

PROTECTING INTELLECTUAL PROPERTY RIGHTS ACCORDING TO TRIPS

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1. TRIPS – An Overview

The right to intellectual property ownership has become one of the two types of ownership rights of human beings – the right to material property and the right to intellectual property. The right to intellectual property ownership is a special type of ownership right but has not emerged and become law until revolutions of science and technology and until human beings recognized profits resulted in by intellectual inventions. Intellectual property rights consist of two main categories: industrial rights and author rights. According to the international private laws, intellectual property rights are deemed to consist of foreign elements. Intellectual property rights are thoroughly territorial. Despite their different origins, languages, histories and so on, products of intellectual inventions share certain common characteristics their immaterialness and their capability of wide popularization. Therefore, it is necessary to adjust and apply protective rights on intellectual property ownership in order to protect the authors and to prevent violence to the ownership of the intellectual property effectively, as well as to establish and perfect the mechanism of exploiting intellectual inventions for the highest social profits.

Along with the rapid scientific-technological developments in the world during the last decade, protecting intellectual property rights has gained a number of remarkable achievements. WIPO and its precursors made numerous attempts at building an international system of regulations to protect intellectual property rights. Some of international important conventions were approved of, including Rome Convention (1961), Paris Convention (1967), Stockholm Convention (1967, revised in 1979), Berne Convention (1971), etc.

Together with the world developments of commerce and economy, WTO was held as a legal institution to regulate global commercial-economic relationships. It has increasingly developed its roles and effects basing on its precursors' regulations of the last 50 years (a general agreement on tariff and trading - GATT). It operates on four main principles: opening markets, treatment of most-favoured nation, treatment of favoured nation and fair competition. With 25 multilateral Agreements, WTO, an 'international playground' of modern rules, profoundly regulates exchanges of products and services, investments and intellectual property rights.

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During the existence of GATT, the protection of intellectual property rights was a separate issue to be adjusted in international agreements and conventions was laid out of the scope of GATT. In the late 1970s and the 1980s, most industrialized countries have been trying to make international conventions on intellectual property rights. These attempts failed due to a fierce protest from developing countries where a view was held then that the developed countries' attempts to protect intellectual property rights actually were to maintain their dominating roles. Not until 1984 when the USA declared to add the problems of faulty goods into GATT had the protection of intellectual property rights been officially added into GATT. At that time, it had been that GATT just functioned to deal with material property but not with immaterial ones; furthermore, problems of faulty goods belonged to WIPO, not to GATT itself. However, afterwards, developing countries have changed their points of view to recognize the importance of intellectual property rights to their own developments and to the technology transferred from developed countries.

The Uruguay Multilateral Negotiation started in Punta Del Este on 20/9/1986 and finished with the Marakesh agreement which formed WTO on 1/1/1994. TRIPS is one of its four pillars. The regulation system of intellectual property rights was built on the following concepts:

- Values of products and services increasingly reflect factors of technologies and creations inside themselves. Thus, exchanges of products and services include exchanges of intellectual values.

- In the unity of the world economies, trading developments might be affected if the criteria in protecting intellectual property rights given by different countries are varied. Furthermore, inadequate implementation of these rights can lead to increasing exchanges of faulty goods and violence to copyrights.

In order to reduce deviations and obstacles in international trading activities, it is necessary to improve the protection of intellectual property rights, and to ensure that protecting measurements will not hinder legal trading activities. There need to be new regulations on:

- 1) The capability to apply the basic principles of GATT 1994 and other suitable international agreements and conventions on the protection of intellectual property rights.

- 2) Defining norms and regulations regarding achievement capability, scope and employment of intellectual property rights concerning trading activities.

- 3) Defining effective measures to implement intellectual property rights which are concerned with trading activities, and taking in to account the difference of law system among countries.

4) Defining effective procedures in order to prevent and deal with controversies among countries; and

5) Defining regulations in order to achieve maximum participation to the results of negotiations.

Trading matters in WTO defined in TRIPs aim to help enhance innovating, transferring and popularizing technologies, and bring profits to the owners of intellectual property, bring about social and economic profits, and create the balance between interests and responsibilities.

TRIPs consists of the following contents:

- The basic principles and general responsibilities.

- The criteria of minimum protection, validity of protection and supervision, and of protecting measures against competitions in contracts.

- The measurements of trading limits.

- Ensuring implementations of intellectual property rights.

- Agreements on the transitional stage to implement at national levels.

- Author rights and relevant ones: there have not been such detailed regulations on protecting computer programs, building and broadcasting public media programs.

- Industrial ownership no rights: in Vietnam, there have been protections of

intellectual property rights for arrangements, integrated circuits, coded satellite signals, famous good marks and labels, geographical indications for wine, and strong alcoholic drinks, and know-how.

2. Basic Principles of TRIPs

Trading regulations are based on the principles of WTO, expressing themselves through two categories. First, TRIPs institutionalised all areas of the international trading system, including both visible and invisible trading activities. Second, trading relationships are dealt with under general principles and the restrictions of special exceptions. TRIPs is one of the most important agreements within the scope of WTO; therefore its principles are based on those of WTO. Besides, TRIPs has achieved remarkable results by applying the principles of GATT to regulate intellectual property rights in trading activities. In short, the principles of TRIPs are the concretization of GATT and WTO in terms of the protection of intellectual property rights.

2.1. Most Favoured Nations (MFN)

Clause 4 in TRIPs says: 'To see protection of intellectual property rights, any privilege that one member country gives to any citizen of any country must immediately and unconditionally be granted to any other citizens of other member countries.'

This is deemed to be the most important and fundamental of (Article 4)

WTO, which ensures equality among their member countries.

However, TRIPS also has some exceptions and waivers. According to its Clause 4, MFN can be omitted:

a) Basing on the international Agreements and conventions on the supports of litigation or law implementation in general meaning, but not just under the restriction on the protection of intellectual property rights.

b) If it matches the principles of Berne Convention (1971) or Rome Convention.

c) In cases of the rights belonging to performers, producers of records and broadcasting organizations which are not defined by TRIPS.

d) Basing on the international Agreements and conventions which took effect before WTO Agreement did, on the condition that they conformed to TRIPS Committee and do not bring about sloppy discriminations among its member countries.

2.2. National Treatment (NT)

Item 1 of Clause 3 in TRIPS says: 'each member country has to give no less willing treatments to other member's citizens than to those of its country regarding intellectual property rights.

This is a fundamental principle of all international conventions on the protection of intellectual property rights, and is also defined in Clause 3 of GATT.

FN in TRIPS has some points worth attending to as follows:

- According to the legend of TRIPS, for WTO members with private customs territories, the term 'citizen' is a resident or legal person residing or running effective industrial or commercial establishments within their customs territories.

- According to Item 1 of Clause 3, any member country is deemed to have its responsibilities to give any approved rights in the Agreement to other member country's citizens, regardless of whether this country gives these rights to its own citizens or not.

- Exceptions of FN of TRIPS are defined in Paris Convention (1967), Berne Convention (1971), Rome Convention and conventions on intellectual property rights concerning integrating circuits.

According to Item 2 of Clause 3 in TRIPS, all member countries can employ the above exceptions regarding administrative judgements only.

- Regarding FN and MFN, TRIPS mentions 'maximum exploiting state' of intellectual property rights. According to Clause 6 of the Agreement, no principles in the Agreement can be used to adjust this matter on dealing with originating problems.

- What have been mentioned above on MFN and FN are not applied to any procedures defined in the Multilateral Agreement signed under the protection of

WIPO which are concerned with gaining and maintaining effects of intellectual property rights.

In the context of Vietnam, although NF in principle receives remarkable attention, there are several obstacles to overcome. Regarding the protection of intellectual property rights, the legal system of Vietnam has not been able to adequately match TRIPS, for example, in setting and maintaining industrial ownership rights, registering author rights...

2.3. Principles of the Balance between the Protection of Intellectual Property Rights and People and Society's Interests

Clauses 7 and 8 in TRIPS say:

- The protection and implementation of intellectual property rights must help enhance improving, transferring, and popularizing technologies, resulting in social and economic interests. This is an important objective of TRIPS.

- On issuing and revising its laws, a member country can take necessary measures in order to ensure health security for its people and improve public interests in certain vital issues for its socio-economic and technological developments, on the condition that they do not conflict with the principles of the Agreement.

- Suitable measures within the principles of the Agreement can be employed to prevent the abuses of

intellectual property rights and what may hinder legal trading activities.

- Member countries can issue their own laws on monopoly rights, goods trade marks and labels, industrial patterns in accordance with Clause 7 of the Agreement.

2.4. Principled Issues Relevant to the Implementation of TRIPS in its Member Countries' National Law Systems

2.4.1. Bases and Scopes of the Member's Responsibility

According to Clause 1 in TRIPS:

"All members must comply with all clauses of the Agreement. All member countries can, but are not necessarily obliged to, employ stronger right protections in their own law systems than what is defined in the Agreement, if they do not conflict the Agreement. All member countries are free to choose their suitable measures to implement the provisions defined in the Agreement."

On implementing TRIPS, some of its member countries may encounter certain common problems. To the most general extent, there may be some differences between the regulations of TRIPS and those of its member countries. Solutions to these problems shall depend on the positions and powers of international conventions in their law systems. In some countries, international conventions receive a priority as compared with any previous issued regulations but not with ones issued later; while in some others,

international conventions, in all cases, receive the highest priority. In addition, its member countries have to localize the regulations of TRIPS.

On the other hand, TRIPS also has some self-implementing and non-self-implementing regulations. Member countries have their responsibilities for accepting these regulations in their own laws and issuing suitable legal regulations so that they can be implemented. This means international laws do not care about measures, but about the results instead.

In terms of responsibilities, Item 3 of Clause 1 says: 'Member countries are deemed to accept any treatments defined in the Agreement and applied to other member countries' citizens. Regarding the rights corresponding intellectual property ownership, citizens of other member countries are deemed to be residents or legal men who meet the requirements of Paris Convention (1967), Berne Convention (1971), Rome Convention, and any conventions on intellectual property rights regarding integrated circuits. Any member countries employ the capability defined Item of Clause 5 or Item 2 of Clause 6 in Rome Convention, have to inform the Committee.

2.4.2. The Relationship between TRIPS and Berne Convention, Rome Convention and Paris Convention

As mentioned above, TRIPS was built on the basis of contemporary conventions relating to intellectual property rights,

including Paris Convention (1967) in terms of the protection of industrial ownership rights, Berne Convention (1971) in terms of copyrights of works of literature, arts, and Rome Convention (1961) in terms of the protection of performers, manufactures of records and of broadcasting organizations. The idea of TRIPS was not to set up new regulations but to combine old ones together as its starting points. Therefore, TRIPS has a close relationship with these conventions. With regard to this relationship, TRIPS has a clause (Clause 2) with the following contents:

- According to Part II, III and IV of the Agreement, all member countries are deemed to comply with Clauses 1-12 and Clause 19 of Paris Convention (1967).

- None of the regulations in Parts I-IV of the Agreement affect the existing responsibilities employed to any member countries of Paris Convention, Berne Convention, Rome Convention and the convention on ownership rights which are concerned with integrating circuits.

- As regards author rights and other relevant rights, member countries are still bound to Berne Convention and Rome Convention. TRIPS member countries are not obliged to join Berne Convention, but are deemed to accept any responsibilities defined in this convention.

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TRIPS is one of the most important achievements of the negotiation in

Uruguay on the general Agreement on custom tariff and trading (GATT). This can be considered to be the first comprehensive Agreement on intellectual property rights signed by most countries joining international trading activities. Therefore, TRIPS has gained further steps than any

other Agreements and conventions in this field. Carefully studying the basic principles and concepts of TRIPS will help get access to the whole contents concerning with intellectual property rights in the scope of WTO for the sake of our international integration.

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BẢO VỆ QUYỀN SỞ HỮU TRÍ TUỆ TRONG HIỆP ĐỊNH TRIPS

PGS. TS. Nguyễn Bá Điển

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