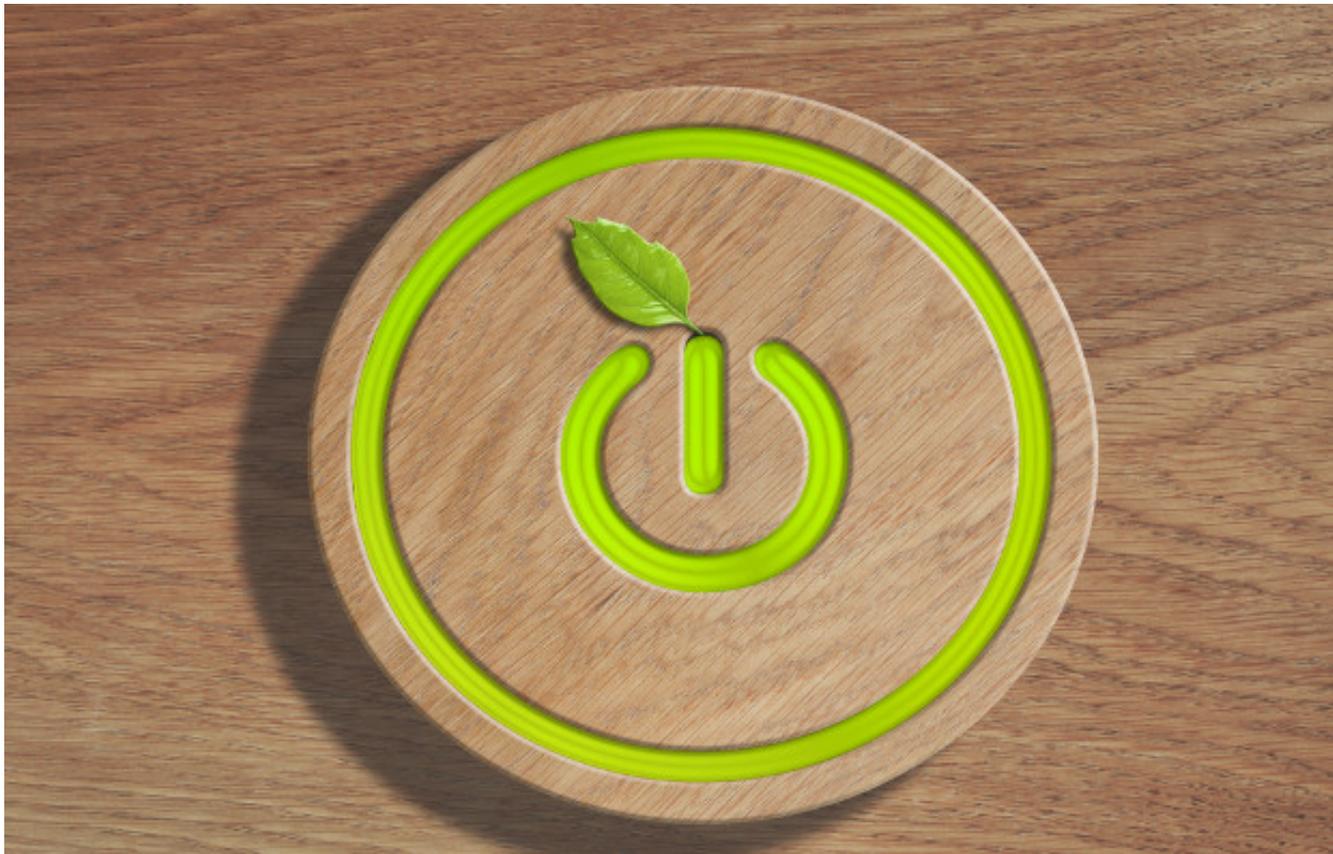


Easing the path for green tech in India

11-08-2016

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Even if India moves towards a patent-unfriendly environment for green technologies, the pro-patent and pro-environment lobbies can coexist and meet their respective goals, argue Swarup Kumar and Jitesh Kumar of Remfry & Sagar.

Mark Twain, the US writer, once said “get your facts first, then you can distort them as you please”.

Green technologies and patents are at a cross-roads in India, so let's get our green patent facts first before analysing whether they have been distorted in an endeavour to create a patent-unfriendly climate.

Amid growing concern that patents restrict access to green technologies, a section of Indian stakeholders has proposed limiting patent protection for climate-friendly technologies. The concept of weakening intellectual property (IP) rights in green technologies has garnered strength after India, partly on account of international pressure, opened the door for phasing out hydrofluorocarbons (HFCs) in 2015 under the provisions of the Montreal Protocol, an international treaty for phasing out substances that deplete the ozone layer.

In order to protect domestic industry from an immediate impact, and to allow for a smooth transition to climate-friendly technologies, India made it a point to incorporate flexibilities in terms of choice of alternative technologies and timeframe for transitioning from HFCs to safe, technically proven, energy-efficient, economically viable, environmentally friendly and commercially available technologies. Unfortunately, some stakeholders have found the above flexibilities inadequate and are vying for implementation of more stringent norms to protect and, perhaps, encourage domestic industry.

For instance, one of the recommendations is that the flexibilities on compulsory licensing provided for in the TRIPS Agreement be utilised in respect of green technologies. TRIPS allows compulsory licensing of patented technology without the authorisation of the patent owner in times of national emergency, other circumstances of extreme urgency, and in cases of public non-commercial use.

In India, one such licence has been granted for a pharmaceutical product for a life-extending drug (the Nexavar [sorafenib] compulsory licence). With this in mind, the supporters of a compulsory licensing regime argue that environmental pollution is a long-term health problem because it leads to the premature death of millions of Indians each year. They propose that environmental pollution should be considered a "national emergency" and, by corollary, compulsory licensing of green technologies—which could help circumvent such emergency—ought to be permissible.

The proponents believe that the crisis is factually supported by (i) a World Health Organization report (June 2016) which indicates that half of the 20 most polluted cities in the world are in India; and (ii) data compiled as a part of the Global Burden of Disease project which show that more than 5.5 million people die prematurely each year due to air pollution, with more than half of those deaths occurring in China and India.

Finally, the compulsory licence proponents argue that there is no *per se* bar to the grant of such licences on green technologies, and support their stance by pointing to the Doha Declaration in 2001, which emphasises that TRIPS does not, and should not, prevent member governments from

acting to protect public health.

Patent concerns

Not surprisingly, such a sweeping proposal has attracted grave apprehension from different quarters including inventors, innovators and patent attorneys. One concern is that introduction of a compulsory licence regime for green patents will act as a deterrent and, potentially, reduce the level of investments directed towards innovation in green technologies.

Increased green technology research is essential for finding better solutions to ensure cleaner environments and strong IP rights are important for creating economic incentives for this research. In today's business environment, it is essential to have exclusive rights in order to attract the necessary capital to turn ideas into inventions and inventions into commercial products. This is particularly true for green technology firms in sectors such as wind energy, solar energy and biofuels where capital investments drive research and development.

Those against compulsory licensing in green technology also assert that IP rights may not constitute a significant barrier as claimed, since a variety of technologies do exist for reducing emissions. In many cases, IP-protected technologies are not necessarily more expensive than those not protected by IP and patent pricing, so they cannot be considered as a major barrier for technology transfer in this field.

In terms of highlighting the contrast with compulsory licences for pharmaceuticals, it is pointed out that while certain diseases are treatable only with a specific drug, there are many technologies available for combating the issue of climate change.

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Additionally, stakeholders point out that the economic and social repercussions of allowing compulsory licences in green technologies may far outweigh the costs saved by the issuance of the licence itself. For example, granting compulsory licences for green technology would also invite international backlash and India may suffer unilateral trade sanctions. Besides, introducing compulsory licences might be accompanied by a slump in foreign investment as several patent owners would likely reduce their investments in India amid their viewing it as a patent-unfriendly environment.

On the other hand, mere weakening of IP rights through compulsory licensing is not considered sufficient by other stakeholders, who have gone further and demanded restriction of IP rights in green technologies. More drastic proposals include, *inter alia*, exclusion of green technologies

from patentability as well as revocation of existing green patents.

The scope of section 3(d)

The crucial role played by the amended section 3(d) of The Patents Act, 1970 in blocking the patenting of incremental pharmaceutical inventions is often highlighted by such stakeholders, and arguments are made in favour of widening the scope of section 3(d) to block the patenting of inventions in green technologies, or for introducing a similar provision for this purpose.

Opponents of this proposition are genuinely concerned that amending patent law to limit patentability of green innovations without carefully weighing the pros and cons may lead to similar issues as experienced in the case of amended section 3(d) of the Indian patents statute.

While the objective behind the amendments to section 3(d) in 2005 was to check any attempt at 'evergreening', in practice the section is applied *carte blanche* (quite often incorrectly) in respect of pharmaceutical inventions, thereby inhibiting patenting of many crucial innovations. Therefore, the fear is that the Indian Patent Office will routinely raise objections under the new exclusionary provision for green innovations even in genuine cases, and we would see a repeat of the section 3(d) predicament where, even after being in force for more than ten years, several issues relating to the applicability, scope and implication of section 3(d) are still unresolved.

In fact, such a development might affect the patentability prospects of a large number of inventions which may not, or only remotely, be related to climate change. For starters, it will certainly be difficult to identify what actually constitutes "green technology" as any technology which accomplishes its goal more efficiently could be considered "green".

Therefore, blocking every technology that fits such a broad definition may effectively eliminate IP rights on many crucial unrelated innovative technologies. The proposed widening of the scope of section 3(d) to block patenting of inventions in green technologies or introducing a new provision for this purpose does not therefore seem to be a step in the right direction.

So, where do we go from here? Considering the downsides of taking the route of compulsory licensing and the preponderance of misuse of a proposed provision for blocking patent protection for climate-friendly technologies, alternative strategies must be considered.

For starters, with the aim of achieving transfer of technologies at affordable costs, patent owners may be encouraged to adopt a tiered pricing system (based on jurisdiction), where products based on green technologies may be sold at a significantly discounted price in India. In contrast to pharmaceutical products, the large size of most energy-efficient products significantly reduces the risk of their re-importation to countries where they are more expensive.

Further, as is prevalent in the telecommunications sector, a system for creating standard-setting

organisations and, consequently, for licensing of standard essential patents in green technologies to interested parties under fair, reasonable, and non-discriminatory terms could also be made a norm rather than an exception. Other effective measures may include setting up centres for technology development and transfer, creation of patent pools of relevant technologies and use of private-public partnership models to license/buy patented green technology.

Time will tell which lobby succeeds. But from the above, it is clear that while a patent-unfriendly environment is a possibility for green technologies in India, both pro-patent and pro-environment lobbies can coexist and meet their respective goals.

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