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INTERNET EDITION

Financial Daily from THE HINDU group of publications

Saturday, Aug 20, 2005

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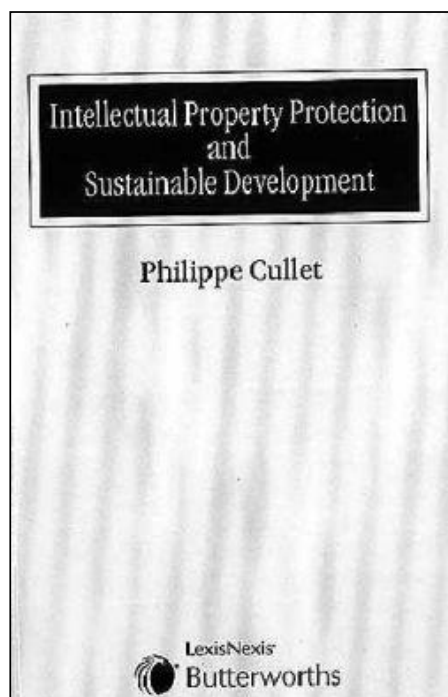
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Protection of IPRs — No guarantee for sustainable development

D. Murali

Quoting instances from Philippe Cullet's Intellectual Property Protection and Sustainable Development, D. Murali explains why it is essential for developing countries to protect traditional knowledge through legal means "in a world where everything is increasingly being commodified".



COMMENTING on the decision of the US Patent Office to revoke the turmeric patent on the basis of a challenge filed by CSIR, www.navdanya.org notes that Uncle Sam's patent system has its own weaknesses, allowing bio-piracy to be practised as a rule.

Ironically, though, the patent in question (No. 5,401,504 on 'use of turmeric in wound healing') had been granted in 1995 to two Indian nationals, Suman K. Das and Hari Har P. Cohly, at the University of Mississippi Medical Centre.

It's in the Indian genes, one may argue, but what is sobering is the day's news about what the US Ambassador to India, Mr David C. Mulford, told members of the Indian Chamber of Commerce in Kolkata. "India must improve its IPR record to attract American investments in the biotechnology, pharmaceutical and clinical research sectors," he said, on the subject of intellectual property rights (IPRs).

The turmeric case was that it was the first time that a patent based on the traditional knowledge of a developing country had been successfully challenged; the legal costs incurred by



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India in this case have been calculated by the Indian Government to be about at \$10,000, informs *www.iprcommission.org* of the Commission on Intellectual Property Rights. "The withdrawal of the turmeric patent is only the first step in reversing biopiracy.

Patents on Neem, Amla, Jar Amla, Anar, Salai, Dudhi, Gulmendhi, Bagbherenda, Karela, Rangoon-ki-bel, Erand, Vilayetishisham and Chamkura all need to be revoked," Navdanya proclaims indignantly.

IPR is a newsy topic, because you find the Indian Machine Tools Manufacturing Association (*http://imtma.org*) busy with a 'path-breaking' seminar on leveraging IPR, focussing on patents, trademarks, industrial designs, trade secrets, and so on, apart from deliberating on "IPR-enabled business strategies for achieving competitiveness and market success".

And, from across the globe, *Bloomberg* reports about a disturbing development in Brazil. There, the Government, saddled with a programme to supply AIDS/HIV drugs free to about 1,63,000 victims, has asserted that it can make the drug for 59 per cent less than what the fourth-largest US drug-maker Abbott Laboratories charges for the medicine.

In response, the company is understood to have delayed its plans to invest \$27 million to remodel a plant in Brazil, and political lobbies are working hard to punish 'the violation of Abbott's patent' by moving for a cancellation of 'trade preferences for \$2 billion of Brazilian exports'. When the bottomline becomes important for companies, there can be cruelty in the name of IPR, it seems.

For clarity, therefore, I turn to Philippe Cullet's *Intellectual Property Protection and Sustainable Development*, from LexisNexis (*www.lexisnexis.co.in*). IPRs have a number of socio-economic impacts, which require the adoption of a broader perspective, argues Cullet in the intro. The challenge is to ensure that one part of the polity does not benefit at the expense of the poor and the fulfilment of basic needs, he points out.

IPRs have long been considered as "one of the available incentives to drive economic development," and such thinking leads to a common delusion, such as what Mulford could have lapsed into: That IPRs could be implemented "with the same degree of success in all countries." No, says Cullet.

"Recent controversies over access to medicines in developing countries or concerning the protection of traditional knowledge have clearly brought out the special situation of developing countries and the need for differential measures which seek to foster not only economic development but also socially and environmentally sustainable development," he writes.

Two lines of enquiry that the author engages in are about the rapidly evolving framework, and challenges in India. But, first, what is sustainable development? It is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs", according to the World Commission on Environment Development (Brundtland Report).

Then came the 27 principles constituting the common minimum on sustainable development, through the 1992 Rio Declaration adopted at the UN Conference on Environment and Development.

However, sustainable development law suffers from lack of unity and direction, points out Cullet. And there is no 'international sustainable development organisation', apart from CSD, or Commission on Sustainable Development, that acts as a forum but lacks the mandate to coordinate activities.

The chapter on 'access and benefit sharing' discusses the example of how the discovery of the anti-fatigue properties of a plant, Aarogyappacha, from the Western Ghats led to the development of a drug called Jeevani, and how 50 per cent of licence fee and royalty was offered to the Kani community, among whom traditional knowledge about the herb was a tribal secret.

There has been criticism about the experiment, and Cullet isn't too happy either. Because it takes as given the right of outsiders to access and use the knowledge of traditional knowledge-holders as long as some form of compensation is given to them. The alternative he suggests is "to start from the principle of prior informed consent and give traditional knowledge holders the right to determine according to democratic procedures whether they want to transfer the knowledge to outsiders, and on what terms".

Part III of the book is on 'agriculture' where Cullet discusses genetic engineering, food security, life patents, plant breeders' rights, farmers' rights, *sui generis* plant variety protection and so on.

Only six countries, viz. Argentina, Brazil, Canada, China, South Africa, and the US, planting only four crops — maize, soybean, canola and cotton — with either insect/herbicide resistance accounted for 99 per cent of the global area planted with transgenic crops in 2003, informs the author.

Genetic engineering in agriculture is shrouded in controversy mainly because the costs and benefits are not clear to all the players concerned, argues the author.

On the other 'G', the Green Revolution, it may be surprising for many to know that a survey in the Philippines showed 70 per cent increase in yields in rice varieties obtained from the International Rice Research Institute, but the gains were more than offset by "a 50 per cent reduction in the sale price of rice and a 358 per cent increase in farm expenses due to chemical inputs", and so, the end result was a 52 per cent drop in farm income.

The discussion on 'traditional knowledge protection' informs the reader about the development of biodiversity laws.

For instance, the Costa Rican Biodiversity Act "separates IPRs and community intellectual rights"; the Philippines have the Indigenous Peoples Rights Act that recognises the need for the state to provide assistance in developing local technologies, agriculture and medicine; and Peru's Collective Knowledge Law "endeavours to provide a framework that ensures fair conditions for indigenous peoples when their knowledge is used by outsiders".

Cullet explores 'further options for traditional knowledge protection' including second-tier patenting, geographical indications, and documentation through registers.

The final part of the book is on such vital issues as biosafety and human rights, wherefrom one learns that the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, the main international legal instrument governing

the introduction of GM or genetically modified organisms (also known as living modified organisms) into the environment, lays down the procedure of 'advanced informed agreement' for trade to be undertaken.

Cullet draws readers' attention to an anomaly: "On the one hand, should damage occur as a result of the introduction of a GM organism into the environment, the patent system does not provide any mechanism for liability and redress.

On the other hand, should farmers replant a patented transgenic seed without purchasing it, they would be deemed to have infringed the rights of the patent-holder." A case of interest in this sphere is *Monsanto vs Schmeiser*, that came up before the Canada Supreme Court, where the company argued that its patented seeds were used by the farmer who, in turn, said he didn't know how the seeds made their way into his field.

Schmeiser argued that he should be held to own the seeds in the same way that landowners own the progeny of animals reproducing on their land, but the court said that a farmer may own seeds spilled onto his land or seeds having germinated from pollen carried to his fields from elsewhere by insects, birds or the wind, but he did not have the right to use the patented gene or seed containing the patented gene or cell. A case that shows how real property rights and IPRs can get gridlocked.

A gloomy message that comes from the conclusion chapter is that "there is no confirmation that expanding the scope of protection of IPRs contributes to sustainable development". IPRs have undoubted potential to contribute to private investment, concedes Cullet, and that should make Mulford happy.

But there's a caveat: IP protection frameworks aren't capable of ensuring that the introduction of life patents contributes to "fostering research in orphan subsistence crops which are of prime importance to poor people in rural areas".

Thus, IPRs may be theoretically the best solution for the developed countries, but the developing ones "should concentrate on adopting domestic IPR legal frameworks which serve their needs".

Towards this end, protect traditional knowledge through legal means, urges the author, because that would be necessary "in a world where everything is increasingly being commodified". Essential read.

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