

# **A Review of the IPR System in India and its Impact on International Business**

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## **INTRODUCTION**

In recent years, the world has witnessed great advancement in technology. This advancement has helped different regions of the world become more connected than ever before. Globalization has brought us closer than ever to McLuhan's (1964) vision of a global village. As national boundaries continue to diminish, national borders no longer define international trade and a constantly increasing number of businesses are seeking opportunities abroad. As a result, consumers now have a wider range of brands and products to choose from. In this competitive environment, one of the most critical questions multinational companies face is how to protect their intellectual property while still taking full advantage of global markets. These questions become even more important when local laws and regulations in any given country are viewed as inadequate to protect intellectual property of multinational companies; thereby forcing these companies to take suo moto action to protect their intellectual property.

In terms of purchasing power parity, India is the fourth largest economy with over a billion people (The Essentials Marketer's Handbook, Business World 2003-2004). However, it is a new economy with limited infrastructure. Since its independence in 1947, India chose the path of mixed economy, which allowed it to have trade and commercial relations with all the countries regardless of ideological leanings. In addition, India implemented WTO standards as a way to remain within the international trade community. Yet, significant differences in the philosophical, cultural, and political views towards the protection of Intellectual Property Rights (IPR) between India and the developed world still remain today. Hence, when making decisions regarding investment in India, IPR is one of the key myriad factors investors consider.

The objective of this paper is to provide an overview of the Indian judicial system, its efficacy, the past and recent developments in the Indian IPR system, and its effects on international business activities. The paper uses secondary data from existing sources and attempts to link the developments in IPR laws to the recent economic developments in India. Understanding where each country stands in relation to intellectual property rights is vital for multinational companies. This article gives a glimpse of Indian laws and judicial system to help multinational companies make decisions as to the extent to which they can rely on Indian laws and regulations to provide the required protection, and what steps these companies may take to improve the protection of their own assets.

## **BACKGROUND: A BRIEF HISTORY OF INDIA**

India, the fifth largest country in terms of land area, has intrigued and attracted people from around the globe for many reasons. It is currently home to about 1.2 billion people (The Essentials Marketer's Handbook, Business World 2003-2004) from almost all religious faiths in the world, making it the most culturally diverse and largest democracy on earth. Since its independence in 1947, India has taken up the path of modernization and industrialization, and is currently in the process of becoming an industrialized and hi-technology economy, where the prevalence of high-income is becoming more common (Mitra 2003).

At the time of India's independence, in 1947, agriculture and allied sectors provided well over 70 percent of the country's employment (Mukherji 2002). From 1950 to 1990, the per capita income growth was below 2% per annum (Mukherji 2002). The lack of competition, the government directed lending and other types of regulatory support provided few incentives to boost efficiency and develop new technology (Mukherji 2002).

The new development strategy in 1991, known by many as the economic reforms of 1991, was designed by the then political leadership to reverse the financial impoverishment of the government and the public / state-owned enterprises (Mukherji 2002). This strategy provided more sustainable policies where the private sector was given a more significant role in the country's economy after deregulation. The rate of investment did not register a significant rise but its composition changed: about 70% of the investment came from the private sector compared to 57% a decade earlier. The reforms have improved the efficiency of the Indian economy and raised its standard of living. The poverty rate fell to 26% in year 2000 compared to 36% in 1993. (Mukherji 2002).

Overall, these reforms liberalized the exchange rate mechanism, opened up the economy to foreign direct investment, and reduced the role of the public sector in the business. These reforms lead also to a symbiotic relationship with the world economy, ensuring a new look at the nation's economy and people by the world. These developments have urged the nation, and its leadership to review the Intellectual property regulation given the requirements on this by the World Trade Organization (WTO).

## **IPR IN INDIA: THE JUDICIAL SYSTEM AND IPR CURRENT STATUS**

### **The Indian Judicial System**

The main sources of law in India are the Constitution, statutes (legislation), customary law, and case law. The statutes are enacted by the federal legislature called the Parliament, state legislatures and union territory legislatures. India is a common law country, and has a written Constitution, which guarantees individual and property rights, through a hierarchy of courts (<http://www.indiaonestop.com>). Because India is a land of diversity, the Indian judicial system recognizes the local customs and conventions that are not against statute or morality or otherwise undesirable, to a limited extent (<http://www.indiaonestop.com>). A unique feature of the country's constitution is that people with different religions and traditions are governed by different personal law with respect to family affairs, e.g. marriage and divorce,. This recognition gives the aspect of cultural diversity formal recognition.

An integrated system of courts administers both union and state laws. The Supreme Court of India, seated in the capital - New Delhi, is the highest office in the entire judicial system. Each state has a High Court under which there is a hierarchy of subordinate courts. The Supreme Court has original, appellate and advisory jurisdiction. The original jurisdiction extends to the enforcement of fundamental rights given by the Constitution and to any dispute among states and the Government of India. The decisions of the Supreme Court are binding on all courts within the territory of India ([http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm)).

At the village level, people are encouraged to solve their local problems with the help of "Panchayats", which is a group of five respected people of the village whose ruling on the matter is final (<http://www.asiatradesh.com/india/legal.asp>). The overall judicial process has significant provisions that make the country an attractive business destination. Judicial activism has the potential of causing some friction between the Courts and the Parliament. In the event of a disagreement, the Parliament shall prevail. A national hierarchy of courts administers justice in India. The apex court is the Supreme Court followed by High Courts in all the states and district courts, and a ruling by a higher court on a specific case is binding on all lower courts if faced with an identical case. Higher courts have appellate power over lower courts.

Rule of law refers to the perceptions about the incidence of crime, the effectiveness and the predictability of the judiciary and the enforceability of contracts (Mitra 2003). The World Competitiveness Report (2003) has found India to be above the mid-point on the rule of law. In other words, India is above average when compared to other countries in issues such as: enforceability of private and government contracts, corruption in banking, crime and theft as obstacles to business, and losses from crime. This is a positive augur for the country. Such a positive positioning in the World Competitiveness Report represents a major determinant for the country's ability to attract international business and foreign direct investment (La Porta and Lopez-De-Silanes 1997).

### **IPR Current Status**

Intellectual Property Rights (IPR), concern ideas that are translated into tangible products, writings, etc. and are protected by the state for a limited period of time from unauthorized commercial exploitation (Seyoum 1996). They

include patents, trademarks, trade secrets, and copyrights (Seyoum 1996). A competitive advantage in the new world economy is based more on the development of new technologies than on availability of natural resources (Seyoum 1996; Ostergard 2000). The advantage created by technology cannot be sustained without adequate intellectual property rights. Seyoum (1996) found that strong intellectual property protection had a positive influence on foreign direct investment (FDI) in countries in which the economic environment was less favorable for investment and in which there was limited industrial and technological infrastructure. In addition, IPR protection has a positive effect on market- and export-oriented investments with products and processes that are relatively easy to imitate, which leads to the conclusion that IPR protection has some positive influence in the case of developed countries (Seyoum 1996).

The year 1999 witnessed the passage of major legislation with regard to protection of intellectual property rights in harmony with international practices and in compliance with India's obligations under WTO (Sheth 2004). At the same time, India showed signs of resistance to quick enforcement of international intellectual property right (IPR) protection laws as demanded by the developed countries, particularly the US. Under the WTO, India was required to implement WTO-standard IPR protection laws by 2005. It must be acknowledged that there has been remarkable progress in IPR protection in the field of software and cinema products. (<http://www.indiaonestop.com>)

Under pressure from its own domestic industry and other countries, India strengthened its copyright law in May 1994, which reflects the provisions of the Berne Convention on copyrights, to which India is a party. (<http://www.indiaonestop.com>). Classification of copyright infringements as "cognizable offenses" expands police search and seizure authority. While the formation of appellate boards under the new legislation should expedite prosecution, local attorneys indicate that some technical flaws in the laws, which require administrative approval prior to police action, need to be corrected (<http://www.indiaonestop.com>). Trademark protection is important, and has been raised to international standards with the passage of a new trademark bill (this has now become the Trademarks Act, 1999, that codifies existing court decisions on the use and protection of foreign trademarks, including service marks. Passage of the trademark bill was in 1998, which enforced trademark owner rights, which had been weak in the past, but is steadily improving as the courts and police respond to domestic concerns about the high cost of piracy to Indian rights' holders (<http://www.indiaonestop.com>).

India has significantly upgraded its laws and the legal system to handle patent-related litigation and allow patents in all areas of technology (Tikku 1998). Accordingly, the provisions relating to the setting up of the Intellectual Property Appellate Board (Tribunal) contained in the Trade Marks Act, 1999, with suitable modifications, have been made applicable to the Patent Law by the Patents (Amendment) Act, 2002. This was done to ensure speedy disposal of appeals against the decisions of the Controller of Patents, which, at present, lie to the High Court. The Patent Act, 1970, as amended by the Patents (Amendment) Act, 2002 has fulfilled India's international obligations contained in the Trade-Related Intellectual Property Rights (TRIPS) Agreements of World Trade Organization (WTO) Agreement. (<http://www.thehindubusinessline.com/bline/2002/12/24/stories/2002122402740500.htm>)

India's entry into the World Trade Organization (WTO) is a milestone in its joining the mainstream of the trade regulatory environment at the global level. India's participation in an increasingly rule based system in the governance of international trade is likely to ensure more stability and predictability, which ultimately would lead to more trade and prosperity for itself and the 134 other nations which now comprise the WTO (<http://www.rediff.com/money/2004/>).

Intellectual property has long been a concern for many industries, particularly for those, which have a heavy reliance on protection afforded by national IPR laws (Ostergard 2000).

A nation can have strong laws or weak laws, but unless they are enforced, they are virtually non-existent in terms of protection afforded IP owners and investors (Sherwood 1997). There is a well-established statutory, administrative and judicial framework to safeguard intellectual property rights in India, and international trademarks have been protected in India even when they were not registered there. The Indian Trademarks Law has been extended through court decisions to service marks in addition to trademarks for goods. Computer software companies have successfully curtailed piracy through court orders. Computer databases have also been protected. Right to privacy, which is not protected even in some developed countries, has been recognized in India.

The Indian government has formed an advisory committee to recommend changes in the 1970 Indian Patents Act and the bottom line is that India considers itself a responsible member of the WTO which suggests that international

class IPR protection should be in place by 2005. Given India's determination to emerge as a power in the global software industry, it is most likely that all IPR protection laws will be instituted and enforced by 2005. Protection of intellectual property rights in India continues to be strengthened further. The year 1999 witnessed the passage of major legislation with regard to protection of intellectual property rights in harmony with international practices and in compliance with India's obligations under WTO and TRIPS. These included: Patents (Amendment) Act, 1999 that provides for establishment of a mail box system to file patents and accords exclusive marketing rights for 5 years; the Trade Marks Bill, 1999 which repeals and replaces the Trade and Merchandise Marks Act, 1958; the Copyright (Amendment) Act, 1999 ; a legislation for the protection of geographical indications called the Geographical Indications of Goods (Registration & Protection) Bill, 1999; Industrial Designs Bill, 1999 which replaces the Designs Act, 1911; Patents (Second Amendment) Bill, 1999 to further amend the Patents Act, 1970 and make it TRIPS compliant ([http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm)).

The Government in India has taken some important measures to strengthen the intellectual property administration system in the country. Projects relating to the modernization of patent information services and trademarks registry have been implemented with help from WIPO/UNDP. The Government of India implemented a project for modernization of patent offices at a cost of USD 17 million incorporating several components such as human resource development and training, recruiting additional examiners, infrastructure support and strengthening by way of computerization and re-engineering work practices, and elimination of backlog of patent applications. The Trade Marks Registry has been strengthened and modernized. A project for modernization was earlier implemented during 1993-96. And further strengthening of the Registry is being taken up at a cost of USD 2 million ([http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm)).

With regards to enforcement, Indian agencies are now working assiduously and have been able to register a significant decline in the levels of piracy in India<sup>1</sup> Making India Globally Competitive (Sheth 2004). In addition to intensifying raids against copyright infringers; the Government has taken a number of measures to strengthen the enforcement of copyright law. Special cells for copyright enforcement have been set up in 23 States and Union Territories. In addition, for collective administration of copyright, copyright societies have been set up for different classes of works ([http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm)).

The government has continued to stress the need for strict enforcement of the Copyright Act and Rules. State governments and other Ministries regularly requested to lay special attention to ensuring copyright protection in their functioning. Instructions were issued to officers in the government requesting them to ensure copyright protection, particularly of software, in their work situation. The Government also brought out *A Handbook of Copyright Law* to create awareness about copyright laws and its importance amongst the stakeholders, enforcement agencies, professional users like the scientific and academic communities and members of the public. Copies of the Handbook were circulated free of cost to the state and central government officials and police personnel. National Police Academy, Hyderabad and National Academy of Customs, Excise and Narcotics conducted several training programs on copyright for the police and customs officers. Modules on copyright have been included in their regular training programs ([http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm)).

The Department of Education, at the Ministry of Human Resource Development, Government of India has initiated several measures in the past for strengthening the enforcement of copyrights that include constitution of a Copyright Enforcement Advisory Council (CEAC). As per the data relating to copyright offenses available with the National Crime Records Bureau, the number of copyright cases registered has gone up from 479 in 1997 to 802 in 1998. The number of persons arrested has increased from 794 in 1997 to 980 in 1998. The value of seizures has gone up from USD .65 million in 1997 to USD 1.70 million in 1998. These figures reflect the general improvement in the enforcement of the copyright law ([http://www.indianembassy.org/policy/ipr/ipr\\_2000.htm](http://www.indianembassy.org/policy/ipr/ipr_2000.htm)).

To overcome the weaknesses in the patent laws and be able to meet the WTO standards, the new law passed in December 2004 amending India's 1970 Patent Act, affects everything from electronics to software to medicines. But after joining the World Trade Organization in 1995, India had to change its patent laws by 1 January 2005 to meet its commitments under the WTO's agreement on Trade Related Intellectual Property Rights (TRIPS). The new bill, finally passed by the Indian Parliament on 23 March 2005, now recognizes both product and process patents

## **INDIA'S IPR ACTIVITIES AND THEIR IMPACT ON INTERNATIONAL BUSINESS**

International business is related to the judicial system, rule of law and the IPR laws and its protection systems in the host country (La Porta and Shleifer 1998). The implementation of an improved IPR administration and conformance to global standards could result in an immediate loss to the domestic industry, but the nation has decided to go ahead with the arduous task of complying with the WTO in January 2005. The strides made by India in complying with WTO and global standards with respect to IPR, has made the nation a viable competitor in the field. Bill Gates, the chief executive officer of Microsoft Corporation, has distinguished India as a most promising base for software development. If an IPR-conscious business leader like Bill Gates is of this opinion, one can conclude that India's IPR scene should not be a deterrent to foreign companies, it should work to instill the confidence multinationals require to be able to sell products protected by IPR in developing countries. In this section we argue that these positive developments will have significant implication for the country's international business attractiveness and engagement. The areas discussed are foreign direct investment, business process outsourcing, exports and imports, and research and development activities.

### **Foreign Direct Investment**

Foreign Direct Investment (FDI) is defined as investments in productive assets by a company incorporated in a foreign country. This is as opposed to investments in shares of local companies by foreign entities, an important feature of an increasingly globalized economic system. As per the World Investment Report World Bank (2003), Foreign Direct Investment in India has increased over the last three years to \$3.4 billion in 2002 from \$2.32 billion in the year 2000. The international financial community's response to the developments in the judicial and IPR administration is evident from the rise in FDI, and this trend is likely to continue in the future. This improved IPR systems supported by laws have made India an attractive destination for foreign investment making it the third largest recipient of foreign direct investment in 2003 after USA and China World Bank (2003).

We argue that with the recent developments in the IPR systems and legal provisions to protect it, falling in line with the requirements of the developed world are having a positive effect on the FDI. Cross-national empirical studies find a robust relationship between policy measures and economic performance and FDI (Levine 1997).

### **Business Process Outsourcing**

The 21<sup>st</sup> century is the century of knowledge, and a knowledge society is one which uses knowledge to empower and enrich all its people, uses knowledge to drive societal transformation, is committed to innovation, has the capacity to generate, absorb, disseminate and protect knowledge and uses this to create economic wealth for societal good, and lastly, uses this to enlighten its people so they develop an integrated view of life (Park and Kim 1999).

In the last decade India has witnessed and registered a significant increase in the business inflow on account of business process outsourcing.

The overall growth of the Indian economy has encompassed the software and computer industry, which led the country into a high speed spiral of growth. Among the major economies of the world, India has the fastest growing services sector exports. In 1993-2003, India's services exports grew at a compounded annual growth rate (CAGR) of as much as 17.3%, which for once is even higher than China's growth rate of 15%

(<http://www.itfacts.biz/index.php?id=P1442>). It is no wonder that over the past ten years, India has been one of the few countries to show a rise in share of world services exports (Planning Commission Government of India (2002), "Tenth Five Year Plan," (<http://planningcommission.nic.in>). The software sector was the most buoyant with an average annual growth rate of 55% since the mid nineties, and the exports of software had growth rates averaging 62% during the period, increasing from just \$ 0.8 billion in 1995-96 to \$ 9.6 billion in 2002-03. According to current projections, the software exports are projected to go up to \$ 41 billion by 2007-2008 Reserve Bank of India (2003), *Annual Report 2002-03*, Reserve Bank of India: Mumbai. The auto industry was almost stagnant for the first 40 years after Independence. The opening of that sector and the entry of global players has changed the rules of the game and

standards. International companies like Ford Motor Company and Hyundai Motor Corporation export cars made in India to the global markets and the size of automobile component exports is more than \$ 1 billion (<http://www.indiaonestop.com>) which is a result of the higher levels of IPR protection systems. Exports in the pharmaceutical sector also stand at \$ 2.5 billion. Over 20 Indian companies have FDA accreditation from the US government and about 17% of the exports of Indian drugs and medicines are to the US, emphasizing the high quality of the product. Indian pharmaceutical companies provide contractual research and development services for many multinational corporations from the developed world (<http://www.indiaonestop.com>).

A large part of this business is driven by low cost of manufacturing and development in India, but most (and especially software) is IP sensitive. This rapid growth in outsourcing from (into?) India is indicative of the fact that the new IPR related laws are bearing fruits for the Indian economy.

### **Exports and Imports**

The nation avails itself of Most Favoured Nation (this is a term of art under the TRIPs agreement status for its exports to all WTO Members. India's exports have nearly doubled to \$51.7 billion in 2002-03 from \$26.3 billion in 1994-95, in less than a decade since it became the member of the World Trade Organization in 1995. India's share in total world exports of goods and commercial services has gone up to 0.86 per cent in 2001 from 0.61 per cent in 1995 (<http://www.rediff.com/money/2004/>). The share of total goods and services traded in the external sector almost doubled from 17.1% of the GDP in 1990-91 to 31.8% of the GDP in 2002-03. Its share of merchandise exports as a percentage of the GDP has gone up from 5.8% in 1990-91 to 10.4% in 2002-2003 and the share of merchandise imports in GDP has shot up from 8.8% to 12.8% during that period. India's overall share of global trade in goods and services has gone up from around 0.5% in 1991 to 0.9% in 2002 (Reserve Bank of India (2003). India's external debt as a share of GDP has declined from 28.7% in 1990-91 to 20% in 2002-03 (International Monetary Fund 2003).

Though the gains in technology in other areas have not been as impressive, there is some optimism about the emerging technological capabilities in the last decade or so. India's corporations have entered global markets, after improving the technology and overall efficiency levels. Consequently, global companies have slowly started outsourcing high technology products from Indian industry, namely in the auto and pharmacy sectors. There are many examples of the technology gains achieved in manufacturing, the most significant being the automobile and pharmaceutical sectors. This significant gain in the export and international trade is significantly related to the IPR protection in India since the products being sourced out of the nation are IP sensitive.

### **Research and Development Activities**

Another evidence of advancement in technology in recent years by India is the large number of global corporations outsourcing research and development to Indian companies. Though accurate figures are not available, the evidence is that over 70 multinational companies have set up research and development facilities in India in the last decade. This together with the companies that came in earlier takes the number of multinational companies with research and development facilities in India closer to 100 (<http://www.indiaonestop.com>). The list continues to grow, just as is the range of industries involved, worth some important players as Microsoft, Texas Instruments, Unisys, and some pharmaceutical companies.

## **CONCLUSION**

India scores at 46 out of a total of 87 points in a study done by Sherwood (1997). Though some more progress needs to be made in the days to come, in the long-run, improved IPR protection scenario will put India in good stead, vis-à-vis other developing countries, vying for a share of the pie of global businesses. These developments in the last decade or so have positioned India as a major contender for international business, and have shown significant progress. As the nation continues to make strides in giving increased cultural recognition to IPRs, there shall be more progress in making Indian businesses international.

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