

Keeping an Eye on India
USA's IP Priority Watch List

Since its inception, India's IP regime has undergone a lot of changes to comply with TRIPS agreement and for harmonious interplay with international standards/practices. Yet, its IP framework is rife with deficiencies bringing it under the scrutiny of big IP giants such as the US.

Compared to other jurisdictions, the US has been quite liberal concerning its IP laws and it expects other countries to be more embracive and acquiescent of the US IP norms so as to have a uniform enforcement and protection of IP rights on expected lines. To ensure this, the US keeps a constant tab on the IP scenario in different countries and officially places them under a "watch list" if their IP regimes are deemed to be of concern.

Every year, the United States Trade Representative (USTR) office in its 'Special 301 Report' identifies countries with deficient and counter intuitive IP policies/norms and categorizes them either under "Priority Foreign Country", "Priority Watch List" (PWL) or "Watch List". Thus, the USTR identifies countries which do not provide adequate and effective protection of IPR or fair and equitable/unbiased market access to US IP right owners, and places them on its watch lists.

Countries with grave IPR deficiencies that require the USTR's undivided attention in dealing with certain IPR aspects are placed under the PWL. As of April 30, 2020, the USTR identified 10 countries to be on the PWL – Algeria, Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela

India on the PWL:

India's IP system has been on the radar of the US for quite a while now. So to speak, India has been on its PWL for over 25 years. The USTR, in its 2020 report, has cited several reasons for yet again placing India on the PWL – the primary reason being lack of sufficient measurable improvements to its IP framework on the "long-standing" and "new challenges" which have negatively impacted US IP right holders. In addition, the report mentions that although India has made "meaningful progress" to enhance IP protection/enforcement in some areas, it does not resolve recent and long-standing challenges, and in fact has created new ones. This was attributed to the following factors.

Trade Barriers:

On the trade front, India has imposed exorbitant customs duties on IP-centred products such as medical devices/equipment, pharmaceuticals/drugs, Information and Communications Technology (ICT) products and capital goods. This has posed ramifications for trade in India for US companies.

Stringent Patentability Requirements:

Section 3 of the Patents Act imposes restrictions on inventions that are patentable. There is Section 3(d) which makes it cumbersome for the pharma industry to obtain patents on drugs/pharmaceuticals. This is clearly seen in the Novartis case, where Novartis was refused a patent on drug Glivec under Section 3(d). And then there is Section 3(k) which overly restricts patenting software/computer-related inventions.

Procedural Deficiencies:

On the patent front, patent applicants experience excessive delays for obtaining patent grants and extensive reporting requirements further introduce additional delays. Furthermore, India's costly and time-consuming opposition/revocation procedures are potential threats to patent owners, yet another factor which highlights India's inadequacy in its patent regime.

Restrained Online IP Rights / Enforcement:

India's 2019 Copyright amendment rules has had a severe impact on right holders of Internet content – the impact is due to the ambit of compulsory licensing (CL) which was earlier for radio/television broadcasting being broadened to include online broadcasting as well. Due to this, the right holders have the obligation to satisfy necessary requirements for their content being posted online. Furthermore, enforcement of IP rights online is limited by factors such as flimsy techniques to detect fake content/goods and lack of sturdy enforcement agencies.

Copyright/Trademark/Trade Secret Issues:

Copyright/trademark counterfeiting is a major concern in India and without effective protection laws in place, the right holders are deprived of their privileges of incentivizing and commercialising their creation. Excessive delays in obtaining IPR such as trademarks coupled with obsolete IP frameworks (for trade secrets), absence of effective IPR protection systems and unauthorized disclosure of tests/data for obtaining regulatory and market approvals on drugs, further places India on the back seat with respect to its IP regime.

Getting into the 'Good Books':

Owing to the expectations of the US for countries in its PWL, India is required to work its way up the IPR ladder to satisfy US requirements to be off the PWL in due course. Beginning with its policies on CL on patents, India should enforce such CLs only in limited circumstances prioritizing the patent owner's privileges and consent and granting the CLs only on reasonable terms and conditions.

India has justified its stringent IP laws as being favourable against monopoly and anti-competitive practices to foster innovations. Nevertheless, some flexibility towards its patentability laws especially for pharmaceutical inventions and concrete IPR norms for protection, enforcement, and commercialization of IP by IP right holders, will go a long way to show India in good light as far as IPR is concerned. In addition to this, India should ensure that it bridges the gaps/loopholes in its IPR laws, with emphasis on objectivity in its guidelines and interpretation.

Having said this, India being a sovereign nation should take the liberty to deal with its IP laws from its own standpoint and not worry too much about how the US perceives it. It is understandable that congruence between nations is key when it comes to IP laws – nevertheless, it is important to determine to what extent India is willing to toe the line when the US takes the upper hand, or sway in a manner that may prevent it from being subjugated to grave implications of being on the PWL. The overall approach should be to promulgate IP growth in India, and

anything contrary to this should be a cause of concern, requiring undertaking of diplomatic actions.

-Author: Emily Premkumar

DISCLAIMER

The content of this article is intended as a research article and provides general information existing at the time of preparation. This article is written for educational purposes only and should not be construed as legal opinion. IPpro Services (India) LLP. neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this article. The information provided in the article is to the best of our knowledge; however, we do not guarantee about the quality, accuracy, reliability, adequacy or completeness of any of such information and material, and expressly disclaim any liability for errors or omissions in such information and material. It is recommended that professional advice be taken based on the specific facts and circumstances. This article does not substitute the need to refer to the original pronouncements.



Bangalore

102, Prestige Loka, 7/1, Brunton Road, Bangalore- 560 025, INDIA.

+91 80 6693 5000

Silicon Valley

220 California Ave, Suite 201, Palo Alto, CA- 94306, USA.

+1 650 325 7100

Mumbai

93-B Mittal Court, Nariman Point, Mumbai- 400 021, INDIA.

+91 22 6669 5000

IPpro Services (India) LLP

To know more visit www.ipproinc.com

ask@ipproinc.com