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Indian path towards TRIPS compliance

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5 Abstract

6 A brief summary is provided of the progress that India is making in adjusting its laws to meet the requirements of TRIPS and the
7 World Trade Organization, e.g. in designs, trademarks, copyright, geographical indications of goods, plant varieties, farmers' rights,
8 and patents. The latest amendments to the Patents Act 1970 are then described, including the harmonisation of the patent term,
9 redefinition of patentable subject matter, matters concerning deposits of biological materials, oppositions, revocations, the working
10 of patents, compulsory licences, and the reversal of the burden of proof in infringement of process patents. Finally the author refers
11 to the need for some further legislation before India can become fully TRIPS compliant, e.g. primary legislation regarding product
12 patents, data protection, biodiversity, competition and the protection of undisclosed information, as well as the Rules needed to
13 fully implement some of the existing Acts.

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15 *Keywords:* TRIPs compliance; World trade organization; WTO; Designs; Trademarks; Copyright; Geographical indications of goods; Plant varieties;
16 Farmers' rights; Patents; Patentable subject matter; Biological materials; Data protection; Oppositions; Revocations; Working of patents;
17 Compulsory licences

18 1. Introduction

19 As a developing nation and a member of World
20 Trade Organization (WTO), India is obliged to meet all
21 her obligations to the agreements that fall within the
22 ambit of WTO. India took the first steps towards a more
23 liberal economy about a decade ago. The IPR scene in
24 India has undergone a dramatic change since 1995 [1,2].

25 2. The pre-TRIPS era

26 The establishment of IPR in India commenced in
27 1856 with the enactment of an Act of Protection of In-
28 ventions, based on the British Patent Law of 1852 when
29 certain privileges were granted to the inventor for new
30 methods of manufacture. Subsequent changes were by
31 way of the Patents and Designs Protection Act 1872 and
32 the Protection Inventions Act introduced in 1883 that
33 was further consolidated as the Invention and Designs
34 Act in 1888. The 1872 *Designs Act* extended protection
35 to textiles, linen, cotton, calicoes and muslin; this in-
36 cluded patterns/prints and modelling, casting, emboss-

ment of ornaments or articles of manufacture. The next 37
development was the Indian Patent and Designs Act in 38
1911 with amendments in 1978 with the rules amended 39
in 1985. After Indian independence in 1947, a new 40
Patents Bill was tabled in Parliament in 1965, which 41
after considerable debate was reintroduced in 1967, re- 42
sulting in the Patents Act of 1970, which, with its sub- 43
sidiary legislation came into force on 20 April 1972 as 44
the Indian Patents Act 1970. Legislation to protect 45
trademarks came into force on 6 June 1942 and was 46
based on the principles of English Common Law. The 47
Act of 1940 was further amended to the Indian Trade 48
and Merchandise Marks Act 1958, which came into 49
force on 25 November 1959. A Copyright Act was 50
passed for the first time in India in 1914. The Copyright 51
Act 1957 adopted several principles of the British 52
Copyright Act 1956 to cope with the emerging problems 53
created by technological advances in communication, 54
broadcasting, microfilming, movies, etc. The Copyright 55
Act 1957 was amended in 1983, 1984, 1992 1994 to keep 56
it in tune with the changing needs and technological 57
progress, including the challenges posed by the rapid 58
growth of information technology. 59

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60 **3. The post-TRIPS status**

61 *3.1. Designs*

62 The *Indian Designs Act 2000* with its subsidiary leg-
63 islation presently in force, is compliant with TRIPS and
64 has replaced the *Designs Act of 1911*. The new Act has

- 65 • enlarged the scope of definition of the terms “*article*”
66 to mean any article of manufacture and any sub-
67 stance, artificial, or partly artificial and partly natu-
68 ral, and includes any part of the article capable of
69 being sold separately, and has introduced other as-
70 pects in the definition of “*design*” to include features
71 of shape, configuration, pattern, ornamentation or
72 composition of lines or colours applied to any article
73 whether in two dimensional or three dimensional or
74 in both forms, by any industrial process or means,
75 whether manual, mechanical or chemical, separate
76 or combined, which in the finished article appeal to
77 and are judged solely by the eye;
- 78 • broadened the meaning of the term “*original*”: in re-
79 lation to a design, meaning designs originating from
80 the author including the cases which though old in
81 themselves yet are new in their application;
- 82 • amplified the scope of “*prior publication*” to include
83 any design that has been disclosed to the public any-
84 where in India or in any other country by publication
85 in tangible form or by use or in any other way prior
86 to the filing date or where applicable, the priority date
87 of the application;
- 88 • introduced the international system of classification;
- 89 • revoked the period of secrecy of two years of a regis-
90 tered design; and
- 91 • enhanced the initial period of registration from 5 to
92 10 years, to be followed by a further extension of a
93 period of five years.

94 The new *Designs Act* has also introduced, for example,
95 stricter enforcement features, raised the penalties in case
96 of infringement, and provided for restoration of lapsed
97 designs registrations.

98 *3.2. Trademarks*

99 The *Trade and Merchandise Marks Act 1958* has
100 been replaced by a TRIPS compliant *Trade Marks Act*
101 *1999*. The subsidiary legislation has been advertised for
102 comments from the public and is yet to be endorsed. In
103 view of this unfinished legislative process, the *Act of*
104 *1958* is still operative.

105 New features of the *Trade Marks Act 1999* are the
106 inclusion on *Service Marks*, provision for the registra-
107 tion of *Collective Marks* for the first time in India,
108 prohibition of registration of certain marks which are
109 mere reproductions of or imitations of “well known”

marks, provisions for filing a single application for 110
registration in more than one class of goods and/or 111
services, increasing the term of registration of trade 112
marks from 7 to 10 years and providing a grace period 113
of six months for payment of renewal fees, amplification 114
of circumstances in which validity of registration can be 115
contested, vesting the final authority in the Registrar for 116
disposing of applications for registration of Certification 117
Trade Marks, harmonizing penal provisions of the 118
Trade Marks law with *Copyright Law*, and the provi- 119
sion for establishment of an *Appellate Board*. 120

3.3. *Copyright* 121

The *Copyright Act* was further amended in 1999 to 122
incorporate features making it TRIPS compliant by 123
encompassing neighbouring rights including performer’s 124
rights and protection of rights of broadcasting organi- 125
sations. 126

3.4. *Geographical indications of goods* 127

The Geographical Indications of Goods (Registration 128
and Protection) Act 1999 was introduced in India for the 129
first time. The subsidiary legislation has been advertised 130
but the appellate board as required by the subsidiary 131
legislation has not yet been formed and hence the *Act* 132
though in force is not yet operative. The significant 133
features include registration of geographical indications 134
of goods in specified classes, prohibition of registration 135
of certain geographical indications, compulsory adver- 136
tisement of all accepted geographical indications and 137
providing provisions for taking infringement action ei- 138
ther by a registered proprietor or an authorized user. 139
Further provisions include those for higher level of 140
protection for notified goods, prohibition of assignment 141
of a geographical indication as a public property, pro- 142
hibition of registration of geographical indication as 143
Trade Mark, and for appeal against the Registrar’s 144
Decision to the *Intellectual Property Appellate Board* 145
established under the *Trade Marks legislation*. Other 146
provisions relate to offences and penalties, detailing the 147
effects of registration and the rights conferred by regis- 148
tration, for reciprocity, powers of the Registrar, main- 149
tenance of index, and the protection of homonymous 150
geographical indications. 151

3.5. *Plant varieties and farmers’ rights* 152

Indian has taken a major initiative to develop and 153
enact a novel *Protection of Plant Varieties and Farmer’s* 154
Rights Act 2001 (PPVFR 2001) which not only intro- 155
duces provisions for the protection of new plant vari- 156
eties but also builds into the legislation features to 157
protect farmer’s rights, provides an administrative 158
framework for benefit sharing between the beneficiaries, 159

160 etc. which in combination with the Indian Patents Act/
161 Trademarks Act/Geographical Indications Act/Biodi-
162 versity Act will significantly impact the IPR status in
163 activities related to agriculture and agricultural bio-
164 technology in India. The PPVFR 2001 in many ways
165 may be considered to be a model Act for Developing
166 and the Least Developed Nations.

167 3.6. Biodiversity provisions

168 The Biodiversity Bill 2000 was passed on December
169 11th 2002. The Bill passed is the first such legislation by
170 any of the twelve megadiverse countries that seeks to
171 check biopiracy, and to protect biodiversity and local
172 growers. The Bill, through a three tier administrative
173 structure of national and state boards and local com-
174 mittees, regulates access to plant and animal genetic
175 resources and enables the sharing of benefits.

176 3.7. Patents: The Patent Act 1970 and the subsequent 177 amendment in 1999

178 The Patent Act of India 1911 was fairly liberal as
179 patenting of products related to foods, pharmaceutical,
180 chemicals, etc. was available with a full term of 16 years.
181 This was directly in line with the British Patent Act of
182 1907. India follows the "first-to-file" system as in most
183 countries. The Indian Patent 1970 brought in significant
184 changes with restrictions related to patenting of inven-
185 tions, in the area of chemicals, pharmaceuticals, agro-
186 chemicals, foods, in which product patents had been
187 discontinued and patenting of processes with a restricted
188 life of seven years from the date of filing of the complete
189 specification (or five years from the date of sealing the
190 patent, whichever is shorter) was introduced.

191 The restrictions outlined in Sections 3, 4 and 5 of the
192 unamended Indian Patents Act 1970 are in direct con-
193 flict to the Articles 27(1), 27(2) and 27(3) of the TRIPS
194 agreement. In the context of WTO, India decided to
195 class herself as a developing nation and take advantage
196 of the full term of 10 years that would be available to her
197 to introduce the product patent regime before January
198 1st, 2005.

199 The first amendment to Patent Act 1970 was enacted
200 in 1999 with retrospective effect from 1st January 1995.
201 This has been elaborated by the author in an earlier
202 article in this journal [3], and hence is not discussed here.

203 4. The second patent amendment (2002) to the Patent Act 204 1970

205 4.1. Main issues

206 The second amendment in continuation of the first
207 amendment (1999) addresses the following issues:

- Harmonisation of patent term to 20 years irrespective of the field of technology. 208
- Publication of the patent application 18 months after filing. 209
- Further definition of non-patentable inventions. 210
- Definition of requirements for biological materials. 211
- Faster prosecution of patent application and transparency in the whole process. 212
- Reversal of the burden of proof of process when there is an infringement of process patents. As per the TRIPS requirement the alleged infringer will have to prove that he is not infringing the process patent. 213
- Effective framework for enforcement. 214
- Conditions for "working of patents", "compulsory licensing", "opposition" and "revocation". 215
- Introduction of Bolar provisions without any time restrictions. Section 107A of the Amended Act states: "For the purposes of this Act 216
- (a) any act of making, constructing, using or selling a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, use or sale of any product; 217
- (b) importation of patented products by any person from a person who is duly authorised by the patentee to sell or distribute the product, shall not be considered as a infringement of patent rights". 218

4.2. Patentable inventions 237

The amendment has made a few significant additions and deletions from the list of inventions that are not patentable in India. The amended Section 3 dealing with inventions that are not patentable is as follows: 238

- an invention which is frivolous or which claims anything obviously contrary to well established natural laws; 239
- an invention the primary or intended use or commercial exploitation of which could be contrary public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment; 240
- the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substance occurring in nature; 241
- the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant; 242

- 259 • a substance obtained by a mere admixture resulting
260 only in the aggregation of the properties of the com-
261 ponents thereof or a process of producing such sub-
262 stance;
- 263 • the mere arrangement or re-arrangement or duplica-
264 tion of known devices each functioning indepen-
265 dently of one another in a known way;
- 266 • a method of agriculture and horticulture;
- 267 • any process for the medicinal, surgical, curative, pro-
268 phylactic, diagnostic, therapeutic or other treatment
269 of human beings or process for a similar treatment
270 of animals to render them free of disease or to in-
271 crease their economic value or that of their products;
- 272 • plants and animals in whole or any part thereof other
273 than microorganisms but including seeds, varieties
274 and species and essentially biological processes for
275 production or propagation of plants and animals;
276 [The exclusions states “other than microorganisms”
277 suggesting that microorganisms in principle have
278 not been excluded from patentability.]
- 279 • a mathematical or business method or a computer
280 program per se or algorithms; [This clarification re-
281 lating to software is important as it suggests that if
282 software satisfies conditions of patentable inventions
283 and are linked to applications, etc., their grant should
284 not be rejected.]
- 285 • a literary, dramatic, musical or artistic work or any
286 other aesthetic creation whatsoever including cine-
287 matographic works and television productions;
- 288 • a mere scheme or rule or method of performing men-
289 tal act or method of playing game;
- 290 • a presentation of information;
- 291 • topography of integrated circuits;
- 292 • an invention which, in effect, is traditional knowledge
293 or which is an aggregation or duplication of known
294 properties of traditionally known component or com-
295 ponents.

296 4.3. Definition of “chemical process”

297 Section 5 subsection (a) and (b) of the unamended
298 Patents Act 1970 does not allow grant of Product Pat-
299 ents for foods, drugs, medicines or even to substances
300 prepared or produced by chemical processes including
301 alloys, optical glass, semiconductors and intermetallic
302 compounds. Only Process Patents are allowed in these
303 areas.

304 The text of the second amendment clarifies that for
305 the purposes of Section 5 of the Act, “chemical process”
306 includes biochemical, biotechnological and microbio-
307 logical process.

308 4.4. Requirements for biological materials

309 In Section 10 of the Indian Patent Act 1970, dealing
310 with the contents of a patent specification, amendments

have been introduced to include the following require- 311
ments for biological materials namely 312

- the specification shall be accompanied by an abstract 313
to provide technical information on the invention; 314
- if the applicant mentions a biological material in the 315
specification which may not be described in such a 316
way as to satisfy clauses requiring the disclosure with 317
the best method of performing the invention such 318
that anyone trained in the art can reproduce the in- 319
vention, and if such material is not available to the 320
public, the application shall be completed by deposit- 321
ing the material to an authorized depository institu- 322
tion as may be notified by the Central Government 323
in the Official Gazette and by fulfilling the following 324
conditions, namely: 325

(a) the deposit of the material shall be made not later 326
than the date of the patent application in India, (b) all 327
the available characteristics of the material required for 328
it to be correctly identified or indicated are included in 329
the specification including the name, address of the de- 330
pository institution and the date and number of the 331
deposit of the material at the institution (as per the 332
Budapest Treaty of which India is a signatory), (c) ac- 333
cess to the material is available in the depository insti- 334
tution only after the date of the application for patent in 335
India or if a priority is claimed after the date of the 336
priority, and (d) disclose the source and geographical 337
origin of the biological material in the specification, 338
when used in an invention”. 339

4.5. Grounds of opposition 340

India continues to follow the “first to file” and the 341
“pre-grant” systems even after the amendments to the 342
Patent Act 1970. Under the pre-grant system, the patent 343
applications after examination and acceptance by the 344
Patent Controller, is advertised in the Gazette of India 345
and any one interested in opposing the accepted appli- 346
cation can file an opposition petition with the Patent 347
Office within four months of the date of publication of 348
the specification. If any of the parties are dissatisfied 349
with the decision of the controller, he can file an appeal 350
with the “Appellate Board” to be set up as a result of the 351
second amendment to the Patent Act 1970. 352

The grounds of opposition as per the second 353
amendment now include among the usual grounds 354

- the complete specification does not disclose or 355
wrongly mentions the source or geographical origin 356
of biological material used for the invention 357
- that the invention so far as claimed in any claim of 358
the complete specification is anticipated having re- 359
gard to the knowledge, oral or otherwise, available 360
within any local or indigenous community in India 361
or elsewhere. 362

363 4.6. Grounds for revocation

364 Similarly the grounds for revocation of a patent also
365 in addition to the usual grounds now include

- 366 • the complete specification does not disclose or
367 wrongly mentions the source or geographical origin
368 of biological material used for the invention;
- 369 • the invention so far as claimed in any claim of the
370 complete specification was anticipated having regard
371 to the knowledge, oral or otherwise, available within
372 any local or indigenous community in India or else-
373 where.

374 These additional grounds have been brought in to cor-
375 rect for any wrongful use of indigenous biological re-
376 sources and traditional knowledge and brings the Patent
377 Act in line with the Protection of Plant Varieties and
378 Farmers Rights Act, 2001.

379 4.7. Working of Patents

380 The second amendment has deleted the Sections 86,
381 87, 88 of the Indian Patent Act 1970 dealing with the
382 practice of "licenses of right" thereby complying with
383 the requirement of TRIPS on this issue.

384 Section 83 dealing with the general principles appli-
385 cable to the *working of patented inventions* has been ex-
386 panded to include several conditions especially
387 mentioning (a) that patents are granted to encourage
388 inventions and to secure that the inventions are worked
389 in India on a commercial scale and to the fullest extent
390 that is reasonably practicable without undue delay; (b)
391 that they are not granted merely to enable patentees to
392 enjoy a monopoly for the importation of the patented
393 article; (c) that the protection and enforcement of patent
394 rights contribute to the promotion of technological in-
395 novation and to the transfer and dissemination of
396 technology, to the mutual advantage of producers and
397 users of technological knowledge and in a manner
398 conducive to social and economic welfare, and to a
399 balance of rights and obligations; (d) that patents
400 granted do not impede protection of public health and
401 nutrition and should act as instruments to promote
402 public interest specially in sectors of vital importance for
403 socio-economic and technological development of India;
404 (e) that patents granted do not in any way prohibit
405 Central Government in taking measures to protect
406 public health; (f) that the patents right is not abused by
407 the patentee or person deriving title or interest on patent
408 from the patentee, and the patentee or a person deriving
409 title or interest on patent from the patentee does not
410 resort to practices which unreasonably restrain trade or
411 adversely affect the international transfer of technology;
412 and (g) that patents are granted to make the benefit of

the patented invention available at reasonably afford- 413
able prices to the public. 414

It may be noted that the broadening of the conditions 415
for "working of patents" has brought this section in 416
conflict with the amendments brought in 1999. The first 417
amendment clearly states that importation would be 418
considered as working of a patent in the context of ex- 419
clusive marketing rights. However Section 83 after the 420
second amendment has clouded the issue by introducing 421
broad qualifiers in this section of the amended Act. 422

4.8. Compulsory licences 423

Along similar lines Section 84 of the Amended Act 424
strengthens the earlier grounds for compulsory licences 425
in that at any time after the expiration of three years 426
from the date of the sealing of a patent, any person 427
interested may make an application to the Controller for 428
grant of compulsory licence on patent on any of the 429
following grounds. 430

As per Section 84 of the Amended Act, The Control- 431
ler, if satisfied that the reasonable requirements of the 432
public with respect to the patented invention have not 433
been satisfied or that the patented invention is not 434
worked in the territory of India or that the patented 435
invention is not available to the public at a reasonably 436
affordable price, may grant a licence to the applicant of 437
a compulsory licence upon such terms as he may deem 438
fit. The Controller may also direct the patentee to grant 439
a licence by exercising his powers set out in Section 88 of 440
the Amended Act which allow him to consider issues 441
related to unfair licensing arrangements, compulsory 442
licensing of dependent and essential patents (where, to 443
work one, the other patent is essential). 444

In considering the application field for compulsory 445
licence, the Controller shall take into account: (i) the 446
nature of the invention, the time which has elapsed since 447
the sealing of the patent and the measures already taken 448
by the patentee or any licensee to make full use of the 449
invention; (ii) the ability of the applicant to work the 450
invention to the public advantage; (iii) the capacity of 451
the applicant to undertake the risk in providing capital 452
and working the invention, if the application were 453
granted; (iv) as to whether the applicant has made efforts 454
to obtain a licence from the patentee on reasonable 455
terms and conditions and such efforts have not been 456
successful within a reasonable period as the Controller 457
may deem fit. 458

It may be noted that these clauses are not applicable 459
in case of national emergency or other circumstances of 460
extreme urgency or in case of public non-commercial use 461
or on establishment of a ground of anti-competitive 462
practices adopted by the patentee, but shall not be re- 463
quired to take into account matters subsequent to the 464
making of the application. 465

466 The reasonable requirements of the public shall be
467 deemed not to have been satisfied:

- (a) if, by reason of the refusal of the patentee to grant a licence or licences on reasonable terms, (i) an existing trade or industry or the development thereof or the establishment of any new trade or industry in India or the trade or industry in India or the trade or industry of any person or class of persons trading or manufacturing in India is prejudiced, or (ii) the demand for the patented article has not been met to an adequate extent or on reasonable terms, or (iii) a market for export of the patented article manufacture in India is not being supplied or developed, or (iv) the establishment or development of commercial activities in India is prejudiced; or
- (b) if, by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of any trade or industry in India, is prejudiced; or
- (c) if the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention to challenges to the validity of patent or coercive package licensing; or
- (d) if the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable; or
- (e) if the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation form abroad of the patented article by: (i) the patentee or person claiming under him, or (ii) persons directly or indirectly purchasing from him, or (iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement.

504 Though on one side the conditions under which the
505 compulsory licences to be granted have been eased, the
506 terms for "fair returns" to the patentee in the case of
507 compulsory licences granted have not been so clearly
508 defined in the Amended Act as it states in Section 90
509 "The royalty and other remuneration, if any, reserved to
510 the patentee or other person beneficially entitled to the
511 patent, is reasonable, having regard to the nature of the
512 invention, the expenditure incurred by the patentee in
513 making the invention or in developing it and keeping it
514 in force and other relevant factors".

515 Similarly as per the special provisions (national
516 emergency) in Section 92(1)(ii) of the Bill states "in
517 setting the terms and conditions of a licence granted
518 under this section, the Controller shall endeavour to
519 secure the articles manufactured under the patent shall

be available to the public at the lowest price consistent
with the patentee *deriving reasonable advantage from
their patent rights.*

In the case of governmental use of a patented invention, the modified Section 100 sets some guidelines for the compensation to the patentee by stating "provided that in the case of any such use of any patent, the patentee shall be paid not more than adequate remuneration in the circumstance of each case taking into account the economic value of the use of the patent. The 'economic value' of the patented drug will be fixed by the government by its own judgement".

In contrast, Section 90(1)(ii) sets the terms and conditions for Compulsory Licensee and the stated objective is to ensure that the patented invention is worked to the fullest extent by the person to whom the licence is granted and with reasonable profit to him.

The sections relating to compulsory licensing and including the term for "fair compensation to the patentee" in the event of compulsory licences being issued are contentious and debatable. It has without any doubt been crafted in favour of the licensee of a compulsory licence rather than adequately protecting the interest of the "innovator".

5. Data protection

It may also be noted that India has yet to introduce an effective system for Data Protection that is compliant with Article 39.3 of TRIPS, though it is argued that a system is indeed in place via the existing National Official Secrets Act that bind the public servants from disclosing or using confidential information in an unauthorised manner that may affect the security, sovereignty and integrity of the country.

6. The future

The issues related to patents will gain clarity only when India takes the next crucial step by 1 January 2005, by when it is expected to comply with all the requirements of TRIPS, especially to satisfy the requirements of the "product patents regime".

The subsidiary legislation by way of Rules to most of the main amended or new Acts is still to be put in place. The Acts relating to competition and to the protection of undisclosed information are yet to be placed before the Indian Parliament. So, further changes are in the offing.

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