

The fallout of Patents Ordinance

THE PATENTS (Amendment) Ordinance, 2004 introducing product patents for all industrial sectors has been announced and along with the deletion of Section 5 of the principal Act of 1970, dealing with the exemption of drugs, foods and chemicals from the scope of product

marketing rights) which in many ways was an anachronism as it provided protection without grant of patents.

At the same time, if the clearance of mail-box applications takes up to four years post-2005 and the validity remains at 20 years from the date of application, the virtual protection peri-

namely, novelty, inventiveness and industrial application can be applied as per the terms and guidelines of the national law of each member country without redefining the meaning of what constitutes an invention.

Pre-grant opposition

With respect to pre-grant opposition to avoid frivolous applications, there is already a provision under the Indian Patents Act 1970 under Section 3 which forbids such applications. There is no indication so far that this provision will be repealed under the Third Amendment. In addition, as per the Second Amendment to IPA 1970, pre-grant examination of

many of these new provisions can be accommodated within the TRIPS provisions under Articles 1, 7, 8, 27, 30, 31, and 69 of TRIPS which are amenable to be interpreted to favour the new Indian patent legislation.

With reference to more contentious issues such as imports not being considered equivalent to working of the patent, permission to stockpile products to enable early introduction of the generic product and liberal compulsory licensing norms, while strictly not compliant with TRIPS, have been generally endorsed by other emerging economies such as Brazil, Venezuela, South Africa, Argentina and Egypt and hence

mandatory status for member states, regardless of their economic status, provides a wide latitude for interpretation and implementation of most clauses to make them beneficial to their interests while staying within the overall ambit of the TRIPS provisions. Wherever there is scope for further negotiations to improve upon the present format and contents in selected areas of concern to individual members or groups of members, the TRIPS Council and the inter-ministerial conferences are excellent forums to promote their causes.

Dispute areas

However like in the case of most legislations with international ramifications, India can possibly default on two counts, the first with respect to the framing of the rules which govern the Act and second with respect to implementation of the rules in a just and timely manner in order to be fair to the inventor and the user. While the judicial system in the country is not only strong but also just, regardless of the parties involved many provisions under the Act will possibly lead to a highly litigious industrial sector unless utmost diligence and caution are exercised while framing the rules to anticipate potential dispute areas and appropriate steps are taken to avoid them.

On the pro-active side, one also needs to consider whether India should take a lead in aspects of intellectual property protection outside the strict ambit of the mandatory provisions embodied in the TRIPS Agreement.

Some of them are protection of traditional knowledge, practices, medicinal plant resources and products indigenous and unique to India through special 'sui generis' type of protection systems, the usefulness of enacting provision for petty patents and protection of heritage sites through appropriate legislations.

While the first priority will be to enact legislations and implement them in a manner that yields the maximum benefits to the country within the current framework of the TRIPS Agreement, it is equally important to design innovative approaches to protect the unique natural and knowledge assets of the country.

(The author can be contacted at: mdnair@vsnl.com)

The contentious issues such as imports not being considered equivalent to working of the patent could be a matter to be taken up with the TRIPS Council, says M. D. Nair.

patents, a few new features have been added. Those who oppose India honouring its commitment under the GATT (General Agreement on Tariffs and Trade) of which Trade Related Intellectual Property Rights (TRIPS) was a part, often forget that the country has much to gain by being a member of the global community, considering that it is among the fastest growing economies and perhaps the second largest repository of scientific and technical talent in the world. Myopic visions of some interest groups do not help broader macro-economic considerations affecting various sectors of the Indian economy, whether they are in textiles, other manufactured goods or agriculture.

Unlike individual stakeholders in a particular sector, the Government needs to take a balanced view to ensure that overall national interests are protected and in that process a give and take on many issues with other members of the World Trade Organisation will be prudent. Through the ordinance the Government has taken into account the concerns of various stakeholders on the implications of the Bill presented by the previous government to the Lok Sabha in December 2003.

Other major issues

While the deadline of January 1, 2005 for introduction of product patents for all innovations including drugs and food products has been met, the other major issues addressed in the ordinance include the need for a facility for pre-grant opposition as provided for in the IPA 1970 and virtual removal of the provision for EMR (exclusive

od for a product patent filed in 1995 will be reduced to six years, a period far too short to be of any benefit to the inventor.

Exporting rights to assist least developed countries with no technical ability to utilise their compulsory licences as provided for under the Doha Declaration are to be exercised by India, even though the rules mandated by the TRIPS Council for its implementation call for a debate, issue of compulsory licences in case of non-manufacture in the country as well as in situations of healthcare emergencies resulting from diseases other than malaria, TB and HIV/AIDS mentioned in the Doha Declaration, provision of parallel imports from the cheapest source in another member country and powers for issue of compulsory licences in deserving cases of non-availability, non-accessibility and/or non-affordability of patented drugs are the other features.

Apparently restriction of patentability to the first innovated molecule, with no provision for granting patents to derivatives, polymorphs, isomers, new crystal forms and new delivery systems to prevent what has been referred to euphemistically as ever-greening of the patent by the original innovator, has not been incorporated. This is justified as establishing higher standards of patentability for an invention is strictly within the rights of nation states under TRIPS and through patent office action the legitimacy of patentability of any invention can be challenged and patents not granted.

Similarly with respect to new uses for existing molecules, the yardstick of patentability,



PRODUCT PATENTS: The deadline for introduction of product patents for all innovations has been met through the Patents (Amendment) Ordinance, 2004, which addresses many specific issues relating to the pharmaceutical industry. — Photo: AFP

patent applications is to be done away with and the applications are to be published without examination automatically 18 months after they are filed.

While some inequities and non-compliance with TRIPS provisions are bound to be raised, as a sequel to the provisions under the ordinance, in balance, it would appear that

could be a matter to be taken up with the TRIPS Council to find an acceptable and at the same time equitable solution within the world body's game rules.

As international multilateral agreements go, the TRIPS agreement has maintained an equitable balance between the rights and privileges of the inventor and the user. However, the TRIPS document and its