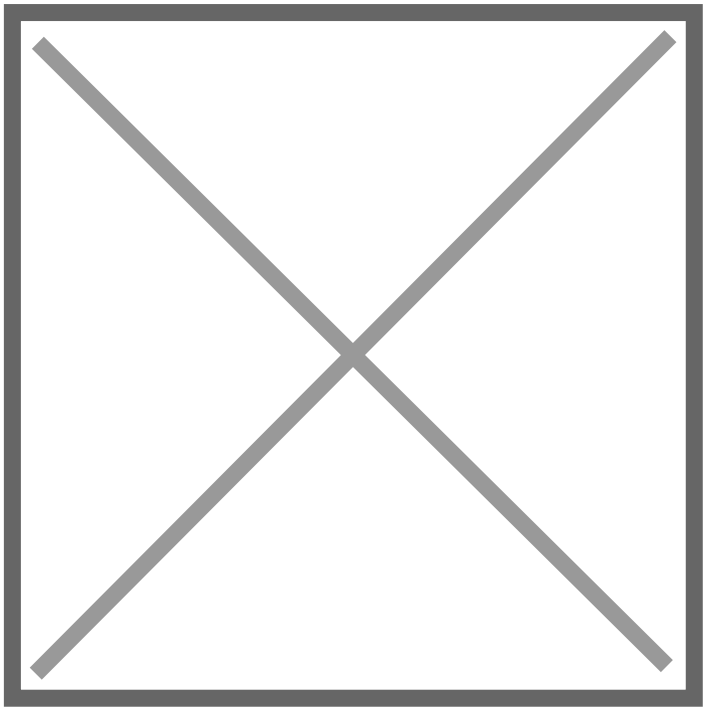
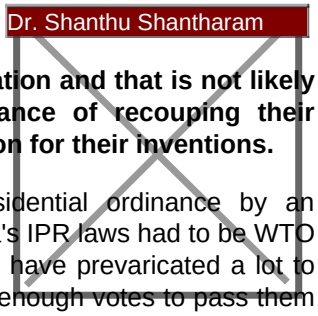
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To Patent or Not to Patent?

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To Patent or Not to Patent?



Indian agriculture is badly in need of capital investment and innovation and that is not likely to come about if the investors do not have a reasonable chance of recouping their investment and one of the tools that will ensure it is patent protection for their inventions.

This $64-million question has been just answered through a presidential ordinance by an amendment to the Indian Patent Act of 1970 just in the nick of time. India's IPR laws had to be WTO compliant by January 2005. The governments in India since the 1990s have prevaricated a lot to bring amendments to the Patent Act as they were never able to muster enough votes to pass them in both the Houses of parliament. Granted India amended the Patent Act twice in the past, the third one for granting product patent will have to ratified by the Parliament when it will definitely run into rough weather. Leftists will oppose it on ideological grounds and rest of the Opposition will do so just to be a prickly opposition sans any ideology. They will have plenty of support from a myriad of Non-Governmental Organizations (NGOs) and Civil Society Organizations (CSOs) who will be soon organizing street protests. The present government did not have much of a choice but to issue an ordinance to avoid the parliamentary wrangle. Likewise, many countries in the developing world are scrambling to amend their Patent laws to be WTO compliant. Both politicians and administrators in India have realized that India has no choice but to bring in product patent these days of knowledge economy to invite foreign direct investment and to promote innovation in India's public and private sector. Yet, they lacked political will and courage to take the determined action publicly.

Dilemma

The Union Agriculture Minister has stated that he will bring amendments to the Seed Act of 1966, to grant patent over transgenic seeds that will run counter to the sui generic system of Plant Varieties and Protection and Farmer's Right Act of 2002. The new amendment to the Patent Act gives silent nod to patenting of biotech seeds and other biotech applications (products) in medicine, agriculture and environment. The opponents fear that the patent protection of transgenic seeds will amount to mortgaging the poor farmer's economic interest when private companies will start extracting technology royalty payments. But, that need not be the case. The Indian government can retain the powers to determine the method of marketing and prevent companies from charging technology fee for biotech seeds as is done elsewhere as it is impractical for the companies to collect such a payment in a country like India. Private seed companies purveying biotech seeds must tread cautiously not to use the technology licensing tactic in India and other developing countries at this point in time. Markets in developing countries will surely bear some increased costs for biotech seeds (as evidenced by the sales of Bt-cotton) that can offer superior value and profits to the grower for the money, but the same markets cannot afford exorbitant costs. Private

companies for sure know the market they are dabbling in and would do well to avoid technology backlash. Biotech companies will have to realize that they have increased social responsibility now than ever before.

The stated objections of many conscientious and ideological protestors are that the revised patent law will throw open the India's intellectual property for a free raid (piracy) by the multi-national companies (MNCs). In fact the bottomline goal of the Leftists and Socialists is to deny any possible benefit to MNCs who in their opinion are only concerned about their profits and do not have any concern for the poor. Many of them seem too concerned about the social and economic injustices that will be inflicted upon the poorest of the poor in the areas of agriculture and medicine. Their patent concern does not seem to stretch into other industrial sectors. They also harp on how the new patent system will offer free access to traditional and indigenous knowledge (TK and IK) of Indian communities and tribes that will be commercialized by private sector without any benefit to those who for centuries have developed the knowledge base.

This point becomes particularly egregious in the area of modern agricultural and medical biotechnology. Recent instances of neem, turmeric and Basmati patents have become lightning rods for their cause and are regularly cited as how the North will exploit India's natural heritage of wealth and knowledge without an iota of benefit accruing to the Indian people. On the face of it, these allegations and accusations seem to be well founded and have been used to whip up emotions.

Everyone falls for it, and that has been the reason why in India, one cannot get almost no patent protection for biotech inventions of any sort. The result is most of the medical biotech community uses licensed technologies for manufacture or use expired patents to manufacture products, or simply engage in contract research. But, that picture is rapidly changing as many as 30 patents have been obtained by Indian medical biotech companies in the US in 2003 alone.

World class talent

This is an elegant proof that there is world class talent in the country but they have to seek protection for their inventions outside the country. This is also one of the reasons why there is hardly any venture capital available in the country that is now likely to change. This also shows how Indian inventors have to spend enormous amount of money to patent their inventions in a foreign country as their own country's law does not grant them any Intellectual Property Rights (IPR). Other than the lone plant gene patent for Ama1 held by the Department of Biotechnology (DBT) and Professor Asis Datta of Jawaharlal Nehru University in the US, there is really no other sign of Indian agribusinesses having patented any invention in recent times. It should not be a surprise that India's investment in R&D in medicine and agriculture is still an insignificant part of the overall investment. In the medical sector, the generic drugs will soon dry up with the proposed patent amendment, and the fear expressed is that India will be denying low cost drugs to even poorer countries if the patent protections for life saving drugs are monopolized for 20 years.

Need of the hour

Indian agriculture is badly in need of capital investment and innovation and that is not likely to come about if the investors do not have a reasonable chance of recouping their investment and one of the tools that will ensure it is patent protection for their inventions. This is perhaps the most important reason why Indian agricultural biotechnologists are constantly looking out for buying or borrowing novel genes and gene constructs to develop products which means they will be just doing "me too" kind of copy cat R&D. With the patent law amendment, even that will become dearer and is sure to hinder scientific and technological progress in the country.

Economic impact

Although the Council of Scientific and Industrial Research (CSIR) strongly encourages patenting scientific discoveries and technological inventions by its scientists, the economic impact of that is still not significant. That scenario is expected to change for the better in due course of time. But, there is also a new tendency among the CSIR scientists to file for all sorts of useless patents for which there will be no buyers.

Patent filing should not become another frivolous activity like publishing "junk" scientific papers just to add to the numbers and seek personal career advancement. Patents do not always translate into successful commercialization. Sometimes defensive patents are obtained to prevent others from cashing in on the idea. Such abuses must also be prevented while implementing the amended patent law. Some critics of patent law would like to see patent protection for just "basic" inventions whatever that means. This is once again a flawed bleeding heart approach to jettison the effectiveness of the Act. You cannot have the carrot and eat it too!

The basic underlying principle of patent must be to spur economic growth. If one looks at the leading economies of the world like members of OECD, one cannot help but notice that they have strong intellectual property rights and developing countries do not, and poverty in these countries is telling. Contrary to the widely held belief, IPR protection will provide social and economic justice in the long run by investment, industrialization, job creation, and overall economic development. If India and other developing economies continue to hold on to their TK and IK base without having the skills and incentives to convert

them to wealth creation, it will continue to scout for technologies around the world and will end up paying dearly.

In this knowledge-based era, it is important to realize that no amount of emotionalizing the issue on the basis of social justice will get our poor farmers and their ilk out of their miserable plight. In reality, Indian agriculture needs enormous investments which the country does not have and sloganeers cannot cook up investments by miracles. Poor Indian farmers cannot afford to wait forever to improve their lot.

The implementation of the patent law should be designed to take care of some of the existing problems in the country. The devil is in the details. India can utilize the provisions of Article 7 of the TRIPS agreement to suit the social and economic needs of the country and at the same time make it worthwhile for the investors in developing technology.

(To be concluded)

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