

***Impediments in the Implementation of  
Intellectual Property Rights in  
Developing Countries***



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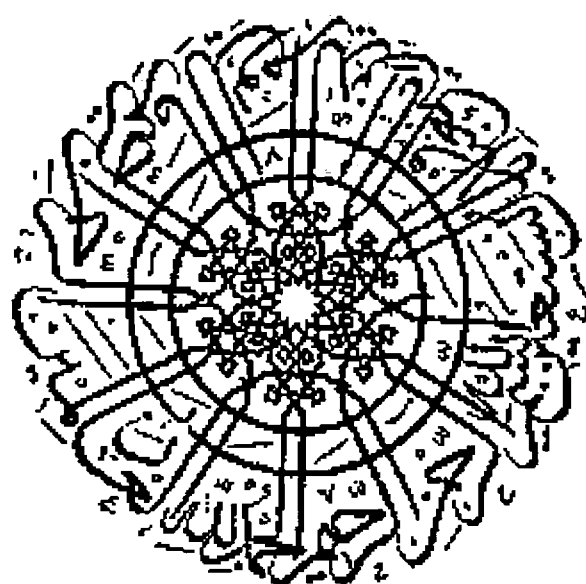
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1. Intellectual property (International Law)
2. Intellectual property

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***The Lord of the two easts is HE, and Lord of the two wasts.  
Which of your Lord's blessing would you deny? 55:17***

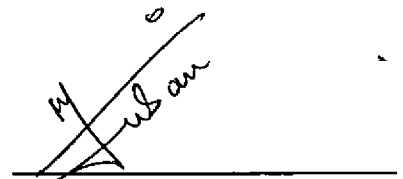
## FINAL APPROVAL

It is certified that we have read the dissertation submitted by Saima Butt, Registration No 248-FSL/LLMCL/F09 on the topic of "Impediments in the Implementation of Intellectual Property Rights in the Developing Countries" in the Faculty of Shariah & Law. We have evaluated the dissertation and found it up to the requirements in its scope and quality by the International Islamic University for award of LL.M Corporate Law Degree.

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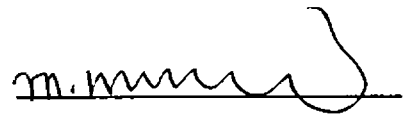
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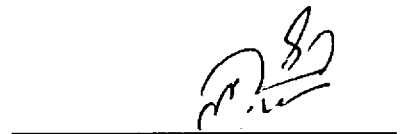
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**A Dissertation submitted in partial fulfillment of the  
Requirements for the degree of MASTER OF LAWS (CORPORATE LAW)  
(Faculty of Shariah and Law)  
In the International Islamic University, Islamabad**

## **DECLARATION**

I hereby declare that this dissertation is original and has never been presented in any other university or institute of learning. I also declare that this thesis has never been copied and any secondary information used has been duly acknowledged in this dissertation.

**SAIMA BUTT**

**248-FSL/LLMCL/F09**

**(NOVEMBER, 2011)**



## DEDICATION

I dedicated this work to my father, who consistently helped me to keep perspective on what is important in life and shown me how to deal with realities of life and I also dedicated to my mother for her never ending love and prayers which also remain unexpressed and invisible but has substantially played a great role throughout my life.

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## **List of Acronyms**

IP	Intellectual Property
UK	United Kingdom
UN	United Nation
IPRs	Intellectual Property Rights
IPL	Intellectual Property Laws
USA	United States of America
FTAs	Free Trade Agreements
FDI	Foreign Direct Investment
BTAs	Bilateral Trade Agreements
UCC	Universal Copyright Convention
WHO	World Health Organization
WTO	World Trade Organization
DSB	Dispute Settlement Board
MNC	Multinational National Company
R&D	Research and Development
LDCs	Least Developed Countries
GATT	General Agreement on Tariff and Trade
WIPO	World Intellectual Property Organization
USTR	United States Trade Representative
SADC	South African Development Community
TRIPS	Trade Related Aspect of Intellectual Property Rights
CESCR	Committee of United Nation on Economic, Social and Cultural Rights
SAARC	South Asian Association of Regional Cooperation
ASEAN	Association of South Asian Nation

## ABSTRACT

The basic object of this research is to create awareness in the people regarding the Intellectual Property Rights. The title of this research is Impediments in the implementation of Intellectual Property Rights in the developing countries. I try to find out those lacunas and gray areas due to which we fail to implement Intellectual Property Rights according to the international standards. Ultimately the purpose of this work is to find out reasons why developing countries are reluctant to implement Intellectual Property Rights and at the same time too much interest of developed countries towards Intellectual property will be discussed.

To achieve this objective, I divide my thesis in four chapters. In the first chapter, the meaning of Intellectual Property Rights and the gradual development of concept of Intellectual Property Rights is discussed. The element and forces responsible for the development of the concept have also been especially highlighted.

In the second chapter, arguments by the proponents and opponent of Intellectual Property Rights are discussed in detail. Third chapter deals with the role played by the international organization and institutions in the global acceptance of Intellectual Property Rights. We find in this chapter that international organization played their constructive role for developing countries or they only represent the developed nation as demy. The way in which developing countries forced or compelled to accept international standards of Intellectual Property will be critically examined.

The last chapter is devoted to the study of current situation of Intellectual Property Rights in the developed and developing countries. Problems and challenges faced by the developing countries while implementing Intellectual Property Laws will be examined. Finally recommendations have been suggested to improve IP situation in developing countries.



## Chapter 1

### Intellectual property rights

#### Introduction:

Intellectual property rights (IPRs) are that form of rights which are given to the creators and inventors for the labor of their intellect. Intellectual property term itself shows that it has some concerns with process of mind. Intellectual property rights have become a very serious issue in the recent years. There is conflict of opinion amongst the states regarding the strictness for the enforcement of Intellectual Property Rights (IPRs). Our interests build our opinion. So the difference of opinion amongst the states means difference of interest between them. Developed nations are eager to enforce the Intellectual Property Rights (IPRs) while the less developed countries seem reluctant in this regard. To get a comprehensive understanding of the intellectual property rights and related issues, it will be more appropriate to spend some time on considering that how Intellectual Property Rights (IPRs) developed, what factors make them popular how they come to their present form, how the basic principal of Intellectual Property Rights (IPRs) are developed and enforced. To get the answer of these questions we will examine the historical back ground of Intellectual Property Rights (IPRs) and their gradual growth at national and then international level. All of the above questions will be answered in the first chapter.

The second chapter discusses the arguments by the proponents of Intellectual Property Rights (IPRs) and the counter arguments by the opponents of Intellectual Property Rights (IPRs). Ultimate object of these arguments is to find whether Intellectual Property Rights (IPRs) should be protected, if yes then to what extent they should be protected. We will make a study and try to find the actual intention of law makers behind the intellectual property protection, whether it is

moral right of the creators or given as a reward to serve the society. Though Intellectual Property Rights (IPRs) should be protected as it works as incentive for creators and inventors but there are some provisions of existing copyright and patent law which are unjustified. Creators and inventors should be protected but on what cost? It will also not to be ignored that creators not independently create or invent the invention but he took benefit from many early inventions and without those inventions he may not be able to invent.

Though there are so many opponents of Intellectual Property Rights (IPRs) but even then they are enforced internationally and globally. Developing countries don't want to implement strict Intellectual Property Rights (IPRs) but even then they are developing strict IP infrastructure. It is important to note that what factors make or compel the developing countries to adopt Intellectual Property Rights (IPRs). So in the third chapter international agreements and institutions regarding the enforcement of Intellectual Property Rights (IPRs) will be discussed, which played an important part in the implementation of Intellectual Property Rights (IPRs) on international level. We will make a hot discussion that international institution help the developing countries in implementing Intellectual Property Rights (IPRs) or these institutions only favored the developed countries. It will be observed that at the time of rule making on the international level developed countries show any concern with the impact of Intellectual Property Rights (IPRs) in the developing countries or they are only eager to protect their own interest.

Forth and the last chapter related to the implementation problem faced by the developing countries regarding Intellectual Property Rights (IPRs). It will describe the problems and challenges that developing countries faced during the implementation of Intellectual Property Rights (IPRs). How these problems can be solved and what role should be played by the industrialized states and international institutions. Some recommendations for the developing

countries regarding the implementation of Intellectual Property Rights (IPRs) will also be given in the end.

### **1.1. Intellectual property:**

Intellectual property is referred to as the creation of mind. It includes inventions, symbols, literary and artistic works, images, names and design used in commerce. The term Intellectual property right is used for certain type of legal monopolies, which are given to the creators for their inventions and artistic works by the state. Intellectual property is an intangible form of property.

### **1.2. Intellectual Property Rights:**

Intellectual property rights are a bundle of exclusive rights over creations of the mind, both artistic and commercial. These rights give statutory expression to the moral and the economic rights of the creators in their creations. Intellectual property rights safeguard creators and other producers of intellectual goods and services by granting them certain time limited rights to control the use made of those productions. These rights also promote creativity and dissemination and application of its results and encourage fair trading, which contributes to economic and social development. Thus, intellectual property refers to the creations of the human mind and human intellect.

The idea or thought itself could not be protected since it was completely intangible or invisible. However, the end product of the human thought, the outcome which is tangible could have been protected, thus the legal concept is created where a capital gets converted into a property.<sup>1</sup>

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<sup>1</sup> Tatwar Sabanna, *Intellectual Property rights in WTO and Developing Countries* (New Delhi: serials publishers, 2010), 2.

### 1.3. Difference between Intellectual Property and Real Property:

The development in science and technology has its impact on the meaning of property and it giving a new dimension in development of rules for property protection. Evolving rules in social and economic life also change the meaning of property. The issues of valuation, protection and exploitation of intellectual property have become critically important all around the world. Intellectual property shares many of its characteristics associated with real and personal property. It is that form of property that can be bought, sold, licensed, exchanged, or gratuitously given away. Further, the intellectual property owner has the right to prevent the unauthorized use or sale of the property.<sup>2</sup>

It is also said that Intellectual Property Rights came about as natural evolution from the property rights on land, capital and labor.<sup>3</sup> The most noticeable difference between intellectual property and other forms of property is that intellectual property is intangible; it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protected.<sup>4</sup>

### 1.4. Significance of Intellectual Property today:

We are living in a global information society. As raw material and labor were key resources in industrial revolution same like that creative work, intellectual commodities and scientific discoveries are very important in knowledge based economy. So the knowledge is ultimate substitute for raw material, labor and capital. In the new global economy of ideas, ownership,

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<sup>2</sup> "Real Property vs. Intellectual Property" available at < <http://www.altacit.com/pdf/12-Real/20%PROPERTY/20%VS/20%Intellectual/20%property.pdf> > (Last accessed Dec 23, 2010).

<sup>3</sup> "If the intellectual property is the answer-what is the question" available on <[http://www.cric.ac.uk/cric/events/frontiers/paper/anderson.pdf\(SECURED\)](http://www.cric.ac.uk/cric/events/frontiers/paper/anderson.pdf(SECURED))> (Last accessed Jan 13, 2011).

<sup>4</sup> "Real Property vs. Intellectual Property" available at < <http://www.altacit.com/pdf/12-Real/20%PROPERTY/20%VS/20%Intellectual/20%property.pdf> > (Last accessed Dec 23, 2010).

control, and access to creative works and scientific knowledge have considerable economic importance, giving rise to fierce competition over intellectual and creative works, or what one analyst describes as the knowledge wars.<sup>5</sup>

In today's dynamic and competitive business environment Intellectual Property rights (IPRs) are the key elements to maintain a competitive edge in the market. Effective acquisition, management, and protection of intellectual property can lead the difference between commercial success and failure for businesses.<sup>6</sup>

### 1.5. An overview of emerging Information economy:

An economy becomes an information economy when information related work begins to exceed work related to the other sectors.<sup>7</sup> The information sector is that sector of the economy that produced, handles or transfers information goods. Information goods are non-material goods. They are qualitatively different from agricultural or industrial goods, which are material goods. The main cost of producing information is incurred at the research and development (R&D) stage when the first instance or copy of that information product is created. Thus, it is 'expensive to create or generate but cheap to copy. The original copy can then be stored and reproduced electronically at very little cost.'<sup>8</sup>

Digital technology, with its unique capability to copy or transfer information without degradation, is the key that opened up the development of the information sector into a full-blown economic sector. The information sector is qualitatively different from other sectors. One

<sup>5</sup>"Implementation of the international covenant on economic, social and cultural rights" available on <<http://www.sciden.net/en/science.pdf>>(Last accessed Dec 01, 2010).

<sup>6</sup>"Real Property vs Intellectual Property" available at< <http://www.altacit.com/pdf/12-Real/20%PROPERTY/20%VS/20%Intellectual/20%property.pdf>>(Last accessed Dec 23, 2010).

<sup>7</sup>"Information economy" available on< <http://vecam.org/artical724html>> (Last accessed Feb 07, 2011).

<sup>8</sup>Pradip Ninan Thomos and Jan Servaes, "The Emerging Information Economy": *Intellectual Property Rights and Communication in Asia*, ed. Robert Verzola (New Dehli: Sage Publication, 2006), 25.

thing that differentiates it from other form of property is easy to share so we more tend to share it and the other is that the cost of reproducing information is very low. But if information is freely shared, who would buy it at a high price? In fact, if one can get it for free, why pay for it at all.

This is the whole concept behind intellectual property rights (IPRs) such as copyright and patents. These rights prohibit the public from freely sharing information; they give the information producer the exclusive right to use, make copies or sell the products. Intellectual property rights are, in fact, information monopolies. The information economies of today are monopolistic information economies. High profit margins is possible in the information sector, it enabling successful information companies to accumulate millions even billions of dollars in a shorter period then their industrial counterparts.<sup>9</sup>

## **1.6. Kinds of Intellectual property:**

Intellectual property rights are the result of someone's intellectual efforts. These rights give the creator a monopoly to use or dispose of his or her creation. Intellectual property rights are given for a limited period of time. We can divide these rights into two main categories.

### **1.6.1. Copyright and rights related to copyright:**

These are the rights of authors of literary and artistic works, such as books and other writings, musical compositions, paintings, sculpture, computer programs and films. These rights are protected for the minimum period of 70 years after the death of the author. Creators are also protected through copyright and related rights, sometimes referred to as "neighboring", rights are the rights of performers e.g. actors, singers and musicians, producers of phonograms, sound

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<sup>9</sup>Pradip Ninan Thomos and Jan Servaes, "The Emerging Information Economy": *Intellectual Property Rights and Communication in Asia*, ed. Robert Verzola (New Dehli: Sage Publication, 2006), 25.

recordings and broadcasting organizations. The main social purpose of protection of copyright and related rights is to encourage and reward creative work.<sup>10</sup>

### 1.6.2. Industrial property:

Industrial property can usefully be divided into two main areas, one area covers patent protection. Inventor is given the exclusive right to prevent others from making, using and selling a patent invention for a fixed period 20 years, in return inventor give full disclosure and details of invention to the public. Other area covers the protection of distinct signs, known as Trademarks. Trademarks are commercial source indicators, distinctive signs that identify certain goods or services produced or provided by a specific person or enterprise.<sup>11</sup>

A trademark is like brand names. It is any word or symbol that represents particular product and distinguish it from other products in the market. Trademark gives surety for product and if needed, accountability as well. This assurance of quality and accountability is completely lost when counterfeiters illegally use a trademark and deceive consumers with their goods. Geographical indications and trade secret are also under protection.

### 1.7. Origin and History of Intellectual Property Rights:

When we see the history of Intellectual Property we came to know that many problems and disputes had been accrued. A conflict and tension between the private right of the creator and the right of the society at large raised. Ownership of knowledge and ideas being a new concept is not acceptable. A number of debates have been made for acceptance or the rejection of Intellectual

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<sup>10</sup>“What are the intellectual property rights” available on [http://www.wto.org/english/tratop\\_e/trips\\_e/intell\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intell_e.htm) (Last accessed Dec 01, 2010).

<sup>11</sup>“Intellectual property rights” available on <http://www.america.gov/media/pdf/books/pdf> (Last accessed Dec 01, 2010).

Property Rights. So it will be most appropriate to discuss the history of intellectual property rights before discussing the global governance of intellectual property rights.

Therefore, the history that we explore is an international history of making knowledge of the idea and information own able. This history is contingent, contested, and constantly evolving.<sup>12</sup>

The different subject areas of intellectual property originate in different places and at different times. Very probably all these laws can be traced back to the system of royal privilege giving which seems to have operated in most of medieval Europe. However the history of intellectual property can be properly explain in three periods.<sup>13</sup>

### 1.7.1. The Territorial period:

The first patent in England is granted by Henry VI in 1449 to a Flemish man a 20 year monopoly on the manufacture of stained glass. This was the start of a long tradition by the English Crown of the granting of "letters patent" which granted "monopolies" to favored person. This became increasingly open to abuse as the Crown granted patents in respect of all sorts of known goods. After public outcry, James I was forced to revoke all existing monopolies and declare that they were only to be used for projects of new invention. This was incorporated into the Statute of Monopolies 1623. In the reign of Queen Anne the rules were changed again so that a written description of the article was given. Outside of England, patent law was the subject of legislative protection in the Venetian Statute of 1474.<sup>14</sup>

<sup>12</sup>Christopher May and Susan K. Sell, *Intellectual Property Rights a Critical History*, (New Dehli: Lynne Rienner publishers, 2008), 5.

<sup>13</sup>"The universality of intellectual property rights: origion and development" available on <<http://www.wipo.int/tk/en/hr/paneldiscussion/paper/pdf/drahos.pdf>> (Last accessed Dec 03, 2010).

<sup>14</sup>"Intellectual property –Definition" available on <[http://www.wordiq.com/definition/Intellectual\\_property](http://www.wordiq.com/definition/Intellectual_property)> (Last accessed Dec 01, 2010).



Revolutionary France recognized the rights of inventors in 1791 and, outside of Europe; the U.S.A. enacted a patent law in 1790. These patent laws were nothing like today's complex systems. They were mercifully short, simply recognizing the rights of the inventor. The English devised the first law on designs in 1787, but they were influenced by the French design law of 1806 when they reformulated their law in 1839. Outside of Europe, intellectual property grew along colonial pathways. So, for example, the self-governing colonies of Australia enacted copyright and patent statutes that were essentially faithful copies of English models<sup>15</sup>

Copyright was not invented until after the advent of the printing press and wider public literacy. In England the King was concerned by the unfair copying of books and used the royal prerogative to pass the Licensing Act 1662 which established a register of licensed books and required a copy to be deposited with the Stationers Company. The Statute of Anne was the first real act of copyright, and gave the author rights for a fixed period. Internationally, the Berne Convention in the late 1800s set out the scope of copyright protection and is still in force to this day.<sup>16</sup>

The territorial period is dominated by the principle of territoriality, the principle that intellectual property rights do not extend beyond the territory of the sovereign which has granted the rights in the first place. Intellectual property owners faced a classic free riding problem. Dealing with free-riding led states into the next phase of intellectual property protection: the international period.<sup>17</sup>

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<sup>15</sup>"The universality of intellectual property rights: origion and development" available on <<http://www.wipo.int/tk/en/hr/panel/discussion/paper/pdf/drahos.pdf>> (Last accessed Dec 03, 2010).

<sup>16</sup>"Intellectual property --Definition" available on <[http://www.wordiq.com/definition/Intellectual\\_property](http://www.wordiq.com/definition/Intellectual_property)> (Last accessed Dec 01, 2010).

<sup>17</sup>"The universality of intellectual property rights: origion and development" available on <<http://www.wipo.int/tk/en/hr/panel/discussion/paper/pdf/drahos.pdf>> (Last accessed Dec 03, 2010).

### 1.7.2. The International Period:

During the nineteenth century states began to take greater interest in the possibility of international co-operation on intellectual property. At first this interest is obvious, in the form of bilateral agreements. Those states that were worried about the free riding problem began to negotiate bilateral treaties with other states. The United Kingdom and the U.S.A. provide an example it. UK feel that copy right work of its authors were copied in other countries without paying royalties and the every work written by a popular author is almost co-instantaneously reprinted in large numbers both in France, Germany and in America and this is done now with much rapidity, and at little expense.<sup>18</sup>

In 1884 UK noticed this problem thus an International Copyright Act was passed to empower Her Majesty to provide protection to the authors of books and works of art, first published in foreign jurisdiction. With this a general practice grew up of giving foreigners the same protection as local authors received in their own countries, provided the foreign country grants a reciprocal protection. This protection was followed by different bilateral treaties which were made between the countries to ensure mutual protection of authors.<sup>19</sup>

Bilateralism in intellectual property in the nineteenth century was very important because it provide contribution to the international framework for the regulation of Intellectual Property rights.<sup>20</sup>

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<sup>18</sup>“The universality of intellectual property rights: origion and development”available on  
<<http://www.wipo.int/tk/en/hr/paneldiscussion/paper/pdf/drahos.pdf>>(Last accessed Dec 03, 2010).

<sup>19</sup>“The role of international legal instruments in the development of copyright law”available  
on<<http://jurisonline.in/2010/10/role-of-international-legal-instruments-in-development-of-copyright-law/>>(Last  
accessed Feb 19, 2011).

<sup>20</sup>“The universality of intellectual property rights: origion and development”available on  
<<http://www.wipo.int/tk/en/hr/paneldiscussion/paper/pdf/drahos.pdf>>(Last accessed Dec 03, 2010).

Serious effort for international co-operation on intellectual property arrived in the form of two multilateral pillars i.e. the Paris Convention of 1883 and the Berne Convention of 1886. The Paris Convention formed a Union for the protection of industrial property and the Berne Convention formed a Union for the protection of literary and artistic works. World Intellectual Property Organization (WIPO) was established by treaty in 1967. World Intellectual Property Organization (WIPO) became a specialized agency of the United Nations in 1974, in which sovereign states had agreed to certain foundational principles, the most important being the principle of national treatment. Important part played by World Intellectual Property Organization (WIPO) to enter intellectual property into the global era.<sup>21</sup>

### 1.7.3. The Global Period:

During the International period Intellectual Property Rights was not as active. More developing countries become the member of Paris and Berne Conventions after the Second World War. Principal of one vote one state applied so these conventions ceased to be western clubs. Western states could be outvoted by a coalition of developing countries. Developing countries were not simply content to play the role of a veto coalition. Developing countries wanted to enforce a system that helps their economic developing stage so in the eyes of the West at least; they began to throw their weight around.<sup>22</sup>

In copyright, developing countries succeeded in obtaining the adoption of the Stockholm Protocol of 1967. The aim of the Protocol was to give developing countries greater access to copyright materials. Its adoption provoked something of a crisis in international copyright. The

<sup>21</sup> Xuemei An, "The Review and Forecast on Development History of IPR in the World" journal of politics and law vol.2 (June 2009): 23. available on <<http://www.ccsenet.org/journals/index.php/ipl/article/view/2316/2373>> (Last accessed Dec 03, 2010).

<sup>22</sup> "The universality of intellectual property rights: origin and development" available on <<http://www.wipo.int/tk/en/hr/paneldiscussion/paper/pdf/drahos.pdf>> (Last accessed Dec 03, 2010).

Paris Convention also became the subject of Diplomatic Conferences of Revision in 1980, 1981, 1982 and 1984 with developing countries pushing for more liberal provisions on compulsory licensing.<sup>23</sup>

When the Paris Convention was reformed, countries like India pushed for provisions that would give developing countries more and more access to technology that had been locked by means of patents. India has a rational of social policy for the educational and health care needs of its citizens. For the United States of America (USA), it was a case of free riding. During the international period a lot of free-riding was tolerated.<sup>24</sup>

Film and pharmaceutical industries of United States of America (USA) is the backbone of their industries. For pharmaceutical companies like Pfizer intellectual property was an investment issue. They wanted to make their inventions secure all around the world. These global entities made intellectual property a trade issues. There are two main upper hand of this collation first is that IP got a global coverage and secondly enforcement mechanism for settling trade disputes cab be used to enforce IP. In 1980 USA reshaped its trade law to make a bilateral enforcement mechanism against the countries that had weak Intellectual Property Laws (IPL) and enforcement mechanism for this purpose United States Trade Representative (USTR) made to identified problem countries.<sup>25</sup>

Intellectual Property Rights (IPRs) include as a negotiating issue in the Uruguay Round talks in 1986. When this round was concluded it contain many agreements including Agreement establishing World Trade Organization (WTO) and TRIPS Agreement. The Trade Related

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<sup>23</sup>“*The universality of intellectual property rights: origin and development*” available on <http://www.wipo.int/tk/en/hr/paneldiscussion/paper/pdf/drahos.pdf> >(Last accessed Dec 03, 2010).

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

Aspect of Intellectual Property Rights (TRIPS) Agreement was binding on all the members of World Trade Organization (WTO). The countries cannot ignore Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement if they want to remain the member of multilateral trade regime.<sup>26</sup>

The Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement marks the beginnings of the global period of Intellectual property. The Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement is built on the principles of territoriality and national treatment. But it also represents the beginnings of property globalization. Via the trade linkage, the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement reaches all those states that are members of the multilateral trading system.

### **1.8. How the concept of intellectual property gradually grow:**

When we see the history we find that the doctrine of intellectual property has been grown steadily and dramatically from the eighteenth century to the present and a great extension has been made in the area of intellectual property. Present Intellectual Property Rights (IPRs) develop gradually. In the start only few protections have been provided and then area of protection expands gradually. Some examples of the growth of intellectual property are as follows.<sup>27</sup>

In April 1710 the concept of copyright was first introduced under the Statute of Anne and it provides protection of 14 years for the work published after the commencement of the act. This right can be renew for an additional period of 14 year if the author still living at the end of that

<sup>26</sup> "The universality of intellectual property rights: origin and development" available on <<http://www.wipo.int/tk/en/hr/paneldiscussion/paper/pdf/drahos.pdf>> (Last accessed Dec 03, 2010).

<sup>27</sup> "The growth of Intellectual property: A history of the ownership of ideas in the united state" available on <<http://cyber.law.harvard.edu/property99/history.html>> (Last accessed Dec 17, 2010).

period. Congress periodically added to these time periods over the next two centuries. Now copyright protection has been given for life and plus 70 year.<sup>28</sup>

Another important aspect in which copyright has grown is the definition of copyrighted work. Till the middle of 19<sup>th</sup> century a little more protection against the exact copy of authors' work has been provided to the copyright owner. In other words the work protected by law was the literal text and nothing more. For example in 1853 a federal Circuit Court rejected the claim of Harriet Beecher Stowe that a German translation of *Uncle Tom's* infringed her copyright protection. But ultimately courts with Congress' encouragement favor that work protected by copyright consists in the substance and not in the form alone. So translation is not in substance a new work. It is a reproduction in a new form of an existing one.<sup>29</sup>

Area of copyright protection has been expanding enormously. Supreme Court in 1884 decided that photographs could be copyrighted. In 1971 musical recordings and musical compositions protected under copyright. Patent office and courts resist the patenting of software till 1980 due to the mathematical algorithms. Now all software programs if novel are protected. The most recent major addition was architectural works.<sup>30</sup>

Patent law same like the copyright extended step by step. In 1842 Industrial designs are protected with a view to provide motivation to the decorative art so the new and original patent protects the

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<sup>28</sup> "The role of international legal instruments in the development of copyright law" available on <<http://jurisonline.in/2010/10/role-of-international-legal-instruments-in-development-of-copyright-law/>> (Last accessed Dec 19, 2011).

<sup>29</sup> "The growth of Intellectual property: A history of the ownership of ideas in the united state" available on <<http://cyber.law.harvard.edu/property99/history.html>> (Last accessed Dec 17, 2010).

<sup>30</sup> *Ibid.*

new and original designs. Plants are considered product of nature till the earlier 20<sup>th</sup> century therefore considered un patentable.<sup>31</sup>

The plant patent act in 1930 provides patent protection for asexually reproduced plants. Supreme Court grants patent for genetically modified bacterium by quoting the 1952 act that anything made by man under the sun should be patentable. In 1995 protection has been given to the biological process for the new and non obvious product. In 1950 surgical procedures are also protected under patent. Remedies for violation of patent for surgical procedures are introduced in 1996. In *State Street Bank v. Signature Financial* hold that there is no prohibition in the USA law on the patent of business method if they are useful and non-obvious.<sup>32</sup>

Patent office and court while applying the standard requirement of patentability favor patentees. Nineteenth century characterized as more generous in interpretation of statutory criteria for granting patent. So as a result patent become important to many companies and industries.<sup>33</sup>

A trade mark is a short symbol used to identify the origin of goods. The benefit of using such short symbol is obvious as it make easier to recognize and remember and it is also easy to apply on the product. Owner of the mark have a right to prevent others from using this mark without authorization.<sup>34</sup>

For many years some criteria and restrictions has been determined for trademarks that they should not be immoral, deceptive or falsely suggest a connection with a person or institution.

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<sup>31</sup>"The growth of Intellectual property: A history of the ownership of ideas in the united state" available on <<http://cyber.law.harvard.edu/property99/history.html>> (Last accessed Dec 17, s2010).

<sup>32</sup>"Brief history of the patent law of the United State" available on <<http://www.ladas.com/Patents/USPatentHistory.html>> (Last accessed Feb 21, 2011).

<sup>33</sup>"The growth of intellectual property: A history of the ownership of ideas in the United State" available on <<http://cyber.law.harvard.edu/property99/history.html>> (Last accessed Dec 17, 2010).

<sup>34</sup>"Trade mark a brief history" available on [http://www.patentsoffice.ie/en/student\\_trademarks.aspx](http://www.patentsoffice.ie/en/student_trademarks.aspx)> (Last accessed Dec 19, 2010).

Belief and national symbols can also not be used as mark. It may not be merely descriptive or surname.<sup>35</sup>

These and other restrictions were lifted gradually. Courts were willing to protect arbitrary names, symbols and geographical names at the end of 19<sup>th</sup> century. Initially only the use of identical mark was actionable but later on competitors were not allowed to use mark sufficiently similar as to cause consumer confusion. Initially the rights of trademark owner were limited to the territories where they were selling their products. After the Lanham Act in 1946 trademark owners allowed to use their right nationwide from the date of trademark registration.<sup>36</sup>

### 1.9. Who is responsible for expansion of Intellectual Property Rights?

Many factors involved in the expansion of intellectual property rights. Responsibility cannot lie in any single factor but a host of factors are involved like ideological, economic and some political factors. However the most important contributing factor was the gradual transformation of American economy. The British North American colonies that become United States depend on agriculture then it changed from the agricultural to the information based economy and it become the major source of American jobs.<sup>37</sup>

The impact of this fundamental change was an increase in the perceived need for intellectual property rights. During the colonial period, few people stood to gain from copyright or patent

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<sup>35</sup>“History of trademark” available on  
<<http://www.tabberone.com/Trademarks/TrademarkLaw/History/History.shtml>> (Last accessed Feb 21, 2011).

<sup>36</sup>“The growth of intellectual property: A history of the ownership of ideas in the United State” available on  
<<http://cyber.law.harvard.edu/property99/history.html>> (Last accessed Dec 17, 2010).

<sup>37</sup> *Ibid.*



protection; not surprisingly, few copyrights or patents were granted. Since that time, the demand for intellectual-property protection has steadily increased.<sup>38</sup>

United States has become from a net consumer of intellectual property to a net producer. Americans were interested in pirating patented or copyrighted materials produced by foreigners till the middle of 19<sup>th</sup> century. They were not interested in protecting copyrighted and patented material by the foreigners. No protection was given to the foreign authors and American publishers were reprinting their work without permission. After this shift a lot of steps had been taken by the United States in international affairs and America has become an effective champion of strengthened intellectual property rights.<sup>39</sup>

American delegation took a very hard line in the TRIPS negotiation process and demanding other nations to agree with their generous version of patent and copy right law. Due to the software piracy sanctions has been imposed by America on China. America set its priority watch list to examine the countries violates Intellectual Property (IP) laws and then impose sanction on those countries. America react more on the violation of Intellectual Property (IP) law then the widespread violation of human rights.<sup>40</sup>

Another fact that had a strong affect on trademark law was that a trend of advertisement of products was emerged in early twentieth century. Manufacturers and retailers had used advertising then before. A lot of money has been spend on advertisement for that reasons

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<sup>38</sup>“The growth of intellectual property: A history of the ownership of ideas in the United State” available on <<http://cyber.law.harvard.edu/property99/history.html>> (Last accessed Dec 17, 2010).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

manufacturers wished to prevent others from free-riding on their investments and sought strengthened trademark protection.<sup>41</sup>

Courts are also played an important role in expanding the rights of patent owners in introducing new technologies and also increase the subject of patentability.<sup>42</sup>

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<sup>41</sup>"The growth of intellectual property: A history of the ownership of ideas in the United State" available on <<http://cyber.law.harvard.edu/property99/history.html>> (Last accessed Dec 17, 2010).

<sup>42</sup>"Rethinking the ownership of information in 21<sup>st</sup> century: ethical implications" available on <<http://www.springerlink.com/content/h34u3v4066w1r81x/fulltext.pdf>> (Last accessed Dec 18, 2010).

## Chapter 2

### How the Intellectual Property Rights become justified?

In the previous chapter we discussed the origin and history of Intellectual property rights and now in this chapter it will be examine how Intellectual Property Rights (IPRs) have become to be justified in the realm of political philosophy. Argument in the favor of Intellectual property rights will be discussed and the arguments by the opponent of Intellectual Property Rights (IPRs) will also be presented. Then we will see the global justification of Intellectual Property Rights (IPRs) and the global effects of Intellectual Property Rights (IPRs) will also be the part of our discussion. We will also examine that the original idea behind the protection of Intellectual Property Rights (IPRs) is to protect or privilege the creators or whether the ultimate purpose is the welfare of society. If it is the welfare of society so Intellectual Property Rights (IPRs) are doing so or not?

Law reflects social norms and at times is explicitly intended to reshape such norms. Law does not exist in a vacuum; it requires social understanding of legitimate interest. Law cannot be enforced or functioned by threat of sanction only it needs strong justification for proper functioning. Therefore when knowledge becomes subject of legal rules it also requires justification. Usually for knowledge justification of reward for the effort of creators is given.<sup>43</sup>

Thus in this chapter we aim to review critically and classify the rationales for Intellectual Property Rights (IPRs), drawing upon past and current academic scholars. Applying theoretical logic, speculations on the effect of Intellectual Property Rights (IPRs) will also be discussed. The controversies surrounding Intellectual Property Rights (IPRs) legislation will form central part of

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<sup>43</sup> Christopher May and Susan K. Sell, *Intellectual property rights a critical history* (New Delhi: Lynne Rienner Publisher, 2008), 17.

discussion. Emphasis will be on natural rights and moral rationales, the economic incentive rationales, the increased competition and market protection of entrepreneurial talent' rationales' and the economic rationales for organizing science, technology and creativity.

## **2.1. Justifications or rationales for intellectual property rights:**

### **2.1.1. Natural Rights and Moral Rationales:**

John Locke argued for a natural rights theory of the social contract. In this context ideas are protected under the principle of natural law in this sense somebody has a right to protect his idea.<sup>44</sup> Utilitarian philosophers introduced ethical or moral principles in the property right theory. They also laid the responsibility of the state for identifying and enforcing these rights. According to this version it is the duty of society to protect the creator and we all are morally bound to do this. So it would be immoral if the law let everybody freely the work of inventors without their consent and without compensation or equivalent in return.<sup>45</sup>

So it is demanded by the countries that they should morally adopt Intellectual Property Rights (IPRs) in order to reduce the natural law crimes of theft, piracy and counterfeiting that were committed by copycat manufacturers within their jurisdiction.<sup>46</sup>

### **2.1.2. Economic Incentive Rationale:**

Human beings are social animals or social product. To facilitate peaceful coexistence they device rules from sophisticated etiquette to international trade regimes. Intellectual Property Rights

<sup>44</sup> Veena, "The Rationale for Intellectual Property Rights Revisited": *Intellectual property Rights*, ed. Birgitee Anderson (Hyderabad, India: The Icfai University press, 2007), 4.

<sup>45</sup> *Ibid*-5

<sup>46</sup> "Ethical Reasons for Intellectual Property Rights Reform" available on <http://www.yala.edu/macmillan/ign/files/DP7-singer-and-schroeder.pdf> (Last accessed Dec 04, 2010).

(IPRs) is one of such set of rules in which states grants protection for the creations of mind so that the originator can recoup his investment by charging monopoly prices for a limited period of time. The ultimate purpose of such protection is to provide incentive for future inventions.<sup>47</sup>

It is believed that Intellectual Property Rights (IPRs) on ideas provides economic incentives for inventors. Basically the efficiency of an incentive system is that it drives people to do things that they would not otherwise have done and these incentives will thus result in some benefit to society as a whole. The incentive arguments are threefold:

- a) Incentives to invent, be creative and innovate
- b) Incentive to use and allocate resources more efficiently
- c) Incentives to disclose ideas in libraries and trade.<sup>48</sup>

Reward which is given to the inventors by Intellectual Property Rights (IPRs) encourages creative and technological advance by providing incentive to invest. Intellectual Property Rights (IPRs) resulted in high private rate of return for innovation. Inventions will not be made without effective incentive system. Intellectual Property Rights (IPRs) are the cheapest and most effective way for society to hold out these incentives.<sup>49</sup>

### **2.1.3. Increased competition and market protection of entrepreneur talent rationales:**

It is believed that industrial development and social welfare depends on enhanced competition or through market protection of entrepreneurial talent, and that property rights on ideas are the most efficient answer to stimulate such dynamics. Intellectual property rights resulted in increased

<sup>47</sup>“Ethical Reasons for Intellectual Property Rights Reform”available on <http://www.yala.edu/macmillan/ign/files/DP7-singer-and-schroeder.pdf>>(Last accessed Dec 04, 2010).

<sup>48</sup>“The Rationale for Intellectual Property Rights:the 21<sup>st</sup> century controversies”available on <http://druid.dk/uploads/tx-picture.db/ds/2003.889pdf>>(Last accessed Dec13, 2011).

<sup>49</sup> Veena, “The Rationale for Intellectual Property Rights Revisited”: *Intellectual property Rights*,ed.Birgitec Anderson(Hyderabad, India: The Icfai University press,2007), 10.

competition because creators and inventors sure about their reward so they work more hardly and a competitive environment are created which resulted advance in technology and science.<sup>50</sup>

If the pharmaceutical innovations are not protected through patent then there would be little pharmaceutical research because there would be apprehension that their successful research efforts would invariably results in economic losses as soon as competitors, unrestrained by the Intellectual Property Rights (IPRs) system, copied their inventions and offered the products at low prices. They would not have to recoup investment costs, their prices would be much more attractive than the price calculated by the originator. So as a result it is argued that it is better to have medicine then to have none at all.<sup>51</sup>

Intellectual Property Rights (IPRs) based on the idea that the innovation is the product of the genius individuals and society enjoys the fruits of the efforts of these individuals. So such people deserve the economic rights and benefits granted by state on behalf of society. If proper reward is given to these genius individuals then they will be able to utilize their talent in the benefit of society.<sup>52</sup> As Abraham Lincoln once put it "The Patent System added the fuel of interest to the fire of genius."<sup>53</sup>

The lack of protection for their intellectual property was forcing those scientists and technicians to immigrate to countries where their hard work could be protected and kept safe from unfair

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<sup>50</sup>"The Rationale for Intellectual Property Rights:the 21<sup>st</sup> century controversies"available on<<http://druid.dk/uploads/tx-picture.db/ds/2003.889pdf>>(Last accessed Jan 13, 2011).

<sup>51</sup>"Ethical Reasons for Intellectual Property Rights Reform"available on <<http://www.yale.edu/macmillan/ign/files/DP7-singer-and-schroeder.pdf>>(Last accessed Feb 04, 2010).

<sup>52</sup>"Are Intellectual Property Rights usefull?"available on< <http://www.directnewsarticles.com/what-are-the-benefits-of-enforcing-intellectual-property-rights/>>(Last accessed Jan 03, 2011).

<sup>53</sup>"Brief history of the patent law of the United State" available on <<http://www.ladas.com/Patents/USPatentHistory.html>>(Last accessed Feb 21, 2011).

exploitation by competitors seeking easy advantages.<sup>54</sup>

#### 2.1.4. Economic rationale of organizing science, technology and creativity:

In order to secure a stream of inventions and innovations it is important that new ideas become generally known to society. But in the absence of protection for novel ideas, inventor will keep their inventions secret and they will die with them. Consequently it is in the interest of the society to invoke inventors to disclose their secrets for the use of future generation of inventors, and some believe that Intellectual Property Rights (IPRs) provide solution here. Therefore the rationale is that Intellectual Property Rights (IPRs) should help to facilitate the world wide sharing of ideas, creative efforts, and new technologies nationally and world-wide. It is believed that this creates faster knowledge spillover and a more coherent technological and industrial development, which in turn will strengthen the national or global economy.<sup>55</sup>

Intellectual Property Rights (IPRs) provide incentive to author and inventors. Without Intellectual Property (IP) protection there would be no incentive so authors and inventors would not be able to devote their time and effort and we would all be worse off because we would have fewer artistic and technological products. So Intellectual Property (IP) protection is way to promote science and technology by giving proper reward to the creators and inventors.<sup>56</sup>

Arguments in favor of Intellectual Property (IP) protection are provided; the law should recognize and protect Intellectual Property (IP) because of the desirable consequences of doing so. On this line of argument, society needs Intellectual Property (IP) protection to ensure that

<sup>54</sup> "Are Intellectual Property Rights useful?" available on < <http://www.directnewsarticles.com/what-are-the-benefits-of-enforcing-intellectual-property-rights/>> (Last accessed January 03, 2011).

<sup>55</sup> Veena, "The Rationale for Intellectual Property Rights Revisited": *Intellectual property Rights*, ed. Birgitee Anderson (Hyderabad, India: The Icfai University press, 2007), 27.

<sup>56</sup> "The Justification of Intellectual property Rights: contemporary philosophical disputes" available on < <http://onlinelibrary.wiley.com/doi/10.1002/asi.20853/pdf>> (Last accessed Dec 27, 2010).

content creators continue to devote their time, effort, and labor to creating or discovering new content whether such content is scientific, artistic or something else. Intellectual Property (IP) protection helps to ensure that authors have a sufficient economic incentive for intellectual activity that results in intellectual content because it affords authors the right to condition access to and use of content upon payment of a fee.<sup>57</sup>

## 2.2. Argument against the intellectual property rights:

Various philosophical arguments have been put forward to support the creation and maintenance of intellectual property systems. However, in an age of information, access to information is a critical need and should be guaranteed for every citizen. Any right of control over the information which is adopted as an incentive to encourage creation and distribution of intellectual property should be subservient to an overriding need to ensure access to the information.<sup>58</sup>

Economic activity is based increasingly on information and intellectual products. However there are some group of people who thought that the current legal restrictions limit the free flow and re-use of information. Recently, these restrictions, in form of copyright and patents, have become dramatically more severe, set by many legal precedents in costly law suits. They believe that situation will deteriorate further, if the trends are not reversed, and will take a heavy toll on technology development, contrary to the rationale for implementing these legal restrictions in the first place. Otherwise, if we continue like this and don't fight back for our freedom, the

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<sup>57</sup>"The justification of Intellectual Property Rights: contemporary philosophical issues" available on [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=904264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904264) > (Last accessed Feb 12, 2011).

<sup>58</sup>"Rethinking the ownership of information in 21<sup>st</sup> century" available on <http://www.springerlink.com/content/h34u3v4066w1r81x/fulltext.pdf> > (Last accessed Dec 28, 2010).



knowledge intense future will not look too rosy and will develop a more deteriorating situation without access to knowledge or will confined knowledge in few hands.<sup>59</sup>

### 2.2.1. Criticism on the natural right and moral right rationale:

Those defending the intellectual property rights regime usually take one of two routes. Either they argue that creators and inventors have a natural right to IPRs protection or they argue that a balance IPRs systems contribute positively to human well-being, and organizing science and technology. One argument referring to rights, the other to human flourishing and happiness.<sup>60</sup>

Now we will first examine these two justifications of the IPRs regime that is there a natural right to intellectual property? Or should IPRs systems be judged on their contribution to social utility? We then compare several scenarios of IPRs systems to establish whether any is morally superior to others. In the last part, we focus on the duties of states and pharmaceutical companies to promote any potentially superior alternative.

We find that philosophical basis of Intellectual Property Right has dual nature. This dual nature functions both to support an ownership or control right, yet in return promises access to subsequent users of that intellectual property. But in today practice greedy elements may wish to control information that others may consider essential to their ability to function in society. It is suggested that this development is inconsistent with the original intent of the intellectual property laws. Because it upsets the balance created by the dual nature of control and access

<sup>59</sup>“Are intellectual property rights justified” available on< <http://www.n-a-n-o.com/ipr/fi-gathering2/ipp-scenarios.html>>(Last accessed Dec 01, 2010).

<sup>60</sup>“Ethical Reasons for Intellectual Property Rights Reform”available on <<http://www.yale.edu/macmillan/ign/files/DP7-singer-and-schroeder.pdf>>(Last accessed Dec 04, 2010).

rights and focus is only on the natural rights of creators and social utility element is totally ignored.<sup>61</sup>

The theory of natural rights is generally denied in technological innovations and it is accepted in literary and artistic work only. The basic argument is that technological inventions are mostly a social creation of collective, cumulative and interrelated work to which all contributes and therefore no one man can claim property. Furthermore it is emphasized that the patent on technological innovations is unfair and against the natural rights because many people work simultaneously on the solution of technical problems but the person who first arrives at the solution deprives all the others from using their own independent ideas.<sup>62</sup>

By asserting an Intellectual Property Rights (IPRs) in an innovation, the innovator claims not merely rights to the products made from own materials, but also new property rights over materials owned by others who lose their freedom to convert their materials into the same products. Such a deprivation of freedom conflicts with the natural law understanding of property rights in material items. So Intellectual Property Rights (IPRs) deprives other people from using their natural right to use their own material items.<sup>63</sup>

Intellectual Property Rights (IPRs) often clash with other important natural rights, such as the right to life. One of the best examples of this tension can be found in the area of access to life-saving medication. As medicines under patent protection are priced under monopoly conditions, their invariably high mark-ups make them unaffordable to poor patients. Given that Intellectual

<sup>61</sup>“Rethinking the ownership of information in 21<sup>st</sup> century”available on  
<<http://www.springerlink.com/content/h34u3v4066w1r81x/fulltext.pdf>>(Last accessed Dec 28, 2010).

<sup>62</sup>“If intellectual property right is the answer – what is the question”available on  
<[http://www.cric.ac.uk/cric/events/frontiers/paper/andersen.pdf\(SECURED\)](http://www.cric.ac.uk/cric/events/frontiers/paper/andersen.pdf(SECURED))>(Last accessed Jan 13, 2011).

<sup>63</sup>“Ethical Reasons for Intellectual Property Rights Reform”available on  
<<http://www.yale.edu/macmillan/ign/files/DP7-singer-and-schroeder.pdf>>(Last accessed Dec 04, 2010).

Property Rights (IPRs) systems provide opportunities to stop generic producers from offering cheap copies of new drugs, no alternative sources of drug supply will be available to the poor, hence conflicting within the worst scenario they lost their right to life.

### **2.2.2. Criticism on the economic incentive rationale:**

First come first serve principal is applying in patents so this lottery version of patent system might lead to under investment in inventive activity due to the lot of risk involvement. So involvement of risk is not working as incentive but has a negative impact for the creators and inventors. It is argued that under the monopolistic situation the incentive to innovate will be lower than under the competitive condition.<sup>64</sup>

Patent is beneficial for the inventor who receive the privileges, the community cannot be benefited by it if it is protected by patent and this is in return deprives society of the benefits that would flow from the more widespread use of these ideas. Thus, the temporary prevention of the use of the most efficient processes by most other producers can be considered as social coast.<sup>65</sup>

### **2.2.3. Criticism on the increased competition and market protection of entrepreneur talent rationales:**

This question needs to be answered that society experience more competition by creating temporary monopolies or not? So answer is that patent monopolies provide so extreme privileges and many opportunities to the inventor against other producers and even the consumers and as a consequence it distorts competition. It is also believed that inventive rivalry is good for inventive progress, but too strong Intellectual Property Rights (IPRs) protections distort such due to patent

<sup>64</sup>“If intellectual property right is the answer – what is the question” available on [<http://www.cric.ac.uk/cric/events/frontiers/paper/andersen.pdf\(SECURED\)>](http://www.cric.ac.uk/cric/events/frontiers/paper/andersen.pdf(SECURED)) (Last accessed January 13, 2011).

<sup>65</sup> *Ibid.*

### 2.3. Global justification of Intellectual Property Rights (IPRs):

World Trade Organization (WTO) and Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement requires that Intellectual Property rights should be accepted globally and Intellectual Property (IP) policies and infrastructure should be developed by all the countries of the world. To adopt Intellectual Property Rights (IPRs) globally it is also important to realize what are the global effect of Intellectual Property Rights (IPRs)? These global effects of Intellectual Property Rights (IPRs) will be provided here. To show that Intellectual Property (IP) protection is legitimate, one must show that such protection is not violates some morally protected interest; it seems clear that no behavior can be wrongful unless it violates some morally protected interest. The fact that intellectual objects can be consumed simultaneously by everyone without reducing their supply, by itself, tells us nothing about whether Intellectual Property (IP) protection is legitimate because it tells us nothing about whether it violates any morally protected interests. While the factual claim is surely relevant in assessing the propriety of IP protection, much more is needed to determine whether such protection is legitimate or otherwise.

It is also argued that moral quality of law will only be determined by its effects on the relevant index of human well being. On this view, whether the content of any law is morally justified is determined entirely by whether it maximally promotes the desired state of affairs; there is no other relevant factor.<sup>69</sup>

While discussing the global effects of Intellectual Property Rights (IPRs) we discuss its two major effects like access to life saving medicines and increased foreign investment which

<sup>69</sup>“The justification of Intellectual Property Rights: contemporary philosophical issues”available on <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=904264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904264)>(Last accessed Feb 12, 2011).

resulted in progress and job opportunities.

### 2.3.1. Global access to life saving Madison:

Committee of United Nation on Economic, Social and Cultural Rights (CESCR) comment that right to health include a right to satisfactory and affordable health care and it levies duties on the Government. Duty of the Government is not only extended to the education and job opportunities but it also includes health care. This indicates that the duty to provide medicines requires States to prevent corporations from obstructing access to medicine. Committee of United Nation on Economic, Social and Cultural Rights (CESER) indicates that these duties extend to ensure that international agreements do not adversely affect the right to health either domestically or in other countries, and that a failure to do so violates the right.<sup>70</sup>

Inaccessibility of lifesaving medicines in developing countries has long presented a grave international health problem. It is argued that by restricting access to essential medicines, trade rules violate core human rights to minimally adequate health care. Medicines are not simply commercial commodities, but basic human needs, fundamental human rights entitlements. The legitimacy and justification for trade-related intellectual property rules on medicines should be assessed from the perspective of human rights standards.<sup>71</sup>

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<sup>70</sup> "Trade Rules, Intellectual Property, and Right to Health" available on <http://onlinelibrary.wiley.com?doi/10.1111/j1747-7093.2007.000103.x/pdf> (Last accessed Dec 28, 2010).

<sup>71</sup> *Ibid.*

The effect of Intellectual Property Rights (IPRs) on access to life saving medicines is described as follows by Anand Grover<sup>72</sup>

“Access to medicines forms an indispensable part of the right to health. Nearly billion people lack access to essential medicines. Improving access to medicines could save 10 million lives a year. The inability of populations to access medicines is partly due to high costs.... TRIPS and FTAs have had an adverse impact on prices and availability of medicines, making it difficult for countries to comply with their obligations to respect, protects, and fulfills the right to health.”

One third of the world's populations do not have access to life-saving medicines. 10 million lives are lost each year, which could be saved if access to life-saving medicines were assured. Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement and Free Trade Agreements (FTAs) led to an increase in drug prices and an invariable decrease in the availability of generic drugs. In other words, in his view, Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement and Free Trade Agreements (FTAs) are partly responsible for lack of access to life-saving medicines and the related deaths.<sup>73</sup>

AIDS statistics highlight the problem vividly. AIDS being the worst infectious pandemic in modern history, the majority of infected people had lack access to life saving antiretroviral therapies. In sub-Saharan Africa, where over two thirds of all people with HIV are located, only 28 percent have access to antiretroviral treatments. In developing countries two million people die from tuberculosis every year; over one million people mainly African children died from malaria in 2002; and approximately three million people die each year from HIV/AIDS globally, with over two million of these deaths occurring in sub-Saharan Africa alone. Victims of

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<sup>72</sup> Grover is the UN Special Reporter on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Grover express his opinion in his report in 2009.

<sup>73</sup> “Ethical Reasons for Intellectual Property Rights Reform” available on <http://www.yale.edu/macmillan/ign/files/DP7-singer-and-schroeder.pdf> (Last accessed Dec 04, 2010).

HIV/AIDS are usually young people who are economically and reproductively active, and whose deaths are resulting in the orphaning of millions of children.<sup>74</sup>

Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement and Free Trade Agreements (FTAs) resulted as an increase in drug prices and an invariable decrease in the availability of generic drugs. In other words Trade Related Aspect of Intellectual Property Rights (TRIPS) and Free Trade Agreements (FTAs) are partly responsible for lack of access to life saving medicines and the related deaths. 10 million premature, avoidable deaths per year are a serious ill. In general, human beings value life and want to enjoy its full length from childhood to adulthood to seniority. If a human construct the IPR regime or contributes to so many deaths per year needs to be justified.<sup>75</sup>

Patents the primary factor of determining drug prices are protected internationally under the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement allow certain exceptions and limitations on exclusivity of patenting in the interests of public health and social welfare, including permitting parallel imports and compulsory licensing. Parallel importing allows countries to import cheaper versions of patented medicines without any restrictions. Compulsory licensing authorizes governments to manufacture generic versions of patented medicines without corporate consent in certain circumstances. Before Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement

<sup>74</sup> "Trade Rules, Intellectual Property, and Right to Health" available on <http://onlinelibrary.wiley.com/doi/10.1111/j1747-7093.2007.000103.x/pdf> (Last accessed Dec 28, 2010).

<sup>75</sup> "Ethical Reasons for Intellectual Property Rights Reform" available on <http://www.yala.edu/macmillan/ign/files/DP7-singer-and-schroeder.pdf> (Last accessed Dec 04, 2010).

more than forty countries did not patent medicines, many others such as India only patented drug processes, and others provided shorter patent terms.<sup>76</sup>

The introduction of global drug patents has a systemic impact on the manufacture and export of generic medicines globally. As Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement is implemented it eventually phase out the generic manufacture of patented medicines unless this is done under compulsory licensing so it affects countries that depend on the importation of generic version of currently patented medicines.

Third World countries especially in Africa claim that intellectual property rights are designed by developed countries and used as a tool to make them poor. The HIV/AIDS issue has brought a debate on whether intellectual property rights really help humanity or kill them. Major pharmaceutical companies have been accused of ignoring the poor in the quest for profits.<sup>77</sup>

Many factors influence the access to medicines. These include national health policies on medicines and the existence of reliable health systems, as well as the affordability of medicines and the availability of sustainable financing. Direct economic factors affect access to medicines in poor countries, especially where drug purchase consumes large proportions of national health budgets and limited resources restrict the types of drugs that can be offered in the public sector. Inadequate public sector provision of medicines also means that the majority of individual drug expenditure in developing countries is out-of-pocket.<sup>78</sup>

Developing countries cannot afford the treatment with medicine because they are very costly and

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<sup>76</sup> "Trade Rules, Intellectual Property, and Right to Health" available on <http://onlinelibrary.wiley.com/doi/10.1111/j1747-7093.2007.000103.x/pdf> (Last accessed Dec 28, 2010).

<sup>77</sup> "Do intellectual property rights harm Africa?" available on [http://www.fnf.org.ph/downloadables/intellectual\\_property\\_rights\\_africa.pdf](http://www.fnf.org.ph/downloadables/intellectual_property_rights_africa.pdf) (Last accessed Dec 23, 2010).

<sup>78</sup> "Trade Rules, Intellectual Property, and Right to Health" available on <http://onlinelibrary.wiley.com/doi/10.1111/j1747-7093.2007.000103.x/pdf> (Last accessed Dec 28, 2010).



out of the reach of the majority of people who are in need of them. This is true for many essential medicines like anti malarial drugs, tuberculosis treatment, reserve antibiotics, HIV/AIDS drugs and hepatitis C an infectious liver disease affecting 170 million people worldwide.<sup>79</sup>

Due to the patent system the essential drugs are very costly for example; to treat AIDS a patient needs five AZT tablets a day at a cost of \$2 a pill, which amounts to more than \$3,600 a year.<sup>80</sup>

To treat hepatitis C it costs \$30,000 per person per year, an infectious liver disease affecting 170 million people worldwide.<sup>81</sup>

The use of lifesaving medicines could significantly reduce these death tolls. In 2001 the World Health Organization (WHO) Commission on Macroeconomics and Health estimated that providing access to existing medicines and vaccines to prevent or treat infectious diseases, maternal and prenatal conditions, childhood diseases, and no communicable diseases could save up to 10.5 million lives per year, and that increasing access to medicines for infectious diseases alone could save almost 9 million lives a year.<sup>82</sup>

### 2.3.2. Relationship between IPR and foreign direct investment:

Multinational enterprises are essential ingredient of economic globalization. These enterprises are encouraged to make use of their intellectual property related assets beyond national borders. However these multinational enterprises are reluctant to invest in countries where an unauthorized use of such assets by outsiders is not prevented.<sup>83</sup>

<sup>79</sup> "Trade Rules, Intellectual Property, and Right to Health" available on <http://onlinelibrary.wiley.com/doi/10.1111/j1747-7093.2007.000103.x/pdf> (Last accessed Dec 28, 2010).

<sup>80</sup> "Rethinking the ownership of information in 21<sup>st</sup> century" available on <http://www.springerlink.com/content/h34u3v4066w1r81x/fulltext.pdf> (Last accessed Dec 28, 2010).

<sup>81</sup> "Trade Rules, Intellectual Property, and Right to Health" available on <http://onlinelibrary.wiley.com/doi/10.1111/j1747-7093.2007.000103.x/pdf> (Last accessed Dec 28, 2010).

<sup>82</sup> Ibid.

<sup>83</sup> "Intellectual Property Rights and Foreign direct investment" available on <http://econweb.tamu.edu/aglass/IPRJIE.pdf> (Last accessed Feb 05, 2011).

One of the greatest problems faced by the multinational corporations in many of the developing economies around the world is intellectual property violation. When technology involved in foreign direct investment is pirated, many Multinational National Companies' (MNC) managers decry their losses and demand relief from their home and host country governments. Most of the time responsibility of Intellectual Property (IP) violation lies on these managers' shoulders. The basic difference in the instance of intellectual property theft is that often, only the victim is punished: the thief frequently not only goes completely unpunished, but is rewarded and viewed as a national hero. Stronger Intellectual Property Rights (IPRs) protection increases the profit incentive for firms to undertake Foreign Direct Investment (FDI) because Intellectual Property Rights (IPRs) will increase the relative return to the firms.<sup>84</sup>

It is also important to note that strong Intellectual Property Rights (IPRs) alone are insufficient for generating strong incentives for firms to invest in a country. If that were the case, recent Foreign Direct Investment (FDI) flows to developing economies would have gone largely to sub-Saharan Africa and Eastern Europe. In contrast, China, Brazil, and other high growth, large-market developing economies with weak protection would not have attracted nearly as much Foreign Direct Investment (FDI) if investment were heavily dependent solely on Intellectual Property Rights (IPRs). There are many other factors which affect the Foreign Direct Investment (FDI) like, market size, relative input cost, agglomeration effects, policy variables, risk factors etc.<sup>85</sup>

<sup>84</sup>“Intellectual property rights and foreign direct investment in emerging markets” available on < <http://www.asia-pacific.com/rights.pdf> > last > (Last accessed Feb 05, 2011).

<sup>85</sup>“The role of intellectual property rights in encouraging foreign direct investment and technology transfer” available on < <http://siteresources.worldbank.org/INTRANETTRADE/resources/maskus2.pdf> > (Last accessed Feb 05, 2011).

## 2.5. Issues regarding Intellectual Property Rights (IPRs):

Intellectual property rights cannot be justified just because it is justified in the United States. We believe that content creators have Intellectual Property (IP) rights and that should be protected by law, but also believe that many elements of existing copyright and patent law in Western nation are unjustified. There are some contemporary issues regarding Intellectual Property (IP). First issue is whether authors have a morally significant interest in controlling the content of their creations and exclude others from using those contents without payment. The second issue is that the ultimate purpose of Intellectual Property Rights (IPRs) is social utility and the benefit of the public at large. The third issue is that whether it is morally permissible for state to use its coercive power to protect any such interests of authors.

These are logically distinct issues. The first concerns moral standards that apply to the acts of creators, while the second deals with the maximum social utility and the third concerns the moral standards that apply to the acts of governmental bodies. Not every morally protected interest an individual has is legitimately protected by the state. For example, we have a morally protected interest in not being told lies, but it would not be legitimate for the state to create a criminal or civil cause of action that makes a person liable for every lie he tells.<sup>86</sup>

Some hold that Intellectual Property Rights (IPRs) should be shaped with an eye to the common good and a balance should be created between encouraging innovations and ensuring easy access to them. Others believe that inventors have a natural right to control the use of their innovation. Which position is more defensible? Should Intellectual Property Rights (IPRs) be designed with social utility in mind or help realize creators' natural rights? This dispute was in evidence in the

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<sup>86</sup> "The justification of Intellectual Property: Contemporary Philosophical Disputes" available on <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=904264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904264)> (Last accessed Feb 12, 2011).

1990s when developed states successfully pressured less developed states to accept Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement, which bound them to legislate for very extensive Intellectual Property Rights (IPRs).<sup>87</sup>

If we accept that Intellectual Property Rights (IPRs) should be morally accepted and the creators or inventors have a moral right about their creations but we have no idea and this morally accepted interest never explain itself that how much protection should be given. There are some essential valuable interest which are given level of moral rights like interest in life but there are some other like interest in happiness are not given level of moral right, no one has amoral right to happiness.<sup>88</sup>

The intention of the lawgiver behind the protection of intellectual property rights was expressed as a social contract. Under this contract state will reward the creator and protection will be given to him and he would ultimately return this creative expression to the public domain for public utility and benefits from these creations. A balance has been created while protecting Intellectual Property Rights but this core balance has been steadily lost.<sup>89</sup>

United States of America (USA) is responsible for present Intellectual Property Rights (IPRs). A great source of USA legislation is the precedents.<sup>90</sup> The USA Supreme Court has been moving from a pure balance test to a pure public benefit purpose test in the last quarter century. Copyright cases are exemplary of this trend. In *Sony Corp. of America v. Universal Studios*<sup>91</sup>, the

<sup>87</sup> "The Justification of Intellectual property Rights: contemporary philosophical disputes" available on <<http://onlinelibrary.wiley.com/doi/10.1002/asi/20853/pdf>> (Last accessed Dec 27, 2010).

<sup>88</sup> "Abundance, Rights and Interest: Thinking about the Legitimacy of Intellectual Property" available on <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=727469](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=727469)> (Last accessed Feb 12, 2011).

<sup>89</sup> Pradip Ninan Thomos and Jan Servaes, "The Emerging Information Economy": *Intellectual Property Rights and Communication in Asia*, ed. Robert Verzola (New Dehli: Sage Publication, 2006), 19.

<sup>90</sup> *Ibid*-9

<sup>91</sup> 464 U.S. 417, 429 (1984)

Court observed that the grant of monopoly privileges was to motivate the creative activity of authors while also giving the public appropriate access to their genius after the limited period of exclusive control has expired. However, in another case such as *Fogerty v. Fantasy, Inc.*<sup>92</sup> have forwarded the preeminence of the public benefit component. Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the law's boundaries be demarcated as clearly as possible. The *Fogerty* Court went on to quote from *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>93</sup>: "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"<sup>94</sup>

The Supreme Court is expanding the rights of patent owners in new technologies by expanding the type of invention subject to patentability. The question of software patentability offers a case in point. In the last 20 years more patent have been granted than the previous history and the courts are more lenient to the inventors.<sup>95</sup>

In 1987, Taco Cabana, a chain of Mexican restaurants in Houston, Texas, brought suit against Two Pesos, a rival chain, claiming that Two Pesos had deliberately copied Taco Cabana's décor. A combination of nonfunctional features overhead garage doors used to separate a patio area from the dining room, a bright color scheme intended to create a festive atmosphere, a distinctive roof design, etc. lent a distinctive overall image to each of its restaurants, Taco Cabana argued. Two Pesos had acted wrongfully in appropriating that image without permission. Five years and

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<sup>92</sup> 510 U.S. 517, 527 (1994)

<sup>93</sup> 499 U.S. 340, 349–350 (1991)

<sup>94</sup> "Rethinking the ownership of information in 21<sup>st</sup> century" available on  
<<http://www.springerlink.com/content/h34u3v4066w1r81x/fulltext.pdf>> (Last accessed Dec 28, 2010).

<sup>95</sup> *Ibid.*

several court rulings later, Taco Cabana prevailed. Two Pesos was required to pay several million dollars in damages and alter the appearance of its restaurants.<sup>96</sup>

It is now practiced that patent owner earn at cost of society, like in terms of monetary reward through licensing in the area of drug research for AIDS. Davis and Slind-Flor have both discussed the potential problems in awarding ownership rights to new drugs. In 1993, a dispute raised between Burroughs Wellcome and generic drug companies such as Barr Laboratories and Novo farm over the patent rights to the AIDS drug AZT. If the drug was in fact invented at the National Institutes of Health it could mean that a version of AZT could be produced generically, and at less cost for AIDS sufferers. According to one report, the company has made more than \$592 million in profits from the drug's sales from 1987 to 1993.<sup>97</sup>

A similar controversy over the AIDS drug 3TC erupted in 1996, when Emory University sued Bio Chem Pharma Inc. The controversy involved charges of theft and deceit as well. Unfortunately, the true loss of these suits will be borne by the AIDS patients. Similarly, the drug manufacturer recorded enormous profits. In 1995 BioChem recorded sales of \$179.8 million, \$300 million (estimated) in 1996. Furthermore, these are expected to increase the full license structure is in place.<sup>98</sup>

A balance has been created when intellectual property rights initially protected. Balance was expressed through the many exemptions which are given to the public for instance, libraries that ensured access, use of material for the purpose of research, recreation and study. A key issue today revolves around copying for the purpose of research and study. The Digital Millennium

<sup>96</sup>*"The growth of intellectual property: A history of the ownership of ideas in the United State"* available on <http://cyber.law.harvard.edu/property99/history.html> >(Last accessed Dec 17, 2010).

<sup>97</sup>*"Rethinking the ownership of information in 21<sup>st</sup> century"* available on <http://www.springerlink.com/content/h34u3v4066w1r81x/fulltext.pdf> >(Last accessed Dec 28, 2010).

<sup>98</sup>*Ibid.*

Copyright Act(1998) passed in the USA, which places severe restrictions on free access to and fair use of material in the public domain, and as a result, libraries in North America are involved in major battles against industries that seem bent on levying a license fee for the use of their property. Present digital world restrict the scope of exemptions so critics pointed out that the digital economy has had a negative impact on the quality of access to the public domain which is the patrimony of all human kind.<sup>99</sup>

The loss of balance is closely related to loss of moral core that restrict the ethics of copyright. Limited monopoly rights given to the writers make some sense but the current situation is totally different from which is initially granted. One of the issues related to the morals has to do with the migration of the rights from the author to the corporation. Monopoly rights are enjoyed by the corporations and not by the creators and corporation sometimes become greedy to earn money and violate morality. So attempts being made to restrict access to knowledge and ideas to the public and to the global commons.<sup>100</sup>

The loss of morality is best illustrated in the manner in which the IP regime has legitimized the patenting of seeds, human biological, and placed limits on a person's and community's right to knowledge and information. There have been innumerable discussions related to bioethics and the need to protect the core areas related to life from being turned into commodities. Micheal Walzer(1984) has used the concept of 'blocked exchanges' to refer to those items that cannot be invested with economic value, that ought not be monetized with in a capitalist society. These

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<sup>99</sup> Pradip Ninan Thomos and Jan Servaes, "The Emerging Information Economy": *Intellectual Property Rights and Communication in Asia*, ed. Robert Verzola(New Dehli: Sage Publication,2006), 20.

<sup>100</sup> *Ibid.*

refer to the categories of items about which society has determined that distribution should be on noneconomic basis.<sup>101</sup>

Human beings and right to life is one of them. The right to knowledge recognized the fact that access to knowledge impacts on the quality of one's life. In the light of this definition, one can argue that all measures, including restrictive understanding of copyright, that block the enjoyment of this right, thus making of less than human, are ultimately a threat to human dignity.<sup>102</sup>

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<sup>101</sup> Pradip Ninan Thomos and Jan Servaes, "The Emerging Information Economy": *Intellectual Property Rights and Communication in Asia*, ed. Robert Verzola (New Dehli: Sage Publication, 2006), 20.

<sup>102</sup> *Ibid*-22



## Chapter 3

### **International Treaties, Institutions and Intellectual Property Rights (IPRs):**

In this chapter we will discuss the international instruments and their role in the development and implementation of Intellectual Property Rights (IPRs). Intellectual Property Rights (IPRs) developed gradually. At the first stage Intellectual Property Rights (IPRs) recognized locally or domestically then their international enforcement is introduced and now Intellectual Property Rights (IPRs) are globally accepted and implemented. A great role has been played by the international treaties in global acceptance of Intellectual Property Rights (IPRs). It will be most appropriate to say that global acceptance of Intellectual Property Rights (IPRs) is possible only due to the international treaties and these international treaties give binding force to Intellectual Property Rights (IPRs) on international and global level.

### **3.1. International treaties, institutions and Intellectual Property Rights (IPRs):**

There are many international treaties but we will discuss only the followings.

- a) The Paris convention
- b) Berne convention
- c) Universal copyright convention
- d) General Agreement on Trade and Tariff
- e) World Intellectual Property Organization
- f) Trade Related Aspect of Intellectual Property Rights
- g) Doha Declaration
- h) Free Trade Agreements

### 3.2. The Paris Convention:

Before the existence of any international convention, it was difficult to obtain protection for industrial property rights in the different countries of the world because they have different laws. Patent application had to be made at the same time in all the countries because publication in one country destroys the novelty of the invention in the other countries. These practical problems created a strong desire to overcome these difficulties. The Government of Austria (Hungary) invited other countries to participate in an international exhibition of inventions held in 1873 at Vienna; many foreign visitors were not willing to exhibit their inventions at that exhibition due to inadequate legal protection offered to the participant of exhibition.<sup>103</sup>

To solve this problem two steps had been taken, firstly, a special Australian law had been made for the protection of foreigners participating in the exhibition. Secondly, in the same year Congress of Vienna for patent Reforms was held. As follow up to the Vienna congress, an international congress on Industrial Property was convened at Paris in 1878, with the task of determining the basis of uniform legislation in the field of Industrial Property.<sup>104</sup>

A final draft proposing an international union for the protection of industrial property was prepared in France and was sent by the French Government to a number of other countries and an invitation is also given to attend the 1880 International Conference in Paris. That Conference adopted a draft convention which contained the substantive provisions that are still the main features of the Paris Convention. A Diplomatic Conference was convened in Paris in 1883, which ended with final approval and signature of the Paris Convention for the Protection of

<sup>103</sup> "International treaties and conventions on intellectual property" available on <<http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf>> (Last accessed Feb 20, 2011).

<sup>104</sup> *Ibid.*

Industrial Property. The Paris Convention was signed by 11 States: Belgium, Brazil, El Salvador, France, Guatemala, Italy, the Netherlands, Portugal, Serbia, Spain and Switzerland.<sup>105</sup>

The countries party to the Paris Convention constitutes a Union for the protection of Industrial Property. In creating a Union, the Paris Convention goes beyond a mere treaty establishing rights and obligations. It also establishes a legal entity in international law with the necessary organs to carry out certain tasks. The Union forms a single administrative entity, and an administrative link between the various Acts of the Paris Convention. A state which becomes a member of the Union by acceding to the Paris Convention becomes bound with respect to all member countries, even those not yet party to it.<sup>106</sup>

Paris Convention for the Protection of Industrial Property was first signed on March 20, 1883. But it revised several time as at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on October 2, 1979.<sup>107</sup>

**The Paris convention provides protection to the industrial property in the following way:**

- a) Patents for 12 months
- b) Utility models
- c) Industrial designs for 6 months
- d) Trademark, services mark and trade names for 6 months

<sup>105</sup> "International treaties and conventions on intellectual property" available on <<http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf>> (Last accessed Feb 20, 2011).

<sup>106</sup> *Ibid.*

<sup>107</sup> "Paris Convention" available at <<http://www.uspto.gov/web/offices/pac/mpep/documents/appxp.htm>> (Last accessed May 16, 2011).

e) Geographical indications

Paris convention also provides rules regarding the following. The main objective of the convention is to provide uniform rules on international level for industrial property.

- i. National treatment
- ii. Right of priority
- iii. Independence of patent
- iv. Geographical indication
- v. Parallel importation

### 3.3. Berne convention:

The Berne Convention is the oldest and most important multilateral copyright treaty. It was negotiated in 1886 and was lastly revised in 1979. The history of Berne Convention has been expanded and the list of rights which are conferred by the convention has been expanded with each revision. The basic objective of the convention is to provide national treatment to various moral as well as economic rights to authors of literary and artistic works. The convention provides that author shall enjoy certain rights and it is the obligation of the member state, which constitute the Berne Union, to ensure that these rights are available in their respective legislations.<sup>108</sup>

Nearly 160 countries are the member of Berne Convention. It includes industrial nations and developing nations, all of these are also members of the World Trade Organization and

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<sup>108</sup> "Berne convention and its importance" available on < [http://www.ehow.com/facts\\_7314533\\_berne-convention-important-copyrighting\\_.html](http://www.ehow.com/facts_7314533_berne-convention-important-copyrighting_.html) > (Last accessed May 16, 2011).

participate in the World Intellectual Property Organization (WIPO) thirty of which have joined since 1992.<sup>109</sup>

Dispute can be brought before the International Court of Justice if any country breaches the basic norms of the convention and not providing certain protection which is required under the convention. In addition to establishing a system of equal treatment that internationalized copyright amongst signatories, the convention also required member states to provide strong minimum standards for copyright law.<sup>110</sup>

### 3.4. Universal Copyright Convention:

Universal Copyright Convention (UCC) was developed by United Nations Educational and Cultural Organization as an alternative to the Berne convention for those states which disagreed with aspects of the Berne Convention, but still wished to participate in some form of multilateral copyright protection it was signed in Geneva in the year 1952. The objective of the convention is to provide sufficient and effective to the authors and copyright proprietors. The Universal Copyright Convention (UCC) was widely prevalent in the US and neighboring countries and many Berne Convention countries also joined the convention in addition to countries which had previously no copyright links with other countries.<sup>111</sup>

### 3.5. World Intellectual Property Organization (WIPO):

The need for international protection of intellectual property became evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 because

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<sup>109</sup>“*Berne convention and its importance*” available on <[http://www.ehow.com/facts\\_7314533\\_berne-convention-important-copyrighting\\_.html](http://www.ehow.com/facts_7314533_berne-convention-important-copyrighting_.html)> (Last accessed May 16, 2011).

<sup>110</sup>“*The role of international legal instruments in the development of copyright law*” available on <<http://jurisonline.in/2010/10/role-of-international-legal-instruments-in-development-of-copyright-law/>> (Last accessed Feb 19, 2011).

<sup>111</sup> *Ibid.*

they were afraid their ideas would be stolen and exploited commercially in other countries. 1883 marked the birth of the Paris Convention for the Protection of Industrial Property and in 1886 the Berne Convention was held for the protection of Literary and Artistic Works. Like the Paris Convention, the Berne Convention set up an International Bureau to carry out administrative tasks.

Initially there were two secretariats for the administration of the two conventions one for industrial property and other for copyright.<sup>112</sup> But in 1893, these two small bureaux united to form an international organization called the United International Bureaux for the Protection of Intellectual Property best known by its French idiom BIRPI. Based in Berne, Switzerland, with a staff of seven, this small organization was the predecessor of the World Intellectual Property Organization.<sup>113</sup>

As the importance of intellectual property grew, the structure and form of the Organization was changed as well. In 1960, BIRPI moved from Berne to Geneva to be closer to the United Nations and other international organizations in that city. A decade later, BIRPI became World Intellectual Property Organization (WIPO), it experience structural and administrative reforms and form a secretariat answerable to the member States.<sup>114</sup>

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest. World Intellectual Property

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<sup>112</sup> "World Intellectual Property Organization" available on <<http://www.wipo.int/about-ip/en/iprml/pdf>> (Last accessed Dec 03, 2010).

<sup>113</sup> "WIPO Treaties" available on <<http://www.wipo.int/treaties/en/general/>> (Last accessed March 03, 2011).

<sup>114</sup> *Ibid.*

Organization (WIPO) was established by the World Intellectual Property Organization (WIPO) Convention in 1967 with a mandate from its member states to promote the protection of Intellectual Property (IP) throughout the world through cooperation among states and in collaboration with other international organizations. Its headquarters are in Geneva, Switzerland.<sup>115</sup>

### 3.5.1. Strategic goals for World Intellectual Property Organization (WIPO):

There are nine strategic goals set as a frame work for World Intellectual Property Organization (WIPO)

1. A balanced evolution of the international normative framework for IP.
2. Provision of premier global IP services.
3. Facilitating the use of IP for development.
4. Coordination and development of global IP infrastructure.
5. World reference source for IP information and analysis.
6. International cooperation on building respect for IP.
7. Addressing IP in relation to global policy issues.
8. A responsive communications interface between WIPO, its Member States and all stakeholders.
9. An efficient administrative and financial support structure to enable WIPO to deliver programs.<sup>116</sup>

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<sup>115</sup> "What is WIPO" available on [http://www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html) (Last accessed March 03, 2011).

<sup>116</sup> "WIPO an overview 2010 edition" available on <http://www.wipo.int/export/sites/www/freepublication/en/general/1007/wipo-pub-107-2010.pdf> (Last accessed March 03, 2011)

### 3.6. General Agreement on Tariff and Trade (GATT) and World Trade

#### Organization (WTO):

The General Agreement on Tariffs and Trade (GATT) is a multilateral agreement regulating trade among about 150 countries. It was signed in 1947. According to its preamble, the purpose of the General Agreement on Tariffs and Trade (GATT) is the substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.<sup>117</sup>

Though the General Agreement on Tariffs and Trade (GATT) is successful but despite of its success in 1980s several problems had been accrued. To solve these problems a new round of trade negotiations had been launched. It is known as Uruguay Round and it was more ambitious than the previous rounds. It introduced new reforms in the trading system and new way of better functioning. The General Agreement on Tariffs and Trade (GATT) treaty of 1994 was negotiated during the Uruguay Round; it established the World Trade Organization (WTO) an international institution for governing trade.<sup>118</sup>

World Trade Organization (WTO) is an international institution. It replaces General Agreement on Tariffs and Trade (GATT) as the world's global trading body. It has 148 members countries with a permanent secretariat situated in Geneva. It started its proper functioning in 1995. It governs the rules related to the international trade. It is like the United Nations (UN) for trade but with sharper teeth. World Trade Organization (WTO) rules as agreed by member countries, limit the role that governments can play in their national economies. The principal object of World

<sup>117</sup> "GATT and WTO" available on <<http://www.law.duke.edu/lib/researchguides/gatt.htm>> (Last accessed April 30, 2011).

<sup>118</sup> "An introduction to the GATT and WTO" available on <[www.chicagofed.org/digital-assets/publications/economics-perspectives/2003/4qepart4.pdf](http://www.chicagofed.org/digital-assets/publications/economics-perspectives/2003/4qepart4.pdf)> (Last accessed May 03, 2011).



Trade Organization (WTO) is to provide a forum where all member countries can reach agreement on lowering tariffs on "foreign trade"<sup>119</sup>. These include the level of taxes charged on goods coming into a country, support for national industry, and subsidies for farmers<sup>120</sup>

If a country breaks the rules of World Trade Organization (WTO) the other country can take them to a special WTO's Disputes Settlement Board (DSB). If the board finds a country guilty of breaking the rules then it gives the complainant the right to impose sanctions. These sanctions can include placing higher taxes on the goods coming from the offender country or suspending other World Trade Organization (WTO) rules until the offender complies with the rules of World Trade Organization (WTO).<sup>121</sup>

The World Trade Organization (WTO) alleged that it operates on the principle of one member, one vote. But most of the time the World Trade Organization (WTO) does not hold votes. Instead it works by passive consensus this means that a country is understood to agree unless it explicitly says no.<sup>122</sup>

The Ministerial Committee of World Trade Organization (WTO) which is based in Geneva, Switzerland, holds meetings at least every two years and makes the top decisions. There is also a General Council, a Goods Council, Services Council, and an Intellectual Property Rights Council

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<sup>119</sup> Things we buy or sell from other countries.

<sup>120</sup> "Trade and the WTO" available on <[www.actionaid.org.uk/-content/documents/trade-wto.pdf](http://www.actionaid.org.uk/-content/documents/trade-wto.pdf)> (Last accessed May 03, 2011).

<sup>121</sup> "How the WTO works" available on <<http://stevesuranovic.blogspot.com/2007/03/how-wto-works-q.html>> (Last accessed May 05, 2011).

<sup>122</sup> "Trade and the WTO" available on <[www.actionaid.org.uk/-content/documents/trade-wto.pdf](http://www.actionaid.org.uk/-content/documents/trade-wto.pdf)> (Last accessed May 03, 2011).

all these councils report to the General Council. Finally, there are a number of working groups and committees.<sup>123</sup>

Criticism has been made on the World Trade Organization (WTO). Opponent argued that policies of World Trade Organization (WTO) are undemocratic and the national Sovereignty is also compromised. It is also said that transparency during negotiation is also lacked. It is also claim that World Trade Organization (WTO) sometime creates a hurdle for state to fulfill its obligations and this situation raised during the HIV/AIDs treatment. Due to the patent cost of patented medicines was become very high. State and people could not afford it. The generic version of HIV/AIDs medicines is affordable and can be helpful in saving the life of so many people who die due to the non availability of medicines. But these states being the member of World Trade Organization (WTO) cannot violate the intellectual property rights otherwise these states are subject to the trade sanctions. Poor countries also claimed that they adopted Intellectual Property Rights (IPRs) and trade liberalization but no additional benefits given to them. It is also alleged that the forum of World Trade Organization (WTO) used by the developed countries to force poor countries to remove or minimized the trade barrier so that they can overcome the developing market.

### **3.7. Trade related Aspects of Intellectual Property Rights (TRIPS):**

TRIPS Agreement is the result of Uruguay Round. The foundations for the Uruguay Round were laid by a ministerial meeting in Geneva in November 1982, where contracting parties agreed to a new negotiation round to begin in September 1986 in Punta del Este, Uruguay. Government ministers assembled in Uruguay adopted an agenda covering every outstanding trade related

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<sup>123</sup> "How the WTO works" available on <<http://stevesuranovic.blogspot.com/2007/03/how-wto-works-q.html>> (Last accessed May 05, 2011).

policy issue. Within the framework of these negotiations there was a request from the United States of America to include a multilateral agreement on minimum standards for intellectual property rights.<sup>124</sup>

The multilateral trade negotiations took very long time and it was on 15 December 1993 that all aspects of negotiation were finally resolved. Final act of multilateral trade was signed and World Trade Organization (WTO) Agreements came into force. So World Trade Organization (WTO) is an umbrella for many agreements and TRIPS Agreement is one of them.<sup>125</sup>

Before the 1986 to 94 Uruguay Round negotiations, there was no specific agreement on intellectual property rights in the framework of the General Agreement on Tariff and Trade (GATT) multilateral trading system. However, some principles contained in the General Agreement on Tariff and Trade (GATT) had a bearing on intellectual property measures taken on imports or exports. Article XX(d) of General Agreement on Tariff and Trade (GATT) 1947 (now Article XX(d) of GATT 1994) specifically referred to intellectual property rights. Under this provision, measures which would otherwise be inconsistent with the General Agreement could be taken subject to certain conditions to secure compliance with laws or regulations relating, among other things, to intellectual property rights.<sup>126</sup>

General Agreement on Tariff and Trade (GATT) failed to liberalize trade in agricultural products to any significant degree. This was one of the major goals of the Uruguay Round. General Agreement on Tariff and Trade (GATT) was an executive agreement under the Protocol of Provisional Application. It was only a gentlemen's agreement with no teeth, no enforcement

<sup>124</sup> "Introduction to the Trips agreement" available on <<http://www.fao.org/docrep/003/x7355e/x7355e02.htm>> (Last accessed May 10, 2011).

<sup>125</sup> *Ibid.*

<sup>126</sup> "Frequently asked question about Trips" available on <<http://www.wto.org/english/tratop-e/trips-e/tripsq-eh.htm>> (Last accessed May 10, 2011).

power to discipline parties that violate the rules. Moreover, contracting parties are not obligated to observe rules that are inconsistent with their domestic laws at the time of entry into General Agreement on Tariff and Trade (GATT). Many countries sidestep or bypass the rules by narrowly defining commodities for tariff purposes.<sup>127</sup>

The lack of protection of IP at the international level has been the source of rising tensions in economic relations and has hindered the technological transfer and innovation. Existing agreements in the area did not have enforcement mechanisms or sanctions if the obligations were not met. Equally, there was concern that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. It was to deal with these issues that the international community engaged in the development of a multilateral agreement on trade-related aspects of intellectual property rights.<sup>128</sup>

The TRIPS Agreement covers, in principle, all forms of intellectual property and aims at harmonizing and strengthening standards of protection for effective enforcement at both national and international levels. It addresses applicability of General Agreement on Tariff and Trade (GATT) principles as well as the provisions in international agreements on IP. It establishes standards for availability, scope, use, enforcement, acquisition and maintenance of Intellectual Property Rights. Furthermore, it addresses related dispute prevention and settlement mechanisms. Formal provisions are addressed, which cover transitional and institutional arrangements, respectively.

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<sup>127</sup> "General agreement on trade and tariff" available on <http://www2.econ.iastate.edu/classes/econ355/choi/gatt.htm> > (Last accessed May 16, 2011).

<sup>128</sup> "Introduction to the Trips agreement" available on <http://www.fao.org/docrep/003/x7355e/x7355e02.htm> > (Last accessed May 10, 2011).

The fundamental characteristic of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement is that it makes protection of intellectual property rights an integral part of the multilateral trading system, as embodied in the World Trade Organization (WTO). The Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement is often described as one of the three pillars of the World Trade Organization (WTO), the other two being trade in goods (the traditional domain of the GATT) and trade in services.<sup>129</sup>

There are three main features of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement

### **3.7.1. It provides standards:**

Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement covers all main areas of intellectual property and set out minimum standards of protection for all members. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.

The Agreement also requires that all member countries must fulfill the substantive obligations of the World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works in their most recent versions. Secondly, the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The Trade Related Aspect

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<sup>129</sup>“Frequently asked question about Trips” available on<<http://www.wto.org/english/tratop-e/trips-e/tripsq-htm>>(Last accessed May 10, 2011).

of Intellectual Property Rights (TRIPS) Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.<sup>130</sup>

### 3.7.1. It provides enforcement mechanism:

Protection for Intellectual Property Rights (IPRs) would be worthless unless the right holders have the opportunity to claim their rights and infringers can be prosecuted. These issues are dealt with in Part III of the Agreement, which commits Members to the development of remedies and procedures under domestic law to ensure that Intellectual Property Rights (IPRs) are effectively enforced for both national and foreign right holders. The implementation should ensure that fair and equitable procedures for effective action against infringement of Intellectual Property Rights (IPRs) be made. This procedure should not be unnecessarily complicated or costly and do not take unreasonable time or unwarranted delay.<sup>131</sup>

Members have to allow judicial review of final administrative decisions and initial judicial decisions. Further provisions in Part III include civil and administrative procedures and remedies on evidence of proof, injunctions, damages and other remedies including the right of judicial authorities to order the disposal or destruction of infringing goods.<sup>132</sup>

### 3.7.3. It provides disputes settlement mechanism:

The Agreement makes the settlement of disputes under the World Trade Organization (WTO)'s dispute settlement procedures between World Trade Organization (WTO) Members about the respect of the Trade Related Aspect of Intellectual Property Rights (TRIPS) obligations.<sup>133</sup>

<sup>130</sup>“Overview: the trips agreement” available on<[http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)>(Last accessed May 10, 2011).

<sup>131</sup>“Introduction to the Trips agreement” available on<<http://www.fao.org/docrep/003/x7355e/x7355e02.htm>>(Last accessed May 10, 2011).

<sup>132</sup> *Ibid.*

<sup>133</sup>“Overview: TRIPS Agreement” available on<[http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)>(Last accessed May 10, 2011).

### 3.7.4. It provides transitional period:

Transitional period has been given to the members countries in the part VI of the Agreement as regards to apply the provisions of the Agreement. The deadlines for the implementation have been given to the member countries and that deadline to be counted from the date of entry into force of the Agreement. The length of the period granted to member countries for compliance of the agreement is depends on the level of development of Members as recognized by the United Nations. Developed countries must comply with all the Agreement provisions within one year, i.e. by 1 January 1996. However during this transitional period provisions like national treatment and MFN will be observed.<sup>134</sup>

### 3.7.5. Compulsory license under TRIPS Agreement:

Compulsory license also referred to as a *statutory license*. According to U.S. law, a license to use content under reasonable and non-discriminatory terms is known as compulsory license.<sup>135</sup>

Compulsory licenses are extremely powerful rights granted to governments, which must be used prudently. A compulsory license restricts the rights of a patent holder and authorized the third party to make use and sell patented products without the consent of the patent holder.<sup>136</sup>

Article 31 of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement is the direct source of the compulsory licensing right. The phrase 'compulsory license' is not used, but the title of Article 31 is other use without authorization of the right holder.<sup>137</sup>

<sup>134</sup> "Introduction to the Trips agreement" available on <<http://www.fao.org/docrep/003/x7355e/x7355e02.htm>> (Last accessed May 10, 2011).

<sup>135</sup> "Compulsory license" available on <[http://www.webopedia.com/TERM/C/compulsory\\_license.html](http://www.webopedia.com/TERM/C/compulsory_license.html)> (Last accessed May 13, 2011).

<sup>136</sup> "Compulsory license" available on <<http://www.hofstra.jbl.org/media/blogs/a/compulsory%20license%20the%20Dangers%20behind%20the%20current%20practice.pdf>> (Last accessed May 12, 2011).

<sup>137</sup> *Ibid.*

The idea of compulsory licenses was not a new one, it was first adopted by the 1883 Paris Convention, this tool has been associated with patent systems around the world, and has perpetually been a topic of controversy. Only under extraordinary circumstances compulsory licenses should be granted upon patented pharmaceutical products; otherwise detrimental effects on global health as well as on the global economy will be going down.<sup>138</sup>

A tension has been exists between the pharmaceuticals and access to life saving medicines. There is need to maintain incentives for pharmaceutical companies to create new innovations by ensuring a return on their investments. On one extreme it is also said that patent protection should end where saving lives or alleviating suffering begins; that is, patent law should be subordinate to certain social interests. At the opposite end of the spectrum, it is argued that pharmaceuticals should be treated like all other commodities, thus the price should be determined by the basic principles of supply and demand.<sup>139</sup>

Every year pharmaceutical companies obtain much profit and they have a crucial impact on the globe 'economic order. Currently, pharmaceutical companies earn profit over \$600 billion each year. This financial power leads to lobbying power, which in turn leads to political power.<sup>140</sup>

A compulsory license is a prime example of a tool that threatens pharmaceutical companies' ability to control the price and availability of new drugs. A compulsory license provides a national government with the authority to practice an invention covered by a patent, or authorize another party to do so, without permission from the patent holder. The practice of issuing compulsory licenses is an exception to the general rule that patent holders have an exclusive

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<sup>138</sup> "Compulsory license" available on <<http://www.hofstrajibi.org/media/blogs/a/compulsory%20license%20the%20Dangers%20behind%20the%20current%20practice.pdf>> (Last accessed May 12, 2011).

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*



right over their invention. The purpose of a compulsory license is to increase access to essential goods by providing a wider use of the invention than the patent holder intended. As a result, the patent holder is forced to give up a large part of his property right for the purported benefit of the public.

#### **3.7.5.1. Grounds for compulsory license:**

Compulsory license shall be issued only for non commercial purpose. Countries have a right to determine the grounds for compulsory license. A decision to issue a Compulsory License must be subject to review, but this does not have to be a judicial review; Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement only requires that the review is independent, so countries may opt for an administrative review, which is less burdensome and much faster. A compulsory license shall be use for the supply of the domestic market.<sup>141</sup>

Remuneration for the patent holder shall be determined according to the economic value of the authorization. So if the contribution of a patent is minor, as for instance in case of a formulation patent, the royalty rate can be lower. Under US national law, compensation is based on what the patent holder has lost. Government has a lot of discretion for determining remuneration.<sup>142</sup>

#### **3.7.6. Developing Countries and TRIPs negotiations:**

When the Trips negotiation process had been started at Punta del Este developing countries participate in it but they did not develop adequate mechanism to consult with civil society and business interest groups which subsequently resulted in difficulties in the implementation of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement. During the Trade

<sup>141</sup> "Compulsory license" available on <<http://apps.who.int/medicinedocs/en/d/Jh1459e/6.3.html>> (Last accessed on May 14, 2011).

<sup>142</sup> "Compulsory license for research" available on <<http://www.iphandbook.org/handbook/ch03/p10>> (Last accessed May 14, 2011).

Related Aspect of Intellectual Property Rights (TRIPS) negotiations developing countries participate constructively. Though they did not have detailed text in treaty language, however they make issue-based alliances as on parallel trade, compulsory licenses and biotechnology.<sup>143</sup>

One thing which is very note able during the Trade Related Aspect of Intellectual Property Rights (TRIPS) negotiation is that there is lack of unity amongst the developing countries. There is absence of any formal coordination mechanism as G-17 during the GATT. USA makes effective use of Section 301 and other bilateral means and wins the silence of major developing countries which are participants in the Trade Related Aspect of Intellectual Property Rights (TRIPS) negotiations. Developing countries try to gain by attracting Foreign Direct Investment (FDI) through unilateral liberalization of trade and investment polices and in return they have to protect and strengthen the Intellectual Property Intellectual Property (IP) laws. There is increased complexity in the subjects of negotiation and there is lack of expertise and inability of developing countries to engage constructively and effectively on a coordinated basis.<sup>144</sup>

### **3.8. Doha Declaration:**

During the World Trade Organization (WTO)'s Fourth Ministerial Conference in Doha, Qatar, on 14 November 2001, the member countries adopted the Declaration on the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement and Public Health by consensus. Its objective is to give a respond to the concern that the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement will remove drug difficulties for the patient in the poor

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<sup>143</sup> Jayashere Watal, *Intellectual property rights in WTO and developing countries* (New Delhi: oxford university press, 2005), 46.

<sup>144</sup> *Ibid.*

countries. It also addresses some specific concerns regarding the implementation of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement.<sup>145</sup>

Patents constitute an incentive for the development of the private sector pharmaceutical industry. The rationale for granting exclusive rights on patented medicines is that while the development of new drugs is a costly process, it is relatively easy to copy an existing drug. Despite the private industry's plea for patent protection, a number of developed and developing countries traditionally put restrictions on the patentability of drugs on public policy grounds.<sup>146</sup>

The Patents Act, 1970 introduced restrictions on product patents for medicines to limit commercialization in the health sector. The adoption of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement is compelling countries that had patentability restrictions like India to fundamentally change their patent laws and meet minimum standards with respect to protecting intellectual property.<sup>147</sup>

This Declaration does not amend the Trade Related Aspect of Intellectual Property Rights (TRIPS) but it only seeks to shed light on acceptable interpretations of the Agreement. It constitutes a first step towards the recognition that intellectual property rights issues cannot be discussed in isolation from health concerns. It provides the wider interpretation of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement.<sup>148</sup>

Doha declaration responds to these questions in a number of ways.

<sup>145</sup> "The separate Doha declaration explained" available

on [http://www.wto.org/english/tratop\\_e/trips\\_e/healthdeclxpln\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/healthdeclxpln_e.htm) > (Last accessed May 15, 2011).

<sup>146</sup> "The Doha declaration of the WTO and access to medicines" available on <http://www.ielrc.org/content/f0201.htm> > (Last accessed May 15, 2011).

<sup>147</sup> "The Doha Declaration on the Trips Agreement and public health" available

on <http://www.imadahmed.com/734290165/the-doha-declaration-on-the-trips-agreement-and-public-health---what-it-is--why-it-came-about/> > (Last accessed May 15, 2011).

<sup>148</sup> "The Doha declaration of the WTO and access to medicines" available on <http://www.ielrc.org/content/f0201.htm> > (Last accessed May 15, 2011).

First of all it emphasizes in "paragraph 4 of the declaration" that the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement does not and should not prevent World Trade Organization (WTO) member's governments from taking measures to protect public health. It reaffirms the members' rights to use fully the provisions of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement, which provide flexibility for this purpose. Before the declaration when the developing countries use these flexibilities, developed countries considered it as violation of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement. These important statements are a signal from all World Trade Organization (WTO) members that they will not try to prevent each other from using these provisions.<sup>149</sup>

The declaration also makes it clear that the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement should be interpreted and implemented in a flexible manner so that it supports World Trade Organization (WTO) members' right to protect public health and to promote access to medicines for all. It also highlights the importance of the objectives and principles of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement for interpreting its provisions. Although the declaration does not refer specifically to Articles 7 ("Objectives") and 8 ("Principles") of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement, developing country members attach particular importance to these provisions.<sup>150</sup>

Declaration make it clear that the government of the each member country would have the freedom to determine the grounds upon which compulsory license would be granted. Typically these grounds include national emergency or other circumstances of public health crises.

<sup>149</sup> "The separate Doha declaration explained" available

on <[http://www.wto.org/english/tratop\\_e/trips\\_e/healthdeclexpln\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/healthdeclexpln_e.htm)> (Last accessed May 15, 2011).

<sup>150</sup> *Ibid.*

Member countries have a right to decide what constitute national emergency or other circumstances of extreme urgency.<sup>151</sup>

Declaration also recognized the problem of those member countries that do not have manufacturing capacity. So a council for Trade Related Aspect of Intellectual Property Rights (TRIPS) to find a speedy solution of that problem and report would be made to the General Council before the end of 2002. The General Council failed to follow the deadline but was agreed on 30 August 2003 to allowing that the generic copies made under compulsory license can be exported to the countries that lack production capacity. But that imported country cannot further export the generic medicine.<sup>152</sup>

For least-developed countries who are members of the World Trade Organization (WTO), the declaration says they do not have to protect patents and undisclosed information rights for pharmaceuticals until 2016. For these rights, the least-developed countries therefore have 10 years added to their transition period for applying the Trade Related Aspect of Intellectual Property Rights (TRIPS) provisions.<sup>153</sup>

### 3.9. Free Trade Agreements (FTAs):

Several developing countries are now either part of bilateral and regional free trade agreements or are involved in negotiations to create them. There are two broad categories of Free Trade Agreements (FTAs). One category involves usually neighboring countries and regional groupings such as Association of South Asian Nation (ASEAN), South Asian Association of

<sup>151</sup> "The Doha Declaration on the Trips Agreement and public health" available on <http://www.imadahmed.com/734290165/the-doha-declaration-on-the-trips-agreement-and-public-health---what-it-is--why-it-came-about/> (Last accessed May 15, 2011).

<sup>152</sup> Ibid.

<sup>153</sup> "The separate Doha declaration explained" available on [http://www.wto.org/english/tratop\\_e/trips\\_e/healthdeclexpln\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/healthdeclexpln_e.htm) (Last accessed May 15, 2011).

Regional Cooperation (SAARC), South African Development Community (SADC), Mercosur, and Andean Community. The second category involves Free Trade Agreements (FTAs) between a developed and developing countries. Our discussion will be on the second category, Free Trade Agreements (FTAs) between developed and developing countries. Such Free Trade Agreements (FTAs) usually cover a long range of issues beyond simply trade in goods. They include market access in trade in goods, services, investment liberalization, protection of investor rights, intellectual property, government procurement, competition policy, labor and environment standards.<sup>154</sup>

Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement becomes the part of World Trade Organization (WTO) and all members' countries adopt it. It was considered that this unprecedented harmonizing treaty would assure international minimum standards for the protection of Intellectual Property Rights. But it never works according to expectations of industrialized countries.<sup>155</sup>

Having failed to achieve all they sought in the Trade Related Aspect of Intellectual Property Rights (TRIPS) negotiations, the US and other developed nations began negotiating for the inclusion of more protectable subject matter, broader and more extensive coverage, increased harmonization, stronger enforcement mechanisms, and a weakening of 'flexibilities' and 'special and differential treatment' granted to developing and least developed countries in the Trade Related Aspect of Intellectual Property Rights (TRIPS). So these nations shifted the focus of

<sup>154</sup>“ *Bilateral and regional free trade agreements*” available on< <http://www.twinside.org.3g/title2/books/Bilateral.Regional.Free.Trade.Agreement.htm>>(Last accessed June 28, 2011).

<sup>155</sup>“ *Impact of free trade agreement on intellectual property standards in a post TRIPS world*” available on<<http://www.marcasur.com/correo/notas.asp?idNota=833&accionBuscar=ListarNota&seccion=&P=1>>(Last accessed June 28, 2011).

their efforts from the multilateral forum to bilateral and regional Free Trade Agreements (FTAs).<sup>156</sup>

Thus, while many developing countries were still struggling to implement their obligations under Trade Related Aspect of Intellectual Property Rights (TRIPS), developed countries were already raising the level of Intellectual Property Rights (IPRs) through Free Trade Agreements (FTAs). In this regard, the US is the clear leader in promoting higher standards of intellectual property protection than required in Trade Related Aspect of Intellectual Property Rights (TRIPS), so called TRIPS-Plus provisions.<sup>157</sup>

### **3.9.1. Multilateral agreements are more effective then Free Trade Agreements (FTAs):**

Multilateral agreements are more effective then Free Trade Agreements (FTAs) due to the following reasons.

- a) In a Free Trade Agreements (FTAs) between a developed country and a developing country or countries, the developing countries are usually in a weaker bargaining position due to the lack of capacity of their economies, weaker political situation, and their weaker negotiating resources.<sup>158</sup>
- b) In the World Trade Organization (WTO), the principles of special and differential treatment and less than full reciprocity are recognized. Thus developing countries are in better position to negotiate on the basis of non-reciprocity and for non-reciprocal outcomes, in which they are not obliged to open up their markets to the same degree as

<sup>156</sup> "*Trips plus provisions in FTAs*" available on <<http://papers.ssrn.com/so/3/paper.cfm?abstract-id947767>> (Last accessed Feb 12, 2011).

<sup>157</sup> *Ibid.*

<sup>158</sup> "*Bilateral and regional free trade agreements*" available on <<http://www.twinside.org.3g/title2/books/Bilateral.Regional.Free.Trade.Agreement.htm>> (Last accessed June 28, 2011).

developed countries. However, these development principles are usually absent in Free Trade Agreements (FTAs), or they are only reflected in longer implementation periods for the developing country. The Free Trade Agreements (FTAs) are basically on the basis of reciprocity. This equal treatment of parties that are unequal in capacity is likely to result in unequal outcomes.

- c) Free Trade Agreements (FTAs) contain many more than World Trade Organization (WTO). Many North-South Free Trade Agreements include rules on investment, government procurement and competition law, which has been rejected by the developing countries as subject for World Trade Organization (WTO) negotiations. Developing countries have also objected to making labor standards and environment standards subjects of discussion in the World Trade Organization (WTO). All these topics are now entering by the side-door through the Free Trade Agreements (FTAs).<sup>159</sup>
- d) Even where issues are already the subject of rules in the World Trade Organization (WTO) e.g. intellectual property and services, there are many flexibilities and options open to developing countries in interpreting and in implementing obligations in these areas. However, developed countries attempt to remove these flexibilities for developing countries through the Free Trade Agreements (FTAs). If these attempts succeed, the policy space for developing countries to pursue development and socio-economic goals would be significantly reduced.<sup>160</sup>

Several researchers pointed out that these bilateral agreements tempting developing countries to get some specific advantages from developed country partner but there are several potential

<sup>159</sup> "Bilateral and regional free trade agreements" available on <http://www.twinside.org.3g/title2/books/Bilateral.Regional.Free.Trade.Agreement.htm> (Last accessed June 28, 2011).

<sup>160</sup> *Ibid.*



danger and disadvantages for developing countries. Developed countries want to achieve the goals which they fail to achieve in World Trade Organization (WTO). There is apprehension that if more and more countries become the part of Free Trade Agreements (FTAs) then it will affect the multilateral rule and make difficult for developing countries to take stand in World Trade Organization (WTO). It is also argued that all such requirements which are not justified at the front door of the World Trade Organization (WTO) they probably should not be encouraged to enter through the side door.

## Chapter 4

### **Problems faced in the implementation of Intellectual Property Rights (IPRs):**

Intellectual Property Rights are the major issue of concern for both developed and developing countries. Intellectual property rights have become an important part of World Trade Organization (WTO). After the implementation of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement Intellectual Property Rights (IPRs) have become trade issues. Developing countries being the members of WTO and signatory to the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement are bound to provide the minimum standards of protection for IPRs in their legislation. Trade Related Aspect of Intellectual Property Rights (TRIPS) provides minimum standards for different Intellectual Property Rights (IPRs) and bound the developing countries to fulfill these standards within a certain time limit which is given as dead line. Implementation of Intellectual Property Rights (IPRs) have become a great challenge for developing countries because they have to fulfill the minimum standards of Trade Related Aspect of Intellectual Property Rights (TRIPS) agreement and at the same time have to safeguard the interest of the public and fulfill its obligations like national development, alleviation of poverty, access to medicines and food security. In spite of all these issues constant pressure put by the developed nation on the developing countries for the enforcement of Intellectual Property Rights (IPRs).

Intellectual Property Rights (IPRs) have different effect for developed and developing countries. There are some issues of developing countries which are more important for them then the Intellectual Property Rights (IPRs) and on the other hand there are some Intellectual Property Rights (IPRs) which are more important for developed countries then the issues of developing

countries. Most of the developing countries have legislation of Intellectual Property Rights (IPRs) but with lack of implementation policies. So in this chapter we will see the why Intellectual Property Rights (IPRs) are attractive for developed nations and why developing countries fails to comply with implementation of Intellectual Property Rights (IPRs). The problem faced by the developing countries during the implementation of international standards of Intellectual Property Rights (IPRs) will also be examined. Developing countries also participated in the Uruguay Round negotiations but due to many reasons they cannot represent their needs and concerns as effectively as it requires, the reasons for their failure will also be discussed briefly.

#### **4.1. Developed countries and protection of Intellectual Property rights:**

It can be seen from the British history that the industrial revolution originates from the invention of steam engine. After that the progress of science and technology has been increased and useful inventions were considered very important. Things which depend on human intellect generate tremendous economic benefits. Intellectual property has got enormous value. When the people notice the importance of intellectual property, they try to control it. They make rules which allow people to own their creativity and innovation. This encourages further innovation and creativity which ultimately benefits the society. Till this point there is no confusion and conflict of opinion between the developed and developing countries. Problem arises when developed nations forced that IPRs should be globally enforced and make it mandatory for the developing countries to adopt the strict compliance of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement irrespective of their domestic problems, needs and issues.

Each country has different situation and circumstances so their IP laws have different regulations which are formulated after conducting a social impact assessment of such laws. During the development of integration with the global economy, many international rules of intellectual property rights were contributed such as the World Intellectual Property Organization (WIPO), World Trade Organization (WTO) and Trade Related Aspect of Intellectual Property Rights (TRIPS). Developed Countries, especially the US, Japan and European Community wanted an effective protection on the minimum standard for intellectual property rights. The purpose is to avoid competition with the newborn enterprise in Developing Countries and to maintain the status of long established monopoly in Developed Countries. They advised using the Dispute settlement body on the enforced protection and removing barriers which they think impede the development of trade.<sup>161</sup>

Developed countries argued that stronger IP laws could increase incentives to conduct R&D by domestic firms in developing countries, making these firms more likely to become owners of the rights to future innovations. A developing country could also take benefit from the TRIPS Agreement because strengthening IP laws increases the probably for technology transfer between developed and developing countries.<sup>162</sup>

It is true that the protection of intellectual property rights provides incentive to the people to make more inventions. Without the protection of intellectual property rights, 65% medicines would not be introduced into the market and 60% medicines would not even be created.<sup>163</sup>

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<sup>161</sup> "TRIPS Agreement Does Little to promote the development of technology transfer to Developing Countries" available on <<http://cscanada.net/index.php/mse/article/view/1134/1219>> (Last accessed June 11, 2011).

<sup>162</sup> "Intellectual property rights and innovation in developing countries" available on <<http://www.enterprisesurveys.org/documents/intellectual-property-rihts-India.pdf>> (Last accessed June 12, 2011).

<sup>163</sup> "TRIPS Agreement Does Little to promote the development of technology transfer to Developing Countries" available on <<http://cscanada.net/index.php/mse/article/view/1134/1219>> (Last accessed June 11, 2011).

## 4.2. Developing countries' concerns and Intellectual Property Rights:

Developing Countries are concerned that protecting intellectual property rights would form hindrance to legal trade. Having strong intellectual property rights create monopoly and resulted in high prices of food and medicines thus disadvantages the public well. Protection of intellectual property rights is not only to protect the owner's private right but also it has turned into a tool for realizing national benefit. The Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement is an equal agreement for all but Developing Countries are slower than Developed Countries in the development of economy and technology and placing them on the same standard and having same rights and duties is unfair.

The Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement regulates computer software as literary works, medicine and the agricultural chemicals are included in the patent system, and trade secrets are included in the copyright system. All These regulations bring huge benefit to Developed Countries. If we examine the pharmaceutical market, then we find that this market is actually controlled by three main countries the US, Japan and Germany. These three countries accounted for 77.38% sales volume in 2000. The same year, American and Japanese annual sales increased to 16% and 4% respectively. Top 20 pharmaceutical companies controlled 57% of the global market. Those top 20 companies are belonged to the Developed Countries, there were 8 companies from America, 4 companies from Germany and 3 companies from Japan.<sup>164</sup>

Some countries did not enforce Intellectual Property Rights during the initial stage of their industrialization due to some social and economic constraints. America is a best example of this.

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<sup>164</sup> "TRIPS Agreement Does Little to promote the development of technology transfer to Developing Countries" available on <<http://cscanada.net/index.php/mse/article/view/1134/1219>> (Last accessed June 11, 2011).

Nowadays America has the strongest technology in this world, but in the initial stages of industrialization, it adopted a policy to weaken the intellectual property rights. It also brought many cases about other countries infringing intellectual property rights. America has attached great importance to protection of intellectual property rights after its technology reached a high level.<sup>165</sup>

Professor George E. Osborne<sup>166</sup> describe the effects of Intellectual Property Rights in the developing countries as

“But, in the case of developing countries, more and stronger protection is not necessarily better. Developing countries should not be encouraged or coerced into adopting stronger IP rights without regard to the impact this has on their development and poor people. They should be allowed to adopt appropriate rights regimes, not necessarily the most protective ones.”<sup>167</sup>

Professor John Barton also noticed the behavior of developed nation towards developing countries as

“Developed countries often proceed on the assumption that what is good for them is likely to be good for developing countries.”<sup>168</sup>

It is said that the World Trade Organization (WTO) is a democratic institution but developing countries claim that it is not as democratic as shown because officially all countries have one vote right but the decisions are made by what they call consensus. In practice votes are almost never taken. Smaller and poorer countries cannot afford to maintain the representatives and trade lawyers necessary to make their voices heard on policy issues at the World Trade Organization

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<sup>165</sup> “TRIPS Agreement Does Little to promote the development of technology transfer to Developing Countries” available on <<http://cscanada.net/index.php/mse/article/view/1134/1219>> (Last accessed June 11, 2011).

<sup>166</sup> Professor of law in Stanford University.

<sup>167</sup> “A call to improve intellectual property rights in developing countries” available on <<http://www.scienceinafrica.co.za/2002/october/ip.html>> (Last accessed June 10, 2011).

<sup>168</sup> *Ibid*.

(WTO) headquarters in Geneva.<sup>169</sup> So when representation has not been made by the small and poor countries, it creates apprehension that their interest might not be protected as would be protected in their presence.

Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement requires the developing states to give up the right to choose a suitable protective level according to their national condition. All Developed Countries used this right when they were developing. If those Developed Countries complied with the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement when they were developing, most of them would not have attained actual technological level. However, to require Developing Countries to observe strong protection of intellectual property right, actually this is to forbid them to go to the same way as Developed Countries did before.<sup>170</sup>

If the domestic area of intellectual property rights also allows the foreign owner to be protected, the state will lose the legal right to make imitations and copies. Then the way to improve the state's technology will be forbidden and foreign monopoly groups might control the domestic economy and technological development.<sup>171</sup>

To make a better understanding of the situation that how Intellectual Property Rights (IPRs) clog the further development the example of computer program is given. The provisions of Article 10 (1) state, Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention. We know that the code is the basic part of software. This provision has protected the right of the one who writes computer programs but it will make the

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<sup>169</sup> "WTO process favor big business and rich countries" available on <<http://www.speakeasy.org/~peterc/wtow/wto-biz.htm>> (Last accessed June 10, 2011).

<sup>170</sup> "TRIPS Agreement Does Little to promote the development of technology transfer to Developing Countries" available on <<http://cscanada.net/index.php/mse/article/view/1134/1219>> (Last accessed June 11, 2011).

<sup>171</sup> *Ibid.*

development of software much slower, especially in Developing Countries. After the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement if someone wants to create new computer programs, which needs some existing programs as foundation, he must paid for it. A large amount of money is needed for the license or people should do exploit again those present programs for making the new one. This obstructs innovation and increases the cost of innovation.<sup>172</sup>

Patents of medicine have an incredible effect in the world, because some medicines are needed by thousands of people in the developing countries. As mentioned above, important patents have not been taken out by Developing Countries because of their underdeveloped economy and technology. Unfortunately most patents are controlled by Developed Countries to maintain their status of monopoly and so it is very difficult and expensive to get license for companies in Developing Countries. Many important medicines related to heart, HIV/AIDS and malaria etc are patented so cost of medicines becomes very high which is not affordable by the poor people of developing and least developed countries.<sup>173</sup>

To take the example of AIDS medicine, there are 36 million AIDS patients in the world, 95% patients live in Developing Countries. In some African countries, as more than a quarter of the population is infected with AIDS, the average life span of population has decreased 20 years. If medicines can be gotten in time, the death rate can be reduced dramatically. Nevertheless, the

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<sup>172</sup>“TRIPS Agreement Does Little to promote the development of technology transfer to Developing Countries” available on<<http://cscanada.net/index.php/mse/article/view/1134/1219>>(Last accessed June 11, 2011).

<sup>173</sup>“Give poor patients a chance” available on<<http://www.palgrave-journals.com/jgm/journal/v6/n1/full/jgm200826.9.html>> (Last accessed April 20, 2011).



medicine which is produced by an American company is too expensive, because of the patent fee. Most of people from Developing Countries are not able to buy this kind of medicine.<sup>174</sup>

It is urgent to examine how developing countries could use IP tools to advance their development process. What are the key Intellectual Property Rights (IPRs) issues of concern to them? What specific difficulties do they face in intellectual property negotiations process? Is intellectual property directly relevant to sustainable development and to the achievement of agreed international development goals? Do developing countries and particularly the least developed have the capacity to formulate their negotiating positions and become well informed negotiating partners? These are essential questions that policy makers need to address in order to design Intellectual Property Rights (IPRs) laws and policies that best meet the needs of their people and to negotiate future agreements effectively.<sup>175</sup>

### **4.3. Continuing Challenges of Global Intellectual Property Rights in the Developing Countries:**

The changes in Intellectual Property (IP) protection laws are changing the roles of the public and private sectors with regard to the funding, research focus, and dissemination of agricultural R&D. They have created new opportunities and challenges for research partnership between the public and private sectors. The national and international public research institutes in developing countries are also partnering with the public and private sectors in industrial countries.<sup>176</sup>

<sup>174</sup> "TRIPS Agreement Does Little to promote the development of technology transfer to Developing Countries" available on <<http://cscanada.net/index.php/mse/article/view/1134/1219>> (Last accessed June 11, 2011).

<sup>175</sup> "Technical assistance and implementation policy in developing countries" available on <[http://www.iprsonline.org/unctadictsd/docs/pengelly\\_TA\\_FINAL.pdf](http://www.iprsonline.org/unctadictsd/docs/pengelly_TA_FINAL.pdf)> (Last accessed June 12, 2011).

<sup>176</sup> "Application of Intellectual Property Rights in the Developing Countries" available on <<http://www.wipo.int/about-ip/en/studies/pdf/study-k-maredia.pdf>> (Last accessed May 26, 2011).

To gain some perspective on the implementation status of Intellectual Property Rights (IPRs), a survey has been conducting by sending out a questionnaire to about 84 researchers in 28 developing countries. The objective of this survey was not to compare countries, but to review the existing state of Intellectual Property Rights (IPRs) regimes in countries at different levels of development and assess possible needs of these countries in the implementation and expansion of Intellectual Property Rights (IPRs) framework. From the survey, at least one clear point is emerging about the status of Intellectual Property Rights (IPRs) in developing countries that slowly but surely, developing countries are adopting new laws or modifying existing legislation to comply with international standards.<sup>177</sup>

Developing countries have been for long time under demand by developed nations to provide assistance for the implementation of intellectual property rights. The main concern by the developed countries is to protect the innovations in the developing countries from the illegal imitation and copying. The debate among both the parties i.e., developed nations and developing nations is getting intense since the last two decades.<sup>178</sup>

Whereas, there is strong need to promote the generation; protection and commercialization of Intellectual Property Rights (IPRs) in developing economies, the success of such efforts would depend on several factors. These include the level of awareness on Intellectual Property Rights (IPRs), the presence of critical mass of Professionals to offer services on Intellectual Property Rights (IPRs), teaching and research on Intellectual Property Rights (IPRs) and the perceived commercial importance of Intellectual Property Rights (IPRs). Universities and Training

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<sup>177</sup> "Application of Intellectual Property Rights in the Developing Countries" available on <http://www.wipo.int/about-ip/en/studies/pdf/study-k-maredia.pdf> > (Last accessed May 26, 2011).

<sup>178</sup> "A dilemma of Intellectual Property Rights for Developing Countries" available on <http://ocw.unu.edu/maastricht-economic-and-technology/economic/development-and-innovations-studies/bilal-mirza-v> > (Last accessed May 25, 2011).

Institutions are expensive organizations and require a lot of resources to establish and operate. As a return on investment, the outputs from these institutions must benefit the society by contributing towards development requirements of a given country. Teaching, training and research programs must be directed towards solving specific needs for manpower development and knowledge creation.<sup>179</sup>

#### 4.3.1. Lack of awareness:

In developing countries there is lack of awareness regarding Intellectual Property Rights (IPRs), and for that reasons, universities and countries often cannot enjoy their investment in R&D. There is lack of experience and knowledge on how to use IP system, how to use technological information contained in patent documents and how to protect and prepare the research results for use by, and transfer to, industry, etc.<sup>180</sup>

The level of Intellectual Property (IP) awareness in the industries is even lower than in universities and R & D institutions. Although industries know the importance of trademarks to business performance, the remaining Intellectual Property (IP) assets are vague concepts to many. As such, very few companies have taken legal steps to protect their enterprise intellectual property and they attribute this to lack of awareness on IP. Companies do not have Intellectual Property (IP) policies and they do not include Intellectual Property (IP) protection provision in contracts and agreements with business partners and stakeholders. The lack of Intellectual Property (IP) awareness in the industries has obviously led to low trade on Intellectual Property assets. Industries are major players in economic development of a country and the lack of

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<sup>179</sup> "Challenges faced by Developing countries in teaching and conducting research on intellectual property" available on <<http://www.wipo.int/export/sites/www/academy/en/meetings/ipcd-sym-05/papers/pdf/ogada-papers.pdf>> (Last accessed May 26, 2011).

<sup>180</sup> "Wipo university initiative" available on <<http://www.wipo.int/export/sites/www/uipc/en/documents/pdf/wto-inf-134.pdf>> (Last accessed June 13, 2011).

awareness of an important economic tool such as Intellectual Property (IP) is a clear justification for Intellectual Property (IP) education.<sup>181</sup>

#### 4.3.2. Lack of adequate resources:

Due to inadequate resources in developing countries, there is stiff competition amongst different sectors for resources allocation. In most countries, priority for government resources goes to programs such as health care, education, food security defense and infrastructure. Education and health in most cases takes the bulk of the grant. This means that creating new programs in the area of education for which government funding is necessary requires good justifications. An Intellectual Property (IP) Audit results normally provide useful tool for such decision making.<sup>182</sup> Poverty and burden of diseases are great challenge for poor countries and the issue to build the research capacity creates an array of challenges for developing countries.<sup>183</sup>

#### 4.3.3. Lack of Intellectual Property (IP) specialist:

Developing countries do not have offices and specialist Intellectual Property (IP) professional staffs in the field, short term advisory missions and consultants are usually deployed in developing countries and to assess needs and plan, deliver and monitor program activities. Most training programs typically have emphasized that there is need for development of professional capacities in IPR administration e.g. training of national IP office staff and local IP attorneys in patent and trademark examination.<sup>184</sup>

<sup>181</sup> "Challenges faced by Developing countries in teaching and conducting research on intellectual property" available on < <http://www.wipo.int/export/sites/www/academy/en/meetings/ipcd-sym-05/papers/pdf/ogada-papers.pdf> > (Last accessed May 26, 2011).

<sup>182</sup> *Ibid.*

<sup>183</sup> Report of the Commission on "Intellectual Property rights, innovation and public health" available on < <http://www.wto.int/IntellectualProperty/documents/therreport/ENPublicHealthReport.pdf> > (Last accessed July 19, 2011).

<sup>184</sup> "Wipo university initiative" available on < <http://www.wipo.int/export/sites/www/uipc/en/documents/pdf/wto-inf-134.pdf> > (Last accessed June 13, 2011).

#### 4.3.4. Enforcement Mechanism:

Many developing countries are facing demands from their trading partners to upgrade Intellectual Property (IP) enforcement and compliance with the enforcement provisions of the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement. Particularly for Least Developed Countries (LDCs), this presents considerable institutional challenges for the policing and judicial institutions, civil and criminal justice systems and customs authorities. For example, judicial systems in many Least Developed Countries (LDCs) currently do not function well in any area of the law, much less for Intellectual Property (IP). The lack of adequately qualified, local legal professionals in many developing countries also acts as an important constraint on the ability of rights-holders to bring cases of Intellectual Property Rights (IPRs) infringement through the civil courts and to obtain remedies through the administrative system.<sup>185</sup>

In Chennai, a city of India, a separate Deputy Police Commissioner appointed, who deals with copyrights infringements, the industry has reported a steep decline in the music and film piracy. So a specific enforcement mechanism may lead to an effective implementation of these rights.<sup>186</sup>

#### 4.3.5. Problem in teaching Intellectual Property (IP) for Developing Countries:

The promotion of the generation, protection and commercial utilization of intellectual property requires that constant efforts should be made and resources should be directed towards the awareness of Intellectual Property (IP) through teaching and carrying out research on Intellectual Property (IP). Several developing countries want to address the issues of creating Intellectual

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<sup>185</sup>“Wipo University Initiative” available on <<http://www.wipo.int/export/sites/www/uipc/en/documents/pdf/wto-inf-134.pdf>>(Last accessed June 13, 2011).

<sup>186</sup> S.K Verma, “Financing of Intellectual Property”, journal of Intellectual Property Rights. vol 11(September,2006):29.

Property (IP) awareness and capacity building through teaching and research, there are several challenges which faced by the developing countries. These problems are<sup>187</sup>

- a) Lack of national IP strategy
- b) Limited number of law schools
- c) Lack of funds for IP training
- d) Lack of market for IP services
- e) Limited faculty for teaching IP
- f) Problem with teaching material
- g) Problem with teaching facility
- h) Multidisciplinary nature of IP
- i) Problem with research on IP
- j) Problem with application of modern teaching method<sup>188</sup>

#### **4.3.5.1. Lack of national Intellectual Property (IP) Strategy:**

Universities are expected to train manpower for national development. The manpower requirement must fit in national development strategies and plans. Consequently Intellectual Property (IP) training and research must be carried out to meet specific national Intellectual Property (IP) Strategies and Policies. Very few countries in developing world currently have national IP strategies and policies. Furthermore, to develop strategies and policies, a country must undertake a comprehensive Intellectual Property (IP) audit. Resources are also required for such exercise.<sup>189</sup>

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<sup>187</sup> "Challenges faced by Developing countries in teaching and conducting research on intellectual property" available on <<http://www.wipo.int/export/sites/www/academy/en/meetings/ipcd-sym-05/papers/pdf/ogada-papers.pdf>> (Last accessed May 26, 2011).

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

#### **4.3.5.2. Limited number of law school:**

Traditionally teaching and research in Intellectual Property has been driven by law faculties and schools. Law schools would include one or several classes or even a complete program of classes, designed for students who intend to become Intellectual Property practitioners. Several universities in developing countries do not have law schools. In Kenya, for example, out of the five public universities and twelve private universities, law programs are offered only in two universities.<sup>190</sup>

#### **4.3.5.3. Lack of funds for IP training:**

Funding for institution building is also a great problem for developing countries. Governments must prioritize initiatives carefully and consider how best to leverage available resources. Some of the developing countries plan to develop the capacity in Intellectual Property (IP) but fail due to lack of financial resources.<sup>191</sup>

#### **4.3.5.4. Limited faculty for teaching IP:**

The quality of an intellectual property educational program will depend in large part on the level of experienced and interested faculty. There are some full-time university faculty members in most countries that have made their specialty the study of one or more aspects of Intellectual Property. However, many universities do not have such specialists, and the education of students in Intellectual Property depends on professors who take a side interest in the field in addition to their main specialty. Basic Intellectual Property courses in a law school curriculum are best taught by full-time law professors who can dedicate the time needed to counsel and guide

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<sup>190</sup> "Challenges faced by Developing countries in teaching and conducting research on intellectual property" available on <<http://www.wipo.int/export/sites/www/academy/en/meetings/iped-sym-05/papers/pdf/ogada-papers.pdf>> (Last accessed May 26, 2011).

<sup>191</sup> "Establishment of the IP institutions in LDCs" available on <<http://www.wipo.int/wipo-magazine/en/2005/01/article-004.html>> (Last accessed June 14, 2011).

students through the program and into the specialty in which they have the most ability. However, to engage full-time professors is not easy in countries where the number of practitioners and IP professionals is small.<sup>192</sup>

#### **4.3.5.5. Problem with teaching material:**

In number of universities and other institutions in which intellectual property law is taught has increased, the fact remains that in a number of developing countries, intellectual property law has not yet been introduced as a course in the curriculum or is only taught as part of a course on commercial and other laws. This is largely because of scarce resources. The task of selecting the proper type of course to include in an intellectual property curriculum will depend on the nature of the students, the faculty, and the type of degree program offered. Most university programs, when they decide to, incorporate intellectual property education; begin with a modest program, offering a survey class and one or two specialized classes. They gradually increase the number and complexity of courses as the level of student and faculty interest increases.<sup>193</sup>

#### **4.3.5.6. Problem with teaching facility:**

Another important factor which affects the quality of teaching is the available teaching materials for a given program. There is lack of teaching materials especially suitable for use in the developing countries. The challenge here is that most libraries in developing countries may not have appropriate Intellectual Property (IP) references. Where they are available, more often than not, they would be old and outdated. This situation is completed further by the fact that Intellectual Property (IP) is a new area of study and research world-wide. The limited access to

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<sup>192</sup> "Teaching method and pedagogy" available on <<http://www.wipo.int/academy/en/teaching/pedagogy/index.html#ip-dev-countries>> (Last accessed June 14, 2011).

<sup>193</sup> *Ibid.*



internet for most universities makes it even more difficult to access latest literature. Furthermore, given that the level of Intellectual Property (IP) trade is comparatively low in developing countries, building relevant case studies is difficult and consequently the professor may be forced to use examples and practices which are remote to the environment and surrounding of the students.<sup>194</sup>

#### **4.3.5.7. Multidisciplinary nature of Intellectual Property (IP):**

One challenge which most countries must undertake is to demystify Intellectual Property (IP). There is a perception that Intellectual Property (IP) is a legal subject and should therefore be left to lawyers. Contrary, the range of students that would benefit from intellectual property education is broad. It includes students from law, engineering, science, technology, medicine, performing art as well as social and cultural studies. The recent attention given to biotechnology and genetic resources as well as traditional knowledge has already expanded the scope of Intellectual Property (IP) training to experts in these areas too. A part from patent attorneys, capacity must be built to prepare professionals in areas like Intellectual Property (IP) Valuation, Intellectual Property (IP) Audit and Technology Managers.<sup>195</sup>

#### **4.3.5.8. Problem with research on Intellectual Property (IP):**

The core business of any university is teaching and training, research and development as well as community and extension services. Teaching at a university level is considered not complete without research and development component. Research and publication of research findings are

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<sup>194</sup>“Challenges faced by Developing countries in teaching and conducting research on intellectual property” available on < <http://www.wipo.int/export/sites/www/academy/en/meetings/iped-sym-05/papers/pdf/ogada-papers.pdf> > (Last accessed May 26, 2011).

<sup>195</sup>*Ibid.*

key outputs of university staff. In most universities promotion is based on the number of publications in referred journals. This is based on the accepted norm of "*Publish or Perish*".

Research in highly specialized field like intellectual property required not only multi disciplinary approach but also international collaboration. In developing countries, University professors do more teaching than research. This is mainly due to lack of resources to fund research.

#### 4.4. Recommendation to improve IPR system in developing countries:

Bill gates during the WHO's World Health Assembly says

"Political systems in rich countries work well to fuel research and fund health care delivery, but only for their own citizens. The market works well in driving the private sector to conduct research and deliver interventions, but only for people who can pay. Unfortunately, the political and market conditions that drive high quality health care in the developed world are almost entirely absent in the rest of the world. We have to make these forces work better for the world's poorest people"<sup>196</sup>

No international debate has been completed without discussing the intellectual property rights. Intellectual Property Rights (IPRs) has become very important now a days but their implementation issue is still not resolved. Developing countries have a lot of problems as mentioned earlier, in the implementation of intellectual property rights. So it is necessary for the global implementation of Intellectual Property Rights (IPRs) to remove or minimize those problems. For this purpose important role can be played by the developed nations and international institutions. The government of developing countries should also make serious efforts in this regard.

##### 4.4.1. ROLE OF DEVELOPING COUNTRIES' GOVERNMENT:

Government should take responsibility for setting research priorities. Developing countries should establish, implement and strengthen a national program for research in science and medicine. It should include best practices for execution and management of research with appropriate political support and long term funding.<sup>197</sup>

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<sup>196</sup> Report of the Commission on "*Intellectual Property rights, innovation and public health*" available on <<http://www.wto.int/IntellectualProperty/documents/therreport/ENPublicHealthReport.pdf>> (Last accessed July 19, 2011).

<sup>197</sup> *Ibid.*

Developing countries should design the patenting and licensing policies according to the situation prevailing in the country. They should not only copy the industrial countries. It should design in a way that it maximizes the availability of invention. Exceptions should be provided for private and non commercial use and for experimentation on the subject matter of the invention even for commercial purposes.

Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement provides some flexibility to the developing countries like compulsory license. These flexibilities should be used by the developing countries when it directly related to health issues. Doha Declaration provides the government, right to use compulsory license when the tension between public health and intellectual property rights arises. Developing countries should legislate the provision of compulsory license and grounds for using it. It should be use as a mean to facilitate access to cheaper medicines through import or local production. The World Trade Organization (WTO) decision on 30<sup>th</sup> August 2003 allowed that the countries having inadequate manufacturing capacity can import patented medicines by compulsory license.

Incentives should be given by the governments to the trained workers and employees. Proper and suitable atmosphere should also be provided. Frustration lack of opportunity and to somehow material gain are the main reasons that the scientist and talented people migrated towards the developed countries. Developed countries claim that restriction should be made on parallel imports. Parallel import is beneficial for developing countries because the cost is comparatively low. So developing countries should take benefit from lower priced medicines.<sup>198</sup>

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<sup>198</sup> Report of the Commission on "*Intellectual Property rights, innovation and public health*" available on <<http://www.wto.int/IntellectualProperty/documents/thereport/ENPublicHealthReport.pdf>> (Last accessed July 19, 2011).

Another issue is that the price of the protected products is very high. A lot of earning has been made by the companies on the goods that are protected under the intellectual property. Companies should adopt some consistence policy for their earning. They should earn reasonably and price of protected goods should be controlled so that people would not move towards the infringing goods. High price is main reason that people prefer the infringing goods. Government should also remove taxes and tariffs on health care products so that price should be controlled and access to medicines would increase.

According to the circumstances of the country and keeping in view the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement developing countries should make such provision which would benefit public health and make positive effect on their economy. During the bilateral trade negotiations developing countries should not agree on the TRIPS plus provisions, because such provision may reduce their access to knowledge and medicines. Developing countries should be more careful while drafting and signing Free Trade Agreements (FTAs) with their partners which are usually developed nations. Such agreements should not violate the provisions of Trade Related Aspect of Intellectual Property Rights (TRIPS) agreement and should not seize the rights which are given to the developing countries under Trade Related Aspect of Intellectual Property Rights (TRIPS). During the negotiation process developing countries should involve the experts and representation by the relevant institutions should be made. So any provision which reduce the access of medicines in developing countries should not be accepted by them.

#### **4.4.2. ROLE SHOULD BE PLAYED BY THE DEVELOPED COUNTRIES:**

Developed countries can also play an important role for the enforcement of intellectual property rights in the developing economies. Intellectual property rights cannot be enforced in the

developing countries unless the research and innovative process has been initiated in these countries and this process would not be successful without the cooperation and help of developed countries.

Developed countries should take initiatives to start research process by making full or partial investment in the research and development process (R&D) of developing countries. Relaxation should be given by the developed countries in the licensing policies. Government and appropriate authorities and funders should work with their counterparts in developing countries. In this regard they will build a mechanism to help identify research priorities particularly relevant to developing countries and provide funding for these R & D. Developed countries can help less developed states by providing their own trained workers. Developed and developing countries should make collaboration which will help and build capacity in developing countries.<sup>199</sup>

Developed countries should make patent and enforcement policies in such a way that it facilitate greater access towards the medicines which developing countries needed. Companies should avoid filling patent in low income developing countries in a way that would inhibit access to their products. Companies are encouraged to grant voluntary licenses in developing countries. Developed countries and pharmaceutical companies should promote transfer of technology. They should follow the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement and the paragraph 7 of Doha Declaration.<sup>200</sup>

Developing countries cannot improve their intellectual property system and cannot developed research oriented infrastructure without the help of developed economies. There is need to

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<sup>199</sup> Report of the Commission on "*Intellectual Property rights, innovation and public health*" available on <http://www.wto.int/IntellectualProperty/documents/thereport/ENPublicHealthReport.pdf> > ( Last accessed July 19, 2011).

<sup>200</sup> *Ibid.*

provide financial and technical assistance to the less developed nations by the developed countries and their regulatory institutions.

#### **4.4.3. ROLE SHOULD BE PLAYED BY THE INTERNATIONAL AGENCIES:**

International institution played a vital role in making intellectual property right an international issue. Now it is a time to help poor and less developed countries in understanding and implementing the intellectual property rights.

Actions should be taken by World Intellectual Property Organization (WIPO) to find ways to make compound libraries more accessible to identify potential compounds to address diseases affecting developing countries. World Health Organization (WHO) should bring together academics, small and large companies in pharmaceuticals governments in the form of aid donors or medical research councils, foundations, public private partnerships and patient and civil society groups for a standing forum to enable more organized sharing of information and greater coordination between the various players.<sup>201</sup>

World Health Organization (WHO) and World Intellectual Property Organization (WIPO) can play important role. They should help in developing a global plan of action to secure more sustainable funding to develop new products and make those products more accessible. They should make arrangements particularly to address the diseases that disproportionately affect developing countries. International agencies should monitor the impact of intellectual property rights from a public health perspective. Special arrangements should be made for strengthen education system regarding Intellectual Property Rights (IPRs) and training the specialist. Sport

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<sup>201</sup> Report of the Commission on "*Intellectual Property rights, innovation and public health*" available on <<http://www.wto.int/IntellectualProperty/documents/thereport/ENPublicHealthReport.pdf>> (Last accessed July 19, 2011).

in biomedical field and public health policies should be made taking into account the needs of the developing countries.

World Health Organization (WHO) should monitor the impact of intellectual property rights on the public health and other factors which effect the development of new products as well as access to medicines in the developing countries. Recommendation has been given by the policy makers of developing countries such recommendations should be seriously observed by the international agencies during the rule making.<sup>202</sup>

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<sup>202</sup> Report of the Commission on "*Intellectual Property rights, innovation and public health*" available on <<http://www.wto.int/IntellectualProperty/documents/thereport/ENPublicHealthReport.pdf>> (Last accessed July 19, 2011).



#### 4.5. Conclusion:

Intellectual property rights have become very important. We cannot overlook their importance in the present scenario. It becomes the part of every national and international debate. Even it is more appropriate to say that no international seminar or agreement complete without discussing Intellectual Property Rights (IPRs). These rights are acknowledging internationally and globally and every country enacted provisions related to Intellectual Property Rights (IPRs) but the infringements of Intellectual Property Rights (IPRs) are accelerating. Primary purpose of my thesis was to discover the reasons, due to which developing countries are reluctant to adopt strict Intellectual Property Rights (IPRs) compliances which resulted in weak implementation of Intellectual Property Rights (IPRs).

It is not possible to enforce a private civil right in a stringent manner. For effective enforcement of law more awareness at the grass root level is essential. There are a huge number of Intellectual Property Rights (IPRs) violations in developing countries as compared to developed nations. The primary reason is that it is difficult for developing countries to strike a balance between the accelerating prices of goods in terms of protecting Intellectual Property Rights (IPRs). Due to this reason the developing countries are reluctant to enforce strict Intellectual Property Rights (IPRs) provisions.

No law can be constantly enforced or implement by force. For the long and strong implementation of law strong reason and justification is required. More violation of Intellectual Property Rights (IPRs) is made in developing countries only few are observed in developed states. First reason for these violations is that developing countries are not willing to enforce strict Intellectual Property Rights (IPRs) provisions. They are pressurized by the industrialized

nations to follow strict Intellectual Property Rights (IPRs). Industrialized nations knowing this fact that they can earn much more if Intellectual Property Rights (IPRs) enforced internationally, so they try to enforce Intellectual Property Rights (IPRs) on international level and serious efforts has been made in this regard. Intellectual Property Rights (IPRs) are used as a tool by developed states for their economic growth. All developed states are very eager to protect Intellectual Property Rights (IPRs) but great role has been played by the USA. So many arguments have been put forward by the less developed states but industrialized nation always claimed that poor countries cannot developed without strong Intellectual Property Rights (IPRs) protection. Long history of Intellectual Property Rights (IPRs) shows that IPRs take a long time to come in present form. During the initial stage of Intellectual Property Rights (IPRs) only few protections have been given to literary and artistic work but with the passage of time area of these protections is expanded.

Many agreements have been made and organizations are created to enforce these agreements but these agreements fail one after another. Though these agreements failed to fulfilled expected criteria but provide grounds for present Intellectual Property Rights (IPRs) system. Negotiating process has been started and the representatives of developed and less developed states participate in it. Purpose of these negotiations process is to reach a solution which is acceptable for all members. Both participants have different problems, issues, circumstances and priorities but they have to reach a similar solution for Intellectual Property Rights (IPRs). It seems very difficult but actually it is very difficult.

In the end all countries agreed on a solution which is Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. All the members of World Trade Organization (WTO) have agreed to follow the Trade Related Aspect of Intellectual Property Rights (TRIPS)

Agreement. Time period has been given to legislate provisions in the light of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement. Pakistan signed the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement in 1995 and by 2000 all Intellectual Property (IP) Laws were revised and made TRIPS compliance. Though all countries enacted Intellectual Property (IP) laws but due to weak enforcement mechanism rate of infringements is very high. There are many reasons for infringement but the most important is that unequal exchange has been made during the negotiating process. Intellectual Property (IP) is a new subject for developing countries. They are not aware of Intellectual Property (IP), related issues and Intellectual Property (IP) infrastructure is a quite new experience for them. There is lack of Intellectual Property (IP) experts in the developing states and few which are available are not involved in negotiation process. Though some less developed states seek guidance from IP experts but these experts are not fully equipped regarding the core Intellectual Property (IP) issues. Practically it is a new subject for them. But on the other hand industrialized states have fully trained Intellectual Property (IP) experts, companies and policy makers who are involved in negotiation process and all these accurately represent the need of industrialized economies.

Lack of awareness in developing countries is resulted in weak implementation of Intellectual Property Rights (IPRs). It is apprehended that if all the demands of developed regimes are agreed and implemented it shall hinder access towards new technology and medicines. So it is necessary to give some relaxation to the developing economies regarding Intellectual Property Rights (IPRs). It is also important to note that these relaxations were enjoyed by industrialized nation at the initial stage of their development. Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement provide some flexibilities which if use reasonably will help them to

solve their problems. These flexibility should be enjoyed by the under developed economies without any restrictions by the industrialized states.

We discussed law, money, development, science, progress and technology but we cannot ignore morality. Being the human being we have to observe the moral law whether it is in enacted form or not. Access toward medicines has become a serious problem after the enforcement of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement. Poor patients die every year and non availability of essential medicines is the main reason. Due to the patent protection the cost of medicines increased tremendously. If these medicines are available at affordable price then we can save lives of millions people who die every year in the poor countries. So it should be decided that patent is more important than life or life is more important than patent. If the priority is given to the patent then it means we are living in a materialistic world where no morality is practiced.

Large research companies who earn millions and billions form a single patent should fix some profit and make sure the availability of medicines on reasonable price to the poor patients. It will not make loss to these multinational pharmaceutical companies but only they will comparatively earn less. I think our earning is not important than the lives of poor people but unfortunately it doesn't happen, industrialized states focus on their earning and they ignored the health related issues of developing countries. Developed states having all resources are not ready to compromise on their high level of profit and they are expecting form less developed countries to follow IPRs even they are developing and they have to make compromise on their health, access towards knowledge etc. We can say that the high prices of protected goods is the main reason for the violation of Intellectual Property Rights (IPRs) if the protected goods are available on affordable price then of course people will not violate Intellectual Property Rights (IPRs).

Health issues are very serious. Medicines should be available to them at affordable price. We see in the case of HIV/AIDS that the poor patient and even their government cannot afford these medicines and a big portion of income spend on these medicines. There is no doubt that poor health ultimately affects the progress of the country and only a healthy society can leads towards success. There is a huge lack of R&D in developing countries.

After the long process of negotiations Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement come into force. Flexibilities have been given in the Agreements like compulsory license and some others. Developed countries desired that these flexibilities should not be used. They find a way to control these flexibilities through Free Trade Agreements (FTAs) and Bilateral Trade Agreements (BTAs). Developed economies introduced Free Trade Agreements (FTAs) and Bilateral Trade Agreements (BTAs) which are also known as TRIPS Plus provisions. These agreements contain provisions like access in foreign market, investors rights, reduction of tariff but it also include provisions related to Intellectual property protection which are TRIPS plus requirements. Industrialized nations demand through Free Trade Agreements (FTAs) much more protection of Intellectual Property Rights (IPRs) then Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreements.

Industrialized states protest that violation of Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement has been made by the under developed countries frequently. They hold the view that strict action should be taken against the state that violate Trade Related Aspect of Intellectual Property Rights (TRIPS) provisions. An important thing that should be noted here is that violation of TRIPS Agreement is also made by the industrialized economies when they enacted TRIPS Plus provisions in Free Trade Agreements (FTAs). Indirectly they violate the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement when they bound the

developing countries not use the rights which are given to them by the TRIPS. Developed economies snatched the rights which are given under Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement. In this way they also violate the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement's provisions and challenge the dignity of TRIPS Agreement.

Poor countries should use the flexibilities given to them Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement and they should not accept any new burden under Free Trade Agreements (FTAs). They should be more vigilant while negotiating FTAs with developed states and experts should be involved so that they negotiate wisely.

Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement made by the long negotiation process of the developed and developing countries. Now it is the duty of both the countries to follow it. Though it is difficult for some developing countries to fulfill the Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement criteria but being the members of World Trade Organization (WTO) they have to fulfill their obligations. These countries should improve their Intellectual Property Laws (IPL) and organized their enforcement mechanism. Awareness programs should be started for the general public and students. Strong Intellectual Property (IP) protection attracts the foreign direct investment, so in this way new technologies introduced to the developing countries. Local employee are hired and more job opportunities available to the public. Developed economies and international organizations should also help them to improve Intellectual Property Laws (IPL). Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement also contains provision that developed economies should help the developing states to solve their issues.

Developed states should not only concentrate on the strict enforcement of Intellectual Property Rights (IPRs) at any cost. They should not bar the poor countries to use Trade Related Aspect of Intellectual Property Rights (TRIPS) flexibility but they should help them to improve their Intellectual Property (IP) system. With the co-ordination of both states it would be possible to enforce Intellectual Property Rights (IPRs) in a smooth way.

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