

LEADER ARTICLE: Patent Wrong

The Mashelkar Report on Patent Law Issues was released recently and understandably, you missed it. But it will be a pity if the report continues to go unnoticed, because its recommendations if accepted could dramatically increase the price we pay for medicines.

Leukemia patients, for instance, could see the cost of their medication increase by 12 times. Technically speaking, the report is fundamentally flawed. Ethically speaking, it substitutes irresponsible plagiarism for analysis. Patents are limited monopolies granted by national governments and regulated by WTO.

In theory, the logic is deceptively straightforward: the discovery of new medicines costs money; companies need an incentive to make this investment; patents provide that protection.

In practice, multinational pharmaceutical companies have turned the system on its head, earning them ire from trade economist like Jagdish Bhagwati and Joseph Stiglitz, among others.

As their pipeline of truly innovative drugs slows to a trickle, they have focused their energies on patenting minor tweaks to existing drugs in order to extend monopolies whenever possible.

In trade circles, this is called 'evergreening' a process that the Mashelkar report asks us not to confuse with "incremental innovation" though it's hard to tell them apart. To you and me, this translates into an infinite monopoly a lifetime of artificially high prices for medicines because only one manufacturer is allowed to supply the market.

The furore over affordable medicines intensified in 2005, when India amended its patent law to comply with the TRIPs agreement. Among the problems to be ironed out: Could India limit patents on medicines to those that are truly new and innovative and yet keep in line with TRIPs?

Enter Mashelkar. Charged with two questions, one of which is whether it would be TRIPs-compatible to "limit the grant of patent for a pharmaceutical substance to a new chemical entity or to a new medical entity involving one or more inventive steps" his committee concludes that it would not, adding that it is not in "national interest".

Consider how it reached these conclusions. The committee, chaired by Mashelkar and comprising four others, was constituted the commerce ministry in April 2005. Their report was submitted to the ministry in December 2006. For one and a half years of work, the analysis is thin not more than a few pages.

It is surprising then that most of the conclusions with respect to new chemical entities (half the exercise of the entire report) have been extracted verbatim from a paper published earlier in 2006 by the IP Institute, a UK-based industry think tank.

Its author, Shamnad Basheer, identifies his funding for the paper as coming from Interpat "a Swiss association of major European, Japanese and US research-based pharmaceutical companies".

Basheer waxed jubilant about the Mashelkar report on his blog: "A very sensible suggestion to me not least because these conclusions were extracted from a report that I submitted to the committee..."

It flatters one to know that the extraction happened verbatim, though I would have been happier had the committee cited the source..." So let's get this straight.

A committee of five renowned experts takes one and a half years to deliberate over a patent law issue that's crucial to millions of people, and finally produces a report whose conclusions are lifted, without acknowledgement, from a paper funded by the multinational pharmaceutical industry.

We couldn't make this up if we tried. Consequently, it's difficult for us to take this report seriously. But we shall try. India's patent law has provisions to prevent 'evergreening'. If a patent is sought on an improvement, that improvement must actually make the medicine more effective.

As logical as this may seem, it is not in the interests of multinationals though India could have set patent standards even higher, since TRIPs explicitly leaves this flexibility in sovereign hands.

The Mashelkar report's twisted logic conveniently overlooks these flexibilities, even the judgment of the WTO on this matter. No the multi-national pharmaceutical lobby is planning to use this same twisted logic to cast doubt on the few protections that are in place in existing law.

There are millions who need cheap medicines from India in order to stay alive. Mashelkar's 'national interest', however, is a fantasy that refers to something else: the Indian pharmaceutical industry. Nothing wrong with this, except that the report's purported beneficiaries don't agree with their benefactor.

The Indian Pharmaceutical Alliance, representing the domestic pharmaceutical sector, has slammed the conclusions of the Mashelkar report as not in their interests. What's more, it recently intervened in a legal case currently pending in the Madras high court to defend the validity of a provision in the Patents Act that sets stricter patent criteria.

Challenging this provision is pharmaceutical giant Novartis. Coincidentally, Novartis is a financial contributor to Interpat. Mashelkar's report is among the first attempts to dent an already compromised patent system.

Certainly, more attempts will follow like the issue of pharmaceutical data exclusivity, currently on the US bilateral agenda, and designed to delay the entry of affordable generic medicines.

The genius of this report lies in how it exhorts itself as simultaneously for Indian patents, for Indian companies, for the nation and for the rule of international law while actually only serving the interests of a few pharmaceutical giants. It's a remarkable sleight of hand.

The question is: Will the Indian government be fooled? Park is with the Lawyers Collective and Prabhala is an IPR researcher.

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