

# **Intellectual Property Rights in the WTO and Developing Countries**

by

**Jayashree Watal**

**Kluwer Law International**

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**INTELLECTUAL PROPERTY RIGHTS  
IN THE WTO AND DEVELOPING COUNTRIES**

*For  
Amma, Ratan, and Divya*

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## Foreword

The conclusion of the Uruguay Round of Multilateral Trade Negotiations and the signing of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) is a major landmark in the development of international law in the field of intellectual property rights. This far-reaching agreement, which builds upon the foundations laid by the Paris and Berne Conventions over a period of over a hundred years, requires all members of the World Trade Organization to enact or amend their national legislation in conformity with its provisions. Broadly, it is the large number of developing and least developed country members that are required to make the most extensive changes. Understandably, the consequences and impact of such changes will only be known over a period of time. The changes required by the TRIPS Agreement were to be made by developing country members by 1 January 2000, and by the least developed country members by 1 January 2005.

A book of this nature should make indispensable reading for all those involved in intellectual property rights issues, whether at policy, management, litigation, advice or study level. It is based on extensive and painstaking research covering a period of about a decade, spanning the crucial years of controversial and often bitter negotiations between the developed and developing countries, and on the first hand experience and keen insight of Jayashree Watal as a negotiator on behalf of the Government of India. At a time when developing and least developed countries are faced with many difficult questions in defining their respective national intellectual property strategy and policy and designing intellectual property rights legislation in conformity with those policies and

the requirements of the TRIPS Agreement, I am pleased to support such a useful and timely publication. Further, as a scholarly input by a developing country national it will make a valuable contribution to the growing debate and discussions world-wide on intellectual property rights in general, and the TRIPS Agreement in particular.

November 2000

KAMIL IDRIS  
World Intellectual Property Organization

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## Acknowledgements

Preparations for this book began in 1990 and took more concrete shape when Oxford University Press, India showed interest in this project in 1996. However, substantive work could only be done from 1998 to 2000 after I had been granted study leave by the Government of Andhra Pradesh in India. My association with the Indian Council for Research in International Economic Relations (ICRIER), New Delhi and consequent affiliation with the Institute for International Economics (IIE), Washington DC during this period spurred the actual writing. This book was researched in part at the George Washington University (GWU) Law School between 1997 and 1999, where I was given access to the library and computer facilities.

My thanks are first due to Dr Isher Judge Ahluwalia, ICRIER, for actively encouraging me to write this book; to Dr C. Fred Bergsten, IIE, for accepting me as a visiting fellow and, more importantly, for engulfing me in the warmth reserved for the IIE family; to GWU Law School, in particular to Professors Martin J. Adelman and John R. Thomas for encouragement, and several lengthy discussions; to Roberto Castelo, N. K. Sabherwal, and Dr G. S. Jaiya of the World Intellectual Property Organization (WIPO) for facilitating my consultation with experts in that organization and in UPOV and most particularly to Adrian Otten, of the World Trade Organization (WTO) and his able team for responding generously to all my unreasonable requests to read and discuss the various chapters, thus vastly improving the original draft. My friend, Ruth Gana Okediji, devoted a lot of her time to correct the final proofs, contributing to the improved presentation and substance of this text.



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Views, interpretations or conclusions expressed here are my own and should not be attributed to anyone else, including any organization I am associated with. Similarly, any errors or shortcomings in the text are entirely mine.

November 2000

JAYASHREE WATAL

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## Abbreviations and Acronyms

AIDS/HIV: Acquired Immune Deficiency Syndrome/  
Human Immunodeficiency Virus  
AIPO: African Intellectual Property Office  
ARIPO: African Regional Industrial Property Organization  
ASEAN: Association of South East Asian Nations  
ATC: Agreement on Textiles and Clothing  
CBD: Convention on Biological Diversity  
CIS: Confederation of Independent States  
CTE: Committee on Trade and Environment  
DNA: Deoxyribose Nucleic Acid  
DSB: Dispute Settlement Body  
DSU: Dispute Settlement Undertaking  
EC: European Communities  
EMRs: Exclusive Marketing Rights  
EPC: European Patent Convention  
EU: European Union  
GAO: General Accounting Office  
GATS: General Agreement on Trade in Services  
GATT: General Agreement on Tariffs and Trade  
GSP: Generalized Scheme of Preferences  
ICANN: Internet Corporation for Assigned Names and Numbers  
IGOs: Inter-governmental Organizations  
IFPMA: International Federation of Pharmaceuticals  
Manufacturers' Association  
IIPA: International Intellectual Property Association  
IP: Intellectual Property  
IPC: Intellectual Property Committee  
IPRs: Intellectual Property Rights

- MTN: Multilateral Trade Negotiations  
MTO: Multilateral Trade Organization  
NAFTA: North American Free Trade Area  
NG: Negotiating Group  
NGOs: Non-governmental organizations  
NIH: National Institutes of Health  
OECD: Organization for Economic Cooperation and Development  
PBRs: Plant Breeders' Rights  
PhRMA: Pharmaceutical Research and Manufacturers' Association  
PIC: Prior Informed Consent  
PLT: Patent Law Treaty  
PVP: Plant Variety Protection  
SAA: Statement of Administrative Action  
SPA: Software Producers' Association  
TLT: Trademark Law Treaty  
TNC: Trademark Negotiations Committee  
TRIPS: Trade-Related Aspects of Intellectual Property Rights  
UN: United Nations  
UNCTAD: United Nations Conference on Trade and Development  
UNDP: United Nations Development Programme  
UNEP: United Nations Environment Programme  
UNIDO: United Nations Industrial Development Organization  
UPOV: Union Pour la Protection des Obtentions Vegetales.  
(International Union for the Protection of New Varieties of Plants)  
US: United States of America  
USPTO: United States Patent and Trademarks Office  
USTR: United States Trade Representative  
UTSA: Uniform Trade Secrets Act  
WHO: World Health Organization  
WIPO: World Intellectual Property Organization  
WTO: World Trade Organization

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## CHAPTER I

# Introduction to Intellectual Property Rights in the World Trade Organization

Intellectual property (IP) can be loosely defined as creations of the human mind.<sup>1</sup> These could be incorporated in creative or inventive works, including distinctive signs or marks. Examples are books, paintings, or other literary and artistic works, inventions, designs, and trademarks. Intellectual property rights (IPRs) are legal rights governing the use of such creations. This term covers a bundle of rights, such as patents, trade-marks or copyrights, each different in scope and duration with a different purpose and effect. However, all IPRs generally exclude third parties from exploiting protected subject matter without explicit authorization of the right holder, for a certain duration of time.<sup>2</sup> This enables IPR owners to use or disclose their creations without fear of loss of control over their use, thus helping in their dissemination. It is generally assumed that IPRs help encourage creative and inventive activity and make for orderly marketing of proprietary goods and services. In the case of protection of distinctive signs like trademarks, the objective is to avoid confusion among free riders and deception of consumers of differentiated goods and services. Protection against is the underlying philosophy of all IPRs, and there are some specific rules in international IP law targeted toward

<sup>1</sup> See definition given by WTO available at <http://www.wto.org>. The term 'ideas' is not used, as copyright protects the specific expression of ideas and not the idea itself.

<sup>2</sup> In the case of trademarks, geographical indications and trade secrets, this may mean unlimited time under certain circumstances.

this. Protection of IPRs is meant for the general benefit and progress of society.

However, sometimes the dynamic, long-term benefits of IPRs could conflict with other short-term public policy objectives. Consequently, there are, almost always, limits to the scope and duration of IPRs, and the specific exceptions allowed to such protection in order to ensure a balance between the interests of the right holders and those of the users.

Historically, the interests of exporters of products or technologies incorporating IP conflicted with those of importers or imitators of such products or technologies. The increasing pace of globalization engendered by faster and cheaper methods of transportation and communication, combined with the growing ease of imitation, produced a strong and continuing demand for improving the international legal framework for the protection and enforcement of IPRs. IPRs have thus moved rapidly from being an esoteric subject confined to specialist circles to become a major policy issue in international economic relations and a term recognized by the general public the world over.

A major landmark in international economic relations was the successful conclusion, in 1994, of the controversial negotiations on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as a part of the Uruguay Round of multilateral trade negotiations. TRIPS now forms part of the legal obligations of the newly founded successor organization to the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO).

TRIPS is, by far, the most wide-ranging and far reaching international treaty on the subject of intellectual property to date and marks the most important milestone in the development of international law in this area.<sup>3</sup> TRIPS, when fully implemented, will unambiguously strengthen protection of IPRs almost world-wide, a feat not achieved by any other single international treaty ever before. In particular, it will bring the standards of protection in major developing country members of the WTO closer to those

<sup>3</sup> Gervais (1998) equates this development with the 1968 Stockholm Conference that revised the Paris and Berne conventions and created WIPO. The Berne Convention was last revised in 1971 at Paris. Most analysts would agree that these last revisions or the transformation of WIPO from BIRPI did not have as dramatic an impact on world-wide intellectual property protection as TRIPS has had.

that exist in developed countries.<sup>4</sup> TRIPS has also ventured into many new areas which was previously outside the purview of international law and, in many cases, even national laws of developed countries. Thus, TRIPS has necessitated changes in the IPR laws of all WTO member countries without exception. However, the changes to be made to the relevant laws, regulations and procedures of developing countries are, undoubtedly, more drastic. Many sensitive sectors of economic and social activity in developing countries such as agriculture, health, education and culture may be affected by the changes demanded by TRIPS. Future methods of doing business in some of these sectors in some developing countries may change on account of the increased awareness and changing attitudes towards IPRs.

Apart from being the first international intellectual property agreement to dramatically increase the level of minimum standards of such law, TRIPS is also the first international intellectual property law agreement:

- that obliges, in a single undertaking, new standards on as many as seven types of IPRs<sup>5</sup> (namely, copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information) for as many as 138 countries/territories (as on July 2000);
- to be included as a part of the rules governing the multilateral trading system, thus marrying trade law and jurisprudence with intellectual property law,<sup>6</sup> particularly making applicable the swift

<sup>4</sup> Throughout this book, the terms 'developed countries' or North and 'developing countries' or South are loosely used to define the crucial difference between those who demanded rules on strengthened IPR protection in the global trading system and those who opposed them. The picture is complicated as national interests differ with particular sectors and particular IPRs. These complications influenced the positions of different countries during these negotiations.

<sup>5</sup> Eight, if protection of plant varieties is taken separately. The only substantive area of intellectual property left out is utility models, which are a weaker form of patents, sometimes referred to as 'petty patents'. In this area, members of the WTO are free to legislate under the overall framework laid down in the Paris Convention.

<sup>6</sup> For example, the concept of most-favoured-nation treatment has been extended to IPRs under TRIPS. Also, some parts of the TRIPS text uses language identical to that used in GATT, 1947. Consequently, the first panel



#### 4 □ *IPRs in the WTO*

and effective dispute settlement process of the WTO, which can impose trade penalties on members violating the agreement;

- that includes fairly detailed standards for domestic enforcement of IPRs, both internally and at the border;

- that obliges protection of new types of IPRs even in developed countries, of which at least one, undisclosed information, has never been the subject of any multilateral agreement before,<sup>7</sup> and another, protection for integrated circuit designs, had no effective international treaty, while others, like plant variety protection or performers' rights, were geographically limited;

- that covers new subject matter under existing types of intellectual property, at least for some developing countries, such as product patents for food, pharmaceuticals, chemicals, microorganisms or copyright protection for software;

- that creates new categories of rights under existing types of intellectual property for the majority of WTO members such as rental rights for computer programmes and sound recording (and for films under certain circumstances) under copyright and related rights; higher level of protection for geographical indications for wines and spirits; reversal of burden of proof for process patentees; and

- that incorporates a text on the control of anti-competitive practices in the licensing of IPRs in a binding treaty.

All WTO members were generally given one year, i.e. upto January 1996, to phase-in these changes into their IPR or other laws and regulations. Developing and other countries-in-transition, such as those of Eastern Central Europe were given an additional four years i.e. upto January 2000, and least developed countries ten years i.e. upto 2006, to do so. A further period of five years upto 2005, was given to developing countries to introduce product patents in fields of technology excluded thus far in their patent laws. These transitional arrangements have proved inadequate for both developed and developing countries as we shall see in later chapters.

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to decide a TRIPS dispute relied on past GATT jurisprudence, applying concepts related to trade in goods to IPRs.

<sup>7</sup> Although the first two subjects were included under the broad heading of 'unfair competition' already covered by the Paris Convention, these were new subjects many developing countries did not even accept to be IPRs.