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E-BOOK

On

*Enforcement of
Intellectual Property Rights
at Border*

(Book No.02)

Enforcement of IPRs at Border

Note:

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1. Introduction

In this e-book, the basics of WTO, TRIPS agreements, Border measures and text of basic provisions of the Trade Marks Act, 1999, the Copy rights Act, 1957, the Design Act, 2000 and the Geographical Indications of Goods (Registration and Protection) Act, 1999 have been incorporated for convenience of readers.

2. Summary of Relevant provisions of IPRs laws in India.

2.1 Summary of relevant provisions of IPRs laws in India is given in the **Table-I** below:-

Table I

Sr. No.	Relevant Section of IPR Laws in India	Subject
1.	WTO and TRIPS Agreement	Brief introduction of World Trade Organization and Agreement on Trade Related Intellectual Property Rights.
2.	Relevant Provisions of TRIPS Agreement (Border Measures)	Articles 50 to 60 of the Trade Related Intellectual Property Rights (TRIPS) contain provisions for enforcement of IPRs at Border.
3.	Sections 2, 81, 102, 139 and 140 of the Trade Marks Act, 1999	These sections provides for definition of terms “false Trade Description”(Section 2); stamping of piece goods, cotton yarn and thread (Section 81); falsifying and falsely applying Trade Marks (Section 102); Power to require goods to show indication of origin (Section 139); and power to require information of imported goods bearing false trade marks (Section 140) respectively.
4.	Section 53 of the Copyrights Act, 1957	This section deals with importation of infringing copies.
5.	Section 2 (g) and 38 of the Geographical Indications of Goods (Registration and Protection) Act, 1999.	While section 2 (g) define the term “geographical indications”, the section 38 of the Geographical Indication of Goods (Registration and Protection) Act, 1999 deals with the situation of falsifying or falsely applying the Geographical indications.
6.	Sections 2 and 22 of the Design Act,2000.	The clause (c) and (d) of Section 2 define the terms “ <i>copyright</i> ” and “ <i>design</i> ” respectively. The section 22 of the Design Act, 2000 deals with the situation of piracy of registered design.

3. *World Trade Organisation*

The World Trade Organization (WTO) was set up on 1st January, 2005 and was created as a result of Uruguay round of negotiation held during the period from 1986-94. Its basic functions are as under:

- to administer WTO trade agreements
- to provide forum for trade negotiations
- to handle trade disputes
- to monitoring national trade policies
- to provide technical assistance and training for developing countries
- to cooperate with other international organizations

4. *TRIPS Agreement*

One of WTO Agreements is TRIPS Agreement. The term 'TRIPS' stands for Trade Related Aspects of Intellectual Property Rights. It aims at making an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. In doing so, it strikes a balance between the long term benefits and possible short term costs to society. Society benefits in the long term when intellectual property protection encourages creation and invention, especially when the period of protection expires and the creations and inventions enter the public domain. Governments are allowed to reduce any short term costs through various exceptions, for example to tackle public health problems. And, when there are trade disputes over intellectual property rights, the WTO's dispute settlement system is now available.

The Agreement covers five broad issues:

- how basic principles of the trading system and other international intellectual property agreements should be applied
- how to give adequate protection to intellectual property rights
- how countries should enforce those rights adequately in their own territories
- how to settle disputes on intellectual property between members of the WTO
- special transitional arrangements during the period when the new system is being introduced.

[Source: WTO website: www.wto.org]

5. *Border Measures under TRIPS Agreement*

5.1 Under TRIPS agreement, Articles 50-60 deals with Border Measures. Border measures essentially refers to the actions to be taken by the Customs Authority at Border against counterfeit, pirated goods or infringing goods while being imported into or export from the national territory.

5.2 The text of articles 50-61 of TRIPS agreement are as under:-

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:
 - (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
 - (b) to preserve relevant evidence in regard to the alleged infringement.
2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.
3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.
4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.
5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.
6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.
7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the

applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

Article 51 : Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 52 : Application

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is prima facie an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53: Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

Article 54: Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51.

Article 55: Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

Article 56: Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

Article 57: Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

Article 58: Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired prima facie evidence that an intellectual property right is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, mutatis mutandis, set out at Article 55;
- (c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59: Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order

the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60: De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

6. Text of Relevant Sections of the Trade Mark Act, 1999

6.1 Text of Relevant Section of the Trade Marks Act, 1999

6.1.1. Clause (i) of Section 2 of the Trade Mark Act, 1999 provides as under:-

“False Trade Description” means

- (i) a trade description which is untrue or misleading in a material respect as regards the goods or services to which it is applied : or
- (ii) any alteration of a trade description as regards the good or services to which it is applied, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue or misleading in a material respect: or
- (iii) any trade description which denotes or implies that there are contained as regards the goods to which it is applied more yards or metres than there are contained therein standard yards or standard metres: or
- (iv) any marks or arrangement or combination thereof when applied--
 - (a) to goods in such a manner as to be likely to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose merchandise or manufacture they really are;
 - (b) in relation to services in such a manner as to be likely to lead persons to believe that services are provided or rendered by some person other than the person, whose services they really are; or
- (v) any false name or initials of a person applied to goods or services in such manner as if such name or initial were a trade description in any case where the name or initials
 - (a) is or are not a trade mark or part of a trade mark: and
 - (b) is or are identical with or deceptively similar to the name or initials of a person carrying on business in connection with goods or services of the same description or both and who has not authorized the use of such name or initials and
 - (c) is or are either the name or initials of a fictitious person or some person not bona fide carrying on business in connection with such goods or services and the fact that a description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act.

6.1.2 Section 81 of the Trade Mark Act, 1999 provides as under:-

Stamping of piece goods, cotton yarn and thread

81. (1) Piece goods, such as are ordinarily sold by length or by the piece, which have been manufactured, bleached, dyed, printed or finished in premises which are a factory, as defined in the Factories Act, 1948, shall not be removed for sale from the last of such premises in which they underwent any of the said processes without having conspicuously stamped in international form of Indian numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, or in standard meters or in standard meters and a fraction of such a meter, according to the real length of the piece, and, except when the goods are sold from the factory for export from India, without being conspicuously marked on each piece with the name of the manufacturer or of the occupier of the premises in which the piece was finally processed or of the wholesale purchaser in India of the piece.

(2) Cotton yarn such as is ordinarily sold in bundles, and cotton thread, namely sewing, darning, crochet or handicraft thread, which have been manufactured, bleached, dyed or finished in any premises not exempted by the rules made under section 82 shall not be removed for sale from those premises unless, in accordance with the said rules in the case of yarn

- (a) the bundles are conspicuously marked with an indication of the weight of yarn in English or the metric system in each bundles; and
- (b) the count of the yarn contained in the bundles and in the case of thread each unit is conspicuously marked with the length or weight of thread in the unit and in such other manner as may be required by the said rules, and Rights conferred by registration of certification trade marks Textile goods.
- (c) except where the goods are sold from the premises for export from India, unless each bundle or unit is conspicuously marked with the name of the manufacturer or of the wholesale purchase in India of the goods.

Provided that the rules made under section 82 shall exempt all premises where the work is done by members of one family with or without the assistance of not more than ten other employees, and all premises controlled by a co-operative society where not more than twenty workers are employed in the premises.

6.1.3: Text of Section 102 of the Trade Marks Act, 1999.

The section 102 of trade Marks Act, 1999, which deals with falsifying and falsely applying trade marks provides as under:-

Falsifying and falsely applying Trade Marks.

102. (1) A person shall be deemed to falsify a trade mark who, either---

- (a) without the assent of the proprietor of the trade mark makes that trade mark or a deceptively similar mark: or
- (b) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

(2) A person shall be deemed to falsely apply to goods or services a trade mark who, without the assent of the proprietor of the trade mark--

- (a) applies such trade mark or a deceptively similar mark to goods or services or any package containing goods.
- (b) uses any package bearing a mark which is identical with or deceptively similar to the trade mark of such proprietor, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the proprietor of the trade mark.

- (3) Any trade mark falsified as mentioned in sub-section (1) or falsely applied as mentioned in sub-section (2) is in this Act referred to as a false trade mark.
- (4) In any prosecution for falsifying a trade mark or falsely applying a trade mark to goods or services the burden of proving the assent of the proprietor shall lie on the accused.

6.1.4: Text of Section 139 of the Trade Marks Act, 1999.

The section 139 of the Trade Marks Act, 1999, which deals with power to require goods to show indication of origin, provides as under:-

Power to require goods to show indication of origin

139. (1) The Central Government may, by notification in the Official Gazette, require that goods of any class specified in the notification which are made or produced beyond the limits of India and imported into the India, or which are made or produced within the limits of India, shall from such date as may be appointed by the notification not being less than three months from its issue, have applied to them an indication of the country or place in which they were made or produced or of the name and address of the manufacturer or the person for whom the goods were manufactured.
- (2) The notification may specify the manner in which such indication shall be applied that is to say, whether to goods themselves or in any other manner, and the times or occasions on which the presence of the indication shall be necessary that is to say, whether on importation only, or also at the time of sale whether by wholesale or retail or both.
- (3) No notification under this section shall be issued, unless application is made for its issue by persons or associations substantially representing the interest of dealers in or manufacturers, producers, or users of the goods concerned, or unless the Central Government is otherwise convinced that it is necessary in the public interest to issue the notification, with or without such inquiry, as the Central Government may consider necessary.
- (4) The provisions of section 23 of the General Clauses Act, 1897 shall apply to the issue of a notification under this section as the apply to the making of a rule or bye-law the making of which is subject to the condition of previous publication.
- (5) A notification under this section shall not apply to goods made or produced beyond the limits of India and imported into India, if in respect of those goods, the Commissioner of customs is satisfied at the time of importation that they are intended for exportation whether after transshipment in or transit through India or otherwise.

6.1.5: Text of Section 140 of the Trade Marks Act, 1999

The section 140 of the Trade Marks Act, 1999, which deals with power to require information of imported goods bearing false trade marks, provides as under:-

Power to require information of imported goods bearing false trade marks

140. (1) The proprietor or a licensee of a registered trade mark may give notice in writing to the collector of Customs to prohibit the importation of any goods if the import of the said goods constitute infringement under clause (c) of sub-section (6) of section 29.

(2) Where goods which are prohibited to be imported into India by notification of the Central Government under clause (n) of sub-section (2) of section 11 of the Customs Act, 1962, for the protection of trade marks, and are liable to confiscation on importation under that Act, are imported into India, the Commissioner of Customs if, upon representation made to him, he has reason to believe that the trade mark complained of is used as a false trade mark, may require the importer of the goods, or his agent, to produce any documents in his possession relating to the goods and to furnish information as to the name and address of the person by whom the goods were consigned to India and the name and address of the person to whom the goods were sent in India.

(3) The importer or his agent shall, within fourteen days, comply with the requirement as aforesaid, and if he fails to do so, he shall be punishable with fine which may extend to five hundred rupees.

(4) Any information obtained from the importer of the goods or his agent under this section may be communicated by the commissioner of Customs to the registered proprietor or registered user of the trade mark which is alleged to have been used as a false trade mark.

6.1.6: Text of Section 53 of the Copyright Act, 1957

The section 53 of the Copy Right Act, 1957, which deals with importation of infringing goods, provides as under:-

53. Importation of infringing copies. –

(1) The Registrar of Copyrights, on application by the owner of the copyright in any work or by his duly authorised agent and on payment of the prescribed fee, may, after making such inquiry as he deems fit, order that copies made out of India of the work which if made in India would infringe copyright shall not be imported.

(2) Subject to any rules made under this Act, the Registrar of Copyrights or any person authorised by him in this behalf may enter any ship, dock or premises where any such copies as are referred to in sub-section (1) may be found and may examine such copies.

(3) All copies to which any order made under sub-section (1) applies shall be deemed to be goods of which the import has been prohibited or restricted under section 11 of the Customs Act, 1962, and all the provisions of that Act shall have effect accordingly:

Provided that all such copies confiscated under the provisions of the said Act shall not vest in the Government but shall be delivered to the owner of the copyright in the work.

6.1.7: Text of Section 2 (g) of the GI Act, 1999

Section 2(g) of the Geographical Indications (Registration and Protection) Act, 1999 define the term “geographical indication” and it provides as under:-

"geographical indication", in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

Explanation:- For the purposes of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific

geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be;

6.1.8: Text of Section 38 of the GI Act, 1999

The section 38 of the Geographical Indications of Goods (Registration and Protection) Act, 1999, which deals with falsifying and falsely applying Geographical Indication, provides as under:-

Falsifying and Falsely Applying Geographical Indication

38. (1) A person shall be deemed to falsify a geographical indication who, either, _
- (a) without the assent of the authorised user of the geographical indication makes that geographical indication or deceptively similar geographical indication;
 - or
 - (b) falsifies any genuine geographical indication, whether by alteration, addition, effacement or otherwise.
- (2) A person shall be deemed to falsely apply to goods a geographical indication who, without the assent of the authorised user of the geographical indication,
- (a) applies such geographical indication or a deceptively similar geographical indication to goods or any package containing goods;
 - (b) uses any package bearing a geographical indication which is identical with or deceptively similar to the geographical indication of such authorised user, for the purpose of packing, filling or wrapping therein any goods other than the genuine goods of the authorised user of the geographical indication.
- (3) Any geographical indication falsified as mentioned in sub-section (1) or falsely applied as mentioned in sub-section (2), is in this Act referred to as a false geographical indication.
- (4) In any prosecution for falsifying a geographical indication or falsely applying a geographical indication to goods, the burden of proving the assent of proprietor shall lie on the accused.

6.1.9: Text of Section 2 (c) and 2 (d) of the Design Act, 2000

Section 2 (c) and 2 (d) of the Design Act, 2000 define the terms “copyright” and “design” as under:-

- (c) “copyright” means the exclusive right to apply a design to any article in any class in which the design is registered;
- (d) “design” means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957

6.1.10: Text of Section 22 of the Design Act, 2000

The section 22 of the Design Act, 2000, which deals with piracy of registered design, provides as under:-

Piracy of registered design

22. (1) During the existence of copyright in any design it shall not be lawful for any person,-
- (a) for the purpose of sale to apply or cause to be applied to any article in any class of articles in which the design is registered, the design or any fraudulent or obvious imitation thereof, except with the license or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or
 - (b) to import for the purposes of sale, without the consent of the registered proprietor, any article belonging to the class in which the design has been registered, and having applied to it the design or any fraudulent or obvious imitation thereof, or
 - (c) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article in any class of articles in which the design is registered without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.
- (2) If any person acts in contravention of this section, he shall be liable for every contravention-
- (a) to pay to the registered proprietor of the design a sum not exceeding twenty-five thousand rupees recoverable as a contract debt, or
 - (b) if the proprietor elects to bring a suit for the recovery of damages for any such contravention, and for an injunction against the repetition thereof, to pay such damages as may be awarded and to be restrained by injunction accordingly:
- Provided that the total sum recoverable in respect of any one design under clause (a) shall not exceed fifty thousand rupees:
- Provided further that no suit or any other proceeding for relief under this subsection shall be instituted in any court below the court of District Judge.
- (3) In any suit or any other proceeding for relief under subsection (2), every ground on which the registration of a design may be cancelled under section 19 shall be available as a ground of defence.
- (4) Notwithstanding anything contained in the second proviso to sub-Section (2), where any ground on which the registration of a design may be cancelled under section 19 has been availed of as a ground of defence and sub-section (3) in any suit or other proceeding for relief under sub-section (2), the suit or such other proceedings shall be transferred by the Court in which the suit or such other proceeding is pending, to the High Court for decision.
- (5) When the court makes a decree in a suit under sub-section (2), it shall send a copy of the decree to the Controller, who shall cause an entry thereof to be made in the register of designs.

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