

INTELLECTUAL PROPERTY RIGHTS – CURRENT STATUS

Rajendra Dobhal

Uttarakhand State Council for Science & Technology,

Vigyan Dham, Jhajra

Dehradun (UK) – 248 007

E-mail: dg@ucost.in; drdobhal@gmail.com

IP - A Critical Balance

- ◆ Private knowledge in public domain

Vs

Shutting the doors for others?

- ◆ Transform creativity into asset form

IPRs - Centrestage

- ◆ Increasingly important role in global economy
- ◆ **IPRs-NEW WEALTH OF NATIONS**
- ◆ Integral part of TOT agreements.
- ◆ Pre-requisite to Bilateral Agreement in Investment Promotion.

LEGISLATION COVERING IPRs IN INDIA

PATENTS

The Patents Act 1970 & Rules(amended), 2016.

COPYRIGHTS

The Copyrights Act, 1957 as amended in 1983, 1984, 1992, 1994, 1999 and 2012, the Copyright Rules, 1958.

DESIGNS

A new Design Act, 2000 has been enacted superseding the earlier Design Act 1911.

TRADEMARKS

A new Trademarks Act, 1999 has been enacted superseding the earlier trade and Merchandise Mark Act, 1958.

LEGISLATION COVERING IPRs IN INDIA

LAYOUT DESIGN OF INTEGRATED CIRCUITS

The semiconductor integrated circuits layout-design Act, 2000

GEOGRAPHICAL INDICATIONS

The Geographical Indication of goods (Registration and Protection), Act, 1999.

PROTECTION OF UNDISCLOSED INFORMATION

No exclusive legislation exists but the matter would be generally covered under the Contract Act. 1872

BIOLOGICAL DIVERSITY ACT-2002

PROTECTION OF PLANT VARIETIES & FARMERS RIGHTS ACT-2001

© Copyright

Copyright –

Right given by the law to creators of
**LITERARY, DRAMATIC, MUSICAL &
ARTISTIC WORKS & PRODUCERS OF
CINEMATOGRAPHY FILMS and SOUND
RECORDINGS.**

What can be Copyrighted?

'IDEA'

↓ transformation

Some tangible form – 'work' (fixation of work)
(work – intellectual creation & not necessarily a material thing)

Common law jurisdictions – material form

Not all above are copyrightable

- ◆ 'Works' – original
- ◆ 'Originality is different from 'Novelty'
(as in patent regime)

Applicable Law In India

Copyright Act 1957

- ◆ First Act in 1914, followed by the **Copyright Act 1957**.
- ◆ **1957 Act**: adopted many English provisions, introduced new ideas and concepts.
- ◆ The Copyright Act has been amended **six** times since 1957
- ◆ The most recent Amendment to the Copyright Act being in **2012**

ORIGINALITY

- Original may not be novel !
- Monopoly over his work doesn't have monopoly over subject matter of the result of work
- **OTHERS** are right to reach same result independently

↓
Expression

Example : Newton's Law (IPR –Secondary)

© Broadly two categories

Literary

Artistic

'Raw material'

(Labour, Skill & Capital)

Quality Product

(all amenable to protection)

Translation

(Permission required but © for translator)

Adaptations -
transformation from one form to other (book to film)

Abridgements

Permission required (Basic frame intact)

Artistic work: Adaptations are permitted but sufficient – 'intellectual input' is required

Copy? What Extent?

De-minimis- not a Copyright infringement

Limit?

Beginning?

Qualitatively substantial portion

Karishma Case

(Mrs. Barbara Taylor Bradford vs Sahara TV)



Vijay Dutt
London

Barbara Taylor Bradford comes across as amiable and without a trace of pretension. The doughty Yorkshire woman rose from typist to journalist, then author; has published in 15 countries, in 40 languages and sold over 70 million copies. She's in the news for suing Sahara for 'intellectual rape'. Excerpts from interview with Hindustan Times

How do you feel after securing an injunction from India's Supreme Court against Sahara screening episodes of Karishma?

I am more happy that many people in India have sent positive messages on my website saying I have done the right thing. The copyright infringements have been going on for too long, they said.

Why did you say that plagiarism has been going on in Bollywood for long and it amounted to intellectual rape?

Writers and many actors I have sent messages to me saying "give it's right". I am told this kind of plagiarism has been going on for a long time. Novels and films like *Wuthering Heights*, *Pride and Prejudice* and *Sense and Sensibility* have all been 'adapted'. I was

BUT IS THE BAPUJI BRAND SAFE?

After all, Shivaji and Netaji are also bidi brands

The Emblems and Names Act prevents his name and image from being registered as a trademark. It doesn't stop commercial use except where such use is "derogatory"

The copyright on his writings expires in six years

Copyright laws protect the Mahatma's writings. Such protection can be extended up to 60 years after the writer's death. In Gandhi's case, this will expire in 2008

But we could declare him a concept of national heritage

This would make commercial use of his image and name difficult if not illegal. Germany did this for Goethe. As of now, the Mahatma has minimal IPR protection overseas



M. Gandhi

TACKLING THE INDIAN JUGAAR: Barbara Taylor Bradford

COPYRIGHT INFRINGEMENT

Barbara Taylor Bradford

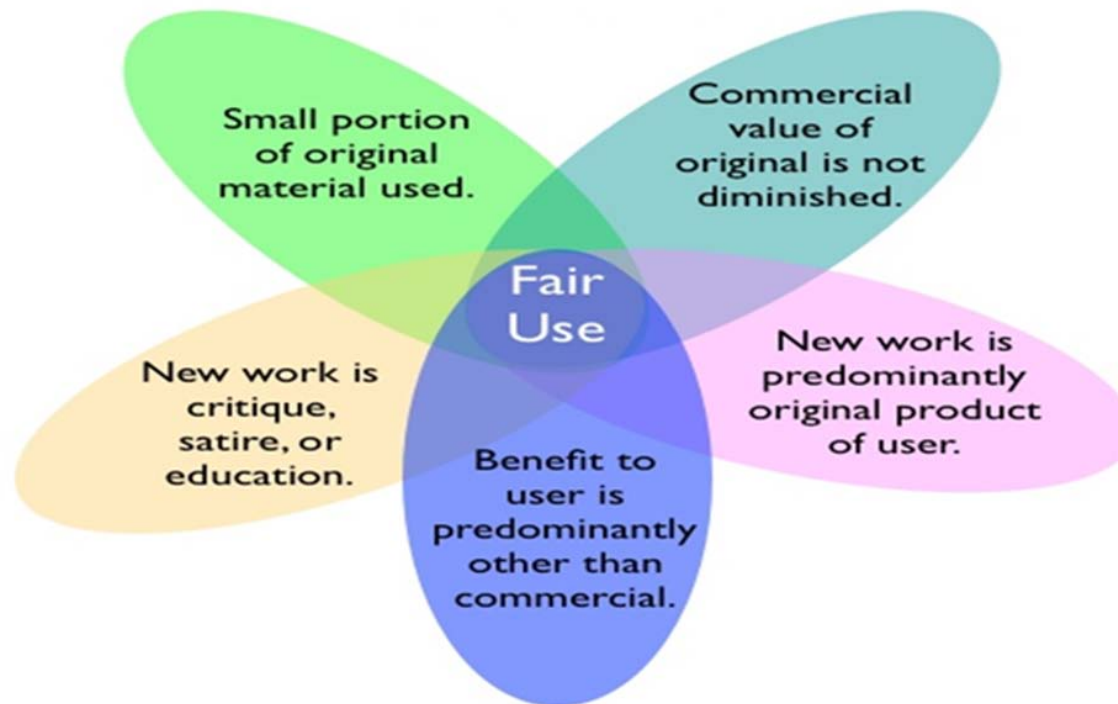


"I am told Ms Kapoor has been very well paid. But she and other stars must be innocent bystanders."

Karisma

Fair use

Fair Use is a legally permissible use of copyrighted material for specific purposes such as commentary, criticism, news reporting, research, teaching or scholarship



DU Photoshop Copyright Case

The **Division Bench of the Delhi High Court** on December 9, 2016 ruled that the preparation of **'course packs'** i.e. compilation of photocopies of the relevant portions of different books prescribed in the syllabus, and their distribution to the students by educational institutions **does not constitute infringement** of copyright in those books under the Copyright Act, 1957, as long as the inclusion of the works photocopied (irrespective of the quantity) was justified by the **purpose of educational instruction**

Therefore,

Critical Balance

Silver line between –
private & non – commercial use

VS

Public & Commercial use
Right to Equity by constitution

Folklore(Traditional Cultural Expression)

- ◆ Folklore – alternate legislative framework
- ◆ Defined differently by authors and institutions.
- ◆ Way of living of a group of people followed from generation to generation.
- ◆ Documented or oral-owned by the group or community.
- ◆ Folk literature, practices, customs, rituals, arts, music, etc.

Concept of Folklore

- ◆ Folk science & technology-medicines, designs, trade secrets, manufactured products and process etc.
- ◆ No comprehensive international legal norm.
- ◆ Attempt by WIPO, Biodiversity Convention & Convention on Indigenous People.
- ◆ Definition by WIPO—confined to folk literature, art, music & craft.

Concept

- ◆ **New attempt by WIPO.**
- ◆ **Need for a separate legislation**
- ◆ **Sui generis?**

Principles of New Law

- ◆ Focus on the community and not on the industry.
- ◆ Concept of folklore must include all forms of knowledge including folk science & technology.
- ◆ Law to protect, preserve & collectively manage folklore.
- ◆ Prohibit the commercial exploitation without authorization.

GEOGRAPHICAL INDICATIONS

- ❑ Origin of product.
- ❑ A mark whose essential feature is a geographical connotation.
- ❑ Importance lies in creating a valuable commercial asset through high reputation, *e.g, Champagne, Sheffield, Havana, Darjeeling, Scotch.*
- ❑ Geographical Indication in two parts: Indications of Source and Appellations of Origin
- ❑ Different from Trademarks: trademarks identify the enterprise which offers the product or service, geographical indications identify geographical area in which it is located.

GEOGRAPHICAL INDICATIONS

How do we protect GI

- ➡ Through *sui-generis* legislation or decrees (France & Portugal).
- ➡ Register the Geographical Indications.
- ➡ Unfair trade practice law or the tort of “passing off”.
(the injured party goes straightly to court)
- ➡ Registration of collective marks or certification marks (EU dairies)

PROTECTION OF PLANT VARIETIES

- ◆ Acknowledge the achievements of breeders

Specific criteria

- ④ New (or novel)** (this requirement ensures that the variety has not been exploited commercially)
 - ④ Distinct*
 - ④ Uniform*
 - ④ Stable*
 - ④ Have a satisfactory denomination
- (under the 1991 Act of the UPOV Convention)

* Technical assessment

** Legal assessment

PROTECTION OF PLANT VARIETIES

- ☞ Through the patent mechanism
- ☞ Through a special (“sui generis”) e.g. farmers rights.
- ☞ Or through a combination of both.

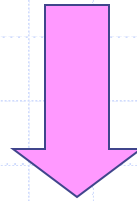
How long do the breeder’s rights last?

- ☞ The minimum duration described in the 2001 act is:
 - ☞ 18 years for trees and vines
 - ☞ 15 years for other plants

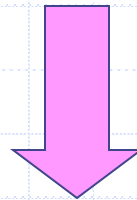
BIOLOGICAL DIVERSITY ACT

National Biodiversity Authority

(Agri., Biotech., DOD, ISM, S& T, DSIR)



State Biodiversity Board



Biodiversity Management Committee (BMC)
(Local level)

Regulation of access to BD

debars certain persons normally not Indian

Approval of NBA

Research/Commercial/Bio-survey/Bio-utilization

Transfer of Research Results – NBA

Seminar/Workshop as per GOI

Above not to apply to certain collaborative research projects

Inter-institutional as per GOI guidelines

NBA- approval for IPR application filing

- ◆ Invention based on **Biological resource obtained from India.**
(acceptance – sealing NBA – 90 days)
- ◆ NBA may impose sharing fee/Royalty or both
- ◆ Provision of above section shall not apply to any person claiming right under “**Protection of Plant Varieties Act**”
(NBA be informed)

- **Prior intimation to STATE BIODIVERSITY BOARD** for obtaining Biological resource. Exemption-*vaids/hakims* and local communities.
- **'LEGAL COVER'** to the recognition of TK, innovations and practices of indigenous people as a part of IP?.

TRIBES OF INDIA

- Over 550 Communities (67.8 million : 8% of total population), 227 ethnic groups.

Determination of benefit sharing by NBA

- ◆ Joint ownership of IPRs
- ◆ TOT
- ◆ R&D units – local geography
- ◆ Venture capital fund
- ◆ Monetary and non-monetary compensation

APPREHENSIONS?

Mandatory disclosure

- ◆ Source & geographic origin of biological material
- ◆ Prior knowledge
- ◆ MTA adherence

Patent Act Amendment

- ◆ Ground for Patent opposition/revocation



anticipation of invention



local knowledge or oral knowledge.

MICRO-ORGANISMS

(Art. 27(3) (b) of TRIPS member states are required to provide a system of patenting of micro-organisms (as a product))

- **TRIPS does not define what a micro-organism is and the scope of the term.**
- **Budapest Treaty on the international recognition of the deposit of micro-organism for the purpose of patent procedure.**
- **Culture collection holding international Depository Authority (IDA) status – 31 in 19 countries.**
- **India signed on 17th December, 2001.**
- **80-total members(July 2016)**

BIOTECHNOLOGICAL INVENTIONS

THE PATENTS AMENDMENT ACT, 2005

AS PER TRIPS Agreement

Products patents allowed in the field of Drug & Chemicals.
Therefore,

Microorganism per se GMO

A method of producing GMO

Products obtained using GMO

ARE AMENABLE TO PATENT PROTECTION

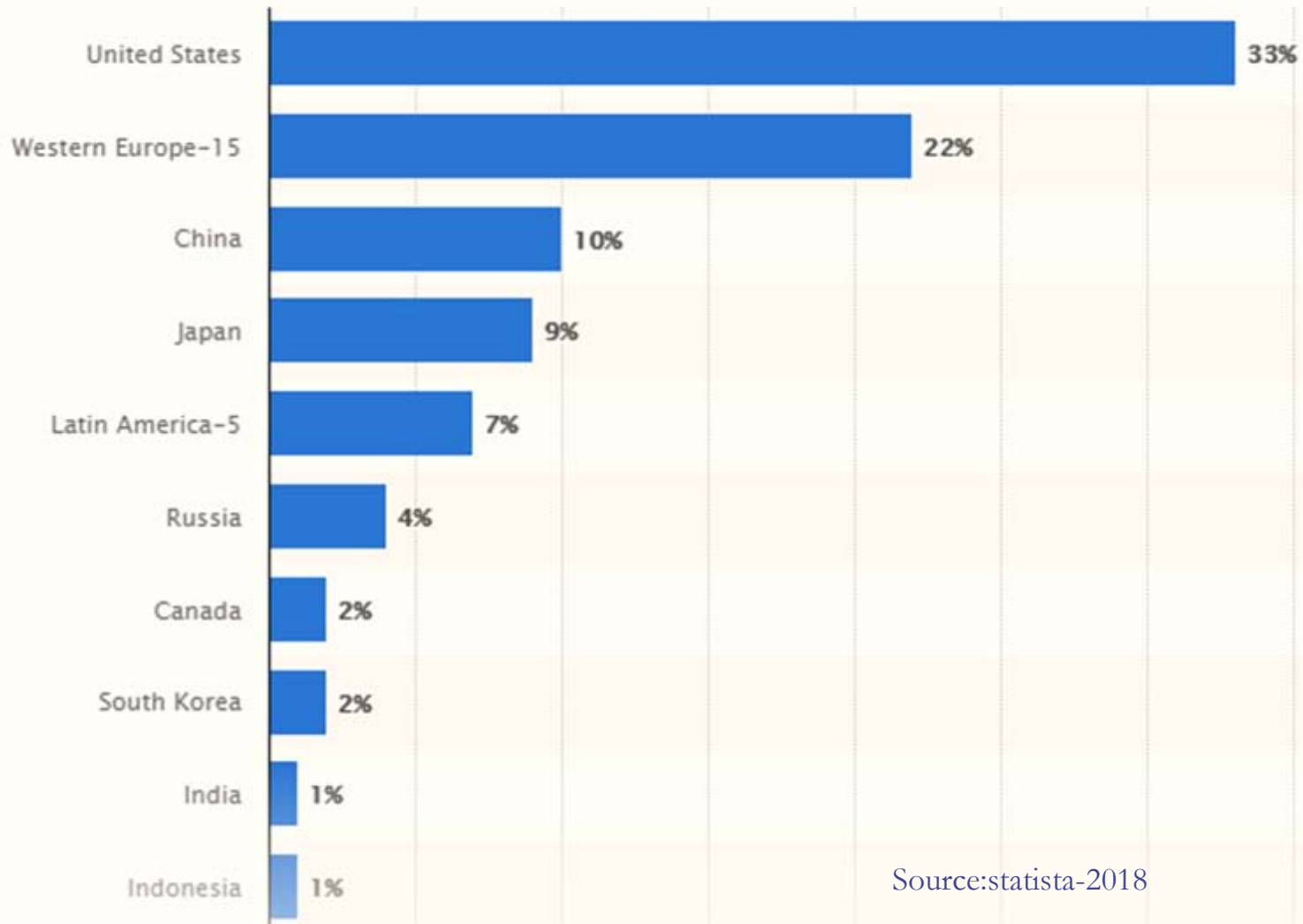
CRITERIA FOR PATENTABILITY

NUNS Test

- **Novelty**
- **Utility**
- **Non-obviousness**
- **Statutory subject matter(Sec 3 of The Patent Act)**

PHARMACEUTICAL SALES IN THE GLOBAL MARKET, 2017

Share of pharmaceutical revenue worldwide in 2017



Source: statista-2018

WHAT SHOULD WE DO?

WHO

- Herbal – current US \$ 72 billion market to \$111 billion by 2023.
- 75% to 80% of the population of some African and Asian countries use herbal Medicine for primary medication

ACTION

- Sharpen Patent literacy skills.
- Strategic alliances.
- File 'PRODUCT' Patents as early as possible.
- Selective research areas chosen for -Natural resources based products.

Section 3d- Novartis Case

- A bench of the Supreme Court, upheld the rejection of a patent application filed by Novartis for **Glivec** in 1998 before the Indian Patent Office.
- **Glivec** for the treatment of chronic myeloid leukemia (CML), has been patented in **nearly 40 countries**
- **beta crystalline** form of already known compound Imatinib Mesylate, does not qualify the test of **Section 3(d) of the Patent Act.**

Compulsory licensing – Natco Vs Bayers

- The Supreme Court of India(Dec, 2014) dismissed Bayer's Special Leave Petition against the Bombay High Court's decision upholding the grant of Compulsory license (CL) to NATCO for the anti-cancer drug
- Bayer was selling the drug under the brand name Nexavar for Rs. 2,84,000 per patient per month
- On 9 March 2012, the Patent Controller granted a CL to Natco Pharma to market a more affordable generic version of Nexavar at around Rs. 8, 800 per person per year.

IPR DIMENSIONS - HOW DO THEY DIFFER?

DESIGNS	TM/GI	PATENTS	COPYRIGHT
Different from TM as its constituted by APPEARANCE OF PRODUCT must NOT necessarily distinctive (essential for TM).	Distinctive capable of distinguishing the GOODS & SERVICES FROM ONE ENTERPRISE TO ANOTHER (Geographical connotation - GI).	Determine the FUNCTIONALITY of an object or process since it must be an INVENTION .	<ul style="list-style-type: none"> • LITERALLY & ARTISTIC works. • Expression in tangible form.

Designs that are primarily literary or artistic in character are not protected under the Designs Act – **LAYOUT DESIGNS OF INTEGRATED CIRCUITS**.

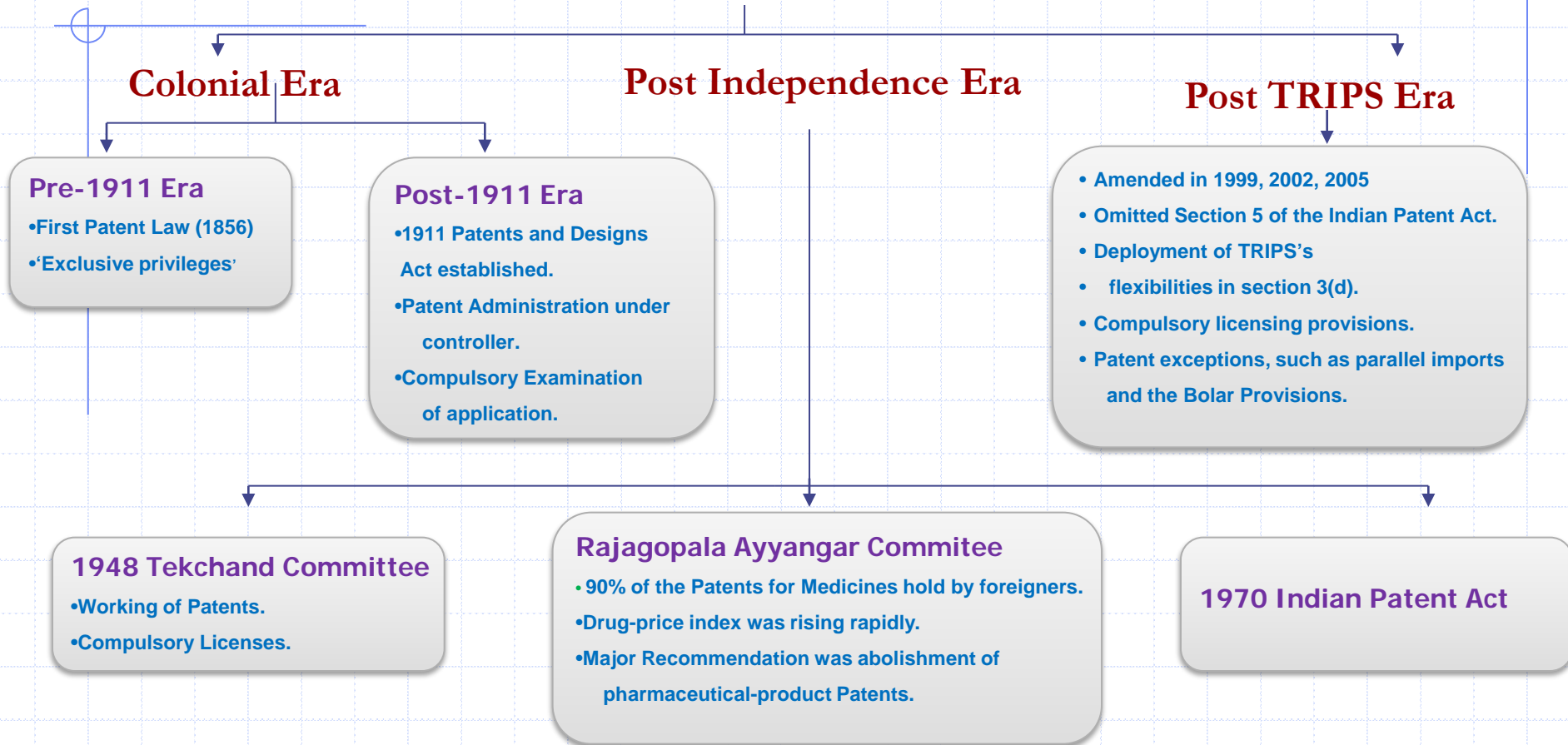
NONE OF THE ABOVE - TRADE SECRETS

Possible Impacts Resulting from TRIPS

- ◆ Escalation of Drug Prices
- ◆ Displacement of Local Drug Industry
- ◆ Monopoly by Multinational Corporations
- ◆ Increase in Drug Imports

The same types of potential risks were discussed when Japan and European countries introduced patent protection on pharmaceutical products.

History of Patent Regimen in India



Historical Perspective

A. UNITED STATES

1. Until 1980s : Little Respect for the Patent System

- ◆ Early History : Mainly A Farming Country
- ◆ Up to 1970s : Strong Enforcement of Antitrust Policy
 - High Rate of Invalidity – As High As 90%
 - Limited Remedy – Injunction and Reasonable Royalty

2. Current : Pro-Patent Policy

- ◆ Linkages Between Trade Policy and Patent Policy
- ◆ Key Persons in Administration and Judiciary
 - Reform of US Patent Trademark Office (USPTO)
 - Creation of the U.S. Court of Appeals for the Federal Circuit (CAFC)

Historical Perspective

B. JAPAN

1. Until 1990s : Emphasis on Patent Information Dissemination

- ◆ Early History : Replacement with Early Technology Monopoly System
- ◆ Up to 1990s : Industry Had No Interest In Enforcing Patents
 - Huge numbers of applications but very little litigation
 - Delay in Examination
 - Narrow Claim Interpretation

2. Current : Pro-Patent Policy

- ◆ Linkages of Patent Policy and Revival of the Japanese Economy
- ◆ Key Persons in Ministry of Int'l Trade & Industry (MITI) and Japanese Patent Office (JPO)
 - Strong and Quick Protection
 - Legislative Changes
 - Case Law Changes

Historical Perspective (US *vis-à-vis* JAPAN)

A. Industry Structure

- U.S. : 30% of Generic Market Occupied by 5 Largest Companies
- Japan : Very Fragmented

B. Patent Related Regulation

Patent Term Extension

- U.S. : Roche-Bolar Scheme (35 U.S.C. Section 271(e))
- Japan : Experimental Use Exception

C. Marketing Authorization

D. Drugs Pricing Regulations

- What to Learn from Domestic Issues:
- The U.S. and Japan share the same concerns with India about balancing the competing interests of keeping drug costs low while encouraging innovation.

Will Fear in India Become Reality ?

– it is very unlikely

1. Escalation of Drug Prices

- No significant increase in Drug Price after Adoption of Drug Patent Protection in Japan and European Countries
- Basic Drugs : Patent Expired
- New Drugs : Quality-of-Life Improving Drugs
- Life Saving Drugs : Compulsory License

2. Displacement of Local Drug Industry

- Capital Intensive – Generic Companies Do Not Want to waste Investment in India
- Manufacture of Generic Drug will very likely remain in countries with Low Labour Costs such as India.

3. Monopoly of Multinational Corporations in India

- Who are “Domestic” Corporations?
- Is There Any “Threat” of Foreign Investment? – Look at Japan’s Experiences.

Academia vs Industries

- ◆ Industry and academics has fundamentally different cultures and **CORE VALUES**.
- ◆ **Universities** – free and open communication of results is essential to the goal of spreading knowledge.
- ◆ **Industries** – the protection of proprietary information is necessary to the ultimate goal of financial return.

Historical Perspective

- ◆ In US until 1980s little respect to IP system
- ◆ Although a handful of US universities were moving science laboratory to industrial commercialization as early as 1920s, academic technology transfer as a formal concept, is said to have originated in a report entitled **-SCIENCE- THE ENDLESS FRONTIER**
- ◆ **BAYH-DOLE ACT**

After Bayh-Dole Act (1980)

- ◆ Encourage Universities to license discoveries made federal funds to private industries
- ◆ All Universities to have **TOT OFFICES**.
- ◆ **Earlier:** concentration on basic research (mostly chemistry & classical pharmacology the advent of industrial) Biotechnology changed the landscape.

Results of the Bayh-Dole Act

Federally funded university discoveries include:

- ◆ Artificial lung surfactant - *University of California.*
- ◆ Cisplatin & carboplatin cancer therapeutics, *Michigan State University.*
- ◆ Citracal® *University of Texas* southwestern Medical Center.
- ◆ Haemophilus B conjugate vaccine, *University of Rochester*
- ◆ Process for taxol production, *Florida State University.*
- ◆ Neupogen®, *Memorial Sloan Kettering Cancer Institute .*
- ◆ Inserting DNA into eucaryotic cells - *Columbia University.*
- ◆ Recombinant DNA technology - *Stanford University and University of California.*
- ◆ TRUSPOT® (dorzolamide) - *University of Florida*

Results of the Bayh-Dole Act

- ◆ Between 1980 and 2009, the number of patents awarded to U.S. universities increased from 380 to 3088.
- ◆ Over 2,200 new companies.
- ◆ Approximately \$30 billion of economic activity each year, supporting 250,000 jobs.
- ◆ Nearly 1000 products currently on the market based on university licensed discoveries inventions.

Bayh-Dole Act: Indian Perspective

The Protection and Utilization of Public Funded Intellectual Property Bill-2008

- approved by India's Union Cabinet and is under consideration by the Parliament
- Allow academic institutes to patent publicly funded research
- reward institutions and inventors with a share of the royalties



THANK YOU