

*On 17 April 1995 the National Working Group on Patent Laws (NWGPL) – a nationwide non-government organization active in the area of Intellectual Property Rights (IPRs) – issued an appeal for preservation of the essential elements of the Indian Patents Act, 1970. Although it is no one's case that changed circumstances do not call for reappraisals, the scientific community has, so far, been admitted to only the outer periphery of the present debate and national decision-making on IPRs. This is all the more surprising because the generators, preservers, advancers, users, transmitters and first owners of the products of the intellect – intellectual property – are, in large measure, scientists and engineers, working within, and receiving approbation and remuneration from, the larger polity.*

— Editors

## Ammending the Patents Act – An appeal from the National Working Group on Patent Laws

In its appeal, the National Working Group on Patent Laws reiterated that what is at stake is not a narrow technical or legal issue. 'We are witnessing nothing short of an ever-expanding annexation of our sovereign spaces of vital decision-making. The proposed amendment of the Patents Act is being imposed on the nation. . . in line with the exclusionist and inequitable approach of the industrialized countries and their transnational corporations. The TRIPs agreement is nothing but a comprehensive and meticulous embodiment of that approach. . . [the] proposed amendment to the Indian Patents Act of 1970 [is] to make it consistent with the TRIPs agreement.'

'The issue is political and transcends "technical" or "legal" considerations. It is therefore, inappropriate to think of introducing "safeguards" in the proposed amendment. . . For the same reason, it is misleading to confine one's outlook to sectoral or superficial adverse effects and

then to plead that there will be no real damage for say "seven" years.'

'There is also no question of our country ceasing to be a member of the World Trade Organization (WTO) automatically if the proposed amendment falls through [in Parliament]. Leaving aside the question of whether it is the national interest to be member of the WTO, with all its detrimental contents and its continuing, intrusive legislative mandate overriding the sovereignty of its members, there is no way of our being expelled from the WTO, only because our sovereign Parliament has decided not to approve the amendment. In many international agreements, the US executive committed itself to the requirements of these agreements after thorough negotiations, but such commitments were rejected or modified by the US legislature in the exercise of its sovereign power. The result was that the agreements were amended to accommodate US and *not* that the US

was expelled from the agreements. Moreover, the expulsion from the WTO requires a decision by a three-fourths majority of its members. Such mobilization in WTO against India on this issue is next to impossible. . . .'

'An apprehension is voiced that unilateral punitive action may follow. First, for any WTO-legal action, the member concerned will have to follow the route of dispute settlement procedures, which can be activated only if there is a specific cause of action. Moreover, the normal working of a democratic process can hardly provide such a cause of action for other members. However, this does not rule out unilateral, WTO-illegal action on the part of any member who wishes to bully us. But *ab initio* such action is WTO-illegal. And all the so-called protection of a rule-based system then becomes a mirage.'

A detailed analysis by the NWGPL of the provisions of the Patents (Amendment) Bill, 1995, follows.

S. no	Provision in the Patents (Amendment) Bill, 1995	Remarks
1	Preamble Whereas India is a signatory to the Agreement for the establishment of the World Trade Organization including the Agreement on Trade Related Aspects of Intellectual Property Rights for the purpose of reduction of distortions and impediments to international trade and promotion of effective and adequate protection of intellectual property rights.	There is nothing to show that the Indian Patents Act, 1970, creates distortions and impediments to trade. In the light of this it would not be desirable to resort to self-condemnation of our Patent Laws.
2	Section 24A(1) Notwithstanding anything contained in sub-section (1) of Section 12, the controller shall not, under that sub-section, refer an application in respect of a claim for a patent covered under sub-section (2) of Section 5 to an examiner for making a report till the 31st day of December 2004 and shall, where an application for grant of exclusive right to sell or distribute the article or substance in India has been made in the prescribed form and manner and on payment of prescribed fee, refer the application for patent, to an examiner for making a report to him as to whether the invention is not an invention within the meaning of this Act in terms of Section 3 or the invention is an invention for which no patent can be granted in terms of Section 4	It would not be desirable to keep the patent application unattended. It is important to examine the patent applications in accordance with Section 12 of the principal Act, in addition to Sections 3 and 4  The TRIPs Text specifies that exclusive marketing right is to be given and not exclusive right to 'sell or distribute'. Exclusive right for distribution may not be tenable under the MRTP Act. It is important to examine whether the article or substance is not in public domain. The invention has to be new, involve an inventive step and should be capable of industrial application to qualify for an exclusive marketing right

## 3 Section 24A(2)

Where the Controller, on receipt of a report under sub-section (1) and after such other investigation as he may deem necessary, is satisfied that the invention is not an invention within the meaning of this Act in terms of Section 3 or the invention is an invention for which no patent can be granted in terms of Section 4, he shall reject the application for exclusive right to sell or distribute the article or substance

as above

## 4 Section 24A(3)

In a case where an application for exclusive right to sell or distribute an article or a substance is not rejected by the Controller on receipt of a report under sub-section (1) and after such other investigation, if any, made by him, he may proceed to grant exclusive right to sell or distribute the article or substance in the manner provided in Section 24B.

In the TRIPs Text, the connotation used is exclusive marketing right and not exclusive right to sell or distribute. Public objection should also be invited

## 5 Section 24B(1)

Where a claim for patent covered under sub-section (2) of Section 5 has been made and the applicant has.

(a) where an invention has been made whether in India or in a country other than India and before filing such a claim filed an application for the same invention claiming identical article or substance in a convention country on or after the 1st day of January, 1995 and the patent and approval to sell or distribute the article or substance on the basis of appropriate tests conducted on or after the 1st day of January 1995, in that country has been granted on or after the date of making a claim for patent covered under sub-section (2) or Section 5; or

(i) Patent must be obtained in the country of invention on a product prior to the claim made under sub-section (2) of Section 5.

(ii) If the patent application has been rejected in other convention countries, it would be desirable to know the status of such applications.

## 6 Section 24B(1)(b)

Where an invention has been made in India and before filing such a claim, made a claim for patent on or after the 1st day of January 1995 for method or process of manufacture for that invention relating to identical article or substance and has been granted in India the patent therefor on or after the date of making a claim for patent covered under sub-section (2) of Section 5,

Process patents are already granted in India and therefore EMR on products arising out of patented processes cannot be granted

## 7 Section 24B(1)(b) – sub-para

and has received the approval to sell or distribute the article or substance from the authority specified in this behalf by the Central Government, then he shall have the exclusive right by himself, his agents or licensees to sell or distribute in India the article or the substance on and from the date of approval granted by the Controller in this behalf till a period of five years or till the date of grant of patent or the date of rejection of application for the grant of patent, whichever is earlier

(i) The relevant authority, e.g., Drug Controller, from whom marketing approval is to be taken should specifically be mentioned in the text.

(ii) Public opposition to marketing approval should be invited.

## 8 Section 24B(2)

Where the specifications of an invention relating to an article or a substance covered under sub-section (2) of Section 5 have been recorded in a document or the invention has been tried or used, or the article or the substance has been sold, by a person, before a claim for a patent of that invention is made in India or in a convention country, then the sale or distribution of the article or substance by such a person, after the claim referred to above is made, shall not be deemed to be an infringement of exclusive right to sell or distribute under sub-section (1).

Since the article or the substance is already in the public domain, no exclusive right can be given.

## 9 Section 24C

The provision in relation to compulsory licences in Chapter XVI shall, subject to the necessary modifications, apply in relation to an exclusive right to sell or distribute under Section 24B as they apply to and in relation to a right under a patent construed accordingly, namely to sell or distribute and for that purpose the following modifications shall be deemed to have been made to the provisions of that chapter and all their grammatical variations and cognate expressions shall be construed accordingly, namely:

(a) throughout Chapter XVI,

(i) working of the invention shall be deemed to be selling or distributing of the article or substance,

(ii) references to 'patents' shall be deemed to be references to 'right to sell or distribute',

(iii) references to 'patented article' shall be deemed to be references to an 'article for which exclusive right to sell or distribute has been granted'.

(i) Indian Patent Act, 1970, provides for Licences of Right which is more appropriate as compared to compulsory licences.

(ii) Licences of Right should only be granted to encourage local production and not marketing.

Local production, and not 'selling and distribution', should be considered as working.