Pravin Anand lends his views on India's IPR framework

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Business Standard's article 'Can a stronger IPR regime hurt India's push for generics?' sees Pravin Anand contribute to the discussion on India's IPR framework.

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The article as published:

Can a stronger IPR regime hurt India's push for generics?

Indian experts think so; MNCs raise concerns around the definition of inventions, provisions for compulsory licensing

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India's intellectual property rights (IPR) framework has long been a touchy subject for Western countries and their multinational conglomerates. The topic came to the fore again during Prime Minister Narendra Modi's last visit to the United States of America, where business leaders implored him to create a stronger IPR regime to facilitate further innovation in India.

The call for a more comprehensive Indian IPR structure by developed countries is anything but new. In 2014, a US Trade Commission Report had highlighted "India's weak standards" in IPR, with a particular focus on protecting patents. To address these concerns, India promulgated the National IPR Policy in 2016 with the objective of balancing the interests of rights holders with those of the public.

Pravin Anand, managing partner of law firm Anand and Anand, says that India has a strong IPR framework in place and whatever gaps that may still exist are being addressed swiftly. The nation and its lawmakers were confident that the 2016 policy would be sufficient to meet international expectations and bolster India's commitment to the 1995 Agreement on Trade-Related Aspects of International Property Rights (TRIPS) and the 2001 Doha Development Agenda. However, Western nations were not as enthused with the new stance, which they saw as merely pacifying the situation without taking a more robust approach. As a result, the 2017 Special 301 report by the US Trade Representative's Office has once again placed India on the 'priority watch' list, which said that it was disappointing that even after the 2016 policy, substantive changes to the existing legislation were still not implemented.

Being placed on the 'priority watch' list means India has been termed a country with serious IPR deficiencies. Although coercive actions are not to be taken against the nations on this list, the US policy allows for retaliatory actions if the situation worsens. Even the US Chamber of Commerce's Global Intellectual Property Center has ranked India 43rd among 45 countries on its 2017 International IP Index — just above Pakistan and Venezuela.

Some major Western concerns about India's patent framework are the definitions of inventions and provisions for compulsory licensing. Section 3 of the Patents Act, 1970, lays down what are not inventions. Section 3(d) in particular says that the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus, is not an invention capable of being patented unless such known process results in a new product.

The provision has been the cause for much concern within the multinational companies, although the TRIPS and World Trade Organization

regulations allow for such national exceptions. "Just because the provisions of Section 3 remain in force does not take away from TRIPS compliance and fulfilment of minimum global standards," says Adheesh Nargolkar, partner, Khaitan & Co.

Another contentious issue raised by these foreign players is one of compulsory licensing. According to Section 84 of the Act, compulsory licences can be granted on a patent after the expiry of three years if reasonable requirements of the public have not been satisfied or that the invention is not available to the public at a reasonable price. According to Nargolkar, there is no trend of granting compulsory licences. They are given only in extreme situations. "Multinational companies should not be worried about this provision as the Indian IPR structure is otherwise built to provide sufficient protection for innovations," adds Nargolkar.

Critics of a stronger regime say any such move will cause more litigation over patents and have an adverse impact on domestic manufacturers

While experts are in agreement that a strong IPR regime is a must for an innovative economy, many have also raised concerns that a more proprietary focus on patent protection might have a potentially adverse impact on the competitiveness of Indian manufacturers and the availability and cost of generic pharmaceutical medicines.

Critics of a stronger regime also say that any such moves will cause more litigation over patents and have an adverse impact on domestic manufacturers. According to Bejon Misra, founder, Consumer Online Foundation, no patent regime should create an unfavourable situation for national manufacturers. "The government should safeguard and promote the interests of citizens and domestic companies," adds Misra.

In this regard, the All India Drug Action Network and Yale Law School's Global Health Justice Partnership — alongside several other global university representatives — have recently made a sharp response to the US rhetoric by highlighting India's role as the most important source of low-cost medicines in the world. The letter also highlights the flaws in expecting India to match Western standards of IP protection, which, it says, is unfeasible, considering the country's levels of poverty and its GDP per capita — which is 35 times lower than the US. The US response in its 2018 reports and rankings will show whether this reaction has served its intended purpose.

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