Intellectual Property Protection in India*

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Paper reviews the level of intellectual property protection in India and presents a strong case for a better IPR regime.

When we are talking about intellectual property rights (IPR) we are not talking only about patents. It is very important to appreciate that we are talking of various other forms also; we are talking about copyrights, royalty rights, we are talking about industrial designs, trade marks and so on and so forth. In each of these cases, barring patents and the Paris Convention, whenever there has been an international convention, we have been signatories. So, it is quite incorrect to assume, as is often assumed, that India has no tradition of protecting intellectual property.

The case law, for example, is quite developed in the area of copyright, trade marks and industrial designs. It is indeed true, you do not seem to have had too many cases of integrated circuits, disclosure of information and geographical indications. But that is perfectly understandable. In the other areas, certainly, we have a well developed case law, in addition to the statutes.

Copyright Protection

One of my fellow economists is now in the Cabinet in West Bengal. About 19 years ago, he was a teacher and he was writing a book. When the manuscript was ready, one of his colleagues plagiarized it, pilfered his book — not plagiarized, because it has not been published — pilfered it and published it under his own name. I remember this. the fellow economist was extremely agitated “how can he do this with my work”. Of course, he is now one of the most important opponents of introducing product patents in India.

The copyright legislation was amended in 1992. Although we had a period of 50 years,

in 1992 it was made 60 years. Why did we suddenly move from 50 years to 60 years. The reason is very simple. Because, Viswabharati had a monopoly of publishing Tagore’s works and in 1992 it expired. So, to preserve that monopoly, it was increased from 50 to 60 years. It would look bad if you do it only for Tagore; so, you club in Prince Charles web. Most Bengalis are the strongest opponents, you will find, of IPR protection, patent protection, but not of copyright. So, it is a very ambivalent attitude.

You see this kind of attitude, particularly in the minds of the courts. It is something like this. All knowledge is public property; how can you expect a price for knowledge. You go back to the Vedas, and you have not sold the Vedas for eternity. Therefore, you will find, the enforcement has been remarkably lax.

In a perverse sort of way, I have often wondered, what is the big problem, why don’t we simply change our legislation. We know very well we have already enforced it. As everyone knows, typically you have a minimum penalty and maximum penalty and the judge has to award punishment within that range, within the minimum and maximum, to have fine and/or imprisonment except in the case of copyright law, which applies to software. Before 1994, the judge had the discretion to choose a punishment that was somewhat outside that range.

Why has the attitude towards software changed? The reason for that is NASSCOM; the reason for that is Indian companies manufacturing software, which are increasingly suffering from piracy, not because of external pressure.

Exactly the same sort of thing happened, not only in enforcement but something that is related, namely, using criminal remedies in addition to civil remedies, which also is one of the essential ingredients in the TRIPS Agreement in the Uruguay Round. Of course, if you track what has happened to cases in India, you will find these criminal provisions have rarely been invoked because, as I have said, enforcement has not improved, or has not historically been important.

**Strong IPR Regime**

Quite often and quite understandably, all these have been labelled as North-South issue. Indeed, the perception is, the moment you have IPR protection for patent or something else, the royalty payment will go up; to use a euphemism, reverse engineering will not be possible; not to use any euphemism, piracy will not be possible.

However, there is certain long run to it, there is very clear correlation between FDI and better IPR protection. The work by Mansfield has been mentioned, but there are other works also. What you will find in all these empirical works is that the correlation is particularly strong in the case of pharmaceuticals. It tends to be a little bit less robust for the other sectors, but certainly it is the case that, in the case of pharmaceuticals, there is very strong positive correlation between FDI inflows and good IPR protection.

In addition, there are issues of technology transfer, there are issues that relate to pharmaceutical companies abroad having to spend less on preventing piracy. In addition, there is the kind of issue that if you have FDI with better IPR protection, foreign pharmaceutical companies, particularly through joint ventures, are likely to invest in diseases, or finding cures for diseases that are much more relevant for your kind of situation than cardio-vascular diseases.
What is very strange in all this is that a country, which boasts of a very very large scientific and technological manpower pool, which is one of the largest in the world, why should it be scared of better IPR protection, be it in patents or somewhere else. Who started all this micro-organisms, in the US? Well, it was someone called Ananda Chakravarty, who was ethnically an Indian. He has invented a bacterium which has this remarkable property that it will swallow up the oil slick. That is how the whole thing began to change. Therefore, with this kind of knowledge base, there is absolutely no reason why one should be scared of better IPR protection.

Talking about patents and the pharmaceutical sector, it is very difficult to generalise about the pharmaceutical sector in India, because there is an enormous amount of fragmentation of production. You have about 23,000 to 24,000 pharmaceutical manufacturers, many of whom are one man shops in the states. Let us not talk about this. If you are talking about bigger companies, if you are talking about Ranbaxy or Dr Reddy's lab, if you are talking of companies which had already raised R&D expenditure to 5 per cent of the turnover, and have plans to increasing it to over 8 to 10 per cent, those companies have absolutely no reason to be scared of what is going to happen, particularly because the market for generic drugs is one of the fastest expenditure segments.

The ORG-Marg study is particularly revealing. The reason why it is revealing is, who are the people who are scared of this? Not the ordinary citizens. Are the pharmaceutical companies scared? No. So, who are the people who are opposing it? The people who are opposing it are the so-called “opinion makers”. And the opinion makers oppose it, because they perceive this to be “in the public interest”. I have a great deal of aversion to these two phrases “public interest” and “public detriment”, because virtually everything that has gone wrong with the Indian economy in the last 50 years has invariably been justified by using one of these two expressions “public interest” or “public detriment”.

If by “public interest” you do not mean the limited interest of inefficient domestic producers, then there is absolutely no evidence to show that the interest of the consumers or the interest of the citizens at large is going to suffer because of better IPR protection. Because, what happens is that limited monopoly, if indeed it is monopoly, is conferred for a limited duration of time. In the process, the inventor has to divulge what he has done. So, that is available to other people, who can use that information to carry forward the frontiers of human knowledge. In other words, in the slightly longer run, better IPR protection also fosters better competition. It is that competition which keeps things like prices in check.

In this context, the drug price issue is a very major issue. No one disputes for a minute that drug prices are not going to go up. However, the fears about drug price increases are greatly exaggerated. Let me mention only three reasons for this, for the fears being exaggerated.

One is the Drug Price Control Order (DPCO), which applies to essential drugs. There is nothing in the Uruguay Round Agreement, which says that you cannot continue to have DPCO. Of course, the DPCO has become unrealistic, but that is a different matter.

Secondly, as I said, you do not have monopolies. The pharmaceutical industry in India, the pharmaceutical sector world wide, is no
longer an industry where you have monopoly any more. For every drug that is on patent, you will find a substitute drug, with slightly different side effects, with slightly different therapeutic effects, which is off patent. Therefore, the issue of competition, which is the point I mentioned earlier, is a factor that keeps price in check.

The most important point to realise now is, no matter what the pros and cons of the Uruguay Round Agreement were, that Agreement is there now, there is no point arguing about it. What we need to do is to try and see what one can do to make the best out of this agreement.

**Indian Patent System**

The basic point here is to look at the Indian Patent Office. It receives about 3,000 patent applications per year. It cannot dispose of more than 2,000. I do not know what the precise figures are, I am just guessing those figures roughly, every year you keep adding a backlog of 1,000 pending applications. So, you cannot dispose of patent applications for 5 years. Even if you do that, you keep making all sorts of mistakes. So, what we are really talking about is, how do we upgrade the Indian Patent Office, how do we build up our database. Maybe, we should increase the fees that are charged for making patent applications, because they are one of the lowest in the world. Maybe, the use of this enhanced fee could upgrade, modernize and computerize the database. This is also in the context of plant and seed varieties.

In parallel with that, we are supposed to have the biodiversity bill, which has completely disappeared. We have the mysteries of two missing bills now, one is the patent amendment bill and the second one is the biodiversity bill. These have disappeared. What we need to build up in the context of biodiversity is some kind of a database. Similarly, genetic engineering is of special importance, because that is one area where the dividing line between invention and discovery is extremely thin and extremely fine.

Finally, *haldi, neem* and all that. What is this *haldi* business? It has been labelled in all the newspapers as a great victory that India has won over the US. I do not perceive it to be anything like that. What has happened? The US Patent Office made a mistake—all patent offices make a mistake; Indian Patent Office also made a mistake a couple of years ago—when it granted a patent to transgenic crops. So, when someone makes a mistake, someone can point out that mistake, and the patent is revoked. Assuming that it is an Indo-US battle, which as I said I do not perceive it to be, what does it really vindicate is that the system has redressal mechanism. If *neem* is going to be patented, which is not, but if it is going to be patented, there are redressal mechanism and the system works. Therefore, let us try out the system.