

Digital Transformation and IPR

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Abstract

Digital India is transforming India into a digitally empowered knowledge economy. It is an concept of government of India to give a common platform to the Government Departments and the people of India to interact easily and directly. The main aim is to make available the services of government electronically to citizens by reducing paper work. There are various challenges faced while implementation one of which is infringement of Intellectual property.

In this paper the different challenges faced by the Digital India Programme with focus on Intellectual Property Right (IPR) will be highlighted.

Introduction:

Digital India programme is the outcome of the changes due to the information and communication technology. Digital India is an innovative thought of Modi government. It includes plan to connect rural areas with high speed internet networks. An initiative to transform the country into digitally empowers knowledge economy. The programme weaves together a large number of ideas and thought into a single, comprehensive vision so that each of them is seen a part of larger goal. It is coordinated by Deity, implemented by the entire government- both at the centre and state.

Digital transformation (DT) – the use of technology to radically improve performance or reach of enterprises The technique used for interaction with each other has totally changed with the introduction of the digital revolution.

Challenges of Digital Transformation

- 1) Secure Platform
- 2) Bandwidth Challenge
- 3) Lack of Digital Experts
- 4) Infringement of Intellectual property
- 5) Cost & Budget
- 6) Content
- 8) Duplicacy
- 9) Resistance to Change

Above mentioned are the challenges in digital transformation. In this paper we will discuss about the Infringement of Intellectual property.

The World Trade Organization (WTO)

The World Trade Organization (WTO), which was established in 1995 as a successor to the General Agreement on Tariffs and Trade-1947 (GATT 1947), is the principal international organization governing multilateral trade among Members. The WTO embraces the principle of non-discrimination, based on the twin concepts of Most Favoured Nation (MFN) and national treatment between Members.

The WTO administers the implementation of a set of agreements, which include the General Agreement on Tariffs and Trade, other agreements in the goods sector (e.g., agriculture, textiles, sanitary and psycho-sanitary measures, Trade Related Investment Measures-TRIMs, anti-dumping, etc.), and in addition, agreements in two other areas, viz., trade in services, and Trade Related Intellectual Property Rights (TRIPs).

What is IPR?

Intellectual Property Rights (IPRs) refers to the legal ownership of by a person or business of an invention/ discovery attached to a particular product/ process which protects the owner against unauthorized copying or limitation.

Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time. Therefore, one important feature that requires note is that the right is not everlasting.

The IP is broadly divided into two main parts namely copyright and rights related to copyright and industrial property.

(i) Copyright and rights related to copyright:

The rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by copyright, for a minimum period of 50 years after the death of the author.

Also protected through copyright and related (sometimes referred to as "neighbouring") rights are the rights of performers (e.g. actors, singers and musicians), producers of phonograms (sound recordings) and broadcasting organizations. The main social purpose of protection of copyright and related rights is to encourage and reward creative work.

(ii) Industrial property:

Industrial property can usefully be divided into two main areas:

One area can be characterized as the protection of distinctive signs, in particular **Trademarks** (which distinguish the goods or services of one undertaking from those of other undertakings) and **Geographical Indications** (which identify a good as originating in a place where a given characteristic of the good is essentially attributable to its geographical origin).

According to WTO, the protection of such distinctive signs aims to stimulate and ensure fair competition and to protect consumers, by enabling them to make informed choices between various goods and services. The protection may last indefinitely, provided the sign in question continues to be distinctive. A functioning intellectual property regime should also facilitate the transfer of technology in the form of foreign direct investment, joint ventures and licensing. The protection is usually given for a finite term (typically 20 years in the case of patents). WTO claims that the exclusive rights given are generally subject to a number of limitations and

exceptions, aimed at fine-tuning the balance that has to be found between the legitimate interests of right holders and of users, such that the social objectives are kept in mind besides the economic interests.

What is TRIPs?

Having defined and classified IP, let us now look at TRIPs: The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is an international treaty administered by the World Trade Organization (WTO) which sets down minimum standards for most forms of intellectual property (IP) regulation within all member countries of the World Trade Organization.

TRIPs deals with the following IPRs

- Copyright and related rights;
- Patents;
- Trademarks;
- Geographical indications, including appellations of origin;
- Industrial designs;
- Integrated circuit layout-designs;
- Protection of undisclosed information
- Control of anti-competitive practices in contractual licenses

TRIPs also specifies enforcement procedures, remedies, and dispute resolution procedures.

WTO specifies the three main features of the Agreement as;

- **Standards:** In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.
- **Enforcement:** The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures.

- **Dispute settlement:** The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

Under TRIPs, all countries have to provide for protection of product patents from January 1, 1995. But developing countries like India, which did not have a regime of product patents, had a transition period of ten years-until January 1, 2005, to affect the switch over. During this transition period, it was decided that these economies would accept applications for patents (which would be considered and granted after January 2005) and provide EMR (Exclusive Marketing Rights) for the producers of patented drugs (in the pharmaceutical industry) and agrochemicals.

The transition period for least developed countries was extended to 2016, and could be extended beyond that.

The TRIPS Agreement is a minimum standards agreement, which allows members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

Why TRIPs?

- Art.7 defines the main objectives and principles, which mentions that Intellectual Property Rights should contribute to social and economic welfare and to a balance of rights and obligations of the members.
- Art.8 stipulates prevention of abuse of IPR that will restrain trade or adversely affect international transfer of technology. A liberal and permissible interpretation of these Articles will ensure equity in the application of TRIPS to the benefit of the country's economy and social welfare.
- A weak IPR regime in developing countries leads to losses from "re-engineered products" for the original innovators, namely the Western multinationals and lowers the incentives for local developing country firms to undertake basic R&D themselves. Thus, the countries of the triad, the U.S.A., Europe and Japan, have been working towards the

global harmonization of IPR regimes since the last two decades. TRIPs is one of the culminations of their efforts.

- The countries initiating TRIPs based their actions on the presumption that a strong IPR regime is a critical pre-condition for private investment in research and development, and hence economic growth.
- It is contended that an expanded and strengthened protection of IPRs would bring about increased flows of foreign direct investment and technology transfer to developing countries. It would also stimulate local innovation.
- Finally, it would also enable the multinationals of the developed countries to recuperate markets from local imitators. The developing world is, on the other hand, not so confident about reaping benefits from this global IPR regime, since having access to technological knowledge is perceived as being crucial for economic growth.

The Controversy:

Since TRIPs came into force it has received a growing level of criticism from developing countries, academics, and Non-governmental organizations. Some of this criticism is against the WTO as a whole, but many advocates of trade liberalisation also regard TRIPs as bad policy. TRIPs' wealth redistribution effects (moving money from people in developing countries to copyright and patent owners in developed countries) and its imposition of artificial scarcity on the citizens of countries that would otherwise have had weaker intellectual property laws, are a common basis for such criticisms².

There exists an extensive literature on the possible impact of TRIPs on developing countries. They deal with this problem along different lines, examining the impact on: R&D, foreign direct investment, technology transfer, market demand and prices that consumers would be paying.

Indian Scenario:

As a signatory to the Uruguay round of GATT, and the founder member of the WTO, India was obliged to meet all provisions of the Trade Related Aspects of Intellectual Property Rights (TRIPs). A transition period was accorded to developing countries depending on their state of development. India has completed the complete term of this transition period i.e. 10 years, to set

up an IPR system in compliance with TRIPS. The main elements of change in the Indian patent system are:

- Enforcement of product patent protection in all branches of technology, including drugs.
- 20 years of protection instead of 14 or 7 in the case of the Indian patent Act.
- No discrimination between imported and domestic products.
- Accommodate compulsory licensing (though no country south of the equator has yet used this clause).

A brief comparison is given in **Table 1** indicating the main changes that are warranted in the Indian patents Act of 1970.

Table 1

Comparison of India's Patent Act and TRIPs

Indian Patent Act of 1970	TRIPs
Only process not product patents in food, medicines, chemicals	Process and product patents in almost all fields of technology
Term of patents 14 years; 5-7 in chemicals, drugs	Term of patents 20 years
Compulsory licensing and license of right	Limited compulsory licensing, no license of right
Several areas excluded from patents (method of agriculture, any process for medicinal surgical or other treatment of humans, or similar treatment of animals and plants to render them free of disease or increase economic value of products)	Almost all fields of technology patentable. Only area conclusively excluded from patentability is plant varieties; debate regarding some areas in agriculture and biotechnology
Government allowed to use patented invention to prevent scarcity	Very limited scope for governments to use patented inventions

Source: Adapted from Patent Office Technical Society, Indian Patent Act, 1970 and Rules, 1991 and MVIRDC, GATT Agreements: Results of the Uruguay Round, World Trade Centre, January 1995

Impact on Major Sectors:

The Major sectors and industries that would be affected with the TRIPs agreement would be Agriculture, Pharmaceutical and Biotechnology Industries.

The greatest impact is expected to be on the Pharmaceutical industry as it's a knowledge based and research oriented industry. Here are some challenges and opportunities that can be noted specifically arising out of this agreement. India today has become one of the major exporters of cheap drugs not only to developed countries but also to other developing countries, the advantage India has is lower prices due to low labour costs and comparatively lower expenditure on Research and development. With the significant change in the IPR regime, there are concerns regarding the export earnings diminishing. Another concern is that compliance with the TRIPs is expected to create a monopoly of the patented drugs and lead to a crisis in the public health issues.

On the other hand, some feel that it is equally plausible that the Indian national system of innovative has evolved sufficiently to take advantage of the strengthening of the IPR system. This view is particularly supported by the clear success of India, in market based, high-tech domains, such as generics and software.

The prescription by TRIPS for product patent implies the following for the industry:

- The industry has to now emphasis on basic research. The days of core competence of the industry in reverse engineering seems to move towards natural death. The firms in the industry now have to offer newer drugs to the customers to break the competitive forces.
- Every industry has to develop a strategic outlook and have a internal policy for innovation if it is looking for sustainability in the long term.
- IPR system requires further escalation for encouraging real outputs in innovation and creativity.

Overall, the industry feels that the TRIPS in its present form, is bent in favor of developed nations and its MNC's and that there is nothing trade related about TRIPS and that the right to trade is being exploited by developed countries. Besides these, the imports are expected to increase leading to a serious question on self-reliance of these industries and overall it may have a dampening impact on the growth of this industry. .

Conclusion:

It is generally observed that a strong patent regime has often been found detrimental to the process of industrial development in particular and scientific advancement in general. TRIPS may prove to be a breeding ground for cost inefficient process technologies. The possible solutions suggested by experts in the field to this problem are:

- Simplify and streamline India's compulsory licensing procedure.
- Retain the pre-grant opposition procedure in its original form. This permits opposition to potentially frivolous patent applications, protecting consumers against high prices on non-innovative pharmaceutical products under consideration for patent protection.
- Remove provisions for the granting of new-use or second-use patents,
- Immediately implement the clause which allows compulsory licensing and importation if the domestic production facility is in-sufficient.

It is thus advised by the group of experts, that the Indian government should, instead of fulfilling its obligation in haste, shall make such amendments in the act which adequately safeguard and protect the interests of the domestic industries and market, taking advantage of the concessions given in the TRIPs agreement.

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