

# **Intellectual Property Rights: Theory & Indian Practice**

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The twenty-first century will be the century of knowledge, indeed the century of the intellect. A nation's ability to translate knowledge into wealth and social good through innovations will determine its future. Thus innovations hold the key to the creation as well as processing of knowledge. Consequently issues of generation, evaluation, protection and exploitation of intellectual property would become critically important all over the world.

Our analysis of intellectual property rights (IPRs) is presented in two sections - in the first we deal with the concept of intellectual property rights and the rationale behind them. In the second section, we focus on the intellectual property rights in the Indian context.

## Section I

Intellectual property can be characterised as the property in ideas or their expression<sup>1</sup>. It is a creation of the mind, for example, a technological innovation, a poem, or a design. It protects the rights of individuals and businesses who have transformed their ideas into property by granting rights to the owners of those properties. Intellectual property can be classified into the following four categories: patents for inventions, copyrights for literary works, trademarks, and trade secrets. We shall briefly define the various kinds of IPRs.

- **Patents:** A patent is a legal monopoly granted for a limited time to the owner of an invention. In many countries, an inventor of a new product or process can apply for a patent giving the holder the exclusive right for a number of years to produce the good or use the process. This right can be used either through their own business or by charging a license fee. The earliest known patent on an invention was awarded in Florence in 1421 to *Filippo Brunelleschi* for a barge with hoisting gear capable of transporting marble. In Britain the first such patent was awarded in 1449 to a Flemish glassmaker for a method of making stained glass windows. During the sixteenth century the English monarchs discovered that the sale of monopoly privilege could be very lucrative and granted patents on an indefinite basis to all manners of trades and manufactures, regardless of their novelty. Even the trade in commodities such as leather, salt, iron, and paper was patented. The consequent high prices of these goods led to accusations that such perpetual monopolies were unjust. Responding to this criticism, numerous patents were revoked. For example, the monopoly on the production of playing cards granted to Edwin Darcy was rescinded.<sup>2</sup>
- **Copyrights:** Copyright is the exclusive right granted by statute to the author of the works to reproduce dramatic, artistic, literary or musical work or to authorise its reproduction by others. The copyright persists for a finite period after the author's death after which it can be sold or inherited. As such it protects the expression of the idea rather than the idea itself. It also extends to films or television.<sup>3</sup> Copyrights comply with international norms like Berne Convention, Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement and World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT).
- **Trademarks:** Trademark means any symbol, logo, or name used to enable the public to identify the supplier of goods. Trademarks can be registered, which gives the holder the exclusive right to use them. Manufacturers, distributors, or importers may register them. They can be sold and are an important form of commercial property. They are poorly enforced in some Least Developed Countries (LDCs) which is a serious source of

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<sup>1</sup> Morris, Julian, Rosalind Mowatt, W Duncan Reekie, Richard Tren 2002. *Ideal Matter: Globalisation and the Intellectual Property Debate*, Centre for the New Europe.

<sup>2</sup> Ibid

<sup>3</sup> 1999. *The Oxford Dictionary of Economics*

international friction.<sup>3</sup>

- Trade secrets: Trade secrets are also like patents but they rely on private measures rather than state action, to maintain exclusivity.<sup>4</sup>

We shall focus mainly on patents and copyrights because these have been at the centre of controversy regarding intellectual property rights.

### The Big Fight

Intellectual property rights are the subject matter of many a fierce debate where the proponents of either side profess their case ardently. We shall begin this debate by defining the basic lines of reasoning briefly and then by conducting an in-depth analysis on them.

<b>Arguments in Favour</b>	<b>Arguments Against</b>
Incentive to innovate	Poses serious roadblocks to innovation
Moral desert theory	Leggett's objection
Personality theory	Palmer's criticism
Utilitarian theory	Weak argument
Incentive to produce	Creates artificial scarcity

As we can see that the arguments for and against intellectual property rights are complementary to each other, we shall tackle them simultaneously. The first argument for intellectual property rights is that it provides an incentive to innovate, as intellectual property rights increase the expected returns from an innovation by increasing profitability. Hence more resources will be devoted to the particular line of work. But on the other hand, patents and copyrights may occasionally retard innovation. In order to improve on an existing product that is patented, a person would have to seek the patentee's permission. For instance, a good deal of great art would not have been created under a strict copyright regime. Shakespeare took the works of others and created greater works. Under today's copyright regime his legal bills would have been staggering!

Tom Palmer critically analyses three distinct arguments in favour of intellectual property rights. They are as follows:

- Moral Desert Theory: According to Locke, "every man has a property in his own person", i.e. the fruits of a man's labour belongs to him. In this scheme intellectual property would seem to follow naturally, since the individual must surely be permitted the fruits of his mental and physical labour. But Leggett points out that if you assert an exclusive right to a particular idea you cannot be sure the very same idea did not at the same moment enter some other mind. Thus these rights can only be justified if they are implemented in such a way that rights of an individual are protected without infringing on another.<sup>5</sup>
- Personality Theory: According to Kant and Hegel, if one's artistic expressions are synonymous with one's personality, then they are deserving of protection just as much as the physical person is deserving of protection since in a sense they are a part of that physical person. However Palmer counters this by saying that if a work of art were part of an individual's personality then they would cease to exist after the person died.<sup>5</sup>

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<sup>4</sup> Palmer, Tom. "Intellectual Property: A non-Posnerian Law and Economics Approach" - *Hamline Law Review*. Vol 12

<sup>5</sup> Morris, Julian, Rosalind Mowatt, W Duncan Reekie, Richard Tren 2002. *Ideal Matter: Globalisation and the Intellectual Property Debate*. Centre for the New Europe.

- Utilitarian Theories: Advocated by economists such as Bentham and Mill and assume that the objective of any policy should be the attainment of the greatest good for the greatest number. However utilitarian arguments can be cut for or against the claims of intellectual property rights. The utility gains from increased incentives for innovation must be weighed against the losses incurred from monopolisation and their diminished diffusion. Thus the problem arises as the benefits gained cannot be measured against the losses suffered.

Another argument against intellectual property rights and in particular patents is that it creates artificial scarcity through a monopoly on various products (which implies a restricted output and higher prices). For instance, from its establishment in 1875, the US company AT & T collected patents in order to ensure its monopoly on telephones. It slowed down the introduction of radio for about 20 years. However, it can be argued that patents and copyrights are not monopolies because monopoly is the use of force to constrain others in the use of what would "in the absence of such law be open to all," while inventions and the like could not be said to exist before their creation. The proponents of patents and copyrights reasoned that an exclusive right over an innovation could not be a monopoly, because prior to its invention it was not a "liberty that they had before." Robert Nozick argues on this basis that patents and copyrights do not run afoul of the "Lockean Proviso": "An inventor's patent does not deprive others of an object which would not exist but for the inventor."<sup>6</sup>

There are no easy and precise answers to this issue. Thus for the purpose of examining the validity of these rights, let us explore a hypothetical situation where intellectual property rights do not exist at all, and analyse whether such a system would sustain itself or collapse.

#### An Alternative Model: The Libertarian Utopia

An intriguing analysis in the field intellectual property rights is the conception of a world where no regulations or laws to protect intellectual property exist. All creations of the mind such as inventions, literary works, innovations are freely accessible and can be utilised by anyone. Many libertarian thinkers such as Kinsella believe that any institution or argument such as the question of intellectual property rights which attempts to legitimise or calls for the continued existence of the state is fallacious. If something can only be done or protected by the state, then it stands to (libertarian) reason that, that something should not be done or protected at all. They believe that it is indisputable that anything that one produces, with their own hands and/or with their own capital in collaboration with their creative mind, is their exclusive property. But once such things are ready to be sold, they should be subject to the competition of the free market, unhampered by claims of intellectual property rights; to allow the inventor of a device to smash competition in the marketplace is to allow him to fester in mediocrity, while someone smarter could have improved on the invention, benefiting everyone.<sup>7</sup>

Benjamin Tucker postulated that property arose as a means of solving conflicts within society, which were caused by scarcity. In the universe of human reality, almost all goods were scarce, and that fact led to an inevitable competition among human beings for their use. For example, since two individuals could not use the same chair in the same manner at the same time, it was necessary to determine who should use the chair. The concept of property resolved this problem. Intellectual property cannot exist because an idea is not property; it is not scarce. The very institution of property came about for the purpose of assigning scarce goods to individuals. An idea in my head is my property, because it is part of my mind. But the instant a person utters it, the next person to hear it also owns the idea, as it is now part of their mind. We may both "own" the idea without diminishing it in either of our brains.<sup>8</sup> Stephan Kinsella

<sup>6</sup> Palmer Tom, "Are Patents and Copyrights morally justified?: The Philosophy of Property Rights and Ideal Objects," *Harvard Journal of Law and Public Policy*, Vol. 13, Number 3

<sup>7</sup> Sapienza Jeremy, "My Un-PC Views on Intellectual Property", accessed at <http://www.lewrockwell.com/>

<sup>8</sup> Ibid

holds the following view regarding the working of such a society: "Imagine, we have an orderly society and one day A invents something, and tells B not to use B's own property in a certain way, because that technique is A's invention. B tells A to push off. A sues B in the courts. The claim is—what? I do not know. But the court is going to say, "A, B is using his own property, and he is not trespassing against you; you do not have a contract with him; he has never transferred to you ownership of his property; he is not committing any tort against you; in short, you state no recognizable cause of action against him. For wasting our time and his, your case is dismissed and you are ordered to pay court costs plus B's attorneys' fees, plus wear a red 1-foot-tall dunce cap for the next 30 days whenever you are outdoors."

The libertarian contention is that the market will find a happy medium between manufacturers protecting their products from copying and the consumers doing the copying. For example, while technology provides ways to trump IP laws, it also creates more ways to protect the creations of writers and artists. To protect their software, companies should hide their source codes; much like Microsoft does to keep other companies from producing Windows. To keep consumers from copying software to give away to friends or to sell, they should use technology that makes it impossible to "pirate" the software or a file. They should use technology that does not allow the owner of a CD to make an MP3 out of a track, or possibly, allow the download of a song in a format that allows only transfer, not duplication. So in the case where someone buys a new computer, and is transferring their files, they would be able to move, not copy, the MP3 onto their new computer or other device.

All the world's products are modeled after something that came before. From clothing to buildings to, yes, writing, there is always a predecessor. To deny someone the right to improve upon another's creation, manifested in the former's personal property, is to contradictorily support intellectual property rights over real and personal property rights.

Although the above system in theory seems ideal, to enforce it in reality would be a formidable task. We must recognise that laws (in this context property law) are the result of a moral consensus among people. Intellectual property laws did not evolve in nature; people living in a civil society gradually converged to them. So if the majority of the people did not approve of these laws they would not exist. Secondly, as we have seen in the past, the market has devised ways to prohibit piracy and imitations. But with the rapidly exploding technology, individuals would work around them and devise ways to duplicate which ultimately would lead to chaos, and the society would ultimately resort to a system of enforcing intellectual property rights (legally or by mutual consent).

Finally, it is incorrect to argue that the scarcity of tangible property is the sole explanation for property rights and as intangible property is in abundance, there is no basis for protecting intellectual property. The urge to own property is inherent in man as it provides security and a sense of identity, which is undeniable. Moreover although ideas as such may not be finite, revolutionary ideas that can be translated to profitable concrete works are, and thus need to be guarded. Therefore, to say whether such a system would be sustainable or not can only be possible by empirical observation, however the probability seems extremely low. Thus it is imperative to suggest a system which is both conceptually sound and also practically viable.

After evaluating the above arguments the conclusion we have come to is that a system of intellectual property rights are justified as long as they do not violate another's parallel right to intellectual property. Although realistically, the development of such a system is a daunting task due to its various intricacies. It is important to realise that there are no clear-cut, easy answers for this debate. This debate is thorny because two important principles clash: legal protection for intangible works conflicts with the free expression and exchange of ideas. IP disputes have always involved trade-off between these two fundamental principles. Thus the

best solution is to minimise the opportunity cost of the trade off. A system whereby an individual is secure in the knowledge that his intellectual property shall be protected without infringing on someone else's right to his intellectual property. One of the systems that can achieve this objective to a large extent is the use of copyrights instead of patents, which was originally suggested by Murray N Rothbard.

### The Rothbardian Solution<sup>9</sup>

Patents and copyrights are both property rights in innovations. But there is a crucial difference in their legal enforcement. If an author or a composer believes his copyright is infringed and he takes legal action, he must prove that the defendant had "access" to the infringed work. If the defendant produces something identical to the plaintiff's work by mere chance, there is no infringement. Copyrights in other words, have their basis in implicit theft. The plaintiff must prove that the defendant stole the former's creation by reproducing it and selling it himself in violation of his or someone else's contract with the original seller. But if the defendant independently arrives at the same creation, the plaintiff has no copyright privilege that could prevent the defendant from using and selling his products. But patent then has nothing to do with implicit theft. It confers an exclusive privilege on its first inventor, and if anyone else should, quite independently, invent the same or similar product, the latter would be debarred by force from using it in production.

This does not seem just as two individuals might independently come up with the same invention that requires huge investments and only one can obtain a patent due to several reasons such as timely appeal, political lobbying or any other coincidental factor. This is fair neither on the consumer nor on the producer. Firstly by restricting the amount of output and hence higher prices and secondly if one producer obtains the patent then the other cannot produce. Thus patents seem highly unreasonable in this regard.

Thus as a solution the patent protection now obtained by the inventor could be achieved in the free market by a type of copyright protection. In the free market, the inventor could mark the copyright status on his product and anyone who buys the product does it on the condition that he would not reproduce and sell such a machine for profit. The patent is incompatible with the free market to the extent that it goes beyond the copyright. The man, who has not bought the machine and has independently arrived at the same invention, will in a free market be perfectly able to use and sell his invention. Thus this would extend a copyright-type of protection to the subject matter of patents as well. Thus, argues Rothbard: suppose that Brown builds a better mousetrap and sells it widely, but stamps each mousetrap "copyright Mr Brown." What he is then doing is selling not the entire property right in each mousetrap, but the right to do anything with the mousetrap except to sell it or an identical copy to someone else. The right to sell the Brown mousetrap is retained in perpetuity by Brown.

The Rothbardian system resolves the debate regarding intellectual property rights to a very large extent as it satisfies the Moral Desert theory while resolving the objections to it. However this system has inherent flaws, which are not conceptual but rather pertain to its enforcement. Some of these flaws are as follows:

- It does not strictly define what qualifies as "copying." For instance, a person can obtain the particular piece of work, alter very trivial aspects of it, and then sell in the market. It is very tough to differentiate between an improvement and a mere alteration of the original work.

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<sup>9</sup> Rothbard Murray N. 1970. *Man, Economy, and State*. Nash Publishing, Los Angeles

- Moreover, Rothbard advocates the copyright to exist in perpetuity that is unfair as although it is generally presumed that ideas and intellectual property are not scarce, but ideas that materialise into profitable products or processes are few. Thus perpetual copyrights drastically reduce the scope of innovation and enhancement of existing ideas.
- It is very difficult to prove that a particular idea was stolen in case of violation of a copyright.

Fortunately, appropriate and precise laws that are enforced efficiently can overcome all the above stated problems.

## **Section II**

The Patent system in India is governed by the Patents Act, 1970 (Number 39 of 1970) and the Patents Rules 1972, effective from April 20, 1972. Subsequently the Patent Act, 1970 is amended effective from January 1, 1995 and the Patents Rules, 1972 is amended effective from June 2, 1999.

The chief features of the original Indian Patent Act, 1970 are as follows:<sup>10</sup>

- The Act tries to strike a balance between the rights of the patent holder and his obligation to the society that grants him such rights.
- The basic philosophy of the Act, as laid down in Section 83, is that patents are granted to encourage inventions to accelerate indigenous industrial growth by securing their working in India on a commercial scale. And, that patents are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article.
- The Act totally excludes atomic energy and methods of agriculture from patentability. One cannot obtain any sort of patent whatsoever in these fields (Section 3).
- The Act permits product patents for all inventions except food, medicines, drugs and substances produced by chemical processes; in these fields only process patent is available because food and health are crucial for the well-being of the people. Process patents in these areas enable the other competitors to find new, improved and economical processes for producing the same product.
- Section 53 provides patent protection for a period of 14 years from the date of filing. In case of food and medical drugs the period of protection is limited to seven years from the date of filing the patent or five years from the date of sealing, whichever is earlier. This shorter period of protection in case of food and medicines is believed to be necessary to prevent the patentee from exploiting the needs of society by charging exorbitant prices for the patented article. Further, in the field of medicine, the rate of obsolescence is high as new and improved molecules keep replacing the existing ones.
- The Act contains provisions for compulsory working of a patent. Working of a patent means manufacturing the product in India. The patentee cannot hold the patent in India and import the product from another country, thereby compelling the Indian consumer to pay an excessive price.
- In public interest, patents are subject to strict and extensive governmental control and use. The provision on Compulsory Licensing under Section 84 of the Act ensures the working of the patent after three years from the date of sealing. If the patent holder ignores this provision, any person may apply for compulsory license and he shall be licensed to manufacture the product. The rationale of compulsory license is that the state undertakes to protect IPRs only to ensure that new products are available cheaply and in abundance.

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<sup>10</sup> Chandiramani, Nilima. January 19, 2002. "Legal Factors in TRIPS": *Economic and Political Weekly*.

So compulsory license is issued if it is in public interest or if the manufacturer does not work the patent.

- Every patent for an invention relating to a method or process for manufacture of substances intended for use, or capable of being used, as food, medicines, or drugs, or relating to substances prepared or produced by chemical process (including alloys, optical glass, semi-conductors and inter-metallic compounds) shall be deemed to be endorsed "Licenses of Right" from the date of expiry of three years after the sealing of the patent.

This patent law which was a model for other developing countries like Argentina, Mexico, Egypt, Brazil and Chile, has been replaced by the Indian Patent Act, 1999, which is modeled on the basis of the TRIPS (Trade-Related Aspects of Intellectual Property Rights) text. This amendment seeks to implement the obligations that India has taken in the field of patents by signing the TRIPS Agreement. The bill generally aims at making the 1970 Patents Act as TRIPS compliant as possible.

Besides TRIPS, India is also a member of the following international treaties related to intellectual property rights:

- Convention establishing World Intellectual Property Organization (WIPO)
- Paris Convention for the protection of Industrial Property with effect from December 7, 1998
- Patent Cooperation Treaty (PCT) with effective from December 7, 1998

#### Provisions of TRIPS<sup>11</sup>

The TRIPS Agreement is one of the fifteen Agreements listed in Annex I of the Marrakesh Agreement establishing WTO. Though retaining the basic principle of mutuality and quid pro quo for patent grant, the TRIPS Agreement has widened the scope, duration, and strength of patent protection. The text:

- Extends the scope of patentable subject matter to any invention, whether product or process, in all fields of technology [Article 27.1];
- Enlarges the period of patent protection to 20 years [Article 33];
- Deems importation as equivalent to working of patent [Article 27.1];
- Protects the right holder against discrimination on the grounds of place of invention, place of production and field of technology [Article 27.1];
- Limits the scope of compulsory licenses, licenses of right, government/third party use [Article 31];
- Reverses the burden of proof.

The demanding TRIPS provisions enumerated above are not to be read in isolation. They have to be interpreted in the light of other beneficial provisions found in the preamble and Articles 2.1, 7, 8, 27(1), 27(2), 27(3), 30 and 31 of the text. The text attempts to balance the rights and privileges of the right holder with his obligations and responsibilities to the society. This is succinctly stated in the preamble which takes into account the need to promote effective and adequate protection of IPRs but at the same time stresses the need to ensure that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. Article 2.1 of the text makes Article 5 of the Paris Convention of 1967 an integral part of the TRIPS text. Therefore TRIPS, through Article 5A of the Paris Convention, empowers the

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<sup>11</sup> Chandiramani Nilima. January 19, 2002. "Legal Factors in TRIPS": *Economic and Political Weekly*.

member states to take legislative steps and to provide in their patent laws, compulsory licensing to prevent and control abuses which arise due to “failure to work” or “insufficient working” of patents. Similarly, TRIPS, through Article 5B of the Paris Convention, admits lack of local working as a ground for issuing compulsory license.

The principles of the TRIPS agreement are laid out in Article 8. Article 8.1 permits the members, while they are formulating or amending their national patent laws and regulations, to adopt measures necessary to protect health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are not inconsistent with the provisions of the TRIPS text. And Article 8.2 accepts the need to prevent the abuse of IPRs by the patent holder. Though Article 27.1 extends the scope of patentable subject matter, it also clarifies that only inventions (and not discoveries) are patentable. Further, it adds that for an invention to be patentable, it should be new, it should involve an inventive step, and it should be capable of industrial application. Further still, Article 27.2 reserves powers for member states to exclude from patentability such inventions as may be necessary to protect public order or morality or for protection of life, health, environment. And Article 27.3 permits members to exclude from patentability: (1) diagnostic, therapeutic and surgical methods for treatment of humans and animals; and (2) plants and animals.

TO SUMMARISE THE CHANGES:

<b>Indian Patent Act</b>	<b>TRIPS</b>
Only process not product patents in food, medicines, and chemicals	Process and product patents in almost all fields of technology
Term of patents – 14 year, 5-7 in chemicals, drugs	Term of patents 20 years
Compulsory licensing	Limited compulsory licensing
Several areas excluded from patents	Almost all fields of technology patentable
Government allowed using patented invention to prevent scarcity	Very limited scope of governments

#### Repercussions of the Patent Act, 1999

These amendments in the Patent Act will foster major changes in the Indian health sector. Indian companies will not be able to legally produce generic versions of drugs currently protected by patents. This in turn will have an important impact for companies mainly manufacturing generic drugs. From the consumer point of view, some of the main impacts will be the unavailability of cheap generic drugs before the 20-year period of protection elapses and the generally higher prices of drugs. The availability of product patents on drugs is generally meant to provide further incentives for private sector R&D in health. While this could theoretically be beneficial to both consumers and producers, it has been noted that the

availability of patents does not necessarily lead to preferential investment in medicines needed by the poor.

The bill takes advantage of some of the exceptions allowed by TRIPS itself. For instance, it incorporates the environmental and health exceptions of Article 27.2 in Section 3, which determines the scope of patentability. Thus, the bill now specifically rules out the patentability of living beings or non-living substances occurring in nature and further rejects the patentability of plants and animals.

The most notable feature of the bill, however, is not how far it makes use of permitted TRIPS exceptions but rather how strictly it follows the text of the agreement on the whole. Apart from some sections of the Act going beyond TRIPS that have not been removed in the bill, the bill does not attempt to go beyond a strict interpretation of TRIPS. This is surprising because of the significant opposition to change the act. Further, this does not coincide with the government's own views in the World Trade Organisation (WTO), where it has asserted that Articles 7 and 8.2 of TRIPS which recognise, for instance, the need to balance the rights and obligations of patent holders are overarching provisions that should qualify other provisions of TRIPS meant to protect intellectual property rights.

The rationale for introducing the bill in this form was partly that TRIPS does not provide much flexibility in the way it can be implemented. That there is today scope for flexibility within TRIPS itself has now been proved as the following examples from South Africa and Brazil indicate.

#### South African and Brazilian Experience

Some countries have had much less amicable reactions to TRIPS. South Africa and Brazil stand out with regard to the health issue. Both countries have successfully attempted to chart out a new course, which goes much beyond what would have been deemed acceptable under TRIPS until recently. This is remarkable because both legal regimes were challenged and the challenge was abandoned in each case.

In South Africa, the debates have concentrated on the 1997 Medicines and Related Substances Control Amendment Act. This amendment was partly a reaction to the severe HIV/AIDS crisis that the country has been facing and the lack of access to drugs because of their unaffordability. Two of the sections of the Act were particularly controversial. The first authorises the government to determine to what extent a specific drug patent will apply. The second entitles the government to authorise parallel imports from other countries where the same medicine is also manufactured.

The possibility for the government to determine the extent to which patent rights apply was a direct challenge to the pharmaceutical industry that reacted by moving the high court. The petitioners wanted the disputed sections to be declared unconstitutional because it gave too much latitude to the government to determine the circumstances under which rights under the patents act could be curtailed and since it authorised the government to determine the extent to which rights conferred under the patents act should apply. Eventually, the petition was abandoned in April 2001 in the face of strong public opposition.

In Brazil, the government decided to take measures to facilitate access to drugs in the context of the HIV/AIDS crisis. This includes, for instance, a strong compulsory licensing regime. The US government objected to the requirement that unless it is economically unfeasible, inventors have the duty to manufacture the product in Brazil. A WTO dispute was initiated by the US in February this year but was withdrawn in June. Interestingly, the US specifically indicated that it was not targeting another section relating to national emergencies. The possibility to provide

easier compulsory licensing in case of national emergencies is recognised under TRIPS. Brazil has, however, gone much further and adopted a decree establishing rules concerning the granting of compulsory licenses in cases of national emergency and public interest. The definition of what falls into the public interest is of great interest. Public interest includes public health, nutrition, the protection of the environment, and elements of primordial importance for technological, social or economic development. The possibility to provide compulsory licensing in each of these cases implies that the fulfillment of most basic needs would be covered.

The experience of Brazil and South Africa indicates that the provisions they have adopted are now "acceptable," if not strictly speaking TRIPS compliant, since they are unlikely to be challenged again. The idea that health emergencies provide sufficient ground for rules derogating from the TRIPS model is now established. The limits of permissible exceptions are not known but there is no reason to think that TRIPS cannot be further qualified to foster the realisation of basic needs. In practice, India also faces health emergencies like South Africa and Brazil.

The patent bill attempts to put India in compliance with its TRIPS obligations. In the process, it sets aside some of the most salient elements of the current legal regime which, together with other instruments such as the Drugs Price Control Order, have generally served well the interests of the country and its inhabitants. It is likely to bring about a legal regime that is less favourable from the point of view of access to drugs for the people of this country. Further, TRIPS cannot be implemented in isolation. India has a number of other international obligations, in particular in the field of human rights. As interpreted by UN human rights organs, the right to health requires that countries progressively take positive steps towards facilitating access. Dismantling the 1970 regime may constitute a violation of India's obligations under the covenant on economic, social and cultural rights.