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LIMITATIONS IN THE RECEPTION OF TRIPS

As one of the most typical manifestations of globalization of intellectual property law, the influence of TRIPS on the global IP legal regime can't be ignored. However, during the process of reception of such unified law, there are also some difficulties and restrictions. This research combines the international conditions and analyzes the defects of TRIPS and limitations of reception of TRIPS in members.

Key words: TRIPS, reception of TRIPS, restrictions, defects.

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Интеллектуалдық меншік және ТРИПС бойынша шектеу

Зияткерлік меншік құқықтары тұрасында көп кездесетін жаһандандудың көріністеріне, жаһандық IP-құқықтарға байланысты, ТРИПС-тің әсері бар. Оны жоққа шығара алмаймыз. Оның үстіне, мұндай бірыңғай заң қабылдау кезінде кездесетін қиындықтар мен шектеулер бар. Бұл зерттеуде ТРИПС ақаулары анализден өткізіледі, ТРИПС құрамына қабылдау шектеулі және халықаралық шарттарға негізделген.

Түйін сөздер: ТРИПС, ТРИПС-ке қабылдау, шектеу, ақаулар.

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Интеллектуальная собственность и ограничения ТРИПС

Статья посвящена изучению вопросов охраны интеллектуальной собственности, прописанных в Соглашении по торговым аспектам прав интеллектуальной собственности. Изучаются ограничения и влияние ТРИПС на глобальный правовой режим, аспекты регулирования правовой охраны интеллектуальной собственности в рамках ВТО. Соглашение ТРИПС является неотъемлемой частью Марракешского соглашения об учреждении Всемирной торговой организации. Автор изучает проблемы, ограничения и недостатки соглашения ТРИПС.

Ключевые слова: ТРИПС, интеллектуальное право, ограничения, дефекты.

Introduction

Like any national legal regime in the world, the international intellectual property legal regime needs to continually improve. As the member countries have to comply with TRIPS, they need to transpose TRIPS into domestic laws; such a process is the reception of TRIPS into domestic legal intellectual property regime. Whether it is on patent, trademark or copyright during the reception process,

there must be some adjustments to meet the local legal traditions and national economic developments. Domestic legal regimes also need to respond to the intellectual property issues which are not covered by TRIPS but prevalent in the world according to the spirits of TRIPS. If a response is inconsistent with most developed countries in the world, they will raise complaints of damaging intellectual property rights on the basis of TRIPS. Whether TRIPS can be localized into domestic legal regimes determines the

implement of international rules and treaty compliance. However, this process will be challenged not only by the defects in its own system, but also by domestic national circumstances.

1 Restrictions from Local Conditions of Members

1.1 Uneven Levels of Citizens' Legal Awareness

The application of any international treaty or domestic legislation needs citizens' support, and their support depends largely on their awareness of the issues. The citizen's awareness of intellectual property plays an important role in the reception of international legal rules.

Because different countries have different levels of economic development and different cultures, there are huge differences in citizens' legal awareness of protection of intellectual property right. In the western developed countries, the intellectual property legal regime was established early and developed fast, and their legislations tended to be complete. In these countries, the principles of anti-counterfeiting, protection of trademark rights and anti-piracy are long rooted in the law system. As a result, their citizens are keenly aware of the protection of intellectual property right. In contrast, citizens in developing countries have weaker legal awareness of protection of intellectual property right, because 1) these countries fell behind on the establishment of intellectual property legal regime, and 2) in these countries, there have been fewer cases concerning infringement of intellectual property rights than in western countries.

Many people in developing countries such as China even don't know what an infringement of intellectual property law is, and therefore they don't know how to protect their own intellectual property rights. The most typical example is that in China, there are many people buying copied books as they are cheaper than the genuine ones. In research areas, many researchers don't know how to use patent law, trademark law or copyright law to protect their achievements. "In Chinese tradition, private interest is believed to be inextricably embedded in public good. Legal research as well as sociology and cultural psychology research has revealed China's distinctive way of perceiving individual rights through their collective embedment" [1].

As William Alford stated in his *To Steal a Book is an Elegant Offense*, [2] in Chinese culture, there was no concept of intellectual property [3], and "early attempts at intellectual property law 'reform' in China at the turn of the century

failed due to the inherent ineffectiveness of coercion to affect true change" [4], there were many differences in culture from western countries which can't be reconciled, the diversity of legal regimes can't be harmonized simply through international treaty [5]. Furthermore, "despite conspicuous bilateral agreements reached between the U.S. and China, problems are bound to continue due to fundamental misconceptions about the nature of legal development" [6]. "Alford also suggests that the 'Confucian disdain for commerce' led to attributing less importance to intellectual and imaginative endeavors" [7].

1.2. Uneven Levels of Protection of IPR in Members

All the countries with advanced economy, advanced technology, and strong global competition power have stronger and more complete intellectual property legal regime. The dynamism of protection of intellectual property system can reflect the level of development of technology and economy. Thus, many countries actively develop their own intellectual property strategy in order to strengthen their competitiveness. However, different countries have different levels of understanding about intellectual property, its basic theory, and its development trends. Therefore, there are deviations from the guiding philosophy; there are also limitations from the national conditions [8]. The United States have a profound understanding of the protection and development of intellectual property right, and have developed effective strategies for intellectual property protection, and increased efforts to support the development of science and technology, and implement appropriate legislations to regulate and protect [9].

According to the International Intellectual Property Alliance report in 1999, "In 1997, the income of all copyright industries estimate holds \$ 529.3 billion, accounting for approximately 6.53% of the US gross domestic product" [10] In the past 20 years, intellectual property has been the primary engine of economic development of the US and some other countries. The reason why the United States has the leading position now in the global economy and science and technology is that it has a strong ability to innovate and protect intellectual property [11].

Compared to developed countries, developing countries have not enhanced the protection and development of intellectual property rights up to the level of national strategy. "The under-development of the commerce and capitalism in turn undermines or attributes less importance to the private ownership of intellectual endeavor, which

leads to the underdevelopment of the intellectual property legal regime” [12] Additionally, relevant legal systems and matching market mechanisms are not complete. Thus, though the developing countries now have continually improved their protection of intellectual property, there are still behind the developed countries [13].

1.3. Different Degrees of Protectionism in Members

Intellectual property right is territorial, which is effective according to the legislations of a certain country. Unless there is a treaty or regulatory reciprocity, there is no obligation to protect the intellectual property rights arising under foreign state laws [14]. However, intellectual property rights as a kind of intelligence wealth can flow and spread throughout the world. Thus, with the conflict between the flowing of intellectual works and the territory of intellectual property, national protectionism arises. Protectionism is a unilateral force aiming at protecting domestic and international marketing share of domestic intellectual property right holders.

From the perspective of international relations and international law, the general performance of national protectionism is a long-arm jurisdiction, which means that a state is entitled to exercise jurisdiction on the foreign defendants and performances concerning national security and vital interests in foreign countries in order to protect the legitimate interests of the country [15]. The reason for national protectionism is that the traditional principles of territorial jurisdiction and personal jurisdiction can't satisfy the needs of safeguarding national interests. Such jurisdiction concerns whether the effect of the performance will have an impact on states, and such impact is the key element for states to apply the long-arm jurisdiction.

When protectionism meets intellectual property rights, things will become more complex. The typical example is the “Special 301 Report”, which is to protect US intellectual property holders from foreign infringements [16]. In the 2015 Special 301 Report, China, Indonesia, and Thailand were listed in the priority watch list; especially China had long been regarded as a “priority foreign country” [17]. And in the 2016 Special 301 Report, China is still listed in the “priority watch list” [18]. The US uses the Special 301 Report as a tool for national protectionism to ensure its own interests in the global market.

I believe that the “Special 301 Report” is one example of various manifestations of national protectionism. Though the US insists that such legislations, policies and measures will do harm to their

intellectual property rights and their access to the market, and that such long-arm protectionism has barred the freedom of trade and equal competition in the global market, it still suggests that under globalization, the hegemony of the US begins to expand even on the implementation of TRIPS while some scholars believe that the TRIPS agreement represents the hegemony power of western developed countries. Actually, the long-arm protectionism is a tool for nations to replace international law by national law on regulating intellectual property issues, which safeguards the rights of domestic intellectual property holders while sacrificing the development of economy in developing countries and substantive justice and even breaking the normal communications among different countries. However, even though protectionism is a double-edged sword, none of the countries will give it up in the international trading, which is one of the problems for the WTO and the TRIPS agreement to settle.

2 Defects of the TRIPS System

2.1. Hegemony Hidden behind TRIPS

In the context of economic globalization, some scholars [19] believe that the global market is a kind of expansion of the Westernized market; in other words, the global market is led by the western developed countries [20].

Susan Strange states in *The retreat of the state: The diffusion of power in the world Economy*: “The impersonal forces of world market, integrated over the postwar period more by private enterprise in finance, industry and trade than by the cooperative decisions of governments are now more powerful than the states to whom ultimate political authority over society and economy is supposed to belong” [21] According to Susan Strange, the integration of global market promoted by the WTO is mostly based on the interests of multinational enterprises rather than equal negotiations between developing and developed countries, while these multinational enterprises with the most well-known trademark in the world such as Coca-Cola, IBM, Microsoft, BMW, Dior mostly represent the economic power of western developed countries, which suggests that WTO and TRIPS represent largely the interests of western developed countries. Member countries will adjust their domestic national laws according to WTO or TRIPS into a form of “neoliberal market principles” [22].

Stephen Gill suggests that “one way to interpret the latest phase in the worldwide bourgeois revolution is in terms of a new level of globalization of capitalist production and competition, with the need

for institutional and political innovation as a counterpart-ideology is not enough to secure the property rights and political prerogatives of capital on a world stage” [23].

Robert Cox has developed his own theory based on the previous two theories. He declares that *Critical political economy* “as a result of the hegemonic encroachment of markets and their agents into national economies, and the government policies that serve to shape them, have become de facto for the vagaries of the globalized market system” [24]. According to Cox, with the globalization of economic hegemony, international organizations such as WTO have transformed western hegemony into the rules of international trade, which they have imposed on the members’ national laws. No matter how the international rules of WTO transposed into the domestic legal regimes or the international rules of TRIPS transposed into the domestic intellectual property legal regimes, their purpose is to ensure the harmonization of national laws between member states of WTO and TRIPS [25].

In the current world, 90% of the world intellectual property belongs to developed countries, and the high-tech which can be converted into productivity is also in the hands of developed countries. In contrast, developing countries lack such hi-tech, especially core technology [26]. With the fear of strong trade sanctions of dispute settlement of WTO by developed countries like the US, developing countries have to amend their domestic intellectual property legal regime to comply with the standards of TRIPS, while these standards are mostly determined by developed western countries according to their national interests, which leads to the situation where the US and other countries with economic power try to harmonize global intellectual property legal regime through TRIPS to maintain their dominant position in the global market. “The failure of accommodating developmental policy objective creates the birth defect of the TRIPS agreement” [27] “With no input into international intellectual property standard setting, developing countries simply become the followers of developed countries. The consent from the developing countries that constitutes the legitimacy of the TRIPS regime becomes merely something pre-given, and the TRIPS regime bears its own legitimacy, which is the fundamental cause of the birth defect of the TRIPS Agreement” [28].

2.2. Conflicts between Public Interest and Private Interest of Right Holders

Intellectual property rights have the nature of monopoly, and they need to be coordinated through necessary means by society. With TRIPS, the in-

ternational standards for protection of intellectual property rights are also being enhanced, which can be seen in the wide range of protectable objects under the international protection of intellectual property system [29]. Ultimately, developing countries benefit little from the expansion and strengthening of international intellectual property protection standards, and the real beneficiaries are still the developed countries represented by multinational enterprises.

Meanwhile, developed countries also stress that there shall be no restrictions on intellectual property right holders when they exercise rights. With the help of TRIPS, intellectual property rights holders have more and more monopoly power which even ignores the public interests. Such circumstances lead to the situation where the private rights of intellectual property holders have the priority over public health and sustainable development, as what Utilitarianism [30] pursues [31]. Thus, in the process of globalization of intellectual property legal regimes, various conflicts are highlighted [32]. In such a context, the original proposal to coordinate and cooperate on protection of intellectual property rights at the international level has been changed as a way to threaten human rights and to make profits for multinational companies, which also challenges the reception of international rules of TRIPS into domestic intellectual property legal regime. “The Fragmentation of international practice in relation to relevant issues under TRIPS clearly illustrates the paradoxical dynamic between private and public in intellectual property philosophy. [33]” “Intellectual property rights protection is a function of authorship constituting ‘the privileged moment of individualization of knowledge creation’, which constructs scarcity of knowledge at the cost of public interests” [34].

2.3. Sidedness of System

As previously mentioned, not only there are no clear relevant solutions provided in TRIPS concerning conflicts between intellectual property rights and human rights and sustainable development of environment, but also TRIPS can’t provide general provisions towards sensitive issues in intellectual property, such as exhaustion of right [35].

On the conflicts between private interests and public interests, the free trade and protection of private rights brings about the issues of exhaustion of right and parallel imports. “The exhaustion of rights ensures the true separation of the right owner’s control over the products, the exhaustion of rights avoids the fundamental paradox of intellectual property’s incomplete alienation. However, international practice of exhaustion of right doctrine is quite di-

verse and parallel importation is always a controversial issue in international trade” [36].

Article 6 of TRIPS provides that “for the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights” [37], which suggests that even TRIPS doesn’t have a general method dealing with such a complex issue concerning the interests of many parties. Exhaustion of rights concerns not only the protection of interests of patent, trademark, or copyright holders, but also the freedom of goods, and the implementation of protection of human rights in international intellectual property legal regime.

Exhaustion of rights brings about the legal issue of parallel imports, which is one of the most controversial issues in TRIPS. According to Frederick M. Abbott, this provision has three meanings: “the subjects of IPR and parallel imports was not inadvertently overlooked; TRIPS negotiators failed to reach a consensus on such issues; having failed to reach consensus on results, each WTO Member reserves the right to regulate parallel imports in the

manner it considers appropriate” [38]. However, this doesn’t mean that TRIPS is without effects on parallel imports in specific fields of intellectual property rights [39].

According to Cottier, Article 16 of TRIPS [40] mentions the “presumption of such likelihood of confusion in the case of identical marks used on identical goods or services” [41]. If there is a likelihood of confusion caused by the inappropriate use of trademarks, there will be an infringement. However, from the literal meaning of this provision, it emphasizes more on the protection of trademark rights from counterfeit products instead of genuine ones. I believe that simply applying such standards on parallel imports will ignore the complexity of those issues involving the interests of many parties. With the expansion of international trading and with the low price of labor in developing countries, parallel imports influence the economic development and interests of consumers in the developing countries. Thus, under the condition that the TRIPS agreement offers the freedom for member states to choose the way of exhaustion of rights, how to protect intellectual property rights in parallel imports while complying with the standards of TRIPS has become one important part of reception of TRIPS in member countries.

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- 10 ‘The development of IP legal regime in US’ <<http://ip.people.com.cn/GB/138147/140612/index.html>>assessed 6 April 2016.(美国知识产权发展概况, 人民网)
- 11 ZHAO Jianguo, ‘US GDP: Intellectual Property Involved’ <<http://www.lungtinsz.com/index.php?c=msg&id=294&>> assessed 6 April 2016(赵建国, 美国GDP:知识产权入列, 知识产权报). According to the data released by US government, intellectual property intensive industry has become a pillar of the US economy, it offers at least 40 million jobs in only 2012, contributing more than\$ 5 trillion to U.S. revenue, accounting for 34.8% of gross domestic products. In this respect, it is not hard to understand why U.S. government link intellectual property closely with GDP
- 12 Guan Wenwei, *Intellectual Property Theory and Practice: A Critical Examination of China’s TRIPS Compliance and Beyond* (Springer Press 2014)52

13 World Trade Organization, 'Trading into the future', 2nd. Revised March 2001, "The extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations. New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and for disputes to be settled more systematically."

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15 Anandashankar MAZUMDAR, 'Parties Dispute Applicability of Copyright Act's First Sale Doctrine to Imported Goods, Patent, Trademark & Copyright Law Daily' (31 October 2012) Bloomberg BNA.

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19 Susan Strange, Stephen Gill, Robert Cox.

20 Robert Cox, 'Civil society at the turn of the millennium: prospects for an alternative world order' (1999) *Review of International Studies* 25 3, 28. There is something that could be called a nascent global historic bloc consisting of the most powerful corporate economic forces, their allies in government, and the variety of networks that evolve policy guidelines and propagate the ideology of globalization. States now by and larger play the role of agencies of the global economy, with the task of adjusting national economic policies and practices to the perceived exigencies of global economic liberalism.

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26 Guan Wenwei, *Intellectual Property Theory and Practice: A Critical Examination of China's TRIPs Compliance and Beyond* (Springer Press 2014) 117

27 *Id.*, at 119.

28 For example, computer program is involved in the protection of copyright and patent right, pharmaceuticals are under protection of trademark and patent right, and also including protection of new rights such as the rights of layout designs of integrated circuits and new plant varieties.

29 Utilitarian thinking comes in different flavors. One is the prospect theory, which suggests that inventors are rewarded with a patent right to centralize investment in the patented invention's commercialization and improvement, which in turn benefits society. Edmund W. Kitch, 'The Nature and Function of the Patent System' (1977) 20 *J.L. & ECON.* 265, 266 Related to that theory is advocacy for direct protection of commercialization, because of its valuable role in diffusion of inventions. *E.g.*, Michael Abramowicz & John F. Duffy, 'Intellectual Property for Market Experimentation' (2008) 83 *N.Y.U. L. REV.* 337. Another is the signaling theory, which proposes that patents are useful signals to financiers that the patenting firm is a worthy investment. Gideon Parchomovsky & R. Polk Wagner, 'Patent Portfolios' (2005) 154 *U. PA. L. REV.* 1, 37 (2005); Clarisa Long, 'Patent Signal' (2002) 69 *U. CHI. L. REV.* 625, 636-37, 648/

30 William M. Landes & Richard A. Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *J. LEGAL STUD.* 325, 326

31 Eyal Zamir & Barak Medina, 'Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law' (2008) 96 *CAL. L. REV.* 323, 325-28. Such as conflicts between economic globalization and environmental rights, ecological rights human rights and sustainable development and these conflicts and contradictions are more and more intense and hard to reconcile.

32 Guan Wenwei, *Intellectual Property Theory and Practice: A Critical Examination of China's TRIPs Compliance and Beyond* (Springer Press 2014) 41

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34 Guan Wenwei, *Intellectual Property Theory and Practice: A Critical Examination of China's TRIPs Compliance and Beyond* (Springer Press 2014) 39

35 *Id.*

36 Article 6 of TRIPS

37 Frederick M. Abbott, 'First Report (final) to the Committee on International trade law of the international law association on the subject of parallel importation' *Journal of International Economic Law* (Oxford University Press 1998) 607, 636.

38 Thomas Cottier, 'The agreement on TRIPs' (2005) *The World Trade Organization: Legal Economic and Political Analysis* Vol. I 46.

39 Paragraph 1 of Article 16 of TRIPS: The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.

40 *Id.*