Copyright and Related Rights*

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Paper discusses various provisions on copyright matters given in the TRIPS Agreement, viz. the general provision, the special provisions, and the provision for the protection of related rights. It enumerates the practical implications of the Agreement on copyright and related rights.

International trade agreements have been in existence for a long time. Agreements existed and shall continue to exist between countries for various trade matters. Initially, such agreements were aimed at abolishing tariff barriers for trade and also to eliminate discriminatory trade measures between countries. Slowly, intellectual property rights (IPR) issues also started surfacing in these agreements. We can look at some such agreements in recent times, viz. NAFTA Treaty (North America Free Trade Agreement) between Canada, Mexico and the United States; the Cartagena Agreement (The Andean Pact), and in the treaty establishing the European Economic Area (the EC and the Member States of the European Free Trade Agreement with the exception of Switzerland).

However, one of the most comprehensive and at the same time the most universally accepted set of provisions on copyright matters in the context of trade law are found in the so called TRIPS Agreement in the framework of the WTO.

TRIPS Agreement

Uruguay Round of negotiations within the framework of the General Agreement on Tariffs and Trade (GATT) was concluded on 15 December 1993. One of the many areas of negotiations was intellectual property. The Agreement was formally signed by the 118 members of GATT at Marrakesh in Morocco on 11 April 1994 and took effect from 1 July 1996.

The TRIPS Agreement contains provisions which are partly self-contained, partly based

on the context of the Conventions administered by WIPO (the Berne Convention and the Rome Convention) and, on the Treaty on Intellectual Property in Respect of Integrated Circuits.

Thus, the main elements of TRIPS are:

(i) Norms on the contents of the right ("standards"),
(ii) Certain basic principles,
(iii) Enforcement standards,
(iv) Dispute prevention and settlement,
(v) Transitional arrangements, and
(vi) Institutional arrangements

Section 1 of Part II of the TRIPS Agreement titled "Copyright and Related Rights consists of 6 Articles (Article 9 to 14) dealing with:

(i) Article 9: Relation to the Berne Convention,
(ii) Article 10: Computer programs and compilation of data,
(iii) Article 11: Rental rights,
(iv) Article 12: Term of protection,
(v) Article 13: Limitations and exceptions, and
(vi) Article 14: Protection of performers, producers of phonograms (sound recording) and organizations

Standards for Protection of Copyright

Article 9 can be termed to be a "General Provision" and Article 10 to 13 can be termed as "Special Provisions" prescribing standards for protection of copyright.

The General Provision

The General Provision (Article 9) prescribed that WTO Member States shall comply with Articles 1 to 21 of the 1971 Paris Act of the Berne Convention and the appendix to that Act. However, there is an important exception from the application of Berne Convention standards, and that is the provision in respect of the 'Moral rights' as conferred under Article 6bis of the Berne Convention. Thus, the TRIPS Agreement does not provide for any rights or obligations in respect of moral rights and hence the TRIPS Agreement cannot be invoked in respect of any moral rights issue.

The General Provision also contains a well-known general principle of the copyright law, namely, that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. This means that ideas as such and facts would not be protected and what is protected is individual expression of ideas.

The Special Provisions

The Special Provisions of the TRIPS Agreement in respect of copyrights requires the following:

1. Computer programs whether in source or object code shall be protected as literary works under the Berne Convention. This means that computer programs cannot be considered as artistic works and in particular, as works of applied art. This provision was presumably provided for, since the Berne Convention does not explicitly mention computer programs.

Thus, in practice, this means that limitation on the right must be kept within the framework of the Berne Convention, that the term of protection would be 50 years and that the national treatment principle shall apply.

2 The TRIPS Agreement also states that compilation of data shall be protected as intellectual creations (i.e. as works), pro-
vided that it meets the criteria of originality, by reason of the selection or arrangement of their contents, regardless of whether the compilation is in a machine readable form or other form. The data or material itself is thus not eligible for protection, and the protection of the compilation shall be without prejudice to the protection under copyright or other protection of the material included.

3 A right in respect of commercial rentals of copies of computer programs and audio visual works is also granted under the TRIPS Agreement. However, the rental right in respect of the audio visual works does not apply unless such rental has led to widespread copying, which materially impairs the exclusive right of reproduction.

Thus, whether a rental right for audio visual works is to be granted, would depend on the factual situation of the Member countries. The rental right must be recognized by Member States only if the commercial rental has resulted in widespread unauthorized copying.

Another exception which is provided for is in respect of computer programs where the rental right shall not apply when the program itself is not the essential object of the rental. For example, when it is incorporated in various appliances.

The term of protection for works (other than photographic works and works of applied arts) is 50 years following the death of the author and where the term of 50 years cannot be calculated on the basis of the death of the author, it shall be 50 years from the end of the year of authorized publication or from making of the works. This provision basically corresponds to the obligation already in existence under the Berne Convention.

5 Finally, certain provisions are incorporated in the TRIPS Agreement dealing with limitations and exceptions to the rights. It is clearly laid out that limitations and exceptions on rights provided by the Member States shall continue to special cases which do not conflict with a normal exploitation of the works and do not unreasonably prejudice the legitimate interests of the author. This provision is similar to the Berne Convention. However, under the Berne Convention the provision applies only in respect of the right of reproduction.

**Standards for Protection of Related Rights**

Article 14 deals with the provisions for the protection of performers, producers of phonograms (sound recording) and broadcasting organizations. Though the term "Related Rights" has been used, the term usually used is "Neighbouring Rights".

Under the provisions of the TRIPS Agreement, it is provided, that performers shall have the right to prevent (not authorize):

(i) The fixation of their unfixed performances on phonograms,

(ii) The wireless broadcasting of their unfixed performances,

(iii) The communication to the public of their unfixed performances, and

(iv) The reproduction of the fixation of their performances.

However, these rights provided to performing artistes do not extend to:

(i) Audio visual fixation,

(ii) Broadcasting of fixed performances, and

(iii) Communication to the public of fixed performances.

In this respect, the protection provided to the performing artistes in the TRIPS Agreement is below the ones provided for in the Rome Convention. Further, whereas in the Rome Convention the protection given to
performing artistes is for preventing fixation on any medium, the TRIPS Agreement covers only fixation of performances on phonograms.

Producers of phonograms are also given the following rights under the TRIPS Agreement:

(i) To authorize or prohibit the direct or indirect reproduction of their phonograms.

Direct reproduction means direct copying from a master copy.

Indirect copying occurs where for example, a person records a broadcast programme wherein the producer's phonogram is broadcast.

(ii) To authorize rental of copies of their phonograms.

There is, however, an exception for Member countries, who as on the date when the TRIPS Agreement was adopted, have in force a system of equitable remuneration of rightholders for rentals. The exception provided that such Member States may maintain that system of equitable remuneration provided that the rental do not give rise to the material impairment of the exclusive right of reproduction of the rightholder concerned.

This provision aims specifically at Japan which has such a remuneration system already in place.

Broadcasting organizations (both radio and television bodies) shall have the right to prohibit:

(i) The fixation of their broadcast,

(ii) The reproduction of the fixation of their broadcast,

(iii) The wireless rebroadcasting of their broadcast, and

(iv) The communication to the public (by wire or wireless means) of television broadcast (not radio broadcast).

However, the countries party to the TRIPS Agreement, are not obliged to provide for such rights to the broadcasting organizations. But, if they do not provide such protection to broadcasting organizations, they shall provide the owners of copyright in the broadcast materials these rights as mentioned above, subject to the provisions of the Berne Convention. This would mean that non-voluntary licences may be introduced under certain conditions.

The term of protection for related rights is 50 years for performers and producers of phonograms and 20 years for broadcasting organizations.

Thus, under the TRIPS Agreement, the beneficiary of the related rights are given longer protection than under the Rome Convention.

As regards limitations and exceptions, it is provided that the same limitations and exceptions on the right may be applied as those allowed under the Rome Convention. However, there is an obligation to apply article 18 of the Berne Convention to the Right of Performers and Producers of Phonograms. This would mean that the national legislation which implements the TRIPS Agreement must provide protection for all performances and phonograms which have not fallen into the public domain at that time.

Implications

The greatest implication of the TRIPS Agreement is that all Member countries have to modernize their laws and regulations on intellectual property and also to start implementing them.
Thus, the practical implications of TRIPS Agreement on copyright and related rights would be as follows:

(i) National laws of Member countries would have to afford protection to computer programs.

(ii) The rental rights afforded under the TRIPS Agreement would be new for various countries since rental rights are not mentioned in the Berne Convention. With the result that Member countries would have to amend their laws to incorporate this new rights.

(iii) WTO Member States which are signatories to both the TRIPS Agreement and the Berne Convention, would have to amend their legislation in respect of the term of protection of copyrighted works, in order to be fully compatible with both the Berne Convention and the TRIPS Agreement.

(iv) Since the TRIPS Agreement does not contain any definition of rebroadcasting, it would be a matter to be decided by national legislations under both the Rome Convention and the TRIPS Agreement.

Thus, now that the TRIPS Agreement has established a council to monitor and operate the TRIPS Agreement and in particular with Members' compliance with the obligations under that Agreement, it means that there is an international "Watch Dog" who will look after the operation of the international copyright system.