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June 14, 2011

By Email (dv.prasad@nic.in; chandni.raina@nic.in; sk.lal@nic.in) followed by Speed Post

To

Sri D. V. Prasad

Joint Secretary

DIPP, Ministry of Commerce,

Government of India,

Udhyog Bhawan,

New Delhi-110011

~~JS (DVP) - on tour~~
~~DIR (CR)~~

Chandni
16/6/11
US (SVC)

Dear Sir,

Sub: Views on Discussion Paper on Utility Patent

With all due regard I am presenting my views on the Discussion Paper on Utility Patent in the following paragraphs:

Patent is a monopoly and monopoly is bad for the open market. With this caution the preamble of the TRIPS Agreement was written. So we need to be extra cautious for introducing another monopoly tool.

India has done with the timeline compliance to the TRIPS agreement. We amended our Patent Law three times to make it TRIPS compliant and there is no international obligation or pressure as such to create an external need for an additional utility or make a room for the utility patents in the patent law.

I agree with the views expressed in point 4 of the Utility Model discussion paper. We are a sovereign country having the national interest supreme. The national interest is in the

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welfare, progress and protection of people of the nation. The authenticity of Patents for inventions is beyond doubt. I agree with the statement, 'we are firmly committed to resist the dilution of patent standards'. Keeping this in background we need to consider the Utility patent tool. I did not find where from the need to opt for a discussion on Utility Model arrived.

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The Government is spending a lot of money for conducting IPR awareness programs around the country. The majority of people of our country including the media don't understand the difference among copyright, patent and trademark. So the demand for Utility Patent has not come from majority of people.

As per the Annual Report of IPO for 2009-10, in India 34287 patent applications were filed in the year 2009-10. Out of the 34287 applications, 7044 applications were filed by Indians. It means 27243 applications or 79.46% applications were filed by the foreigners. This small data in the light of the discussion paper indicates that most of the Indian inventions fail at patentability test and therefore is the requirement of Utility Patent. When rights are in majority with foreigners and obligations with the Indians, why not to replace the Patent Law with the Utility Patent Law? Indeed, it is not the fact!

In the Chapter 2 of the Discussion Paper the example of *Jugaad* has been mentioned. Well, who made *Jugaad* is not known. Perhaps the 'inventor' was not interested in being known as the inventor. Around 70% of Indian population sustains on less than \$2 per day income. For them sustainability is the biggest question. The majority of them have no bank account, life or medical insurance. For them each day is a new life. *Jugaad* was developed to meet out the demand of this class of people. People of such type of 'inventions' cannot draft the specification at their own and don't have pockets deep enough to meet out the professional expenses for even filing the patent applications. In such a budget perhaps the inventor would be it more prudent to make a few *Jugaad* to be sold off in the open market.

The second reason was cited about the SME sector. To counter this argument, I would state that there are plenty of Government run programs to encourage SME sector for innovations and IP rights creations. But most of the SMEs have either failed to utilize the benefits of the schemes or could not innovate. The IPO's annual report could not mention even a single SME as a role model innovator enterprise. It means that most of the SME are sustaining

without investing in creating patent rights. I would not say that SME don't innovate, but indeed they don't opt for patent protection as done by their developed countries counterparts. Hence lowering the patentability test conditions by naming them Utility Patent test seems futile.

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Indeed, India has made a big leap in creating IP ambience in the country. The number of applications has also soared. But the commercialization of patents and enforcement of patent rights through the court of law are still lacking and in very crude stage in comparison to the developed countries. Without a system to commercialize patent and other IP rights, like securitization of patent or trademark, IP fails to qualify as a property in itself. Though there is no doubt about the mental acumen of Indian judiciary, but it is a rude fact that excluding the a few metros of the country the judiciary is not well equipped to deal with IP cases. It is a very terrifying fact that in the history of independent India there is not a single patent infringement case decided by a higher judiciary. The cases reach to the extent of interim injunction. It is the condition of the patent system in India. India has patent law since the British period. In this backdrop of the patents, is it fair to introduce Utility Patents in India in the name of SME or the genius minds having the capacity to make Jugaad or clay refrigerator?

The point 8 of the Chapter 2 of the Discussion Paper mentions National Innovation Foundation (NIF). The purpose of inventions, innovations and traditional knowledge is to use IP tool kit to create monopoly and then exploit the monopoly in the open market place. The point 8 mentions about the list of ideas and innovations to number of the patent applications filed and the patents secured. It fails to report the number of patents commercialized or the number of the licenses granted and the amount secured from royalties. Without this data, filing a patent application and receiving a granted patent is a cheating with the inventor. It is a cheating with the inventor because he may have paid the cost for filing patent application; or if the NIF was bearing the cost, it is a bigger cheating because that was public money. The paragraph 8 mentioned about traditional knowledge but was silent how NIF helped the traditional knowledge owners to earn their livelihood through traditional knowledge. Hence the contents of the paragraph 8 make no impact on the necessity of the Utility Patent. It seems NIF is a burden on public money!

The Paragraphs 9 & 10 describes the innovations and their failure to qualify the patentability test respectively. The patentability conditions are not just qualifying conditions. They have developed over a period of time. The patentability conditions come handy in infringement matters. The presence of Utility Patent in Indian scenario will create a chaos in both the market place and in the law enforcement system.

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In the paragraph 17 the interpretation of the TRIPS Agreement in respect of advocacy for Utility Patent is erroneous. The TRIPS says that it is providing minimum conditions for safeguarding the intellectual property across the WTO Member countries but the upper cap has been left open for the Member States to raise the level of IP protection. The Utility model does not raise the IP protection level rather compromise the level of patent protection. Though Utility Model makes the IP protection domain wider, it dilutes the patenting rights. The Utility model may be used as an additional layer of IP protection to the patent protection. This is against the national spirit of one protection to one aspect of IP.

The notion of paragraph 27 appears outdated and bogus. The WIPO provide the more authentic source <http://www.wipo.int/pct/en/texts/pdf/typesprotection.pdf> of the countries providing Utility Patenting.

I would like to counter the statistics of lesser number of granted patents in India to Indians. Well, the law cannot do anything if one is not using the law. Similarly under the doctrine of National Treatment, the trade-related laws treat both nationals and foreigners equally. If the foreigners are securing the majority of the patents right, then it should not be surprising that after the enactment of the Utility Patent the foreigners would dominate the Utility Patents too. So creation of a lesser quality patent is not going to increase the number of utility patents. The reason behind reluctance of Indians for securing patents has some ignorance aspect.

Coming now to the issues part of the Discussion Paper, the nation does not need another IP law in the form of Utility Patent because it will further imbalance the rights-obligations equation against the majority of people of the nation. It is obvious that foreigners would dominate in Utility Patents rights creation.

The question no. 2 in itself shows that there is reluctance for opting for Utility Patents.

The question no. 3 provides the glimpse of the definition of the Utility Patent. The language shows that it would not be an apply register process but would be exhaustive like patent process. The only difference is that non-obviousness test would be waived. It means that it would also take at least 12 months to secure registration. On the count of Exhaustion there is a chilling silence from the level of the TRIPS Agreement to the domestic patent/utility laws of the Member Countries. So I doubt if it would be raised to incorporate in the Utility Patent Bill, if such a bill is ever made. Further insertion of the exhaustion principle would be impotent with respect to international set up for the utility patents. There is no such international utility patenting system as exists for the patents. In absence of the international system, the utility patent shall fall flat for securing utility patent rights in all countries of business interest.

The novelty can be examined in relative terms. The absolute novelty exists in rare path breaking technologies.

With the kind of our legal system and knowledge of law among people, it is obvious that utility patent would dilute the patents and people rather corporates would make strategies to artificially extend the monopoly life span. I will explain it with a real case in the later part.

There is no scope of amending the Design Act for incorporating the utility patent provisions in it. Design aspect is exclusively confined to the material that catches the attention of eyes. Whereas, the rest of the questions cannot be predetermined and answered accordingly. These questions will come later to the more vital priority question like opting for utility patent and the definition of the utility patent.

The reply to the seventh question is YES. The existing IP laws are such that an IP aspect is covered by one IP tool only. So, double protection is out of question otherwise incremental innovations may qualify only for the utility patent whereas the inventions may qualify for both patent and utility patent.

The answer to the question 8 is yes if the utility model provision is incorporated in the patent law. Else, the answer is No.

The question 9: Traditional knowledge is community knowledge and is practiced day-in and day-out. The traditional knowledge is out of question for patent or utility patent protection.

The answer to the first part of the question 9 is also NO because equality is a basic principal of law.

The disputes resolution has a big role to play in solving the conflicts and disputes. But a law cannot become silent only at dispute settlement on enforcement court. Secondly creation of another authority after creating IPAB appears absurd. Further IPAB is an appellate authority and having HQ at Chennai and moves 2-3 times in metros only. The basic premise of the utility patent was to reach out the rural areas where perhaps utility patent may be helpful. For the enforcement of the rural people rights, the provision of jurisdiction of the local courts appears mandatory. The court of law has to play the central role in the enforcement of the rights. Page 1

The answer to the question 11 is also No. The monopolistic thing can be checked and struck down at the registration process. It would minimise the abuse of monopoly through misuse of laws.

The question No. 11 was very apt setting for providing an example of abuse of monopoly and abject hollowness and insensitivity of the judicial machinery in deciding the patent cases. Varanasi town was having a cottage industry for making the brass rings for the bulb holders. A cease and desist notice appeared in the local papers warning against breach of rights created by filing a patent Application No. 782/DEL/1996. Before the patent (No. 194620) could be secured in 2009, a gentleman went behind bars on the basis of FIR filed by the patent applicant. This arrest to bail episode was repeated twice. It means the poor fellow went to jail for breaching rights created by the patent application. This is a glare example of misuse & ignorance of law. Both the times all the goods were ceased and the application for the release of the goods were repeatedly refused by the local courts despite of showing the Supreme Court rulings according to that the ceased goods should be released in 15 days. The pre-grant opposition application was filed against the application and the concerned IPO officials were informed about the misuse of the application itself. In fact there was no invention as such. The patent was secured for without join brass ring that the local industry was making for several years. But all in vain! The patent was granted. Finally the poor fellow closed his cottage industry. He lost his goodwill, honour and sunk into a huge monetary loss.

The Patent Law is a civil law and even for the infringement of a patent the remedy is civil in nature. The above-stated example exposes the sorry state of affairs in the lower courts in respect of enforcement of IP laws. Do we really need utility patent? I believe in the light of the above-example, the answer to this question for me is a BIG NO. Let innovations lacking on non-obviousness serve the society without IP bounty and inventions alone qualify for patent rights. We as a nation don't need another IP tool but we should concentrate on efficient commercialization and enforcement of patents.

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I am thankful to uploading this discussion paper online and providing an opportunity to present our views. The IP and the WTO issues are not just mute questions, the right path in this direction can take the nation to the road of prosperity for the people and wealth for the nation. I shall always be at your service for the call of the national interest.

Best regards.


Rahul Dutta

Patent & IP Attorney