

Preface

On April 15, 1994, the “Agreement on the Trade-Related Aspects of Intellectual Property Rights” (TRIPS) has been signed in Marrakech as part of the “Agreement on the Establishment of the World Trade Organization” (WTO). Soon thereafter, on January 1, 2015, the WTO entered into operation. Since the Max Planck Institute for Innovation and Competition always took great academic interest in critically analyzing, first the drafting process, and then the freshly created TRIPS Agreement,¹ we felt that after 20 years of existence of the Agreement, there were reasons enough to take a fresh look at it.

Within the framework, which the WTO sets for the economic and legal regulation of international trade relations, the TRIPS Agreement aims at comprehensively ensuring the international protection of intellectual property by obliging all WTO Members to provide for such adequate standards of protection as it defines in detail with respect to the substance and the enforcement of the rights flowing from the main categories of intellectual property. Over the last 20 years, the conditions have changed fundamentally, however, which had been assumed determining the operation of this international system of trade-related intellectual property rights. Due to economic globalization, markets have largely expanded beyond national borders, if not merged internationally. As a considerable number of once developing States have emerged as global and frequently enough as “big” players, the political weights have shifted geographically and the terms of international competition have undergone quite some modification. At the same time, progress of technologies, of transportation and of communication have had a deep impact on the choice of localization of manufacture and on the configuration of the chains of production as well as on the forms and the contents of the exchange of goods and services. Also, the exchange itself has accelerated. As a result, the need for the protection of

¹ F.-K. Beier & G. Schricker (1989), GATT or WIPO – New Ways in the International Protection of Intellectual Property; F.-K. Beier & G. Schricker (1996), From GATT to TRIPS – The Agreement on Trade-Related Aspects of Intellectual Property Rights.

intellectual property has changed and, concomitantly, a need for “protection against protection” has arisen in instances, where the right to protection produces dysfunctional or other potentially harmful effects.

Moreover, developments in public international law, such as the increased awareness of the vulnerability of public international goods or the broader recognition of human rights have made that ever more frequently the reach of intellectual property protection is put into question. Tensions also have made themselves felt inside the WTO. Membership has increased from 76 to 160 States, and, partly due to that increase, the WTO has run into a deep institutional and structural crisis. The rules of so many bilateral and regional (free) trade agreements, which Members have concluded during and after the Uruguay Round, tend to supersede not only the general WTO trade regime of GATT and of GATS, but also the TRIPS system of intellectual property protection (so-called TRIPS plus clauses). At the same time, the TRIPS Agreement, whilst remaining as highly controversial as ever, has been developed further, in part by some smaller, express amendment, but mainly by State practice, WTO dispute settlement, and possibly also by a rich and intense public political (and academic!) discussion of its economic and legal terms.

This publication does not aim at retracing these changes and developments in any detail. Rather, it takes them as points of departure for examining whether the TRIPS Agreement should still be seen only as being part of an international trade regulation, which rests on reciprocity of trade concessions, or whether, instead, it needs to be understood as representing a generally accepted—or at least a generally acceptable—legal order of intellectual property, which Member States are supposed and able to transform into a functionally appropriate system of domestic intellectual property protection. The perspective, therefore, is not that of defining the terms of an outright revision of the TRIPS Agreement as such, which, politically speaking, is not to be expected. Rather, the perspective is that of an interpretative evolution, which makes the Agreement better meet the real needs of the economies concerned.

In that regard, the focus is, first, on establishing a better balance between the conflicting interests of the owners of intellectual property rights and of third parties, users or competitors (many of whom may possibly hold or come to hold such property rights as well). Second, there is a constant concern about a potential need for redefining and improving the terms of protection as a matter of enhancing its macroeconomic functionality. Third, it has become ever more important to ensure the compatibility, if not convergence of intellectual property protection with the protection of other private and public goods. Last, but not least, attention must be had of risks of undue indirect or extraterritorial effects of national systems of protection on other nations’ systems and economies.

Given the natural limitation of the number of contributors and of their possible involvement in the common research project, it has not been possible to take up all relevant issues. Therefore, some of the more prominent and already broadly discussed problem areas had to be left unattended, such as the controversial link between the protection of intellectual property and economic development in general, or, more specifically, the relationship between intellectual property

protection and access to medicines at prices, which are affordable under given economic conditions.

The contributions have been submitted to critical discussion at a workshop held in Munich on 14 and 15 April 2014, the “anniversary” of the TRIPS Agreement. We express our sincere thanks to all the invited external experts, who by their generous inputs helped us so much to refine our draft papers into the final versions, which we now present in this book.

Munich, Germany
April 2015

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TRIPS plus 20

From Trade Rules to Market Principles

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2016, XVII, 760 p. 5 illus., 4 illus. in color., Hardcover

ISBN: 978-3-662-48106-6