

Examining Patent Enforcement and Litigation in India from A Development Perspective – A study

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Abstract: Intellectual Property Rights (IPRs) have long played important roles in the innovation systems of most advanced economies. India, like many developing economies, began re-examining its approaches to IPRs when the World Trade Organization's Trade-Related Aspects of Intellectual Property (TRIPS) Agreement became effective in 1995. Patents represent one of the most powerful IPRs. The purpose of the law of patents is to protect inventive ideas by giving the inventor exclusive rights over the invention for a period of time. The procedure for granting patent, the requirements placed on the patentee and the extent of exclusive rights vary between countries according to the national laws and international agreements. Patent owners in India that want to enforce their rights in the courts have to deal with a series of obstacles. This paper explains about the effects of the legislative provisions concerning enforcement and litigation under Indian Patents Act and its compliance of TRIPS agreement. This paper briefly reviews the protection afforded with regard to dispute resolution and litigation under the statute and the problems relating to it. This paper attempts to point out several changes that should be brought about in the system or steps to be taken to provide better Patent protection to the inventors.

Keywords: Patents, Infringement, TRIPS, Enforcement, Litigation

1. Introduction

The enforcement of IPRs and the threat of enforcement are of primary importance to those engaged in innovative activities. The word 'Patent' is used to denote a monopoly right in respect of an invention. Patent is a grant made by a government to an inventor, conveying and securing him the exclusive right to make, use and sell his invention for a term of 20 years. It is granted for an invention which is new and useful. This right is available for a limited period of time. However, the use or exploitation of a patent may be affected by other laws of the country which has awarded the patent. The law relating to patent is governed by The Patents Act, 1970. The Indian Patents (Amendment) Act, 2005 introduced *product patents* in India and marked the beginning of a new patent regime aimed at protecting the intellectual property rights of patent holders. India's patent law dates back to 1856 with the enactment of Act VI of 1856 on Protection of Inventions, which is based on the British Patent Law of 1852[1]. Patents were called "exclusive privileges," and were granted fourteen year terms[2]. In 1959, the Act was expanded to include protection for designs. Although India had patent laws before the 1900s, formal patent protection was introduced with the enactment of the Patent Act of 1911[3]. During the middle of the twentieth century, the Indian government appointed two committees-the first in 1949 and the second in 1957-to review India's patent law and suggest potential modifications to the law [4]. The 1957 committee's recommendations inspired a Patent Bill that was passed by India's Parliament and effective as the Patents Act, 1970[5]. The 1970 Patent Act provided protection for processes, but did not provide protection for compositions of matter [6]. The term of patent protection for process patents was seven years from the filing date of a patent application [7]. India revised the 1970 Act in 1999, 2002 and 2005[8]. The 2005 revisions to India's patent law expand patent protection to food, drugs and medicines [9]. Until the 2005 amendments, India's patent law did not provide protection for pharmaceuticals [10].

The paper is organized as follows: Following a brief description of the methodology used, Section 3 identifies the provisions of enforcement and litigation under the Patents Act and its TRIPS compliance. Section 5 briefly describes the dispute resolution machineries available for patent protection and the role of judiciary in protecting inventors is well explained in Section 6 followed by a comparative evaluation of the

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approaches to IP litigation by the developed and the developing countries in Section 7 and the conclusions and implications of the study in Section 8.

2. Methodology

The paper is conceptual in nature. Research in this area of law involves the analysis of statutes, international treaties, conventions and case laws. The sources of research include both primary and secondary. The statutes are the primary sources while the case laws are the secondary sources. The primary sources include various international instruments such as Trade related aspects of Intellectual Property rights (TRIPS) and treaties under World Intellectual Property Organization. The secondary sources are mainly the books and articles written by eminent authors and experts, electronic data made available on the Internet by various websites, periodical and news sources.

3. Provision of Enforcement and Litigation under TRIPS Agreement and Patents Act

The provisions of the TRIPS Agreement essentially define the objective to be attained rather than the specific details of the procedures that may be incorporated by member countries. Part III of the TRIPS Agreement includes general obligations, rules on civil and administrative procedures and remedies to fulfil the general obligations, provisional measures, special requirements related to border measures, and criminal procedures.

Article 41 sets out the main principles regarding enforcement. India asserts that its 2005 amendments brought its patent laws into full compliance with TRIPS. These amendments have had dramatic effects. The Patents Act, 1970 provides under Chapter XVIII 'Suits Concerning Infringement of Patents' and under Chapter XIX 'Appeals'. Under the former, sections 104 to 115 deal with different issues related to jurisdiction, declaration as to non-infringement, cases of groundless threats of infringement proceedings, defences in suits for infringement, reliefs in suits for infringement, rights of exclusive licensees, damages, injunctions, certificate of validity, partially valid specification, and scientific advisers. The latter chapter deals with appeals, which are filed in a High Court. The provisions which are most often used are related to the declaration as to non-infringement in section 105 and the power of the court to grant relief in cases of groundless threats of infringement proceedings in section 106.

4. Dispute Resolution Mechanisms in India

In India, there are four dispute resolution mechanisms [11] with the following powers and duties:

- **Indian Patent Office (IPO):** The IPO examines patent applications and grants them if they conform to Indian patent laws. It also keeps records of renewal and working of patents. The IPO participates in resolving disputes related to pre and post-grant oppositions. The administrative functions of the IPO include formulating and implementing rules and procedures.
- **IP Appellate Board (IPAB):** The IPAB became operational in April 2007 to hear patent related disputes in the country. It is equivalent to the Indian High courts. It hears revocation proceedings and the appeals arising out of decisions of the controller of patents. The IPAB has technical and legal experts to handle IP matters.
- **District courts and High courts:** The Indian district courts are the first judicial machinery (adjudicating body) which can hear cases concerning patent infringement in the form of suits. The Indian High courts hear the appeals arising out of the decisions of the district courts.
- **Supreme Court:** The Supreme Court of India hears appeals against the decisions of the IPAB and the high courts. As the Supreme Court is the highest court of appeal, their decision is the final decision and is not appealable.

5. Role of Indian Judiciary in Protecting Inventors

Since the new law came into effect on January 1, 2005, there have been serious concerns regarding the role of the domestic Indian generic industry in the new product patents regime, and the continued availability

of essential medicines at affordable prices. Infringement litigation will follow a standard civil suit path through the courts, with appellate authority vested in the High Courts and ultimately in the Supreme Court. However, the structure of the Indian national court system is not conducive to imposing consistency. Each state maintains its own High Court, bound only by its own precedents and rulings of the Supreme Court, not by the rulings of other High Courts. This configuration can and does lead to splits among the High Courts, situations where a single national law is subject to different interpretations in different states. A suit was filed by **Bajaj Auto Ltd.** (the second largest automobile manufacturer in India) before a Single Judge of the Madras High Court alleging infringement of its Patent No.195904 by **TVS Motor Company Ltd.** (the third largest automobile manufacturer in India) under Section 108 of the Indian Patents Act. [12]. Another important case in dispute (legal battle) was between **Cipla and Roche** [13]. The courts found that Roche had concealed information regarding an earlier application that was rejected by the IPO. The ruling of the division bench was rather technical in nature and the validity of the patent was questioned and argued by both parties. In another famous case, **Bayer** received an Indian patent for Nexavar in March 2008, which is one of the potential blockbuster drugs of Bayer Corporation and is expected to clock an annual global sales turnover of around U.S \$1 billion soon. Besides, the Court has asked the Bayer Corporation to pay Rs 6.75 lakh to the Government and Cipla as legal costs. [14] The difficulties faced by a multinational patent holder are reflected in the landmark **Novartis** case [15]. In a decision reached on August 6th 2007, the Madras High Court rendered its judgement with regard to the well-known Swiss pharmaceutical firm's Novartis challenge to Indian patent law. In May 2006 Novartis decided to contest this decision before the Madras High Court and also argued that Section 3(d) of the Indian Patent Act was contrary to the TRIPS Agreement. On the latter point, the court found that a private company could not challenge a law as being TRIPS non-compliant, and that an Indian court is not the proper forum either to decide whether the Indian patent law is TRIPS compliant: this had to be taken before the WTO Disputes Settlement Body. However, the Swiss government, as the Member State where Novartis has its headquarters, has proclaimed no intention of taking the issue to the WTO. The decision is one part of an old litigation in which Novartis opposes the Indian government and generic manufacturers. From 1998, when Novartis filed a mailbox application, to 2003, when it was granted EMR by the Indian Patent Office, to 2007 and battling a refusal under Section 3(d) of the Patent Act, it has been a long journey [16]. Novartis moved the Supreme Court, which issued notices in 2009 and the matter is yet to be decided [17]. After this case with the denial of a patent to Gleevec has traversed through many pharma patents disputes and is still going strong with some recently decided patent cases.

Recently in September 2011, a Supreme court Judge in India has rescued himself from hearing Novartis case after protests from healthcare activists over his attending and making comments at events sponsored by IP owners [18]. Now the case is before India's Supreme Court with final arguments being prepared. After 6 years from the date of filing, the likely expectation of the Supreme court ruling in a couple of months in the Novartis case will surely have a great impact in the Patent arena.

The proceedings in these litigation cases are an indication that enterprises in India have started entering the patent game in a big way. Corporations are actively approaching courts to settle patent-related disputes. The United States also recommends that India improve its IPR regime by providing for stronger patent protection [19]. Particular concerns have been raised regarding provisions of India's Patent Law that prohibit patents on certain chemical forms absent a showing of increased efficacy, thereby possibly limiting the patentability of potentially beneficial innovations, such as temperature-stable forms of a drug or new means of drug delivery. India should also take additional steps to address its patent application backlog and to streamline its patent opposition proceedings.

The United States encourages India to provide an effective system for protecting against unfair commercial use, as well as unauthorized disclosure, of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products. Finally, the United States recommends that India take steps to improve the efficiency of judicial proceedings, and strengthen its criminal enforcement regime, by encouraging the imposition of deterrent-level sentences for IPR violations and by giving prosecution of IPR offenses greater priority. The United States looks forward to increased engagement with India to address these and other matters in the coming year.

6. Comparative Evaluation of IP (Patent) Enforcement and Litigation Approaches around the World

Approaches to IP litigation in some developed and developing countries:

Country	IP (Patent) Enforcement and Litigation Approach
Australia	The Federal Court of Australia, one of the superior court across the country, handles IP cases through specialized IP judges.
China	Specialized courts with panels consisting of two technologists and one judge resolve patent cases. A single appellate court in Beijing handles all patent appeals.
India	Indian courts treat patent or other IP case in a similar way as other commercial disputes. Acute lack of expertise on the part of judiciary and even the legal fraternity.
Japan	Specialized IP divisions of the national court system, in Tokyo and Osaka, hear patent disputes. Judges typically hire Patent Office personnel as technical advisers.
South Korea	The IP Office runs the independent and specialized IP Tribunal, though general trial courts can still resolve selected patent issues.
Malaysia	Special courts of IP constituted in 2007.
Singapore	A specialized court draws on a bench with IP expertise
United Kingdom	The Patents Court of the English High Court, a specialized court in the Chancery Division, has jurisdiction to hear all IP actions.

7. Conclusion and Implications

More than 75 patent infringement cases were pending in the Delhi High Court, and several others are pending in other Indian courts [20]. The effectiveness of procedures for enforcement of patents is more than ensuring that intellectual property rights are respected. The substantive obligations under the TRIPS Agreement are now being widely implemented in national legislation and so have become common denominators among member states of the WTO. Most countries make available various procedures and remedies for intellectual property enforcement. However, intellectual property right holders, especially bigger companies, constantly demand further government-led efforts for strengthening intellectual property right protection. Thus, developing countries are facing increased pressure from developed countries to bolster their efforts on the enforcement of intellectual property rights. These efforts are largely beyond international obligations as set out in the TRIPS Agreement.

India needs to have IPR infrastructure including IPR managers, IPR attorneys and IPR enforcement machinery. Poor enforcement can destroy the efficacy of even the best IP system. If IPR holders cannot trust the authorities to enforce even hard-won legal victories, the system will lose all credibility and perhaps more to the point, it will lose all ability to motivate.

India needs to improve its enforcement record to the point that potential innovators believe that the public will respect their IPRs whether voluntarily or for fear of official enforcement. Even though there are a series of problems encountered with regard to enforcement, the major problem to be considered in the Indian scenario is judicial delay. There is an inadequacy of the enforcement machinery and the slow judicial process. To strengthen the enforcement and litigation system powerful, it is proposed that the Govt. should come forward to introduce and establish a unified IP litigation system (equivalent to constitution of specialised IP courts). This system may ensure that IP disputes can be dealt with in a sophisticated way using a variety of procedural tools; the legal costs involved can significantly be well reduced and that the disputes can well be adjudged with a reasonable time frame (at least within a year). Irrespective of the complexity or the nature of the case, this system can ensure effective adjudication of IP disputes which can be handled by experts with appropriate fairness and justice.

8. References

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