

A Study of Intellectual Property Rights Policy in Modi's Government

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ABSTRACT

The present study explain that the policy will govern the following Acts: Patents, Trade Marks, Design, Geographical Indications of Goods, Copyright, Protection of Plant Varieties and Farmers' Rights, Semiconductor Integrated Circuits Layout Design and Biological Diversity. It is expected, therefore, that it will impact sectors as diverse as pharmaceuticals, software, electronics and communications, seeds, environmental goods, renewable energy, agricultural and health biotechnology, and information and communications.

Keywords : Intellectual Property Rights, Policy, Modi Government

I. INTRODUCTION

It is a "first of its kind" policy for India, covering all forms of intellectual property together in a single framework. The policy follows a completely new set of principles that are tilted in favour of intellectual property (IP) owners in every possible way. The principles laid down in the policy incentivise IP owners by granting them monopoly rights. The policy rewards big capital without paying attention to the balance to be established vis-à-vis public interest and development. Since the government presents itself as pursuing development, it is ironic that its new policy gives very little importance to either public interest or the developmental challenges that India faces.

The policy demonstrates a maximalist agenda (that is, an agenda geared towards the maximum possible incentive and rights for IP owners), to drive the development of industry, publicly-funded research and development organisations, educational institutions and government departments in India from now on. The policy admits that the intellectual property of foreign corporations has gained from the changes made to India's IP laws after joining the

World Trade Organisation and that the size of Indian IP is small. Even so, it continues on the same path without adducing an iota of evidence to support the assumption that a strong IP-based policy framework is essential for promoting creativity and innovation in India.

II. NO CASE FOR STRONG IP

In this context, one must state with some concern that India's rank on the Global Innovation Index, which attempts to measure performance with respect to creativity and innovation, has slipped from 62 in 2011 to 76 in 2014.

Indian applicants lead in the matter of trademark applications and not patents. The number of new drug applications filed by Indian companies with USFDA, for instance, has never crossed the single digit figure.

However, in the sphere of trademarks, out of the 1,79,317 applications in 2010–11, the class consisting of "medicinal, pharmaceuticals, veterinary and sanitary substances" accounted for 31,634 trademarks, representing 17.64%. Analysis shows that the number of Indian design patent assignees was as small as

271.33% of design patents were for jewellery and ornaments.

This tells us quite clearly that there is no point in exaggerating the scale of Indian creativity and innovation in order to make a case for IP protection. Jaitley spoke of accelerating the registration and approval of trademarks. The policy speaks of promoting IP as a financial asset and economic tool. However, policy makers need to be reminded of how the public banking system was robbed when it relied on the valuation of Kingfisher brand to release funds to Vijay Mallya.

The Vision Statement and the Mission Statement of the policy proclaim that creativity and innovation are stimulated by intellectual property for the benefit of all. The policy states that it shall promote entrepreneurship and enhance socio-economic and cultural development, including access to healthcare, food security and environmental protection.

But what is the basis of this proclamation? Did the committee set up by the ministry for the formulation of the national IPR policy sift and analyse the evidence? None of the evaluations made by the committee are clear. Had the committee addressed this question, it would not have been able to argue that the adoption of stronger IPR is necessary for the enhancement of innovation.

A strong IP-based system was not responsible for the creation of the foundational elements of new generic technologies such as software, semiconductors, microprocessors, mobile telephony, recombinant DNA technology, monoclonal antibodies and other such biotechnological tools. The same fact applies to the case of 3-D printing. For all these generic technologies, patents, designs and layouts were not applicable when the foundational tools emerged. Scientists had to be pushed to treat some of these cases as IP by the technology transfer offices of US universities.

Did a strong IP regime work for the benefit of the pharmaceutical industry after the adoption of the TRIPS Agreement?

The policy does not demonstrate how a regime favouring the maximum possible incentive for IP owners and the granting of monopolies will be able to ensure the “socio-cultural development” of India. Analysis in a forthcoming publication by this author of the impact of the patents granted on new chemical entities (NCEs) for the 262 drugs introduced in India since 1995 indicates that the market power of foreign firms is on the rise due to the adoption of product patents in various therapeutic groups such as anti-cancer, cardiovascular, central nervous system, diabetes, urology and other non-communicable diseases. The data clearly reveals that the market power of foreign firms would have been greater had India opted for early TRIPS implementation, as did many Latin American countries, making their industries as well as people suffer the adverse consequences of strong intellectual property regime.

III. SUCCESS WITHOUT IP

In fact, far more contrary evidence is directly available from the pre-TRIPS period.

The green revolution took place in India without any IP protection for the breeders of new varieties of seeds. The Indian pharmaceutical industry became the pharmacy of the Third World because of the rejection of a strong intellectual property rights (IPRs) system in the 1970s. Since the domestic industry supplies a large number of pharmaceuticals to the regulated markets of the US and Europe and is the lifeline for patients particularly in the developing world, it is paradoxical that the policy makers of the Modi government choose to do little more than give lip service to India’s global role in the case of generic pharmaceuticals. With no mention at all by them of the use of critical safeguards in India’s patent law, such as compulsory licenses, parallel imports or support for patent oppositions, it seems there was

some merit to India's assurances to the US industry that compulsory licenses will no longer be issued in India.

The policy focuses on improving the IPR output of national research laboratories, universities, technology institutions and researchers by encouraging and facilitating the acquisition of IPR. It proposes to link research funding and career progression with the creation of IPR and identifies this link as a key performance metric for public funded R&D and technology institutions. Although it is clear that the policy suggests an ambitious harnessing of intellectual property by public institutions (through, for example, the patenting or licensing of research results) and the partnering of public institutions with the private sector, it chooses not to ask the obvious question of what has been the outcome of the implementation of precisely such policies in the laboratories of the Council of Scientific and Industrial Research (CSIR) and the Indian Council of Agricultural Research (ICAR). Since the mid-1990s, CSIR researchers were directed to file patents but the policy failed to yield patents that could earn CSIR revenue. A vast majority of patents obtained by CSIR (2001–2010) lie idle and have not been able to generate enough licensing revenue to cover even four to five percent of the cost incurred by the filing of patents.

The policy on patenting has not only cost CSIR money to maintain the patents in India and abroad, but also has directed it away from more important directions.

In order to generate IP that can be commercialised, the laboratories are required to plan patent portfolios without which enforceable IP will not get generated. It is not enough to celebrate the intellectual property of individual researchers. Indian patents are the outcome of non-collaborative, individual organisation-based efforts, both for industry and research institutions. According to India Science & Technology, 90% are single entity patents; in 2010,

the percentage was as high as 96% for India's US patents. Only 7% of the total patents are outcomes of collaborative R&D (Volume 3, 2015).

Even in the case of patents filed with the Indian Patent Office (IPO), a large majority (75%) were filed and obtained by individual assignees. Both R&D institutions and industry have been acting separately in their pursuits of technology development-related investments.

The same can be said of collaborations between academic institutions, universities and research institutions that have been granted patents: the trend is to "go-alone." The Indian collaborative scenario is no different internationally. According to analysis in India Science & Technology (Volume 3, 2015), industry collaboration with universities and R&D laboratories is negligible. There have been no more than 0–10 patents in any given year. Analysis of the patent assignment database of the USPTO indicates that only 173 out of the total 2420 patents obtained during the period resulted in the licensing of other entities. Further examination reveals that 32 of the 173 patents were instances of internal trading. Just 7.15% of India's patents were licensed on the whole and 5.83% of the total, if we leave out cases where the transfer was to one's own subsidiary.

IV. FLAWED PATENT STRATEGY

Clearly, the message of this analysis is that the Indian industry and R&D organisations are not at the stage that patent strategy is going to yield high returns. It seems that our policy-making is not informed by ground realities in India but rather by the pressure being exerted by multinationals. Multinationals and R&D organisations abroad do not treat the challenge of IP generation without a strategy. They spend money on patent litigation. Does India want its laboratories to focus on science or litigation?

Further, we must not forget that if publicly-funded laboratories are encouraged to patent their research

contributions, seek exclusionary rights and make money from the private sector from their research contributions, the tax payer will be paying twice. The cost of the product will include the total R&D expenses incurred after a huge mark-up.

Why should the policy makers opt for exclusive licensing of public IP? Exclusive licensing is an important element of a strong IP system. This is a matter of serious concern. The policy proposes to establish and strengthen IP facilitation centres as nodal points in industrial and innovation university clusters. Evidence on the performance of science and technology (S&T) parks is not very encouraging with regard to IP-based entrepreneurship from India. There is a significant gap between scientists and industry with regards to important factors in the process of technology transfer from the publicly-funded R&D sector to the private sector industry. Scientists consider the lack of motivation and demand from industry for investment in indigenous technology development to be a key barrier to sustainable collaboration.

V. HIGH VOLTAGE PROPAGANDA

The experience with IP-based entrepreneurship and technology transfer of the National Research and Development Corporation (NRDC), National Innovation Foundation (NIF) and Technology and Information Forecasting and Assessment Council (TIFAC), SIBRI and BIRAC of Department of Biotechnology is hardly encouraging. However, thanks to propaganda that favours strong IP, the same mantra of IP-based entrepreneurship is being repeated. Take the case of NRDC, which manages the IP generated from the programme aimed at technological self-reliance (PATSER) of the Department of Scientific and Industrial Research (DSIR). In royalty-paying projects, the firm paid on a regular basis only in one case. In most cases, the firm paid royalty for one or two years. The amount of royalty paid varied widely, from Rs. 954 to Rs. 86 lakhs. The most common reasons cited for non-

commercialisation were that the technologies developed were obsolete and that there was no market demand for the technology developed (India Spend & Technology, Volume 3, 2015).

The policy considers IP rights to be private rights. The policy wants to promote IPRs as marketable financial assets. The policy views IP as an economic tool. But intellectual property is a regulatory tool for the government. The government should not be using it only as an incentive. The government needs to provide safeguards for public interest when statutory monopolies are being offered to IP owners. The objectives and instruments of the policy need to be guided by a social contract between state and society on the basis of the consequences of the intellectual property regime for the development process. As a regulatory tool, the state has to ask how and what benefits corporates will deliver and what costs the policy will entail for the Indian people. A social bargain should reward or grant incentives to innovators but not without asking what kind of innovation and access to innovation is being offered by the particular system of reward. Incentive has to be commensurate with the stage of development and the quality of intellectual property. Intellectual property must maximise disclosure, diffusion and dissemination, access to knowledge, and public interest.

The policy is vague about how such a balance can be achieved and how the rights of IP owners will be implemented in a manner conducive to social and economic welfare that will prevent the misuse or abuse of IP rights.

Although the policy speaks of encouraging open source drug discovery (OSDD), it is well known that the OSDD programme is no longer being pursued by CSIR. While the policy speaks of promoting free and open source software, it could have given a genuine boost to the idea of open source in the areas of software, seeds and creative publishing if the government was willing to announce a public

procurement policy for encouraging open source in software and seeds. The policy should have announced a law favouring open source licensing. Special licenses for non-exclusive dissemination of intellectual property could have been encouraged. Twenty-five countries including Australia, Belgium, Croatia, Czech Republic, France, Germany, Greece, Hungary and Italy provide for legislative support to open source.

The policy also refers to open innovation as part of the promotion of corporate social responsibility (CSR). Open innovation is practised by large companies as a programme of collaborative R&D strategy and not as CSR activity. Apart from the NIF (National Innovation Foundation) which has tried collaborating with Big Bazar to market the “outcomes of grassroots innovations,” there are not too many corporate social responsibility (CSR) examples that can be used as models by R&D organisations. CSIR has many rural technologies to offer, but large companies have not been typically willing to transfer these technologies to the population that is at the base of pyramid.

VI. MULTILATERAL NEGOTIATION

The policy provides for the enhancement of IP enforcement agencies at various levels, including strengthening of IPR cells in state police forces. It proposes to adjudicate IP disputes through commercial courts. The policy marks a major departure from the earlier well-stated understanding of the Bakshi Tekchand and Justice Iyengar committees that guided the framing of the Indian Patent Act, 1970. The model patent act provided for the granting of rights for the use of new processes to benefit pharmaceutical and food industries and laid the basis for creative imitation or the reverse engineering approach, which led Indian R&D institutions to create over 50 new chemical reaction processes for more than 100 essential drugs.

The policy states in writing that the government will engage constructively in the negotiation of international treaties and agreements. It also states that it will examine accession to some multilateral treaties which are in India’s interest. Is this a signal that India could be party to Trans-Pacific Partnership (TPP) where the TRIPS-plus agenda is already in place?

The policy seeks respect for IP and, in its usual style, the present government wants this message to be taken to schools, colleges and the public. It wants to involve multinational corporations in IP awareness programmes. The policy proposes to strengthen and spread IPR facilitation centres and open up the traditional knowledge digital library (TKDL) to corporates. What is of perhaps greatest concern is the targeting of the judiciary through “awareness” and “training” on an IP maximalist agenda that is likely to threaten the fine balance between public interest and IP that the courts have struggled to maintain. Contributions from publicly funded research will follow the norms of licensing of strong intellectual property. India can even join UPOV 1991, which will prevent farmers from saving and using their own seeds. Given the fact that farmers’ rights, health and access to information are at stake, the IPR policy is not in national interest.

While the stated rationale of this policy is that a strong intellectual property rights system is necessary in order to promote creativity and innovation in India, there is plenty of evidence to the contrary. Monopoly rights stifle radical innovation. Monopolies do not promote sustainable innovation trajectories. Barriers to research collaboration may develop. The diffusion of knowledge suffers and industry and science tend to innovate with difficulty. A strong IP system means a reduced access to innovation for the people of India.

The policy of the Modi government is clearly informed by conservative pro-IP ideology, which big capital promotes with the aim of appropriating all the

gains from the progress underway in science and technology. The policy was framed by a committee whose convener is the FICCI's IPR committee coordinator. The committee was filled with lawyers who have worked with the Finance Minister in the past and have no experience with the challenges of policy formulation. Clearly the policy has been shaped by growing pressure from the US-, Europe- and Japan-based multinationals that support strong IP system.

VII. WESTERN PRESSURE

It is no secret that India has recently been under pressure from the US government under their Special 301 law to change its patents regime. For the last two years in the conferences held on trade and investment, Ministry of Commerce officials have talked favourably about the benefits of joining the Trans Pacific Partnership (TPP), which has several TRIPS-plus provisions. These officials have argued about how it is not possible for India to keep out of "mega-regionals."

Furthermore, the timing of this policy is extremely significant. The Prime Minister is leaving on his fourth visit to the US on June 7 and is expected to address the US Congress.

Although the policy pays lip service to economic and social welfare and states that India remains committed to the Doha Declaration on TRIPS Agreement and Public Health, this commitment is not reflected in the policy's provisions. The policy is not devoted to using public health safeguards and biodiversity protection. Nor can one ignore the fact that the Centre has been reluctant to use compulsory licensing and improve the manual of patent examination to check the quality of the patent grant.

VIII. CONCLUSION

The government has agreed to join the US government in the WTO to discuss "twenty-first

century issues of trade and investment" at the time of the conclusion of the Nairobi Ministerial. According to the United States Trade Representative, the Doha Development Agenda is dead. There has been no progress. Needless to say, the IP maximalist agenda of the new IPR policy will no doubt warm the heart of the US government. It appears that the government wanted to make a gift to the US, and decided on gifting it this IPR policy. But this particular gift to the US must be taken back. It should be prevented from becoming national policy.

IX. REFERENCES

- [1]. <https://thewire.in/120122/national-ipr-policy-cautionary-pessimism-continues-washington-d-c/>
- [2]. Abrol, Dinesh (2016). Who Gains from the Modi Government's Intellectual Property Rights Policy? The Wire, <https://thewire.in/37795/who-gains-from-the-modi-governments-intellectual-property-rights-policy/>
- [3]. Sinha, Anubha (2016). Modi's New Intellectual Property Rights Policy Will Only Benefit Players with Deep Pockets. The Wire, <https://thewire.in/37567/the-new-intellectual-property-rights-policy-will-only-benefit-players-with-deep-pockets-and-great-power/>