

Roadmap for Intellectual Property Regime in India: A Study of India's National IPR Policy 2016

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ABSTRACT: Intellectual Property has become a key instrument and a strategic asset in the knowledge based economy of the 21st Century. The institutionalization of Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement in the World Trade Organisation (WTO) has embedded intellectual property rights (IPRs) in global trade. Various IPR instruments now play a key role in development of value added products/processes, technology transfer, research and innovation. Thus it becomes imperative for a country to strategically protect its IPR and also create roadmaps for development of this institution. In this context it is a good policy initiative of the Indian government to bring out the National Intellectual Property Rights policy, first of its kind for the country. This document attempts to provide a roadmap for IPR policy in the country.

The paper makes a critical assessment of this policy document. We argue that this document has to be examined within the various policy articulations and implementation frameworks for stimulating research, innovation, and entrepreneurship in the country. Does it provide clear articulation and implementation framework for contentious issues in the global IPR environment? These are some of the issues that this paper critically examines in its investigation. The paper concludes by providing some suggestions that can strengthen this policy document further.

Keywords: TRIPs; WTO; National Intellectual Property Rights Policy; Research and Innovation; Intellectual Property Rights

I. INTRODUCTION

Intellectual Property is becoming instrumental in country's economic and social welfare with the evolving new forms of protection, their expanding scope, as well as the increasing protection of open research. IPRs are, in many cases, leading to unfair market distortions and are coming in conflict with competition laws, thereby disturbing the balance between them.

Various scholars have also questioned the working and effectiveness of the patent system (see for example Cowan et al., 2007; Guellec and van Pottelsberghe de Potterie, 2007). This working can be understood through various exogenous and endogenous factors/variables affecting the system. The emergence of new technologies and scientific advancements are perceived as the main exogenous forces. These technologies have posed many questions to the scope of patentable subject matter and generated the need for IP legislators to consider regulating new types of technology and knowledge. The quality of granted patents can be understood to be a major endogenous factor that is challenging the ability of the patent system to encourage innovation and the diffusion of technology (Cowan et al., 2007; Hall, 2007). Improving patent quality implies the extent to which patents fulfil the patentability criteria (novelty, non-obviousness & industrial applicability), costs of patenting and timeliness of examination, successful disclosure of the patent application by applicants.

Scholars like Heller and Eisenberg (1998) provides important views on distortion that can happen and defeat the role of IPRs in promoting innovation if there are too many concurrent fragments of intellectual property rights in potential future products (or by permitting too many upstream patent owners to stack licenses on top of the future discoveries of downstream users). This has a higher probability to happen in biotechnology as the development and commercialisation of a new genetically engineered product has to navigate through a large number of patented technologies. Scholars like Brandt (2002) and Kaldos (2011) among others underscore that many high potential innovation ideas keep floating in the laboratories and are not exploited due to stringent IPR requirements thereby remain undeveloped. This poses a serious concern to push useful innovation to market. Lall (1985) and Shamsavari (2016) view the market as a flawed one due to IP protection mechanisms.

However, in spite of the various conflicts and limitations, IPR still remains a central part of the strategy for countries to foster innovation and facilitate technology transfer. IPR is seen as the key driver of the knowledge based economy (Withers, 2006). Developing countries benefit from greater inflows of technology transfer (Filippetti and Archibugi, 2015; Awokuse and Yin, 2010). Kalanje (2000) among others highlight the important role played by IPR in transferring innovative technologies to the market. An enabling link between IPR and trade was observed by Maskus and Penubarti (1995) who found that the strength of national patent laws exercise a positive effect on bilateral imports in many products within the group of both large as well as smaller developing economies. Small firms get benefited by IPR and it is one of the most critical factors in determining the net worth of a company. The calculation of intangible assets is not generally a major issue when the assets are protected by IPRs.

This makes a strong case for a country to create policy document that can provide a strategy for the country to develop a robust IPR system that can promote innovation and creativity; enhancing the capacity of enterprise and public institutions to create and exploit IPR. It is also important that the policy document provides for instruments that can safeguard against unfair monopoly infringement against traditional knowledge, and exploit provisions that can help enhancing economic and social welfare. It should provide guidance for developing institutional mechanisms that can help to properly exploit IPR and address contentious issues and disputes.

India has recently articulated an IPR policy, National Intellectual Property Rights Policy, 2016 (hereinafter, the NIPR policy). Bringing a policy document gives an important signal of India's intention to develop IPR as a strategic instrument. Mainly the debate on this policy have been on internet blogs and magazine columns. Most of these sites have made broad criticism of the policy document in terms of enforcement challenges, Indian government's attempts to address US concerns, maximalist approach in certain provisions, disconnection from the development concerns of the country, etc. Gopakumar (2016) criticised the policy calling it unsuitable for India's socio-economic requirements drawing attention primarily to the access to affordable medicines, technology transfer and its dissemination. Abrol (2016) drew attention towards

the vague provisions of the policy. The Hindu¹ emphasized upon the flawed assumption of the policy that "more IP means more innovation". We contend that analysis of this policy document needs to be situated within the broader framework of country's research and innovation and the contemporary challenges of the global IPR regime. It is thus important to underscore the pressing issues that has emerged due to TRIPs and whether the policy has provided directions to address them. The paper is structured as follows: (1) Section 2 highlights the salient aspects of this policy document; (2) Section 3 draws attention to new complexities that challenge the current IPR system; (3) Section 4 draws from the above two sections to make a critical introspection of the policy document (4) Section 5 concludes the paper with key policy suggestions.

II. THE NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY, 2016: SOME SALIENT ASPECTS

This policy document emphasizes that a comprehensive IPR Policy is required for creating a robust intellectual property system in the country. The policy has a vision statement which stresses the above aspects and a mission statement that articulates to: (a) foster creativity and innovation and thereby, promote entrepreneurship and enhance socio-economic and cultural development, and (b) focus on enhancing access to healthcare, food security and environmental protection, among other sectors of vital social, economic and technological importance. The core of the policy is the set of seven objectives that it asserts needs to be addressed for creating a robust IPR ecosystem for the country. It also spells out the steps and procedures that need to be undertaken for implementing the objectives, however, they are more in terms of expressing actions that are required without explicitly articulating implementation strategy.

¹ Prabhala, A. and Krishnaswamy, S., "Patently a missed opportunity", The Hindu, May 25, 2016; Updated: September 12, 2016. Accessed at: <http://www.thehindu.com/opinion/op-ed/national-intellectual-property-rights-policy-patently-a-missed-opportunity/article8641600.ece>

Table1: Major Provisions in the National IPR Policy 2016

Objective	Highlights / Provisions in the Policy
IPR Awareness	<p>Basic Level Education: Educating people about how to access and utilize IP rights by including IPR as a subject in school curriculums</p> <p>Celebrating IP Creators: Setting up India's 'Hall of Fame' to celebrate IP creators.</p> <p>Pro-active Training: Educating researchers in public and private research organisations about processes of IP creation.</p>
Generation of IPRs	<p>Targeted Programs: Creating ‘targeted programs’ after conducting a base line survey across different sectors of knowledge.</p> <p>Royalty Sharing: Uniform guidelines for division of royalties between the organizations and individual researchers.</p>
Legal and Legislative framework	<p>Maximalist Approach: Facilitating the ease of doing business in India by including penal provisions in the Indian Cinematographic Act for illegal duplication of films.</p> <p>Novel Legislations: Exploring new opportunities possible within TRIPS.</p> <p>International Treaties: To engage in the negotiation of international treaties in consultation with the stakeholders; also to examine accession to treaties which are in India's interests.</p> <p>Dynamism to IP laws: Review and revision of existing IP laws time to time.</p>
Administration and Management	<p>IP Centralisation: Department of Industrial Policy and Promotion (DIPP) given the charge of copyright operations along with other forms of IPR.</p> <p>Expedition of grant procedures: Exploring possibility of expedited examination process for patent applications.</p> <p>Creation of New Body: ‘Cell For IPR Promotion And Management (CIPAM)’ formed to carry out the policy objectives, undertaking steps for furthering IPR awareness, commercialization and enforcement.</p> <p>Creating Effective Mechanisms: Calls for developing transparent and efficient procedural mechanisms, well-informed adjudicatory structure to complement the strengths of other substantive laws.</p> <p>Start-ups Intellectual Property Protection (SIPP) scheme launched to facilitate IP creation among Start-Ups</p>
Commercialisation of IPRs	<p>Value Chain Support: Calls for cross-sector partnerships, promoting novel licensing models, and developing novel technology platforms</p> <p>Funding mechanisms: Simple loan guarantee scheme to encourage invention based start-ups, treating IPRs them as mortgage-able assets.</p> <p>Supporting Start-up Growth Mechanisms: Strengthening the existing mechanisms such as incubators and accelerators</p> <p>Tax Relaxations: The Finance Act, 2016 has made provision for Startups to get income tax exemption for 3 years.</p>
Enforcement and Adjudication	<p>Dispute Settlement: Initiating studies related ‘counterfeiting and piracy’, and mechanisms for improving dispute settlement.</p> <p>Supporting Small Firms: Creation of easy-to-use portals for small firms; support for protection of their IPRs internationally</p>
Human Capital Development	<p>IP incentivization: Incentivization of IP related matters such as division of royalties, awards for IP awareness activities.</p> <p>Induction of Personnel: Conduct patent and trademark agent examinations at regular intervals; arrange training programs and involve them in capacity building activities.</p>

III. THE CHANGING DYNAMICS OF IPR REGULATION AND GOVERNANCE AND THE INDIAN IPR POLICY FRAMEWORK

The varying interests of the emerging and developed economies lead to conflicts. Some conflicts even fail to get resolved at global platforms like World Trade Organisation (WTO). There is an inherent conflict between TRIPs Agreement and the objectives of Convention on Biodiversity (CBD). Under CBD, countries can regulate the access to biological material found in their territory and can ask for benefit sharing agreements with the beneficiary. Similarly the TRIPs provisions enable persons to patent a country's biological resources. In this manner

TRIPs facilitates the conditions for misappropriation of rights over the knowledge and use of biodiversity while the provisions in the CBD are found to be more aligned with the interests of developing countries. In another aspect, Doha Declaration which is considered to be favourable for developing countries (as it enables them to grant compulsory licenses for the manufacture of drugs under certain conditions) is not that effective due to its non-binding nature on the member states. The post TRIPs era has faced many issues in which policy innovation has been done to exploit the flexibilities provided in the TRIPs. Table 2 highlights the Indian IPR scenario and some of the contemporary issues related to the same.

Table 2: Some Important Aspects of Indian IP Scenario

Aspect	Comments
Compulsory License	<ul style="list-style-type: none"> Country's first Compulsory License granted to NATCO against the Bayer cancer drug "NEXAVAR" First and only one such case in favour of granting Compulsory License Strong discording positions of USA and big pharma companies on providing compulsory license.
Technology Transfer and Commercialisation of technology	<ul style="list-style-type: none"> NIPR Policy 2016 recognises Technology Transfer Offices to play a key role in commercialisation of technologies Effective technology transfer strategies required along with promising inventions for return on investments
Data Exclusivity	<ul style="list-style-type: none"> If authorities use this data to test the generic drugs, the cost and time for the generic drugs to enter

	<p>the market would decline (Basant, 2011)</p> <ul style="list-style-type: none"> If allowed, it will slow down the growth of generic pharmaceutical industry and will affect the availability of low cost generic medicines to the public.
Evergreening of Patents	<ul style="list-style-type: none"> Led to extensive debate with foreign MNCs, big pharma firms Novartis v. UoI – Novartis lost the case due to non-fulfilment of "enhanced efficacy" requirement beyond establishing patentability requirements Evergreening may impede generic drug industry

<p>Bio-piracy of Traditional Knowledge</p>	<ul style="list-style-type: none"> • India has always supported for protection of traditional knowledge • India-US Basmati Rice Dispute- Indian government intervened and several claims of the patent were invalidated • Section 3 of the BDA provides for prior approval of NBA in obtaining any biological resource occurring in India. • NBA can ask for revocation of a patent² in case of non-fulfilment of prior permission • Conflicts have emerged between Patent Office and NBA occur on the issue of timelines.
<p>Domain Name Protection</p>	<ul style="list-style-type: none"> • India lacks any Domain Name Protection Law and many cybersquatting cases have been reported. Still no measures have been discussed at length in the policy to deal with the issue.

critics of the policy draws attention to this India’s unpreparedness in exploiting its intellectual property has been highlighted in different studies (see for example Kashyap, 2014). New contentious issues have been raised in technology transfer particularly in clean technologies³. Ever increasing scope and breadth of IPRs has put new pressures on India to adopt them. There has been a long debate on Indian IPR system to promote incremental innovation by adopting utility model protection mechanism in her IPR laws. Thus, scholars like Basant (2011) call for review of the emerging IP regime in India, development of regulations on incremental innovations and data protection to better the opportunities for Indian firms to participate in global networks and build technological capabilities.

IPR in new emerging technologies has major implications for agriculture and industry. Gene patenting goes beyond innovation to question ethical and moral rights. The policy document is silent on these issues. The government has given a policy thrust for promotion of start-ups and SMEs and entrepreneurship. The policy envisages for capacity building, customized programs for specific needs of MSMEs, start-ups, entrepreneurs, strengthening existing mechanisms to promote entrepreneurship to extract value form IPRs through commercialisation, reducing transaction costs for start-ups to stimulate the generation of IPRs. But the power of SMEs to protect their inventions is limited by capability market power even though their inventions are suited to be protected by such power (Kingston, 2010).

Some scholars have argued that apparently the policy looks fine, but a more thorough or careful look at the document doesn’t make it feel like a Policy document, but rather a guideline or instruction book to DIPP and other government

IV. GAPS IN THE POLICY DOCUMENT

We observe that the policy document has the potentiality for strengthening the IPR system in the country. However, it has not touched upon the larger issues that may impact the research and innovation ecosystem, trade, biological and community knowledge resources, technology transfer, affordable medicine. Gopakumar, 2016 argument that weak provisions for affordable medicines and seeds have been apprehended by the

³In a case, Indian government in order to adhere to certain obligations of Montreal Protocol, asked the Indian manufacturers to change the production processes of components of refrigerators and air conditioners so as to phase out chlorofluorocarbons (CFCs). The manufacturers decided to use hydrofluorocarbons (HFCs) and approached a patent holder for the matter, who quoted a price of US\$25 million which was way beyond the Indian company’s resources. As part of negotiation, unacceptable terms were offered such as limited market access or minority stake in a joint venture, thereby abusing the dominative power of patent holder and restricting the transfer of technology (May and Sell, 2008).

²Letter No. NBA/Tech-Gen/22/32/11-12-15-16-3478 dated 19.01.2016 from National Biodiversity Authority to European Patent Office regarding ‘observation filed under Article 115 of European Patent Convention’.

departments. It is a new era for trade-related intellectual property. IPR has to be integrated or made coherent with the trade policy. This embedding of IPR with trade will make it more comprehensive policy and one will have to look carefully at the social, cultural and political nuances which need to be addressed. It should also be seen that for concerns such as health, education, environmental considerations and other global commons, where market mechanisms do not work, new strategies for IPR need to be designed.

V. DISCUSSION AND CONCLUSION

It is a step in the right direction to create a strategic framework for IPR management and roadmap for enhancing its effectiveness. The policy document has brought attention to many of the issues and also given intentions to address them.

Our investigation draws upon the need to develop implantation strategies, create institutions among others so that the suggestions made can be incorporated. Thus, a policy document like this must be followed by related set of documents that can strengthen the various objectives and create a comprehensive and robust system of IPR to support the development of science, technology, innovation and entrepreneurship.

In the present policy also, the problem lies in implementation strategies of the solutions, proposals, and suggestions proposed. For instance, one of the objectives of Indian IP policy is to carry out massive awareness programmes on the benefits of IP. But it is equally important to discuss the limitations of IP with the people which is missing the policy. This disconnects the policy from addressing the developmental needs of the country. Recently, the IP Policy of South Africa (Phase 1) was released in 2018. The policy is aligned to promote local manufacturing, competitiveness, using IP in the informal sector in South Africa. This does not sever the policy from addressing the issues of developmental concerns. The South African policy states to be aligned with the constitution, National Development Plan, National Industrial Policy Framework, etc. Documents like these should also be taken in consideration while working further on this policy document for its enrichment.

Low quality patents do not comply with the patentability criteria and may seriously harm the innovation process by causing the public to pay higher monopoly rent to the product, can impose unnecessary constraints on downstream innovation, risk undermining scientific research and advancement of technologies. Major patent offices have already put in place mechanisms to improve

patent quality. High patent pendency rates with huge backlogs, severely limited employee strength, patents getting more complex, and difficulty in finding prior-art on new and emerging technologies have all contributed to falling patent quality. Thus, a patent policy should strongly focus on developing institutional mechanisms that can improve patent quality. The issue of patent quality is more severe in emerging countries like India as with opening of markets and adhering to TRIPs agreement had further constrained the IPR institutions. Thus, the key thrust of the NIPR Policy 2016 should have been providing novel implementable directions for improving patent quality.

Key Policy Suggestions

1. The IPR policy has made many suggestions but provides only in some instances how to implementation framework. Further, there is only a restrictive view of IPR with the larger issue of IPR to be developed as a strategic asset for competitiveness and trade is missing in the policy framework.
2. The IPR policy document needs to provide directions for India's approach to protecting its traditional knowledge, anti-competitive provisions, open access, protection and royalty sharing on public-funded research.
3. The policy should also articulate India's unequivocal stand on issues like data exclusivity, benefit sharing, evergreening of patents, and other contemporary issues.
4. IPR policy framework needs to be a comprehensive one wherein it covers all the other peripherals related to it. Only amending the IPR laws of the country will not generate desired results. Along with working on the regulation, the promotion of science and technology in education, orientation programs for students to develop nurture their creative skills are also very important.
5. There is no discussion on Trade Secret Protection in the policy. Trade secrets protection in India is as a major concern for global players as they seek to expand their R&D and innovation in the country. As India grows in IT and innovation, there has been a demand for regulations to discourage theft of data and trade secrets. The EU adopted a Directive on the Protection of Trade Secrets on 8th June 2016. US has also been supporting the protection of Trade Secrets through its statutory laws.
6. Bodies for commercialisation of IPR may be given the task of collaborating the scientists (especially in public research organisations)

and industry to help them understand each other and take public funded research to marketplace.

In the ever changing dynamics, developing policy framework should not be a onetime exercise. NIPR has to be seen in this context. India can only prepare an effective IPR system if we learn lessons from this policy framework, develop institutional mechanisms to address the gaps among others.

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