

A Brief History of IP & Patents: Drawing Lessons from the Past

Asean Workshop on Compulsory Licensing to
Increase Access to Antiretrovirals (ARVs) and
Diagnostic Reagents

Kuala Lumpur, Malaysia, May 2006

Tahir Amin
Intellectual Property Advisor
tahirmamin@gmail.com

“It is a very clever device that when anyone has attained the summit of greatness, he kicks away the ladder by which he has climbed up, in order to deprive others of the means of climbing up after him.

Any nation which by means of protective duties and restrictions on navigation has raised her manufacturing power and her navigation to such a degree of development that no other country can sustain free competition with her, can do nothing wiser than to throw away these ladders of her greatness, to preach to other nations the benefits of free trade, and to declare in pertinent tones that she has hitherto wandered into the paths of error, and has now for the first time succeeded in discovering the truth.”

Freidrich List, The National System of Political Economy (1841)

IP and Patents Today

- In the age of a 'knowledge economy' IP, in particular patents, have become key economic assets.
- Now countries are being forced to adopt the same IP policies and patentability standards as essentially adopted by the U.S and European Union. Is this a case of 'kicking away the ladder'?

A Brief History

- The debate around IP and patents has always been controversial:

“The privileges granted to inventors by patent laws are prohibitions on other men, and the history of inventions accordingly teems with accounts of trifling improvements, patented, that have put a stop, for a long period, to other similar and much greater improvements. The privileges have stifled more inventions than they have promoted...Every patent is a prohibition against improvements in a particular direction, except by the patentee for a certain number of years; and however beneficial that may be to him who receives the privilege, the community cannot be benefited by it...”

(The Economist, 1851)

A Brief History

- Historically, countries have always used IP policies and patent laws as strategic tools to access knowledge and develop technological skills, changing their regimes at different stages of economic development.
- Various restrictions have been imposed at different periods of time by countries on patenting, most notably inventions in certain industries providing essential goods, such as foodstuffs, pharmaceuticals and chemistry.

A Brief History

Examples:

- Between 1790 and 1836, as a net importer of technology, the U.S restricted the issue of patents to its own citizens and residents.
- In most of continental Europe, until recent years, only the process of producing a drug could be patented:

A Brief History

Examples (cont'd):

- *France*: From 1844-1966 only permitted patents on processes. Even then, it was only until 1978 that the ban on patenting drugs was completely lifted.
- *Germany*: 4 September 1967 introduced general patentability of chemical and pharmaceutical products.

A Brief History

Examples (cont'd):

- *Switzerland*: Patent for products introduced in 1977. Now Switzerland is the home to some of the largest multinational pharmaceutical companies.
- *Italy*: Up until a ruling from its Supreme Court in 1978, pharmaceutical product patents were prohibited. Despite its complete lack of any patent protection, by the end of the 70's, Italy was the 5th world producer of pharmaceuticals and 7th exporter.

A Brief History

Examples (cont'd):

- *Spain*: Introduced a product patent regime in 1986, but which was applied only from 1992.
- *Korea*: Adopted patent legislation in 1961 but excluded chemicals and pharmaceuticals. Following action in the mid-80's by the U.S under s301 of its Trade Act 1974, the patent laws were revised, but not immediately to current TRIPS standards.
- *India*: Repealed colonial Patent Act left by the British in 1970 to only allow process patents for 7 years. Now one of the leading producers and exporters of low cost generic medicines and bulk intermediates.

A Historical Lesson Learnt?

- The above examples show how countries have been able to adapt their IP regimes and patent laws to facilitate technological learning. But what lessons have been learnt?
- Now developing countries have been forced or are being forced to adopt stringent IP regimes and patent laws with low standards of patentability through TRIPS (WTO), WIPO (Substantive Patent Law Treaty), but more worryingly through unilateral, bilateral and regional agreements which are in many cases 'TRIPS plus' or even 'TRIPS plus plus'!

The Lesson to be Learnt

- To use every possible flexibility available in TRIPS to ensure development of local industry and technology, but more importantly access to information, knowledge and medicines.
- To avoid harmonising IP regimes and patent laws with developed country practices, but to implement definitions of patenting which support true research and development, and laws which enable patents to be scrutinised by the public.

The Lesson to be Learnt

“In a global economy, a global system of intellectual property rights is needed. This system must reflect the needs both of countries that are developing and those that have developed. The problem is similar to the one concerning which types of knowledge should be in the public domain in the developed world. But the Third World’s need to get low cost pharmaceuticals is not equivalent to its need for low cost CDs. Any system that treats such needs equally, as our current system does, is neither a good nor a viable system.”

(Thurow, L. (1997) Needed: A New System of Intellectual Property Rights, Harvard Business Review, Sept.-Oct. 1997, p.103.)