India's IP Regime: Renewed Reform Efforts and Ongoing Challenges

An Interview with Ashish Bharadwaj

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By Louis Ritzinger
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As the United States and India continue to develop their trade relationship, conflicts over intellectual property (IP) issues have proved to be a significant impediment, particularly in fields such as science...
and technology, manufacturing, pharmaceuticals, and entertainment. While an accelerating economy and business-minded reforms have spurred greater interest in investing in India, many business groups and policymakers in the United States argue that India’s IP regime is inefficient and unpredictable. Meanwhile, many Indian leaders argue that their current policies, though in need of improvement, fully comply with international agreements and that adopting the same standards as the United States would not be appropriate for a developing economy.

In this Q&A, Ashish Bharadwaj, professor at India’s noted Jindal Global Law School, analyzes the different approaches of India and the United States to IP issues and discusses the areas of India’s IP regime that are most in need of reform. Dr. Bharadwaj identifies the most important innovation and IP issues for Indian businesses, while stressing the importance of improving the country’s IP capacity by strengthening educational and professional institutions. Finally, he offers a pointed critique of India’s draft national intellectual property rights (IPR) policy before suggesting possible avenues of reform.

IP issues continue to be a point of contention in the U.S.-India relationship. Many U.S. business groups and policymakers argue that a weak IP regime, compulsory licensing policies, and excessive innovation requirements for improvements on products covered by existing patents contribute to a poor business environment in India. Many Indian officials, however, contend that Indian policies are fully compliant with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and are sensitive to the costs that U.S.-backed IP reforms may impose on the country’s poor—particularly in the field of pharmaceuticals. Where do you see current efforts to bridge this gap leading?

In the past few months, the Indian IP policy regime has witnessed significant changes. The Indian government has initiated a process to formulate a national IPR policy to bring more predictability and transparency to India’s IP policy, address the IP concerns of potential investors, and banish India’s reputation as a difficult place to do business. This is a step in the right direction. Meanwhile, however, the Office of the U.S. Trade Representative (USTR) started an out-of-cycle review (OCR) of India’s IP regime. According to the USTR, this review is a tool that is used to encourage progress on IPR issues of concern and can provide an opportunity for heightened engagement to address and remedy such issues. The decision to conduct an OCR is indicative of the U.S. government’s inclination to enhance worldwide protection and enforcement of IP.

It is indeed true that the IP policies of India are TRIPS-compliant and that several Indian officials question the approach and standard adopted by the USTR. Their arguments are at least twofold: First, it is inappropriate to use the U.S. regime as the benchmark in evaluating India’s IP laws. Rather, the
standards ought to be those accepted under TRIPS, which is an internationally recognized agreement on protection and enforcement of IP, ratified by many countries, including India and the United States. Second, the ensuing advocacy campaigns by U.S. interests targeting Indian IP laws may have had a deleterious effect on investor and business sentiments in India.

The new IP policy is intended to create positive synergies with other government initiatives, including the “Make in India” campaign. The government of Prime Minister Narendra Modi is perceived as friendly to businesses and investors but probably still does not see eye-to-eye with the Obama administration on certain IP and trade-related issues. This has resulted in a tug of war between the two sides on whether to embrace stronger IP laws akin to those in the United States and European Union. By bringing optimism and positive sentiments, Prime Minister Modi is trying to set the right tone with bureaucrats and business leaders in India as well as with their American counterparts. Subsequently, after a two-year hiatus, officials from the two countries came together on November 25, 2014, to discuss issues concerning trade and IPRs under the Trade Policy Forum.

The joint statement made by Prime Minister Modi and President Obama during Obama’s visit to India earlier this year included attempts by the two leaders to bridge the IPR gap on different levels. This included setting up a high-level working committee to discuss IP and a proposal for a bilateral investment treaty (BIT). Although some concerns were raised regarding public interest safeguards and investor-state arbitration provisions, the bilateral investment treaty can provide legal certainty to investors who hitherto considered India’s business climate to be hostile and riddled with bureaucratic and regulatory hurdles. These steps will help the two countries strike a balance between access and public interest, create incentives to innovate, and finally, establish adequate safeguards against the frivolous use of IP, which, inter alia, results in costly litigation.

What are some of the important interests that Indian businesses, particularly in the fields of pharmaceuticals, green tech, entertainment, and manufacturing, have in the reform of India’s IP policies?

In the pharmaceutical sector, Indian businesses are concerned about multinational companies not bringing some of their patent-protected drugs to the market, thereby denying patients access to beneficial medicines. The problem is much worse in the case of essential lifesaving drugs. Some Indian businesses would perhaps like to see the Indian government take a more cautious approach in discussing IP issues in the Trade Policy Forum. This is because of the potentially far-reaching implications the decisions can have on the broader issue of access to medicine in India and in other developing countries. For instance, the Indian generic drug industry would not want the government to put in place provisions of data exclusivity and patent linkage, which will affect the speed of entry of low-cost generic drugs in the market. Price discrimination is a common strategy of many businesses, including those in the pharmaceutical sector. What we need to understand is that part of the decision of some of the biggest pharmaceutical companies to make their drugs available to the poor in low-income countries is due to the competitive threat from Indian generic drug companies.

Businesses in the manufacturing sectors expect changes in policies that can improve both competitiveness as well as the current innovation ecosystem. In the last few years, there has been a
discernible shift in policymaking toward promoting clean energy in India. All the parties to the UN Framework Convention on Climate Change, including the United States and India, have committed to cooperate to promote, facilitate, and finance the transfer of environmentally sound technologies and technical know-how. Those in the green-tech sector are keen to see clear policies that facilitate dissemination of such technologies, including, for instance, removing trade barriers and implementing favorable FDI policies. Coherent environment and trade policies will help bring about technology transfers and access to low-carbon technologies as part of the broader National Manufacturing Policy of the current government.

The Indian entertainment industry suffers losses from rampant piracy. These apprehensions are growing due to increasing access to digital technology and online media as well as a corresponding rise in cases of illegal downloads and video recording. Before making policy or legislative changes, it is important to educate people, especially youths, about the value of creativity, craft, and copyright and to think about innovative ways to make people more aware about these issues. In the past few years, the entertainment industry has seen some significant changes. Litigation around IP issues has increased, mostly involving conflicts over royalties and copyright violations of scripts and songs. To meet domestic and international requirements, significant amendments were made in 2012 to the Indian Copyright Act to strengthen protections for rights in artistic works, films, and sound recordings. Some of these changes included laying down specific considerations in allowing compulsory licenses, under special circumstances, for unpublished work held back from the public domain; determining appropriate royalty rates in granting compulsory licenses for the disabled; and introducing technology-protection measures and special fair-use provisions. The industry will have to wait and see how these changes play out. The Indian entertainment industry has an important interest in setting up a solid agency for copyright enforcement to ensure compliance with the amendments. A lot depends on how efficiently the reconstituted copyright board performs its duties to realize the law’s original vision.

What do you see as the most urgent areas for reform in India’s IP policies? What obstacles have prevented the Indian government from addressing these issues in the past, and do you see these hurdles being overcome in the near future?

I think creating awareness among common users of all kinds of IP-based products and services is imperative. India’s National Pharmaceutical Pricing Authority also needs to work in a more predictable manner, but the emphasis should not always be on the biopharmaceutical industry. India needs to do more to curtail online piracy, deal with the myriad technology-based dodging devices in the creative sectors, and ensure strong enforcement of the IP laws that are already in place to tackle these problems. There have been a number of positive developments, including the greater emphasis on the rights of authors in the field of sound and movie recording in the recently amended copyright law and the decision by the current government to formulate a national IPR policy that promotes awareness and respect for IPR, as well as strengthening enforcement mechanisms. I certainly see the huge copyright-based creative industry overcoming challenges in the near future.
You have written extensively on the challenges facing Indian academics in the field of IPR, including a lack of innovative research, publications, and qualified instructors. Prime Minister Modi has made IP reform a priority in his efforts to improve India’s business environment, establishing a high-level think tank to consider reforms and drafting a much-publicized IP policy. Have these efforts begun to address the challenge of educating India’s future IP professionals?

Since 2001, the Indian Ministry of Human Resource Development has instituted twenty research chairs in IPR at various universities. The functioning of these IPR chairs has been mired in unseemly controversies reported in the media. In an article in Law & Policy Brief published by the Jindal Global Law School, we have highlighted deficiencies in research and teaching in these chairs, despite the generous financial and logistical support they receive.

The draft national IPR policy envisages IPR as “an integral part of India’s development” and states that the “Make in India” initiative must be “predicated on fostering innovation and creativity by generating, protecting and utilizing intellectual property assets.” Unfortunately, the draft fell short of expectations and a lot still needs to be done. In the absence of a well-trained pool of IPR experts, such goals are unlikely to be realized. It is vital for governments to pump resources to build capabilities in universities, which can impart relevant knowledge and skills. Competent IPR experts are needed not only for complex negotiations in the World Trade Organization and other intergovernmental forums but also because IPR is a highly litigious field that involves advanced aspects of international law.

The national IPR think tank, which drafted the policy, did not make any concrete recommendations on how exactly the functioning of the chairs can be improved. We have yet to see the chairs assist the Indian government and judiciary on matters of law and policy. As the final policy is yet to be released, it would perhaps be unfair and premature to judge these shortcomings too harshly. I hope that the final policy will seek to enforce accountability in national educational institutions involved in IP teaching and research.
You and your colleagues at the Centre for Intellectual Property and Technology Law (CIPTEL) at the Jindal Global Law School provided extensive commentary on the draft national IPR policy. Can you highlight some of your most important thoughts and criticisms? Have you seen any indications that they will be addressed? What do you see as the most likely IP reforms that Prime Minister Modi will accomplish in the short to medium term?

Apart from the recommendations to help improve the quality of IP education, CIPTEL submitted extensive comments on all chapters of the document and was invited to present its recommendations before the think tank in February this year.

As a general criticism, it must be noted that the draft policy, although quite comprehensive in its coverage, contains little empirical data and no scholarly opinion in support of its recommendations. Only anecdotal evidence has been presented for some objectives. It also does not provide clear timelines for achieving its objectives, apart from stating that a “major review of the policy will be undertaken after three years.” Furthermore, no cost estimates have been mentioned, although we acknowledge that it might be too early for the think tank to provide concrete figures. Given that the government’s resources are limited and need to be allocated in several competing areas, an indication of which objectives are of the highest priority, along with an impact assessment, would have made the draft policy more useful.

A coherent nationwide innovation framework depends on the existence and availability of sound statistics. In this context, one of CIPTEL’s suggestions was to initiate a nationwide survey (along the lines of the European Community Innovation Surveys) on inventive activity and IP in India. The resulting micro-level data would also be valuable for researchers in academia and industry. This recommendation will require more time to implement. Another suggestion was to include technologies covering environmentally friendly inventions in areas such as solar, combustion, smart grids, wind, and hydroelectric technologies on the list of national priority areas. The fees for accelerated patent examination for early publication and for expedited examination for Patent Cooperation Treaty applications should be waived for these technologies.

The policy should also be mindful of the fact that educational campaigns will not be effective without a crackdown on hawkers that sell pirated and counterfeited products, in most cases openly. As hawkers often form political unions, a dialogue with the political establishment, along with such unions, should be established to phase out the sale of pirated and counterfeited products. To raise awareness and elicit interest, films where IP is an important theme can be screened for the youth. Following in the footsteps of the U.S. Patent and Trademark Office (USPTO) and European Patent Office, tools such as games, videos, and quizzes should be used to reach out to kids. This has recently been implemented by the Indian Patent Office with the launch of “Kids Nook” in March, focusing on different forms of IP.

Finally, there ought to be greater emphasis on the training of judges at the lower levels of the judiciary in order to equip them with IP expertise early in their careers. There is also a need for the Indian Patent Office to innovate. Cash rewards can be offered for the development of new software
Given the myriad challenges India faces in strengthening its business environment—including poor infrastructure, FDI caps, and cumbersome regulations—just how much of an impediment is India’s IP regime to attracting foreign investment?

The backlog of pending IP cases and dismal judge-population ratio are impediments in India’s legal system that require urgent attention. A fast-track and transparent legal system can improve FDI flows by making foreign investors more confident in the security of their investments. IP rights by themselves are insufficient to attract FDI, which also relies on domestic absorptive capacity as well as conducive industrial and competition policies. That being said, technology and other transfers emanating from foreign investment inflows tend to be positively correlated with the strength and enforcement of IP rights. The government is taking steps to dismantle certain regulatory and bureaucratic hurdles and scrap archaic laws, in addition to trying to demystify the country’s IPR regime through a national IPR policy. India should continue liberalization policies that focus on growth, socioeconomic development, and promotion of innovation.

What do you see as the most likely IP reforms that Prime Minister Modi will accomplish in the short to medium term?

Data on expenditure, in nominal terms, presented in the 2015 Union Budget of India by Prime Minister Modi suggests that the total funding for the IP system has increased by only a small amount. This includes budget allocations to modernize and strengthen the Indian Patent Office, Geographical Indications Registry, and the Intellectual Property Appellate Board—India’s only specialized IP tribunal. Amid the imbroglio around IP issues, some experts have suggested that the government will look at modifying administrative rules rather than pushing for significant changes in the law. Streamlining the quasi-judicial system, which adjudicates IP issues, is also in the cards. In any process to reform IP policy in India, issues of patent law and pharmaceutical drugs end up taking center stage. Regulating marketing practices by pharmaceutical companies, checking price-control mechanisms, and reducing delays in regulatory approvals need particular attention, though it is difficult to say how likely such efforts are to succeed. It is clear that after the controversy over the compulsory license issued by India, the government has now become more cautious in its approach. Like most countries, India too needs to do much more to improve its IP regime, facilitate IP rights, and foster a climate of innovation.

Louis Ritzinger is a Bridge Award Fellow at NBR.
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Ashish Bharadwaj is Assistant Professor and Editor of the Law & Policy Brief at the Jindal Global Law School. He is a member of the Centre for IP and Technology Law and an affiliated faculty at the Center for Intellectual Property Research in the Maurer School of Law at Indiana University, Bloomington.

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