Circumventing the Debate over State Policy and Property Rights: Section 3(d) of the Indian Patents Act Law

Tanuja V. Garde*

1. Introduction

The development of patent law in India, more so than any other intellectual property right, from the time of India’s independence to the present has paralleled the development of industrial policy. Most recently seen in the debates over the patentability of new forms, captured in the infamous Section 3(d) of the patent law, the tension over ownership of property rights and the socialistic goals of the Indian constitution is not new. Indeed this tension has primarily been associated with the expropriation of agricultural lands from the zamindars, wealthy Indians that were often considered as cronies of the British Raj. Neverless the issues in the patent context are similar. Industrial policy battled with social policy, with the latter emerging as the victor, in the debate over patent rights on medicines. The development and change in the patent laws had the most adverse impact, from a perspective of property rights, on innovators of medicines, typically foreign enterprises. Interestingly, patents as a property right per se was not the issue; as discussed below, in the 1970 amendments and then later, in the amendments intended to implement the TRIPS Agreement, the patent rights in other areas of technology were, for the most part, not singularly affected. This article will discuss the development of patent law in India and attempt to address how the construction of Section 3(d) and the Madras High Court’s decision in the Novartis case effectively immunizes the provision from judicial review under the rights afforded by the Constitution, thereby circumventing another protracted debate over just compensation for the taking of property rights as a measure to further the social policies outlined in the Constitution.


While India’s patent law is rooted in the system erected by the British prior to independence, the amendments post-independence reflect the tension in India’s development of industrial and social policies. In 1948, the government appointed a technical committee to review the relationship of patent rights to industrial development. The report of the committee, the Justice Bakshi Tek Chand Report1 proposed the use

* The views expressed in this paper are solely those of the Author and are not to be attributed in any manner to United States Trade Representative or the United States Government.

of compulsory licenses as a means to address abuses of the system. The recommend-
dations of the report were not codified.²

Subsequently, another technical committee, led by Shri Justice N. Rajagopala
Ayyangar, was charged with the review of the patent laws. While the report of that
committee acknowledged that the purpose of the patent laws is to promote the
industrial policy of encouraging technological advancement, it noted that these pur-
poses would not be achieved when applying a patent system to an underdeveloped
country. Quoting the Interim Report, the Ayyangar Report noted:

[T]he Indian Patent system has failed in its main purpose, namely, to stimulate
invention among Indians and to encourage the development and exploitation of new
inventions for industrial purposes in the country so as to secure the benefits thereof to
the largest section of the public.³

The report focused on innovation among the domestic population and described the
disproportionality of patent grants between domestic and foreign proprietors, with
the ratio favoring the latter.⁴ Focusing heavily on chemical products, the Report
reasoned that process patents were more conducive to industrial progress as they
would eliminate the product patent owners’ monopoly over the development of new
processes.⁵ The report made several recommendations, some of which were aimed
at subordinating patent rights to public health considerations.⁶ The Patents Act
1970⁷ followed these suggestions by recognizing both process and product patents,
with the latter not being available for inventions relating to food, medicine or drugs
or chemicals produced by a chemical process.⁸ Furthermore, a patent claiming the
method or process of manufacturing a substance for use as a food, medicine or drug

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² A bill was introduced but lapsed when the lower House, the Lok Sabha, was dissolved.
³ N. RAJAGOPALA AYYANGAR, Report on the Revision of the Patent Law, Government of India
(1959).
⁴ Indeed, it was shown that the number of patent applications filed from 1949-1958 was 143%
greater than the number of applications filed from 1930-1939. However, the number of patent
applications filed by Indians remained proportionally the same. Moreover, 91% of patents in
force as of January 1, 1958 were owned solely by foreigners.
⁵ The concerns over foreign ownership were visible here as the percentage of patent applications
relating to drugs and pharmaceuticals increased from 92% to 95% in the ten years following
independence.
⁶ The first and fourth recommendations are as follows:
(1) defining with precision inventions which should be patentable and by rendering unpatenta-
able certain inventions, the grant of patents, to which will retard research, or industrial progress
or be detrimental to national health or well-being; …
(4) by providing special provisions as regards the licensing of patents for inventions relating to
food and medicine
⁸ Section 5 of the 1970 Patents Act. In the case of inventions –
(a) claiming substances intended for use, or capable of being used, as food or as medicine or
drug,
(b) or relating to substances prepared or produced by chemical processes (including alloys,
optical glass, semi-conductors and inter-metallic compounds)
no patent shall be granted in respect of claim for the substances themselves, but claims for the
methods or processes of manufacture shall be patentable.