispute settlement processes that were the norms in the 1980s, when differences in regard to intellectual property rights were negotiated bilaterally under the threat of unilateral trade

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[148] See John Revesz, supra note 130.

[149] Id.

[150] See TRIPs Agreement, supra note 109 arts. 41.

[151] See WTO, Intellectual Property, supra note 116.

sanctions. The WTO dispute settlement mechanism establishes a more predictable rules-based environment. It is still unclear whether the judicial standards exhibited by developing countries should be in level with that of advanced countries, but article 41.5 of TRIPS limits the obligations of developing countries to invest in enforcement procedures.[152]

At the conclusion of the Uruguay round of negotiations, many of the developing country members of the WTO did not have pre established rules and laws on intellectual property rights protection, that would meet the new TRIPS Agreement standards. Since introducing these rules and systems for the first time would be difficult, the TRIPS Agreement established certain transition arrangements for developing and least developed countries. This is the transition time from the time the agreement came into force to the date of enforcement by member countries.[153] The developed countries were given a transition period of one year following the entry into force of the WTO Agreement, i.e. until 1 January 1996. The developing countries[154] were allowed a further period of four years (i.e. to 1 January 2000) to apply the provisions of the agreement other than Articles 3, 4 and 5 which deal with general principles such as non-discrimination. Transition economies, i.e. members in the process of transformation from centrally-planned into market economies, could

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[152] See John Revesz, supra note 130.

[153] Id.

[154] Antigua and Barbuda, Argentina, Bahrain, Barbados, Belize, Bolivia, Botswana, Brazil, Brunei Darussalam, Cameroon, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Dominica, Dominican Republic, Egypt, El Salvador, Estonia, Fiji, Gabon, Ghana, Grenada, Guatemala, Guyana, Honduras, Hong Kong, China, India, Indonesia, Israel, Jamaica, Kenya, Korea, Kuwait, Macau, Malaysia, Malta, Mauritius, Mexico, Morocco, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Poland (areas which were not reviewed in '96–'98), Qatar, Saint Lucia, Senegal, Singapore, Sri Lanka, St. Kitts and Nevis, St. Vincent and Grenadines, Suriname, Swaziland, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, Uruguay, Venezuela, Zimbabwe.

also benefit from the same delay (also until 1 January 2000) if they met certain additional conditions. Finally least-developed countries[155] are granted a longer transition period of a total of eleven years (until 1 January 2006), with the possibility of an extension.[156]

C) Agreement between the WIPO and WTO

In order to assist in the implementation of the TRIPS Agreement, an agreement on cooperation between WIPO and the WTO was concluded, which came into force on 1 January 1996.[157] As set out in the Preamble to the TRIPS Agreement, the WTO desires a mutually supportive relationship with WIPO. It provides for cooperation concerning the implementation of the TRIPS Agreement, such as notification of laws and regulations and legal-technical assistance and technical cooperation in favor of developing countries.[158]

A joint initiative was also established in order to assist developing countries meet their TRIPS obligations in the year 2000. This assistance will continue to be provided after year 2000 deadline for many developing countries. Assistance will also be given to least-developed countries that have a transition period until 2006.[159]

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[155] Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Zambia.

[156] See World Trade Organization, supra note 116.

[157] Id at (http://www.wto.org/english/tratop_e/trips_e/intel3_e.htm)

[158] See http://www.wipo.int/about-wipo/en/gib.htm#wto (visited on November 1, 2000)

[159] Id.

D) Current controversial aspects of the TRIPS impact

The implementation of TRIPS by all the member countries is an uphill battle, given the diverse interest and priorities of the member countries. The views of both developed and developing country on many subjects is very distinct and far apart. This difference of opinion can be illustrated by discussing two of the current controversial issues involving the TRIPS agreement, which are "Compulsory Licensing" and "Neem tree patent" controversy.

i) Compulsory Licensing

Compulsory licensing is defined generally as the granting of a license by a government to use a patent without the patent-holder's permission.[160] As applied to international intellectual property rights, it allows governments to grant licenses for patent use in two situations – one, where the patent-holder is not using the patent within the country and two when it is not being used adequately.[161] Though compulsory licensing is not a new concept,[162] it recently has received considerable attention from different sources. Compulsory licensing allows a foreign government to take away an exclusive product when the health or safety of a nation is at risk. Under compulsory licensing, a generic manufacturer is allowed to produce a drug

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[160] See Review of TRIPs, Int'l Trade Daily News (BNA) (Int'l Trade Rep.) at D7 (June 9, 1999) (highlighting the recent controversy surrounding the interpretation of compulsory licensing in TRIPs).

[161] Theresa Beeby Lewis, *Patent Protection for the Pharmaceutical Industry: A Survey of Patent Laws of Various Countries*, 30 Int'l L. 835, 859-64 (1996) (highlighting pharmaceutical patent disputes between the United States and Singapore, Costa Rica, China, Egypt, Korea, and Thailand).

[162] Robert Weissman, Symposium, Insight Mag., Sept. 13, 1999, at 1, 1-2 (describing the opposition of the United States to South Africa's Medicines and Related Substances Act, which gives the South African Health Minister the ability to issue compulsory licenses for drugs otherwise not obtainable by the population).

discovered by a developed countries pharmaceutical giant in exchange for a licensing fee. Those fees vary from deal to deal.[163] Although TRIPs incorporates portions of the Paris Convention, the Berne Convention, the Rome Convention[164], and the Treaty on Intellectual Property in Respect of Integrated Circuits, etc., the patent provisions are very new to international intellectual property law.[165] Even though it is not expressly mentioned, TRIPs allows for compulsory licensing and it is seen from the provisions of Article 31.[166]

Since the concept of compulsory licensing has been dealt with in the TRIPs agreement, developing nations are more likely to argue for a broader interpretation to facilitate for easier implementation of compulsory licensing.[167] The developing nations who face huge challenges to their heath care system, argue generally in favor of morality in international trade practices. [168] Developing nations are of the view that the economic injury and losses complained of by the pharmaceutical companies in

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[163] Forbes 11/27/2000 Corporate Saboteurs.

[164] See TRIPS, supra note 109, Part I, art. 2, sec. 1-2 (noting that members of TRIPs should comply with the Paris Convention and that nothing in TRIPs takes away from existing obligations in the other international treaties).

[165] Kevin W. McCabe, The January 1999 Review of Article 27 of the TRIPs Agreement: *Diverging Views of Developed and Developing Countries Toward the Patentability of Biotechnology*, 6 J. Intell. Prop. L. 41, 61 (1998) (highlighting the intense debate on the issue of compulsory licenses during TRIPs negotiations).

[166] See TRIPS Agreement, supra note 109, Part II, sec. 5, art. 31 (authorizing laws of a member nation that allow "for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government" under certain conditions).

[167] Compulsory Licensing Provisions Under the TRIPs Agreement: Balancing Pills and Patents by Sara M. Ford.

[168] Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conversation of Biodiversity*, 6 Ind. J. Global Legal Stud. 59 (1998) (discussing the social justice implications of intellectual property rights). See Weissman, A Long Strange TRIPs, supra note 162, at 1088 (noting how the pharmaceutical industry created their moral twist on the intellectual property debate by characterizing patents as "rights").

developed nations should have no bearing on their right to receive adequate health care.[169] India's late prime minister Indira Gandhi's view on this issue was that, the idea of a better ordered world is one in which medical discoveries would be free of patents and there would be no profiting from life or death. In the view of the developing nations, compulsory licenses should be available for any health concern where there exists a capability of either curing or postponing the disease.[170] Thus, they believe that the moral exception argument should mandate the broad use and implementation of compulsory licenses under the TRIPs Article 31.[171] The justification for the developing nation's view would most probably arise out of the exclusions noted in Article 27 of TRIPs. [172] Article 27 provides various exceptions for patents, such as in cases where members wish to protect public order and morality, including saving of human beings. [173]

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[169] Id.

[170] See World Health Organization, Essential Drugs (visited Nov. 1, 2000) <http://www.who.org/aboutwho/en/ensuring/essential.htm> (The WHO Essential Drug Programme tries to "... ensure that all people, wherever they may be, are able to obtain the drugs they need at the lowest possible price; that these drugs are safe, effective, and of high quality; and that they are prescribed and used rationally").

[171] Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle,* 25 Brook. J. Int'l L. 51, 60 (1999) (setting forth two methods for breaking the tension between international economic policy and trade policy by altering the current division of systems). The first suggestion is to incorporate human rights into WTO trade agreements by amending the structure of the WTO. The second suggestion is to eliminate trade-related human rights issues from WTO jurisdiction.

[172] See TRIPS Agreement, supra note 109, Part II, sec. 5, art. 27 (providing exceptions to the **patent** enforcement outside of compulsory license provisions).

[173] Id. TRIPs Part II, sec.5, art. 27. This provision reads: Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law. Id.

The developed nations on the other hand are arguing for a very narrow interpretation of the section in order to limit the use of compulsory licenses, especially in the case of pharmaceuticals.[174] They fear that simple and ordinary health risks will be construed as emergency, which will demand a waiver of compulsory licenses for pharmaceuticals.[175] Issuance of compulsory license would definitely affect the profits and gains of the pharmaceutical industry. But, it is also essential to note that the United States government does not want to seem hypocritical by making general assertions that compulsory licensing is illegal. [176] In the United States, the Government reserves the right to issue compulsory licenses for products, including drugs that it funds.[177] In addition, it allows for some types of patent infringements under the doctrine of misuse.[178]

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[174] See 145 Cong. Rec. H6027 (daily ed. July 21, 1999) (noting how some policymakers in the United States fear a slippery-slope effect of allowing compulsory licenses in developing nations).

[175] Id. at 33 (quoting Rep. Callahan who asserts that the proposed amendment, Section 15 (c) of the South Africa Medicines & Related Substances Act, creates a disturbing precedent for the deterioration of intellectual property rights in South Africa).

[176] See CPT's Letter to Cong. Black Caucus, supra note 60 (suggesting that the United States and the EU would be hypocritical by insisting on an unconditional rejection of compulsory licenses under Article 27 of TRIPS because both have codified their own compulsory licensing schemes).

[177] See March-in Rights, 35 U.S.C. sec. 203(1)(b) (1984) (limiting the scope of patents created with federal assistance by reserving the right to grant a compulsory license for the patent if it is necessary to alleviate health or safety needs which are not being met by the patent-holder); see also 17 U.S.C. sec. 115 (1984) (outlining the provisions for issuing compulsory licenses for phonorecords).

[178] See Mallinckrodt v. Medipart, 976 F.2d 700 (Fed. Cir. 1992) (holding that the criteria for applying the doctrine of misuse depends on whether the patentee's "restriction is reasonably within the patent grant, or whether the patentee has ventured beyond the patent grant and into behavior having an anti-competitive effect not justifiable under the rule of reason"); see also Note, Is the Patent Misuse Doctrine Obsolete?, 110 Harv. L. Rev. 1922 (1997) (debating whether the equitable doctrine of misuse should be replaced by reliance on antitrust laws, ultimately postulating that a greater reliance on the misuse doctrine is preferred). But see Theo Bodewig, On the Misuse of Intellectual Property Rights, in Intellectual Property Rights and Global Competition: Towards a New Synthesis, 247 (Horst Albach & Stephanie Rosenkranz eds., 1995) (establishing that, according to the European Court of Justice, the denial of a license alone does not constitute misuse). Yet, when a company participates in discriminatory practices designed to prevent competitors from market access, the Court effectively has issued compulsory licenses for IBM products.

ii) The Neem Tree Controversy

The neem tree, otherwise known as azadirachta indica, is also known in Sanskrit as "sarva-roga nivarini" or "curer of all ailments." [179] The neem tree is considered sacred in India and is in most parts of the country worshipped.[180] In addition, the tree has long been known for its medicinal value and curing effects and has been used for centuries by Indians for a wide variety of daily uses such as cleaning teeth, as curing skin disorders, malaria, to create spermicide and insecticides etc.[181]

In 1959, a German entomologist reported that the neem trees were the only survivors during a locust swarm that killed all other foliage.[182] Since then, researchers have discovered that azadirachtin, a powerful insecticide that is not harmful to humans was present in the neem tree. Centuries before this discovery, farmers in India had been applying this knowledge. For the farmers, application of neem as a pesticide was limited since the solution was not storable.[183] In the early 1990s, the use of this product was researched by a group of American researchers and they created a storable version of this product.[184] In June 1992 they obtained a patent (Patent No. 5,124,349 for W.R. Grace & Co. ("Grace"), an agricultural chemical company based in Boca Raton, Florida) for this product of the neem tree.[185] "The patent covered both

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[179] Lori Wolfgang, *Patents on Native Technology Challenged*, SCIENCE, Sept. 15, 1995, at 1506; *see also* Sir Monier Monier-Williams, A Sanskrit-English.

[180] Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (1997), at 69.

[181] Marilitz Dizon, *Panacea for a Hundred and One Ailments*, BUS. DAILY, Jan. 13, 1997

[182] Paul Hoversten, *Legal Battle Takes Root over "Miracle Tree*," USA TODAY, Oct. 18, 1995, at 8A.

[183] *See* Jacoby & Weiss, *supra* note 6, at 75-76

[184] U.S. Patent No. 5,124,349, *available in* LEXIS, Patent Library, All File

[185] Id.

a method of creating a stabilized azadirachtin in solution and the stabilized azadirachtin solution itself, processes which make the extract both more valuable to the pesticide industry and more useful to farmers."[186][187] By obtaining the patent, it appears that it is a good example of American discovery and innovation.[188]

India and many activist groups believe that Grace merely "tweaked" the neem seeds and is set to gain all the economic benefits of the tweaking. India hopes the neem tree controversy clearly demonstrates the one way flow of economic gains. The money at stake in these types of disputes is substantial. One report estimates that the developing world would gain $ 5.4 billion per year if multinational food, seed, and pharmaceutical firms paid royalties for local knowledge and plant varieties. [189]

Still others have maintained that controversies are the natural outgrowth of an unfair system of international intellectual property rights, including those in the Agreement on TRIPS. They argue that because these laws only recognize individual innovations which were "scientifically" achieved, the typically communal, "folk" knowledge of developing countries are excluded, leading to unrest and controversy[190].

US believes that the neem tree issue and such patents are public goods. With these innovations and use of these natural pesticides humanity as a whole benefits by reducing the dependence on toxic synthetic pesticides.[191]

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[186] Richard H. Kjeldgaard & David R. Marsh, *A Biotech Battle Brewing*, LEGAL TIMES, Dec. 11, 1995, at 16.

[187] Emily Marden, *The Neem Tree Patent: International Conflict over the Commodification of Life,* 22 B.C. Int'l & Comp. L. Rev. 279 (Spring 1999).

[188] Id.

[189] K.S. Jayaraman, *India Set to End Gene Robbery*, NATURE, Aug. 25, 1994, at 587

[190] See Emily Marden, supra note 187.

[191] Id.

In the defense of developed countries the neem challenge is also motivated to some degree by common misperceptions about what the Grace patent actually means Many of the strong advocates of such patents appear to fear that a patent on an extract somehow confers a property right on the original entity itself thus fearing India as well as other developing countries have to pay to use the neem tree or the neem seed itself, which is a misconception.

With the views of developed and developing nations on compulsory licensing and the neem tree patent controversy so wide apart, the best solutions for resolving this issue would be to present it before the WTO's Dispute Settlement Body (DSB).[192] In the view of developed and developing nations, bringing the issue with the DSB has its pros and cons. Developed nations prefer to rely on their unilateral trade sanctioning measures to achieve their desired results.[193] They do not want to risk getting a "binding negative decision" by bringing the disputes before the DSB.[194] On the other hand, the developing nations stand to gain legitimacy in their compulsory licensing schemes and the protection of local knowledge on bio diverse projects and international recognition for paving the road for other developing nations and potential trading partners to create similar mechanisms.[195] The major harm in bringing the matter before the DSB is the risk of damaging their relationships with the developed nations.[196] The best option at this juncture would be for the DSP to clarify

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[192] Sara M. Ford, *Compulsory Licensing Provisions Under the TRIPs Agreement: Balancing Pills and Patents* 15 Am. U. Int'l L. Rev. 941

[193] See Beeby Lewis, supra note 161, at 853-54 (exploring the success of bilateral trade negotiations for short term dispute settlements).

[194] Id. at 854.

[195] See Sara M. Ford, supra note 192.

[196] Carlos A. Primo Braga, *Industrial Property Rights and Private Sector Development: Lessons for Developing Countries, in Strategic Issues of Industrial Property Management in a Globalizing Economy*: Abstracts & Selected Papers 23, 29 (Thomas Cottier et al., eds. 1999) (suggesting that

the meaning and language of certain provisions such as Article 31 of TRIPS, which deals with the issue of compulsory licensing.

When the TRIPS agreement was entered into, the framers may have believed that the issue of compulsory licenses and other patent registration was well defined, but the opposing views are erupting and bound to grow in proportion. It is important for the WTO to handle this issue quickly and efficiently as these issue are of great concern, to those countries and companies who stand to lose a lot of money in the pharmaceutical industry and, more importantly, by those developing countries who seek medical treatments for life-threatening diseases.[197] Now seems like a good time for the WTO and TRIPS to embrace these issues and take necessary steps to assure the developed and developing nations that reasonable solutions can be made through the DSU.[198]

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compliance with high standards of intellectual property protection will foster increased trade in developing nations). Conversely, risking political relationships may adversely affect trade relations between developing nations and their developed nation trading partners.

[197] See Sara M. Ford, supra note 192.

[198] Id.

CHAPTER V

IMPACT OF TRIPS IN THE RECORDING INDUSTRY

A) Recording Industry

Though man has for centuries dreamt of capturing the sounds and music of his environment, it was not until Thomas Alva Edison discovered a method of recording and playing back sound. "What started out as an apparatus intended as part of an improved telephone led to the development of an instrument which would change the world, making it a happier, even a better, place to live".[199]

The recording industry is one of the great global industries of today. It brings pleasure and fulfillment to people of all ages, cultures and creeds; it is definitely one of the leading creative industries that drives the development of modern economies, and is pioneering in the era of digital technologies and electronic commerce.[200]

Being a talent-driven and creative, the recording industry is totally dependent on copyright and intellectual property protection. These rights are essentially the building blocks of the music business, allowing artists, song writers and record companies to invest their revenues and their livelihoods in the creative process, secure in the knowledge that they, and no one else, will own the result. Intellectual

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[199] http://www.ifpi.org/ visited on 11/1/00 A brief history of recorded music

[200] http://www.ifpi.org/ visited on 11/1/00 Music: one of the great global industries

property protection is the incentive to be creative. It protects artists from piracy of their works and it nurtures new talent.[201]

B) Piracy in Recording Industry

The practice of recording music and then selling those recordings for a profit, without the musicians' permission, has been a major problem pervading the music industry for decades. [202] In fact, losses arising out of music piracy are currently estimated as costing the U.S. recording industry nearly $ 300 million annually.[203] Certain countries in particular have caused the recording industry a major problem by retaining old, outdated or insufficient copyright laws, and by being unconcerned about their nation's growing pirate music market.[204] Pirates and bootleggers in different parts of the world have invaded the fundamental rights of artists and producers by copying sound recordings or live performances to regulate the use, distribution, and profits of their own performances.[205]

The introduction of the portable tape recorder, the compact disc (CD), and most recently the digital audio tape (DAT) and recordable CD--which both offer high-fidelity digital recording and the promise of no loss of fidelity in subsequent copies [206]--now play a large part in driving the piracy of music.

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[201] Id.

[202] Jeanmarie LoVoi, Competing Interests: Anti-Piracy Efforts Triumph Under TRIPS but New Copying Technology Undermines the Success, 1999 25 Brooklyn J. Int'l L. 445.

[203] Lauren Wiley, Bootleggers Turning to Burning: RIAA says CD-R Piracy is on the Rise, EMedia Prof., June 1, 1998, available in 1998 WL 9595630.

[204] See generally Jerry D. Brown, U.S. Copyright Law After GATT: Why a New Chapter Eleven Means Bankruptcy for Bootleggers, 16 Loy. L.A. Ent. L.J. 1, 9-15 (1995).

[205] See Jeanmarie LoVoi, supra note 202.

[206] Clinton Heylin, Bootleg: The Secret History of the Other Recording Industry 242-43 (1994).

The term 'music piracy' refers to the illegal duplication and distribution of sound recordings. The types of piracy in the music industry are counterfeit, pirate, bootleg [207] and a later addition online piracy. The first three are referred to as traditional forms of piracy and the last being an emerging form of piracy. Online piracy may very well dwarf the first three in its enormity and grave consequence to the recording industry.

i) Traditional Piracy

Counterfeit recordings, pirate recordings and bootleg recordings are identified as the three forms of traditional piracy. Counterfeit recordings are the unauthorized recording of the prerecorded sounds, including the unauthorized duplication of original artwork, label, trademark and packaging of prerecorded music.[208] Pirate recordings are the unauthorized duplication of just the sounds of one or more legitimate recordings, [209] and bootleg recordings are the unauthorized recordings of a musical broadcast on radio or television or of a live concert. Bootlegs are otherwise called underground recordings.[210]

ii) Emerging Piracy

Online piracy general is defined as the uploading of a sound recording that is copyrighted without the permission of the owner and making it available to its

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[207] http://www.grayzone.com/faqindex.htm, Grayzone, Inc., The Federal Anti-Piracy and Bootleg FAQ visited Oct 29, 2000

[208] Id.

[209] Id.

[210] Id.

customers and public.[211] It is also the downloading of copyrighted sound recording from an Internet site, even if the recording is not resold in the market.[212] Online piracy may now also include certain uses of "streaming" technologies from the Internet.[213] One such service is Napster - the world's leading file-sharing community. Napster's software application enables users to locate and share media files from one convenient, easy-to-use interface.[214]

iii) Piracy Related Financial Losses

Income from the music industry is earned from several sources among which album sales to publishers and writers is the largest.[215] After album sales, some of the others larger sources are public performances, synchronization rights,[216] and printed editions of sheet music.[217]

The recording industry's world retail sales increased from US $27 billion to $38 billion during the 1990s. "The global music market was worth US$38.5 billion in 1999, up by 1% in constant dollar terms, with total unit sales of 3.8 billion. Globally unit growth remained constant with CD sales up by 3%. There was notable

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[211] http://www.riaa.org/Protect-Campaign-1.cfm, Recording Industry Association of America, Anti Piracy visited on Oct 27, 2000.

[212] Id.

[213] Id.

[214] http://www.napster.com/company/ visited on Nov 18, 2000

[215] Ira B. Selsky, *Music Publishing in the International Marketplace*, 17 Whittier L. Rev. 293, 294 (1995).

[216] Id at 294-295. Synchronization rights are the rights to use a song in a motion picture, television show, or commercial.

[217] Clifford A. Congo, *Drawing a Distinction Between Bootleg and Counterfeit Recordings and Implementing a Market Solution Towards Combating Music Piracy in Europe*, 17 Dick. J. Int'l L. 383 (Winter 1999).

growth in North America and South East Asia and a slight fall in sales in Europe."[218] If pirated sales of musical recordings is minimally estimated at 36%[219] of the world's legitimate sales, then, according to statistics, piracy and the inadequate protection of intellectual copyrights costs the world recording industry over $12 billion dollars.[220]

C) Agreement and Conventions Protecting Intellectual Property Rights in the Music Industry Prior to the TRIPS Agreement

As discussed in previous chapters several international treaties and trade agreements, including the Berne Convention for the Protection of Literary and Artistic Works, [221] the Geneva[222] and Rome Conventions,[223] the Universal Copyright Convention,[224] etc exist for the protection of intellectual property rights in several industries among which the recording industry is also one.

The Berne Convention is generally not sufficient for the protection of the music industry since its was mainly focused on literary and artistic works and not on performances,[225] does not provide adequate protection to producers of sound

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[218] http://www.ifpi.org/ World sales of recorded music - 1999 visi ted on 11/1/00

[219] IFPI Music Piracy Report 2000 June 2000

[220] Id.

[221] See Berne Convention, supra note 57.

[222] Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67 [hereinafter Geneva Convention].

[223] See Rome Convention, supra note 68.

[224] Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, revised, July 24, 1971, 25 U.S.T. 1341 [hereinafter U.C. Convention].

[225] See Berne Convention, supra note 57, art 2.

recording,[226] and does not possess sufficient enforcement mechanisms. The other international treaties and conventions also failed to adequately protect copyrighted materials.[227] These conventions and treaties no doubt have establish an international system of copyright enforcement, but the problems with membership, treaty overlap, and problems with enforcement have made them ineffective in many cases. Even if such a system is in place, the restorative economic benefits of its enforcement may not show up for many years. In addition to the existence of the laws, there should be cooperation among the nations in enforcing these laws in order to stop bootleggers from continuing their acts.[228] The lack of such enforcement mechanism has enabled a few countries--namely China, Italy, Germany and Luxembourg—to become safe places for pirates and bootleggers, because the amount of legal protection available for copyright holders in these countries is very limited. [229] In addition, due to the lack of a globally recognized and firmly enforced copyright law, there is a possibility that many countries outside of the United States could become a potential production site for bootlegs.[230]

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[226] See Jeanmarie LoVoi, supra note 202. Note the absence of sound recordings from the definition of "literary and artistic works" in the Berne Convention, supra note 57 art. 2(1).

[227] David Schwartz, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 Fed. Comm. L.J. 611, 633-637 (1995) (discussing the varying copyright protections sought by the enactment of the Universal Copyright Convention, the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the General Agreement on Tariffs and Trade).

[228] Robert M. Blunt, *Boolegs and Imports: Seeking Effective International Enforcement of Copyright Protection for Unauthorized Musical Recordings*, 1999 22 Hous. J. Int'l L 169.

[229] Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 Wis. Int'l J. L. 389 (1997).

[230] Id.

D) Protection Afforded by the TRIPS Agreement

The introduction of TRIPs brought some changes to this problem. The general attitude towards TRIPS is that, it intends to provide a stronger and stricter international standard and rules for the protection of intellectual property rights including copyrights.[231] The areas of intellectual property that it covers are notably copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations).

In the area of copyright piracy relating to music industry where the previous treaties and conventions are silent, TRIPS has tried to made significant contributions. TRIPS has incorporated the provisions of the Berne Convention (Articles 1 through 21) dealing with copyright protection and is dubbed the "Berne plus" approach.[232] In addition to incorporating most of the provisions of the already existing convention, TRIPS lays down new protections in areas where the other conventions are silent.[233] Article 14 of TRIPs protects sound recordings and live performances and attempts to prevent piracy, and bootlegging.[234] In the area of sound recordings, TRIPs provides that "producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms."[235] With respect to performances such as concerts, TRIPS provides that "performers shall have the possibility of preventing

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[231] See generally Marshall Leaffer, *Understanding Copyright Law* 377, 380 (2d ed. 1995) (discussing the provisions of the Berne Convention relating to formalities).

[232] See Leaffer, supra note 233, at 396.

[233] See Jeanmarie LoVoi, supra note 202.

[234] See TRIPS, supra note 109, art. 14.

[235] Id. art. 14(2).

the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation."[236]

Although TRIPS has provided for adequate protection, the member countries have to implement the protection afforded, and amend their own copyright laws. TRIPS is a non-self executing[237] agreement. The members do not have to automatically abide by the provisions of TRIPS, but must determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.[238]

TRIPS has made significant impact in the protection of traditional forms of music piracy, which includes counterfeit recordings, pirate recordings and bootleg recordings. TRIPs required that the copyright law of member countries include protection for sound recordings and the unauthorized fixation of live performances.[239]

Even though TRIPS adequately addresses the traditional forms of piracy in the recording industry, it does not address the biggest threat posed to the Recording industry to date - online piracy. According to the Chief Counsel of the U.S. House Judiciary Subcommittee on Intellectual Property, the modern copyright industry has been most significantly affected by the development of digital recording

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[236] Id. art. 14(1).

[237] William F. Patry, *Copyright and The GATT: An Interpretation and Legislative History of The Uruguay Round Agreements Act:* Supplement to Copyright Law and Practice 3 (1995). As a general matter, a treaty which is enforceable by its terms, without prior implementation of the treaty by domestic legislation of the signatories, is "self-executing." On the other hand, a "non-selfexecuting" treaty requires that domestic legislation of the signatories be enacted to make the treaty enforceable.

[238] See TRIPS, supra note 109, art. 1(1).

[239] Id art. 14.

technology.[240] The Internet offers music lovers and pirates virtually unlimited possibilities. The age of digital technology brings music to a wider public, affords performing artists access to their audiences, makes vast and rich musical heritage widely available to the public, and distributes old, new and extraordinary music at affordable prices.[241] In the process of doing all this, the Internet unfortunately, gives music pirates a new weapon. Within the Internet theft of intellectual property is spreading rampantly.[242] The music business and its artists have become the biggest victims, which eventually leads to indirect suffering for the consumers. Illegal and unauthorized Internet music archive sites provide illegal sound recordings online to anyone with a personal computer. Without permission or compensation to the artists, it lets a music lover download and played music indefinitely. Other music pirates use the Internet to peddle illegal CDs.[243]

Because the nature of the theft is intangible and not concrete, the damage is difficult to ascertain and calculate but not hard to envision. Millions of dollars are at stake. Many of the individuals who download information without authorization, see nothing wrong with downloading an occasional song or even an entire CD off the Internet, inspite of the fact that is illegal under recently enacted federal legislation.[244] The online piracy, unlike the traditional forms, is a product of technological innovation and all pervasive nature of Internet. On-line piracy and laws related to its

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[240] Teresa Riordan, *Digital Age to Trigger Copyright Adaptation,* Com. Appeal, July 10, 1994, at 3C.

[241] See http://www.riaa.com/Protect-Online-1.cfm (visited November 1, 2000).

[242] Id.

[243] Id.

[244] Id.

prevention have to be fist enacted and enforced in the developed countries, before it can be moved to the international arena such as TRIPS and WTO

E) Recent Cases Against On-Line Music Piracy

In the USA the RIAA has filed two separate suits against Internet services companies Napster and MP3.com. In December 1999 the RIAA, acting on behalf of its member companies, filed a suit against Napster, a company the RIAA alleges is operating as a haven for music piracy on the Internet. The RIAA claims that Napster is responsible for making millions of MP3 files widely available to countless users around the world by acting as a kind of giant online pirate bazaar. Users log on to Napster servers and make their previously personal MP3 collections available for download by other Napster users who are logged on at the same time. [245]

As of November 2000, Napster has forged an alliance with Bertelsmann (corporate which owns BMG a leading recording label) to ensure the continued growth of the Napster Community and to realize its full potential. They believe cooperation from the major record labels, music publishers, independent labels, artists and songwriters is better then confrontation. However, not withstanding the alliance Bertelsmann the lawsuit brought against Napster by the RIAA has not been dropped.[246]

The spread of piracy, through pirated CDs, read writable CD's and on the Internet, is the greatest threat to the legitimate music industry. The need for

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[245] IFPI Network Newsletter, April 2000

[246] http://www.napster.com/pressroom/qanda.html

governments worldwide to provide strong laws, effective enforcement and adequate deterrent penalties against piracy has never been greater.[247]

Some of the emerging piracy forms are still being defined in the US courts (primary producers of intellectual property) and to large degree violation occurs in the developed countries (as opposed to traditional piracy which occurred in developing countries and adequately addressed by TRIPS).

The emerging form of piracy does not require a big factory for its production since it is done in millions of personal computers connected to the Internet by gadgets, which are legally sold in the developed countries for very less amount of money. TRIPS does not protect against any of these emerging piracy issues. In fact, unauthorized home recording do not violate Article 14 of TRIPS because the copying involved is done only on a personal and non-commercial level.[248]

Although TRIPS covers a lot of ground, its success can only be measured by the continued efforts of member countries, and for the present it is safe to conclude that TRIPS may win the battle presently by its policies, but piracy is likely to win the war in the long run.

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[247] IFPI Music Piracy Report 2000 June 2000

[248] See Jeanmarie LoVoi, supra note 202.

CHAPTER VI

CONCLUSION

On January 1, 2000, the Agreement on TRIPS that went into effect for developing countries was a significant milestone for TRIPS and to a large extent for WTO. TRIPS for the developed countries which already had some intellectual property protection in place merely shored up some areas while providing for new remedies or enforcement mechanisms.[249] However, for developing and underdeveloped countries TRIPS required the adoption of entirely new laws as well as a framework for their enforcement. The preliminary indication (till October 2000) shows little evidence of significant compliance of TRIPs by developing countries, which certainly threaten the commitment of WTO members to IP protection and to a degree to WTO system itself. [250]

TRIPS is a major milestone in the road of intellectual property rights protection, by laying out for the first time a minimum level of adequate IP protection and an enforcement mechanism on an international level.[251] It constitutes a comprehensive and far reaching effort to establish international standards for intellectual property protection. If the developing countries are expected to provide increased protection for intellectual property rights, it is important that there is full

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[249] Charles S. Levy, *Review of Key Substantive Agreements: Panel II A: Agreement on Trade-Related Intellectual Property Rights (TRIPS): Implementing Trips--A Test of Political Will* - 31 Law & Pol'y Int'l Bus. 789

[250] Id.

[251] Id.

cooperation from developed countries. The interdependence between developed and developing countries is well stated by Stephen Ladas as follows:

"Failure to extend the benefits of technology and science to large parts of the world is not only morally wrong, but in the long run denies to the total system its ultimate fulfillment. Prosperity like peace is invisible. The accelerated pace of the West's own economic progress could be nullified by the failure of the rise in the standard of living of the largest part of the world"[252].

Thus in order for the future envisioned by the Uruguay Round of Negotiations while enacting the TRIPS agreements, in the long run there has to be full cooperation and consideration between the developed and the developing worlds. Though this may seem idealistic, signs of such cooperation are present and there is slow but steady development towards greater protection of Intellectual property Rights in the International community.

Since its introduction TRIPS has represented a major step forward in international intellectual property agreements, but it does have its shortcomings. There are two main problems feared by the international community, which threaten the future existence and effectiveness of the agreement.[253] Firstly, the developed countries (especially the United States) feel that TRIPS is very lenient towards developing countries.[254] They feel that TRIPS exaggerates the special needs of

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[252] Ladas, *Existing Uniformity of Industrial Property Laws and Revised Patent of Introduction: Means for Transfer of Technical Information to Less Industrialized Countries*, 12 IDEA: The Patent Trademark & Copyright J. Res, & Educ.163 (1968).

[253] Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPs" over Special 301*, 7 Minn. J. Global Trade 179 (Winter 1998).

[254] Anthony D. Sabatelli, *Impediments to Global Patent Law Harmonization*, 22 N.Ky. L. Rev. 616 (1995).

developing countries.[255] The second major concern is whether the WTO will be able to expand the success of the GATT philosophy and dispute settlement process into the realm of intellectual property protection.[256] Such concerns are increased by the fact that the WTO has little or no expertise in governing the complex trade issues involved with intellectual property.[257]

We are at a pivotal time for TRIPS, when we will see whether TRIPS has and will achieve its purpose of bringing developing countries to a minimum level of IP protection. It is also a pivotal time for the WTO generally, where we will see whether the TRIPS model of imposing "positive" obligations on members is a viable approach to future WTO negotiations.

In order to help TRIPS succeed in its mission, members need to use the enforcement mechanisms and bring those cases that will develop a body of precedent. They should also try and solve noncompliance problems with other tools such as negotiation and conciliation.[258] "Members must implement strategies to leverage these gains by picking those cases that will establish legal precedent broad enough for other members to follow, and by indicating the resolve of members to pursue dispute settlement as far as necessary until there is full compliance with TRIPS."[259]

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[255] See id. at 603.

[256] See Robert J. Pechman, supra note 256.

[257] See Anthony D. Sabatelli, supra note 257, at 616.

[258] See Charles S. Levy, supra note 252.

[259] Id.

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