

# Will the Pirates Walk the Plank?

## *Prospects for Reform in India's Intellectual Property Rights Standards.*

By Luxman Nathan

**W**HEN P. V. NARASIMHA Rao's government came to power in 1990, the reform of India's intellectual property rights standards appeared to be the least of its concerns. The Soviet Union's collapse resulted in the loss of India's long-time trading partner and political ally. The country was in the midst of a balance-of-payments crisis and was facing stiff penalties from the International Monetary Fund (IMF). India's lucrative yet highly restrictive market was still not attracting nearly the amount of foreign investment as other developing nations. And although India had become self-reliant in agricultural and energy production, it was still besieged by extreme poverty, professional flight, and uneven development.

In response to these and other factors, Rao's government proposed a dramatic re-orientation of the country's economic policy. No longer was self-reliance going to be the dominant theme of India's industrial saga. In July of 1991, Rao's Finance Minister, Manmohan Singh, announced that the largest market in the free world was finally open for business. India would start the decade off with a program of gradual but intensive liberalization and privatization, emphasizing increased foreign direct investment (FDI) and technological collaborations.

But while New Delhi was caught up in the excitement of economic change, the once marginalized issue of intellectual property rights moved to center stage. For years, India's legislation on the protection of intellectual property rights (IPRs) had been criticized by many international organizations and foreign governments as both weak and ineffectual. By the 1990s, the criticisms had increased in both their amount and their intensity.

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India was no longer a nation full of possibilities, but a nation full of IPR "pirates." India's current IPR policy was running counter to the interests of the very international and domestic actors that it needed to realize its new development dream.

In a broad sense, "intellectual property" is the fruits of the intellect— inventions, innovations, forms of expression,

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and ideas. The term "industrial property" is used more specifically, in relation to technology licenses, product designs and trade secrets. Most states regulate the production and protection of intellectual property through their own patent and copyright systems; these systems grant the holder a temporary license to use and profit from the application of the innovation. In most countries, technology and product-related information are protected by patents, while literary and artistic expression fall under the jurisdiction of copyrights.

An increasingly interdependent world, complete with transparent international borders and rapid diffusion of information, compromises efforts to protect and enforce one's intellectual property rights. Throughout the developed world, where the majority of technology-intensive intellectual property is created, there have been efforts to harmonize standards of patent and copyright protection. Leading the pack is the United States, whose multinationals lost somewhere between \$43 billion to \$61 billion a year in the mid-1980s due to foreign "piracy" of their intellectual property (Hoffman 9). Though piracy of IPRs occurs in industrialized nations such as Japan, it is increasingly found within the lesser

developed countries (LDCs), whose multinational corporations (MNCs) make hefty profits on adapted or stolen technology.

Indian MNCs have increasingly come under fire from most developed countries for being among the most notorious IPR pirates. The most damaging evidence is from the country's pharmaceutical industry. It is estimated that India earns \$920 million annually through the sale of pirated pharmaceuticals within India and abroad, corresponding to roughly 97% of its revenues from all pirated products (Gadbaw 12). There are also concerns over piracy in the agrochemical and high-tech machinery industries. And due to the Berne Convention's provisions that software be granted copyright protection, India's computer software manufacturers have become vulnerable to claims of copyright infringement.

At heart of this controversy are Indian laws on patent and copyrights, which have not been updated since the mid-19/0s. In accordance with the nation's past emphasis on import substitute industrialization and self-sufficiency, India based its IPR laws on the diffusion of technology from foreign sources to indigenous firms. The main purpose was to facilitate the local adaptation and improvement of incoming technology. This led to the current system which grants a limited amount of patent protection in the vital pharmaceutical, electrical, and chemical sectors. The main problem is that Indian law grants patents for most technologies and products for 14 years, while it specifies that patents for processes are only protected for seven years. Indian law also holds that process patents, which comprise the bulk of patents held by pharmaceutical, food manufacturing, and bio-chemical companies, do not cover the products that result from the use and adaptation of these industrial processes (Nayyar 163-4). Problems are also present in the computer industry. Though computer software is protected under the nation's strict copyright laws, the production of hardware still falls under the imperfect patent system.

In terms of copyright protection, India has one of the most comprehensive legal enforcement mechanisms to deal with artistic and literary piracy. This is due primarily to the enormous influence of the nation's gigantic film, recording, and publishing industries.

The subtle problems with Indian IPR

policy are compounded by the glaring lack of effective enforcement mechanisms. Concerned government agencies, especially the Copyright Office, are notoriously understaffed. Until recently, most bureaucrats, let alone customs officials and police officers, were not well equipped to identify counterfeit technology or trademarks. Neither has the Indian legal system been aggressive in

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the prosecution of pirates under existing IPR laws.

The main critics of India's IPR policies argue that this system makes it easier for the larger Indian firms to copy the technology of foreign MNCs or of smaller indigenous companies and to then sell these products at lower prices in the vast Indian market. Indian rationales for keeping the current IPR standards, and resisting compliance with what are perceived as "Northern" demands, can be categorized as purely economic arguments over IPRs. This view, prevalent in developing nations, contrasts sharply with the advanced nations' more moralistic view of the issue. The moralistic view of intellectual property rights is that they are defensible legal rights. Some have even asserted that there exists an inviolable human right to have one's intellectual property protected, and thus infringement cannot be tolerated (Emmert 1357). Developing nations often argue that intellectual property rights, though warranting some legal protection, should not stand in the way of technology transfer and diffusion. More IPR protection would disadvantage the whole of society by placing in the hands of the few the potential ingredients for development and prosperity.

Thus, India has argued that its IPR schemes, particularly its patent laws, are necessary in order to help build up its infant industries and to keep vital prod-

ucts, such as pharmaceuticals, within the reach of its poor citizens. Such noble motives, whether or not they manifest themselves in the real world, have been central to the thinking behind post-independence Indian economic policy. From the 1940s until the 1990s, the intelligentsia viewed economic self-sufficiency and socialist measures as integral elements in the fight to break former colonial ties, and in the establishment of India as a prominent economic and political actor. This reasoning accompanied an overall cultural attitude that was incredibly anti-American, and anti-MNC. In fact, most Indian policy makers and business interests have long viewed the prospect of global IPR harmonization as an example of the malignancy of American imperialism. When asked at a 1981 World Health Organization conference about an ideal world, then Prime Minister Indira Gandhi, reacting to earlier US demands for more pharmaceutical patent protection, responded, "My idea of a better ordered world is one in which medical discoveries would be free of patents and there would be no profiteering from life and death" (Keayla 3).

Given this high level of contempt for the subject, it is no wonder that many American-led strategies to pressure the Indian government over IPR issues have been ineffective. Bilateral talks on the issue have been staged since the 1970s, when intellectual property became an important topic in international trade circles. But most bilateral talks between the US and India on IPRs have failed, primarily due to Indian perceptions of the issue as a possible impediment to its own development plan. Bilateral talks also failed due to geopolitical factors: during the Cold War, Indo-US diplomatic relations were strained by American support for Pakistan in the Indo-Pak wars and the Kashmir dispute, as well as the strengthening of American ties with the People's Republic of China. The overwhelming fear was **that** pushing any kind of trade demands on India would make this non-aligned country tilt more towards the Soviet Union. Thus, issues of security were of far greater importance than those of trade and IPRs when it came to negotiating with India.

The US has also pushed IPR harmonization through multilateral vehicles such as the General Agreement of Tariffs and Trade (GATT). India has traditionally been very vocal in its opposition to the Uruguay Round negotiations. The main point of contention is that much of the

GATT, including the provisions on IPRs, would undermine India's sovereignty over its economic policies. India has often been more amenable to the standards set by another multilateral organization, the World Intellectual Property Organization (WIPO), which seeks IPR harmonization on terms that are more favorable to developing countries (Hallstein-Kunz 269).

But circumstances have changed. India's non-alignment stance is increasingly unimportant in a world without a Cold War. Many other LDCs have begun to ratify the GATT and have abandoned WIPO provisions in order to attract more capital and technology from the developed world. India's government is now also seeking stronger political and economic ties with the United States and other advanced economies. Within this framework, US pressure has increased tremendously, and India seems to be shifting its stance.

In 1990, for example, the United States Trade Representative (USTR) opened a Special Section 301 investigation of India for IPR infringement. The USTR had previously used the Section 301 provision of the Omnibus Trade and Tariff Act to prosecute several other foreign governments for poor IPR protection and enforcement. In some countries, most notably South Korea and Taiwan, the strategy paid off with better terms for foreign patent and copyright holders.

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The USTR eventually placed India on a priority list of nations with severe problems of IPR piracy. India was spared prosecution under Special 301 in exchange for its acceptance of GATT provisions on patent and copyright enforcement. This has been especially important in the creation of better standards for copyright protection in the booming software industry (Heeks 24).

The above change in institutional attitudes can be credited to both the heightened global sensitivity to this issue and to the liberalization program of the Rao government. All of these factors have

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made it increasingly desirable and inevitable for India to entertain the prospect of IPR reform.

Given the new international environment, there are many possible advantages for India if it chooses to create a more forward-looking policy on IPRs. First, India's poor protection of IPRs, and especially of patents, has been a major contributing factor in the reluctance of many foreign MNCs (Coca Cola, IBM, etc.) to do business in India. Better IPR protection would help India attract more FDI and increase the speed of vital technology transfer. Second, Indian MNCs have been routinely denied access to foreign markets for their products and services based on a lack of IPR and other trade concessions from New Delhi. A stronger IPR policy would be a potent tool in negotiating reciprocity of market access for Indian goods abroad. And since existing IPR regulations have served only to exacerbate India's trade tensions with nations such as the United States, IPR reform would contribute to a relaxing of already tense relations. Furthermore, in terms of the United States, IPR concessions could lead to a strengthening of diplomatic and security ties with the world's second most powerful democracy.

These arguments have not evaded most government officials who have become more amenable to external concerns over IPR infringement. The new cadre of economic policy specialists are keen on throwing away old socialist-based conceptions about technology transfer and investment. Since 1991, the country has experienced tremendous growth and benefits. Real GDP for the 1993-94 financial year went up to 4.5% and India's foreign exchange reserves were estimated at around US \$9 billion this April

(Abdoolcarim 19). It is unlikely that given the enormous surge of growth, politicians are going to stand in the way of some form of IPR reform.

Inherent in this ideological transformation has been the role of Indian business interests. Many Indian business lobbies who had once protested any IPR reforms are now pushing for standards that are more tenable concerning their potential foreign collaborators. The most important of these groups is the Organization of Pharmaceutical Producers of India (OPPI), which has been quite active in promoting changes in patent law through lobbying efforts (Gadbaw 193). Software industry representatives have also been successful at pushing for incorporation of GATT and Berne Convention standards on copyrights. Smaller Indian firms also see the advantages of better IPR protection. Those companies used to having their hard-earned technology routinely copied by larger Indian MNCs view better IPR legislation as providing them with an incentive to invest in costly research and development.

The traditional voices of opposition are simultaneously losing their strength. The most vocal opponents to any IPR reform are the Indian Drug Manufacturers Association (IDMA) and the Federation of Indian Chambers of Commerce and Industry (FICI), whose members have profited immensely from past standards. Consumer groups had also pressed for limited IPR protection to keep prices low. But as the Indian government seeks to bring in more competition in the drug industry, as well as to increase foreign investment in food processing, computer-electronics, and chemical sectors; the amount of influence that these interests have within the realm of policy making is declining.

At the current time Indian IPR standards have not been adequately updated to meet the country's new economic goals, but change is on the horizon. The actual extent of reform will depend on the ability of international actors, concerned policy makers, and pro-reform business interests to convince the government and the people of India that better intellectual property rights legislation can be beneficial in the long-run. In this sense, some IPR harmonization may need to be perceived by India not as a Northern weapon, but as an inevitable consequence of the expansion of the global marketplace. ■

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