

# IPR policy must drive innovation

It will also have to balance public policy objectives and private rights of the creators of new knowledge

Commerce & industry minister Nirmala Sitharaman has made a significant announcement that India would have a National Intellectual Property Rights (IPR) Policy. Many would argue that this pronouncement would not involve a paradigm shift in the government's approach towards IPRs since there is already a degree of coherence in the way this issue is being dealt within the government. But few would disagree that there seems to be a need to consider this critical area in a more holistic manner. What is needed is identification of the elements, which can help in laying the foundations of an IPR policy that clearly articulates the needs of the country. This exercise has become important for two compelling reasons. One, advanced industrialised countries are ratcheting up global standards for intellectual property protection with monotonous regularity, keeping in view the interests of the dominant corporate interests. Two, countries like India are being put under tremendous pressure to accept these norms through bilateral processes or unilateral measures like Special 301 investigations used by the US.

The first challenge for the IPR policy is to draw a clear line between the global developments in setting of norms and standards for intellectual property protection and India's priorities. The present government should be able to deal with this issue quite easily, since over the past several decades, India's performance in this regard has been nothing short of exemplary. In the case of patents, the most important form of IPRs, India has been able to develop an extremely coherent national position that few in the developing world can boast of. This position was given effect for the first time in the Patents Act, 1970, the law having been developed after Parliament deliberated over it for more than two decades. This Patents Act was the country's patent policy, although it never got the epithet it deserved.

The architects of the Patents Act were mindful of the incentives that a patent monopoly should provide to the country's scientists and technologists and, at the same time, they tried to ensure that the monopoly granted to the inventors did not result in higher prices of essential products like pharmaceuticals. The

latter focus of Patents Act was a response to the problems that the country faced while implementing the Indian Patents and Designs Act of 1911. A report of the Committee on the Judiciary of the US Senate commented in 1961 that in India, which was one of the few countries granting patents on pharmaceutical products, the prices of antibiotics were among the highest in the world.

The feature of India's patent policy was that it was able to strike a balance between the interests of the owners and users of patented products. Quarter of a century later, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) adopted under the aegis of the WTO underlined the imperative of a similar approach. The TRIPS agreement, which established global standards for IPRs, states in its objective that "protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology; to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations". The principles on which the agreement has been founded emphasise that while amending laws, WTO members must "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development" and they need to adopt measures to "prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology".

For establishing the right balance, India's patent law includes provisions that do not allow patent holders to exert excessive influence over the market for patented products, to the detriment of



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the public at large. Thus, India's patent law does not allow the grant of patents for minor innovations. Section 3(d) of the Patents Act ensures that rights cannot be obtained if an inventor made only minor modifications to an existing product. After all, a 20-year patent term was agreed to only because large pharma firms argued that they needed a longer period of patent monopoly to recoup their substantial R&D costs for producing new molecules. This logic demands that entities making minor modifications of an existing product should not enjoy the rights as those making major investments in R&D.

Public interest considerations have resulted in the adoption of the system of compulsory licensing.

These provisions can be invoked where patent monopolies are in conflict with public interest. Such circumstances can arise when a patent holder charges exceptionally high prices for a patented medicine or does not make a medicine available when the country faces a public health crisis. Under these conditions, India's patent authorities can issue a licence to anyone other than the patent holder who is willing to produce the patented product, on payment of royalty to the patent holder.

These two provisions in India's patent policy underline the fact that the patent system represents a balance between enjoyment of private rights and the promotion of public interest. Other IP laws on the country's statute book are modelled along similar lines. The Protection of Plant Varieties and Farmers' Rights Act, which enables commercial breeders to protect their new plant varieties, allows the farmers using seeds of protected plant varieties to reuse the seeds from one harvest to the next. India's Copyright Act includes a broad rendering of 'fair use' provisions, the exceptions allowed under the Act for education & research.

Some of the major forms of IPRs can make a fundamental impact on the devel-

opment pathway. For instance, the patent policy has deep imprint on the innovation ecosystem. Though the dominant view in this regard is that patent laws spur innovation, there is evidence that a patent system that puts too much of emphasis on protecting the rights of the inventor can cause harm to the innovation system. Over the past decade, the US has been witnessing an engaging debate, in which the Federal Trade Commission (the agency entrusted with the task of preventing anticompetitive business practices) has played an influential role. FTC has said that a patent system overloaded in favour of the rights holders gives rise to coercive monopolies that could prevent entry of new players in the innovation system.

What should be the underpinnings of India's IPR policy? The first prerequisite should be to preserve the balance between public policy objectives and the private rights of creators of new knowledge, which has been the hallmark of the country's IP laws. Perhaps more important task of the IPR policy is to provide the basis for an innovation ecosystem that has eluded this country, if the results of innovative activities are any indication. For decades, India has boasted of a science and technology (S&T) infrastructure and manpower that are among the world's best. Yet, barring a few exceptions, this S&T system has failed to contribute to the lives of the common man. For instance, large sections of the population are suffering from diseases such as TB, malaria and leishmaniasis (kala-azar), but the innovation system has not responded adequately to this suffering. The challenge for the IPR policy is to provide an environment that allows the S&T talent to manifest itself and not be drowned under the weight of the patent monopolies, as has happened in India.

Finally, it is essential that the IPR policy is supported by institutions such as the US FTC, which can perform critical oversight functions and prevent abuse of patent monopolies. This can ensure that IPRs contribute to societal welfare and progress, instead of being mere hand-maidens of powerful corporate interests.

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