

Politicization of patents not a new development



Mumbai | Delhi | Bangalore | Pune | Ahmedabad
 Head Office: New Excelsior Building, 7th Floor, Wallace Street,
 A.K. Nayak Marg, Fort, Mumbai – 400001 India
 Tel: +91 22 2200 6322
 Fax: +91 22 2200 6326 / 66550607
 Email: info@krishnaandsaurastri.com
 Website: www.krishnaandsaurastri.com



By Richa Pandey,
 Krishna & Saurastri Associates

How long back would you have to look if you wanted to find the link between patents and politics? Probably at the very inception of patents. The linkage between the two can be traced to the first letters patent granted by royal decree. When patent rights were born, they were translated by the political will of the monarch. In the 1990s, when the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) was signed, world politics stood divided between developed vis-à-vis developing and least developed countries. Amid a lot of upheaval an uneasy treaty forged its way ahead.

Free patent years

In the 1970s India had a free patent regime which, combined with drug price control, kept drugs at reasonable price. Post the signing of TRIPS in 1995, India was given a transition period of 10 years to become fully compliant in view of its status as a developing country. This 10-year period paved the way for the Indian pharmaceutical industry to flourish.

India reverse engineered foreign patented drugs without licensing and was able to make less expensive copies (aka generics) of the world's best-selling patent protected drugs. India now is the top supplier of generics. This transition from virtually non-existent to a leading drug manufacturer happened over these free patent years.

The protection debate

On the flip side patent protection of drugs and medicines is accorded a special status in the pharmaceutical industry because of the very fact that drugs and medicines can easily be reverse engineered or imitated and all the major research and development

spending and the high risks associated with the development of a new drug will flow down the drain. The innovator companies contend that exclusive patent rights and the resulting high prices are required for pharmaceutical companies to recoup the large investments needed for research and development.

The developing countries argue that poor people in both the developed and developing world cannot afford the high prices for patented drugs that the innovators charge. Another allegation is that pharmaceutical companies direct their patents towards incrementally improving treatments for diseases prevalent in wealthy countries and away from diseases that cause devastation in the developing world.

Finding a balance

Public opinion swings like a pendulum unable to find balance. Allegations and counter-allegations both from innovators and moral police cloud the real picture beyond recognition.

There have been public campaigns for improving access to medicines. India being a socialist and a developing country was bound to be pulled into this quagmire. As *Bloomberg Businessweek* rightly wrote "only lawyers win in patent wars." A middle path needs to be carved.

There has been overwhelming public concern for "preventing the over-reach" of intellectual property protection including patent protection, and "to retain a public balance in property rights". There has been hue and cry from the generics world that through a stringent patent regime a patent holder would be able to prevent all generics manufacturers that might have been able to make the drug available in the market at affordable prices.

The outright ousting of patent rights in India may encourage bulk generic drug production at cheap prices, but generic drugs will not result in the development of new and more effective drugs and by not acknowledging innovation India would run the risk of not having access to future medicines, which would in turn affect public health.

Denying patents and allowing the generic companies to freely copy new drugs cannot be the solution to deliver medications to patients too poor to buy them. The generic drugs intended for the poor may be frittered away by way of re-imports. In the long run it is the introduction of product patents which will help in development of new and more effective drugs.

The fact remains that both the innovator companies and the generics makers are in the market for profits. Any philanthropic gesture will only be to a limited degree. However, the pharmaceutical industry, both innovators and generics, owes moral responsibility to the society. Therefore the exclusivity granted by patents to the drug companies should be exercised with responsibility.

The standard set out in the Doha Declaration on TRIPS and public health is "access to medicine for all". This standard has to be upheld by India. The government needs to ensure a reliable system that delivers cheap medicines to the poor, as intended. India has to safeguard not only its people and generics but also its reputation for upholding IP rights. We may consider using differential pricing and parallel imports to provide medication to the poor without compromising on innovation.

Richa Pandey is a partner at Krishna & Saurastri Associates. She is an advocate registered with the Bar Council of India and also a patent attorney.