Patent Laws: Mashelkar Committee Trips Again

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Fourteen years ago when India became a signatory to the agreement setting up the World Trade Organisation (WTO), it automatically signed on to a number of agreements including the one on Trade Related Intellectual Property Rights (TRIPS). The TRIPS agreement protect "intellectual property", i.e. our ideas that become new creations, as rights through the medium of patents, copyrights, trademarks, etc. It is important to remember that during the Uruguay round of negotiations in GATT (that resulted in setting up of the WTO), India and other developing countries opposed the inclusion of TRIPS under the framework of the WTO. They faced, in these negotiations, the full might of the United States, Europe and Japan – who were keen to enshrine intellectual property rights in the laws of all countries of the world. The driving interests in this battle were the giant pharmaceutical and software companies. In the battle of unequals the developing countries lost out and TRIPS became a reality.

But even when the agreement was signed the Indian Government announced within the country that they were forced to "give in" because India was abandoned by other developing countries. This is not the place to analyse if we could have negotiated better, but the short point was that fourteen years ago the Indian Government's stated position was that TRIPS had the potential to harm national interests.

Fast forward to early 2004. The then BJP led NDA Government had finalised the text of the amendments to the Indian Patents Act of 1970. Once India signed the TRIPS agreement, it became mandatory to amend our Patent Act so as to make it compliant with the agreement. However, developing countries like India were given the option of using a transition period of 10 years – i.e. the country's Patent Act had to be amended by January 2005. But the issue remained of amending the Act in such a manner that the impact of the amendments would be cushioned. The sectors most affected by the TRIPS agreement are pharmaceuticals and software. In the case of pharmaceuticals, the 1970 Patents Act barred medicines from being patented. Having signed the TRIPS agreement, India was bound by it to provide for patents for medicines. However the agreement does have what are known as "flexibilities", which if incorporated in national laws can safeguard access to medicines at reasonable prices even while providing for patents. This, then, was the task before the NDA Government in early 2004. However, in all its wisdom, the draft amendments it prepared failed to make use of the flexibilities in TRIPS. Fortunately, the NDA Government was voted out of power in early 2004 and these amendments were not tabled in Parliament.

On 26th December 2004 a great tragedy lashed the shores of India in the form of the tsunami that ravaged thousands of lives. Almost unnoticed, in the midst of this calamity, the Indian Government notified the amendments to the Indian Patents Act in the form of an ordinance. The UPA Government, without any semblance of debate on the issue in Parliament, attempted by this measure to present the nation with a fait acompli. The ordinance issued by the Government was almost a verbatim copy of the draft prepared by the previous NDA Government! The Government felt comfortable in taking recourse to this brazen undemocratic stance, as it was felt that the opposition NDA would feel compelled to support its own draft when it came up for mandatory ratification in parliament within the next six months.

UPA Government's Plans go Astray

But sometimes the best laid plans are known to go astray. The Patent Amendment Ordinance of 2004 soon became the subject of widespread criticism. It was clear that the amendments would jeopardize access to new medicines for millions of Indians. A host of democratic organisations and concerned groups took to the streets, protesting against the amendments. Demonstrations were organised not just in India, but all over the globe, by groups working for access to medicines. It was clear that the amended Indian law would also make it impossible for Indian companies to sell cheaper versions of medicines in poor countries of Asia and Africa. The battle had been joined and the Left parties, led by the CPI(M), lent their voice and strength to the struggle.

Even this may not have made a difference, with the UPA still confident of support from the NDA. In March 2005 the situation turned when the BJP – with a view to embarrass the Government – decided to oppose the Ordinance in Parliament (i.e. the BJP decided to oppose the text that its own Government had prepared in 2004!). It was then that the UPA Government was forced to negotiate with the Left parties, so as to avoid the embarrassment of a defeat on the floor of Parliament. The CPI(M) led the Left parties in taking this opportunity to amend the text in the ordinance, so as to include the TRIPS flexibilities and thereby safeguard public health and access to medicines. The UPA Government was forced into these negotiations with the Left and the final text of the amendments incorporated most of the suggestions made by the Left parties and other concerned groups. There were two issues, however, on which a consensus could not be arrived at. One pertained to further restrictions on patentability so that patents would be allowed only on "new chemical entities" and the other to barring of all patents on micro-organisms. The Government made a commitment that these issues would be referred to an "expert group" and if necessary the Indian Act could be further amended. On the basis of this commitment, Parliament passed the amendments to the Indian Patent Act.

Mashelkar Committee Constituted

The Government set up a committee called the "Technical Expert Group (TEG) on Patent Laws". We stop here to appreciate the dilemma that the UPA Government was faced with. It had been forced to steer through Parliament an Act that it did not agree with! For, if it were not for the conjuncture of circumstances described above, its preferred course would have been to enforce the much criticized 2004 Ordinance. Now the Government went into a damage control mode. It chose, as chairperson of the expert group, Dr.R.G.Mashelkar. The former Director General of CSIR is lionized in some sections of the corporate controlled media as the person who modernized the apex scientific institution of the country. A more sober estimate of his tenure would indicate that he was instrumental in the corporatisation of CSIR. Also, importantly, he has been in the forefront of airbrushing the notion of patents and intellectual property rights, to present it as something that is good for Indian science and the Indian people.

In choosing Dr.Mashelkar as chairperson, the Government perhaps calculated that the TEG would brush aside available evidence and rubber stamp the view that the Indian Patent Act did not need further amendments that would make patenting more difficult. The TEG or Mashelkar Committee (as it was loosely termed) did not fail in this task. In December 2006 the committee filed its report, which stated that no further amendments were necessary. Matters would have rested there, except for what the committee termed as a "technical flaw". Within days of submission of the report, it became public that the Mashelkar Committee report had copied, almost verbatim, from a submission made to the Committee by a London based institute, called the "Intellectual Property Institute". The interests served by this institute would be clear from the fact that it lists the following MNCs as some of its major donors: Astra Zeneca, Glaxo Smith Kline, Merck Sharp & Dohme, Pfizer Ltd, and Microsoft. Faced with public outrage, Dr.Mashelkar admitted that "technical inaccuracies" had crept into the report "inadvertently". Such an excuse was a rather innovative use of the English language, as other could justifiably claim that the head of the apex scientific organisation of the country had been guilty of blatant plagiarism.

Resubumission of Report by the Discredited Committee

The public outcry forced Dr.Mashelkar to resign as chairperson of the committee and the committee supposedly took back the report. What followed is shrouded in mystery. The website of the Ministry of Commerce continued to prominently display the discredited report. The Government of the day did not comment on the status of the TEG. Then, in April 2009, it was reported that the TEG had "resubmitted" its report. The TEG, we learnt, had not changed in its composition in the intervening two years and Dr.Mashelkar continued to be its chairperson!

The "resubmitted" report came to the identical conclusions as the report that was "taken back". But to be fair, the plagiarized portions had been deleted and replaced by some new portions and substantial portions of the arguments had been rewritten. But, intellectual dishonesty is a hard act to renounce. The report quoted extensively from a paper written by Prof. Carlos Correa, a very well know expert on Patent Laws. When the report was shown to Prof. Correa he is understood to have said that his paper had been

quoted out of context and further that he was of the view that an amendment to the Indian law, that further restricts patenting, is actually possible.

The issue at stake, however, goes far beyond individual dishonesty. It is a matter of concern that the report was resubmitted in April, 2009 when Parliament had been adjourned. This seems a clear attempt to bypass the country's elected representatives, more so on a matter that had been set in motion based on a promise made by the Government on the floor of Parliament. It is imperative that the issue be discussed again in Parliament, and a reconstituted committee be mandated to opine afresh on the issues. Nothing less would suffice to restore the damage done to the credibility of the highest institution of the country.