

THE INDIAN JUGAAD: PROSPECTS OF PATENTING UTILITY MODELS IN INDIA

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Abstract

The research paper aims to inquire into the realm of Jugaad, which is also called utility models or petty patents and what are the prospects of patenting utility models in India. In order to examine the prospects, the present International laws and Treaties on the point that together constitutes the global IPR regime related to utility patents has been examined. To get a holistic picture, the global trends in patenting utility models have been seen. Thereafter, the domestic scenario has been discussed ranging from Indian Patent Law to the institutions catering to the needs of such innovations. At last the whole situation has been analysed and concluded accordingly. The paper is an effort to see whether India should go ahead with the patenting of Jugaad.

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INTRODUCTION

The research paper is an attempt to study the concept which is popularly called “*Jugaad*” in Indian languages. Here in this paper, it is used in the context of Utility Models or Petty Patents. They are very much part of our IPR policy though not explicitly recognized in the present system. In order to give more recognition and attach more importance to them, our government has ignited discussions on this in the year 2011¹ and 2014² respectively. In the year 2014, it gained momentum when it was covered in the Draft IPR Policy. The draft IPR policy was looking forward to legalize the utility models so that it builds the culture of commercialization of innovations.

Talking about the utility models, it is difficult to define it with exact precision. Though it has been defined by WIPO as-

*“A utility model is an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorization, for a limited period of time. In its basic definition, which may vary from one country (where such protection is available) to another, a utility model is similar to a patent. In fact, utility models are sometimes referred to as petty patents or innovation patent”.*³

If we see this term in domestic realm, a more familiar word named “*Jugaad*” comes to our mind. It is considered by many as a million dollar word. It basically denotes the idea of discovering a way out of a problem situation, amidst all odds. It is used in many other streams and not just IPR. It also qualifies as a mainstream management technique. Not only this, many scholars believe that *Jugaad* is the driving force behind the Indian start-up culture and their optimism for a better future.

Coming up with a low cost solution to a problem is born out of Indian way of life. We are accustomed to situations of scarcity and time shortage, which in turn has made us more flexible in getting problem situations resolved. Everything need not be cured in the conventional proper way but they can be resolved as quick as possible in the minimum

¹ DIPP Discussion Paper 2011, available at: http://dipp.nic.in/english/Discuss_paper/DiscussionPaper_relevance_23June2011.pdf last accessed on 8.5.2016

² Draft NATIONAL IPR POLICY 2014, available at: http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf last accessed on 8.5.2016

³ *What is a Utility Model?* available at: http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm last accessed on 8.5.2016

resources available. The biggest example of *Jugaad*, which gathered global attention was the India's successful Mission on Mars. It was very low in cost and time as compared to their International counterparts. It was known worldwide that it was almost half the cost of the movie made on a similar concept. The budget was only \$74 million compared to NASA's \$671 million for the MAVEN project.⁴

INTERNATIONAL CONVENTIONS ON UTILITY PATENTS

There are a number of international treaties and conventions that cover the intellectual property rights across the globe. In order to understand the global legal regime on utility patents, there is a need to see what legal provisions are there in them to cover and protect utility patents. The following are the International Conventions:

1. The Paris Convention, 1883
2. TRIPS
3. The Patent Cooperation Treaty and the Patent Law Treaty.
4. Free trade Agreements

The Paris Convention for the Protection of Industrial Property (1883) – This is one of the Oldest Convention protecting the Intellectual Property Rights, then known as Industrial rights. This text which is as old as 120 years defines the industrial property that covers all the forms of IPR along with utility patents too. At present, there are about more than 170 members to this convention. India joined the Paris Convention on December 8, 1998 and became bound to the provisions of this convention.⁵

What is important implication of this definition is that as in the case of other IPRs, the utility patents also enjoy the benefits arising out of the convention like National treatment⁶, Priority rights⁷ and Compulsory Licensing⁸. And the contracting states, which are almost 170 in

⁴ *Getting to Mars through 'jugaad'* by Karine Schomer (2014), available at: <http://www.thehindu.com/opinion/op-ed/getting-to-mars-through-jugaad/article6479048.ece> last accessed on 8.5.2016

⁵ *Utility model –A tool for economic and technological development: A case study of Japan*, Submitted By Dr.K.S.Kardam as Final Report In Fulfillment of the Long-term Fellowship Sponsored by World Intellectual Property Office (WIPO), available at: http://www.ipindia.nic.in/research_studies/finalreport_april2007.pdf last accessed on 8.5.2016

⁶ Article 2 of the Paris Convention, 1883 available at: <http://www.wipo.int/treaties/en/ip/paris/> last accessed on 8.5.2016

⁷ Article 4A of the Paris Convention, 1883 available at: <http://www.wipo.int/treaties/en/ip/paris/> last accessed on 8.5.2016

number, are bound to accord the protection to the utility models as laid down in the convention.

It needs to be realized that all these articles talk in general about the Industrial rights, which covers Utility patents too. For e.g. the words of article 2 goes like this-

Art. 2(1) states:

*“Nationals of any country of the Union shall, as regards the protection of **industrial property**, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.”*

TRIPS – Probably the most popular agreement on IPRs, TRIPS is one of the many agreements that come in the WTO package of agreements. The scope of TRIPS to which its substantive law extends, is defined in its Art. 1(2) whereby “*the term ‘intellectual property’ refers to all categories of intellectual property*” of the Agreement. So, as we can see there is no explicit mention of the utility models, but a sweeping effect has been given within the scope of TRIPS. At the same time, there is a reference to the Paris Convention, 1883 in the TRIPS. There is an obligation put on all the WTO members to comply with the Paris convention. Art 2(1) of the TRIPS lays down that WTO Members are obliged to “*comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)*”.

This article not only makes it mandatory for the contracting parties to follow the Paris Regime, but now those obligations are very much part of WTO as they find mention in the TRIPS (which is an inherent part of WTO agreements). Being part of WTO implies that the doors of WTO dispute Settlement body is compulsorily open to the parties.

The Patent Cooperation treaty and Patent Law Treaty. They are a couple of treaties that aim to uniformise the patent application system across the world. The Patent Cooperation Treaty (PCT) was concluded in 1970 and entered into force on January 21, 1978. It has been

⁸ Article 5A of the Paris Convention, 1883 available at: <http://www.wipo.int/treaties/en/ip/paris/> last accessed on 8.5.2016

modified several times.⁹ There are about more than 135 members to this treaty. India has become member to this treaty with effect from December, 8, 1998. Similarly, the Patent Law Treaty was concluded in 2000, and entered into force in 2005. The PLT is open to States members of WIPO and/or States party to the Paris Convention for the Protection of Industrial Property (1883). These treaties do not confer any extra or overt protection to the utility models. But according to some scholars they do encourage and protect the utility models procedurally.

The Free Trade Agreements – The Free trade agreements refer to the regional trade agreement which are made between nations for highly subsidized or tariff reduced or zero tariff trade. It is also called the Regional Trade Agreements (RTAs), one example being the Trans Pacific Partnership Agreement (TPP). Many FTAs are being signed across the globe, so much so that they have almost taken over WTO in terms of world trade. When functional, the TPP would cover 40% of the world trade. The bilateral or multilateral agreements related to IPRs which are not within the ambit of TRIPS or which are in excess to it are often referred to as “TRIPS Plus”. A popular example is the Economic Partnership Agreement signed between European Union and the Caribbean Countries in the year 2008. This agreement is a very good example of protection towards Utility Models as there is an explicit mention and mandatory provisions for them. Article 148¹⁰ of this agreement provides so.

⁹ Summary of the Patent Law Treaty (PLT)(2000), available at: http://www.wipo.int/treaties/en/ip/plt/summary_plt.html last accessed on 8.5.2016

¹⁰ **ARTICLE 148 - Utility models**

A. Requirements for protection - 1. The EC Party and the Signatory CARIFORUM States may provide protection for any products or processes in any fields of technology, provided they are new, involve some degree of non-obviousness and are capable of industrial application. 2. The EC Party and the Signatory CARIFORUM States may exclude from protection all those products and processes the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law. 3. The EC Party and the Signatory CARIFORUM States may also exclude from protection: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) subject to Article 150, plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. 4. The provisions of this Article shall be without prejudice to existing legislation in the EC Party or the Signatory CARIFORUM States.

B. Term of protection - The term of protection available shall not end before five years, nor exceed ten years, counted from the filing date, or where priority is claimed, from the priority date.

C. Relationship to patents - 1. All other conditions and flexibilities provided for patents in Section 5 of the TRIPS Agreement shall apply mutatis mutandis to Utility Models, in particular any that might be required to ensure public health. 2. An application for the grant of a patent may be converted into an application for utility model protection provided the request for conversion is made before the patent has been granted.

GLOBAL TRENDS IN GRANTING UTILITY PATENTS

A study of the aforementioned International Conventions shows that apart from the FTAs, which are totally dependent on the Nations between whom they are signed, no other Treaty or conventions mentions Utility patents. They haven't been expressly recognized separately. They do not have any dedicated article or point of law on them. They are accorded the same level of protection as others. Also, the member nations of the International treaties and conventions are in no way bound to make a domestic law for the protection of Utility Patents.¹¹

In order to map what is the global trend in granting utility patents we need to see what countries offer utility patents. A number of resources taken together give an idea in this regard. There are a fairly good number of nations that grant such patents some of them being Germany, South Korea, Japan, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Slovakia, Spain, Brazil and China.¹² It is important to note here that our allies in BRICS also recognize utility patents in some form or the other. It can very well happen that the form of protection granted to these petty patents are not of the same scale as the other regular IPRs, to say a bit weaker protection or for a smaller term. A study shows that these weaker protections do provide and encourage technological learning. They help on the local absorption of foreign innovations. It triggers invention by the domestic and local manufacturers.¹³

INDIAN LAW ON POINT

Much has been discussed about the international scenario of Utility patents, now the Indian scenario needs a look. Our law on the point, being The Patent Act, 1970 does define

¹¹ *THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF UTILITY MODELS* by Henning Grosse Ruse – Khan, Senior Research Fellow, Max Planck Institute for Intellectual Property and Competition Law, presented at WIPO Regional Seminar on the Legislative, Economic and Policy Aspects of the Utility Model System, Kuala Lumpur (Malaysia), September 2012 available at: http://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_kul_12/wipo_ip_kul_12_ref_t2b.pdf last accessed on 8.5.2016

¹² *UTILITY MODELS AND THEIR COMPARISON WITH PATENTS AND IMPLICATIONS FOR THE US INTELLECTUAL PROPERTY LAW SYSTEM* by Dr. Hans-Peter Brack, 2009 Boston College Intellectual Property & Technology Forum available at: <http://www.bciprf.org>

¹³ U. Suthersanen, *Utility Models and Innovation in Developing Countries*, International Center for Trade and Sustainable Development (ICTSD), Issue Paper No. 13 (2006), available at: http://www.unctad.org/en/docs/iteipc20066_en.pdf

“Invention”¹⁴ but does not define utility models. Also it has a reference to “Patent of Addition”¹⁵, which basically gives recognition to the improvement made to the patent. As a matter of fact, the utility models are most seen in small and medium size industries.¹⁶ These refer to small manufacturing units catering to the local needs. They are engaged in the business of mechanical innovations on regular basis. This area is more exposed to minor innovations which are often called “Incremental Inventions”. Also, there is one fact that despite a dedicated IPR legal regime, India is way behind in filing of patents. It is often hoped that once we start granting patents for these utility models, it will encourage the spirit of invention in public.

INNOVATION IN INDIA

Just because India does not legally recognize Utility Patents, it cannot be at all concluded that there is less innovation done in the country. May be we are not aware of everyday innovations that take place. One such institution that takes note of these innovations and recognizes them is the National Innovation Foundation-India (NIF). It works on the principle of Honey Bee Network. Honey Bee network is a network of innovators and it is spread in 75 nations worldwide. The inherent idea behind NIF was to recognize the Traditional knowledge. It started in the year 2000 but today it is very much resourceful. The statistics show that it has a rich database of more than 210000 technological ideas, innovations and traditional knowledge practices from over 575 districts of the country.¹⁷ As a body it has been very active and functional as till date recognized more than 775 grassroots innovators and school students at the national level in its various award functions¹⁸.

ANALYSIS

After studying the global trends of utility patents, it is necessary to analyse the situation. One thing that is very clear that there is a huge amount of diversity in regard to grant of Utility patents across the worlds. Let us not conclude that the presence of utility patent protection in a number of countries make it successful. Mere recognition does not tell the tale. There are studies that show the doubts as to why petty patents are not reaping benefits in Australia and

¹⁴ Section 2(j) of the Patents Act

¹⁵ Section 54 of the Patents Act

¹⁶ Intellectual Property Rights - Utility Models, available at: http://ipindia.nic.in/whats_new/Intellectual_Property_Rights_UtilityModel.pdf last accessed on 8.5.2016

¹⁷ WHO ARE WE?, available at http://www.sristi.org/cms/en/our_network

¹⁸ About NIF, available at: <http://nif.org.in/aboutnif>

Brazil when compared to those in China, Taiwan and Korea. Also, as it is mentioned in 2011 policy the legal enforceability attached to patents is weakened by lack of prior substantive examination.¹⁹ On similar lines it can be assumed that when a weaker protection is available for a minor patent, it will gradually lower down the overall quality of patents. It will in turn affect both invention and innovations.

Not only this, the other side of the story needs perusal too, the utility patents are subjects to a number of criticisms. Ranging from the poor quality of patents to it being a tool in the hands of foreign bodies to extract more royalty from our country.²⁰

CONCLUSION

After studying the above discussed details, it can be said that granting utility patents does not guarantee the high invention rate or high filing of patents. But at the same time, it does provide recognition to the small patents, which in turn instill a feeling of innovation in the holder to pursue bigger challenges. Let us not forget we are still in our developing phase. We need a lot of Indian built technology to achieve self-sufficiency, which is the key to development, lest we want to be dependent on importing technology and pay high royalties in return. Many scholars see the same thing in a different spectrum. Some say that every great journey starts with a small step.²¹ Hence, these petty patents need to be protected as one day they will lead to bigger patents. So, the toil and intellect required for these small patents also need to be protected.

Talking about the small and medium size industries, where the utility models are most prevalent. It is also said that granting of utility patents will boost up this sector. This will establish a rich databank of innovations and minor improvements. If this sector ushers into the utility patents, it will graduate or develop into proper patenting system too.²² In short if

¹⁹ DIPP Discussion Paper 2011 available at: http://dipp.nic.in/english/Discuss_paper/DiscussionPaper_relevance_23June2011.pdf last accessed on 8.5.2016

²⁰ National IPR Policy Series : CIS Comments to the First Draft of the National IP Policy, available at: <http://cis-india.org/a2k/blogs/national-ipr-policy-series-cis-comments-to-the-first-draft-of-the-national-ip-policy>

²¹ *India: Need For Utility Model Protection In India* by Suchi Rai and Akshay Mehta (2014), available at: <http://www.mondaq.com/india/x/325864/Patent/NEED+FOR+UTILITY+MODEL+PROTECTION+IN+INDIA> last accessed on 8.5.2016

²² *Govt mulls IPR courts to fast-track cases* by Arun S (2014) , available at: <http://archive.financialexpress.com/news/govt-mulls-ipr-courts-to-fasttrack-cases/1295746> last accessed on 8.5.2016

there will be a pool of utility patents, in all probability it will definitely lead to a few proper Patents.

India as a nation is still evolving with utility patents and we are still in the nascent stage. There is so much diversity in this area globally that there can be absolutely no hard and fast rule for inclusion of utility models patenting. Though prima facie Jugaads have an all-round support from every strata of society. But coming up with a law on the point requires much more than just popular sentiment or public voting for it. If we are looking into the prospects of patenting utility models in India, the call of time is to see and learn from the failures and successes across the world than just to rush towards bringing a law on Jugaad. By failures and successes of the world, it is meant the legal system of those nations where the utility patents are failure and successfull. There is dire need to zero in to those causes. And then bring a law keeping in consideration all the factors and parameters. It is only after addressing those issues, the inclusion of utility models in our IPR regime shall be fruitful. As if right now there are still many grey areas which need to be clarified.