

CHAPTER 5

CONCLUSION & RECOMMENDATIONS

5.1. CONCLUSION

For the progress of science and technology free flow of information is desirable. It has been understood that the deprivation of any incentive for a researcher encourages him to keep it secret rather than freely letting public know about it for the threat of it getting copied without any reaping recognition in return. Intellectual property rights help protect the creative work.⁶⁰⁵ Creative work ranging from literary works to technological inventions, all are covered under the umbrella of intellectual property rights namely, copyrights, related rights, trademarks, geographical indications, patents, industrial designs, plant breeders rights, trade secrets, integrated circuits layout design. Intellectual property is a state mandated monopoly which grants exclusive rights to the inventor for limited time in return of inventions being made public. Legal luminaries like Lyssander spooner (1855)⁶⁰⁶ and Ayn Rand⁶⁰⁷ have argued that a man has both natural and absolute rights for the ideas and the protection of intellectual property is a moral issue, respectively. The Utilitarian theorists Bentham and Mill have argued that intellectual property protection works for greater good of all. Jeremy Bentham⁶⁰⁸ stated that: "which one man has invented, all the world can imitate. Without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by selling at a lower price". The first legislation in India relating to patents was Act VI of 1856. The objective of this legislation was to encourage inventions of new and useful manufactures and to induce inventors to disclose secret of their inventions. Development of patent rights responds to rising demands for protection, because countries with higher R&D intensities and human capital inputs have higher indexes.⁶⁰⁹ A strong system of intellectual property protection has been seen as an impetus for attracting inward flows of technology and flourishing of local innovation and cultural industries. Evidence suggests that stronger system for intellectual property protection could increase economic growth and

⁶⁰⁵ ("The term intellectual property refers to a category of intangible rights protecting commercially valuable products of human intellect comprising primarily trade mark, copyright and patent right, as also trade secret rights, publicity rights, moral rights and rights against unfair competition.") *ICAI v. Shaunak H. Satya*, (2011) 8 SCC 781.

⁶⁰⁶ *The Law of Intellectual Property, Part 1 Chapter 1 Section 9 – Lysander Spooner*

⁶⁰⁷ *Rand, Ayn (1967) [1966]. Capitalism: The Unknown Ideal (paperback 2nd ed.). New York: Signet.*

⁶⁰⁸ Jeremy Bentham (1839, p. 71)

⁶⁰⁹ Ginarte, Juan Carlos and Walter G. Park, 1997, "Determinants of Patent Rights: A Cross-National Study," *Research Policy* 26, 283-301.

foster technical change, thereby improving development prospects.⁶¹⁰ It is evidently clear that intellectual property seeks to maximize social utility by providing inventors with incentive as a return for their time, investment and labour.⁶¹¹ It is supposed that the grant of monopoly rights promotes public welfare by encouraging production, protection and promotion of knowledge.⁶¹² According to a recent study, 1% increase in patents can increase GDP of the country by up to 2.8%. Similarly, 1% increase in Intellectual Property can increase GDP of a country by up to 7%⁶¹³.

There are many countries which have implemented various systems to ensure that the useful inventions find protection under the legal system to boost domestic innovations and technological growth of the country. There are more than 93 countries which have implemented the system of 2nd Tier Patent protection usually known as utility model (UM), petty patents, innovations patents etc. (herein referred to as "UM") to spur domestic innovations which are incremental in nature and are unable to stand the test of higher patentability threshold as enshrined under the standard patent system. UM systems are ideal for inventions which become outdated soon and need not be protected for a long tenure of twenty years⁶¹⁴. They also enable quick commercialization of products as opposed to patent applications which may very well be shelved in patent offices for many years⁶¹⁵. It has been suggested that UM may be useful for countries that are major importers of technologies by enabling them to absorb and adopt these technologies. UM Protection can help in spurring local innovations besides helping local companies to adapt existing technologies and is good for developing countries where SMEs are involved in cumulative inventions⁶¹⁶. Further,

⁶¹⁰ Anja Breitwieser and Neil Foster, Intellectual Property Rights, Innovation and Technology Transfer: A Survey, The Vienna Institute for International Economic Studies, Working Paper no.88, 2012.

⁶¹¹ Spinello, Richard A. (January 2007). "Intellectual property rights". *Library Hi Tech* 25 (1): 12–22. doi:10.1108/07378830710735821.

⁶¹² Spinello, Richard A. (January 2007). "Intellectual property rights". *Library Hi Tech* 25 (1): 12–22. doi:10.1108/07378830710735821.

⁶¹³ Lack of IP protection may hit Asia's rise, *Time of India*, 3rd January 2012

⁶¹⁴ 2nd Tier patent protection, *Harvard International Law Journal*, Winter 1999, Harv. Int'l L.J. 151, 31 of 997 DOCUMENTS, page 5, third last paragraph

⁶¹⁵ Page no. 6 Utility model – a tool for economic and Technological development: A case study of Japan by Dr. K.S. Kardam "The legislation with regard to Patents, Copyrights and other forms of Intellectual Property will ensure that maximum incentives are provided for individual inventors, and to our scientific and technological community, to undertake large scale and rapid commercialization, at home and abroad." available at: http://www.ipindia.nic.in/research_studies/FinalReport_April2007.pdf

⁶¹⁶ Utility Model and Invention in developing countries, UNCTAD, Uma Suthersanen, page xi, xii and xiii, Available at unctad.org/en/Docs/iteipc20066_en.pdf: "(iii) Practical and economic benefits:

- Utility model law may encourage local innovation so that local industries produce more goods
- Utility model law can protect valuable inventions which would otherwise not be protected under the standard patent law or other intellectual property laws
- This type of protection prevents free-riding of inventions by other predatory firms which expend no R&D costs

protection of IP is important especially for SMEs that themselves are resource constraint to commercialize the IP but may have better chance to get it licensed out in case IP is protected⁶¹⁷. Various reports/statistics revealed that the countries which were majorly producing the incremental inventions used this system extensively which helped in increasing the technological capacity of the firms. Introduction of UM is likely to spur domestic innovations⁶¹⁸. Japan represents an exemplary nation which successfully used 2nd Tier patent protection system to become technologically advanced. This can be proved by the fact that initially the total no. of filings by domestic innovators under the UM legislation was more which after some years decreased and the domestic applicants started using the standard patent system more in Japan as by that time Japan became technologically advanced⁶¹⁹.

or investment

- Utility model law can provide revenue to governments in the form of registration, search, publication, etc. fees
- Registered utility model rights can act as a source of valuable information via published specifications
- The existence of a utility model system may reduce incentives for industry to lobby for the inclusion of minor inventions in the patent regime; this in turn would limit the public domain much more than the less expansive utility model system”

“In the East Asian countries such as Japan, South Korea and Taiwan, Province of China, a combination of relatively weak IPR protection and the availability of second-tier patents like utility models and design patents encouraged technological learning. The weak IPRs helped by allowing for local absorption of foreign innovations. The second-tier systems encouraged minor adaptations and inventions by local firms. Later on, the IP systems became stronger partly because local technological capacity was sufficiently advanced to generate a significant amount of innovation, and also as a result of international pressure”

“It is often claimed that utility model systems are particularly advantageous for SMEs, especially in developing countries. It is quite likely that SMEs have a large presence in those industries where cumulative innovation is the norm and copying is rife. Indeed, it is also often argued that a cheap and rapid second tier patent regime would improve the legal environment for SMEs, especially those which are engaged in an ongoing process of innovation and adaptation. This is more so in relation to certain product sectors which are concerned, not so much with revolutionary technological breakthroughs, but more so with incremental or improvement innovation.”

⁶¹⁷ Utility Model and Invention in developing countries, UNCTAD, Uma Suthersanen, page no.5,

Available at unctad.org/en/Docs/iteipc20066_en.pdf: *“Take the case of a creative but small company lacking the funds to develop and commercialise new products based upon its inventions. If such products are desirable for consumers, failure to commercialize would be a loss for society. But if the company owns a patent, a wealthier company may wish to license or buy the patent secure in the knowledge that the invention is legally protected. And if the invention were kept secret, how would bigger companies know about it? The disclosure of patent information makes it possible for prospective users to find inventions of interest and then to approach their owners”*

⁶¹⁸ Intellectual property and Economic development. Lessons from American and European History, page 4, by B Jorina Khan, point no.5, last three lines

⁶¹⁹ UNCTAD-ICTSD Project on IPRs and Sustainable Development, Fostering Invention, Innovation and Creativity in Developing Countries, page no. 67: *“There has been a steady drop in applications for registrations: from approximately 191,000 in 1980 to 77,000 in 1993 and 10,000 in 1999. There are various reasons for this. First, the Japanese Government revised the utility model law and introduced a “no examination” rule, while curtailing the duration of protection from 10 to 6 years. One commentator states that these revisions to the law have meant difficulty in obtaining judicial or administrative relief and a loss of confidence as to the validity of non-examined rights. Secondly, since the total number of patents granted increased during this same period, another explanation is that there has been a shift in the Japanese innovation culture. Japanese industries tended to focus on incremental innovation rather than radical innovation during the period from the post-war years to the 1980s and this trend has since been reversed. This in turn has meant*

Today Japan's economy is the world's fourth-largest Purchasing Power Parity (PPP)⁶²⁰ and second-largest market exchange rates⁶²¹. UM is exploited in higher %age by IP owner than that in case of patents (in the range of 40-50% in case of UM and only 30% in case of patents). The introduction of UM encouraged the innovators to protect the utility oriented inventions, particularly SMEs and since then Germany has made tremendous growth in the technological development⁶²². The grant of Utility model has definitely contributed to the increase in the GDP in China. In order to prove this, what is required is a study of GDP of China. Study⁶²³ reveals that "Chinese utility model patent arguably helped small, poorly capitalized businesses get off the ground". China has many success stories to share which proves that by use of Utility Model many small scale industries/companies have grown to noticeable size and have now been supplying innovative Utility Models to world's stalwarts such as Sony, Niconetc⁶²⁴. Statistics also proves that Utility Models helps in country's

that the utility model system is no longer seen to be as vital as it had once been" available at http://ictsd.org/downloads/2008/06/pp_3ch_03.pdf.

⁶²⁰ The Economic Times "India overtakes Japan to become third-largest economy in purchasing power parity", New Delhi, April 19, 2012 "Its economy may be in the grips of a slowdown, its polity paralysed and markets morose, but all this hasn't prevented India from overtaking Japan to become the world's third-largest economy in purchasing power terms." Available at http://articles.economictimes.indiatimes.com/2012-04-19/news/31367838_1_ppp-terms-india-s-gdp-power-parity, last visited on June 6, 2013.

⁶²¹ "Utility Model –A Tool For Economic And Technological Development: A Case Study Of Japan" by Dr. K.S. Kardam, page 28 "Today Japan's economy is the world's third-largest Purchasing Power Parity (PPP) after united states and the people's republic of china and second-largest by market exchange rates."

⁶²² Utility Model, A tool for economic and technological development, WIPO, April 2007, Available at www.ipindia.nic.in/research_studies/FinalReport_April2007.pdf

⁶²³ China's Utility Model System: Innovation Driver or Deterrent, by Thomas T Moga, published by US Chamber of Commerce, November 2012, page no. 10

⁶²⁴ "Development of China's Utility Model Patent System, State Intellectual Property Office of the P. R. China, 2009, available at http://english.sipo.gov.cn/news/official/201301/t20130105_782325.html, last visited on 16th June 2013: "China has a large number of SMEs, in which many researchers and even decision makers do not have much knowledge of the complicated patent system. The utility model examination in China adopts preliminary examination system which simplifies the examination procedures, shortens the examination period and reduces the application expenses, and thus introduces patent system to many SMEs.

Suzhou Touchstone International Medical Science Co., Ltd. is a high-tech company which emphasizes medical technology R&D, innovation and production. Its main products are mid and high end surgical operating instruments which are exported to various countries in Europe and North America. The company owns 297 utility model patents. Its most representative utility model patent—"surgical binding instrument rotary cutter head" completely changed the traditional design of stapler. It eased the strict requirements for materials and manufacture, reduced operation costs and improved the reliability and success rate of surgery.

Suzhou Haixin Mechanical & Electrical Equipment Co., Ltd. has been devoted to researching and producing anti-static products. The company insists in technology innovation and focuses on indigenous IP development and protection. The company now owns over 50 utility model patents. After nine years' efforts, it gradually forms a large-scale production base for anti-static equipments and provides high quality services to the world at affordable prices through internet. It is the designated supplier of some famous companies such as KONICA MINOLTA, SONY, and NIKON"

China has a lot of technology-oriented SMEs like Suzhou Touchstone and Haixin who protect their technological innovations and strengthen their market competitiveness effectively by utility model patents. Utility model patents provide powerful protection for a company's innovation during its starting-up stage and paves the way for company's future development"

economic prosperity as the rate of commercialization of Utility Model is much higher (about 60% more) as against the standard patents⁶²⁵. Practice indicates that utility models are very important and useful in China⁶²⁶. Similarly, Germany, Australia and many other countries have witnessed positive correlation between implementation of UM with that of growth in Country's GDP and its technological growth. For efficient working of UM it is important to understand that the law should be such which makes it easier for domestic applicants to use this system for their advantage. Brazil and UK present excellent examples of aforesaid concerns where insignificant difference between the two systems led to failure of UM System. In fact there are many countries (approx. 16⁶²⁷) where procedural and substantive provisions under UM were as exhaustive and cumbersome as available under the standard patent system⁶²⁸. The 2nd Tier Patent Protection System has seen tremendous success in countries which have kept the level of inventive step much lower as against the standard patent system. Further, statistical analysis of filings in various countries under the 2nd Tier Patent Protection has revealed that the major beneficiaries of UM filings have always been the domestic users. Opponents fear that while UM is brought in force for bringing out benefit to small scale industries, but since a UM is granted without substantive examination, this would lead to number of litigations as the quality of UMs being granted would be seriously jeopardized. The overall result of this would be high cost of maintenance and as small scale industries are short of resources; this kind of protection may serve as an added burden on them. UM framework therefore fails to address most significant bottleneck faced by SMEs which is access to patent rights: Cost and complexity of enforcement rights⁶²⁹. Research has

⁶²⁵Development of China's Utility Model Patent System, State Intellectual Property Office of the P. R. China, 2009, available at http://english.sipo.gov.cn/news/official/201301/t20130105_782325.html, last visited on 16th June 2013: "According to investigations, by the end of 2011, the valid utility model patents that maintained for more than 3 years account for 52.8% of the total, among which 12.9% maintained for over 6 years. From 2006 to 2010, the implementation rate of utility model patent was above 60%. Among the implemented utility model patents, the percentage of self-implementation by the patentees was over 90%. The long maintenance period and the relative high rate of implementation indicate that utility model patents not only contain comparatively high technology but also play an important role in promoting economic prosperity. Most of China's utility model patents have been utilized in real manufacturing and the implementation rate of utility model patents is higher than that of invention patents (less than 60%)"

⁶²⁶The Development and Perspective of Intellectual Property in the People's Republic of China, Intellectual Property Quarterly, 1997, by Guo Shoukang

⁶²⁷The Economic Value of The Australian Innovation Patent, The Australian Innovation Patent Survey, 24 March 2013, IP Australia, see Chart 2, page 9, Countries with blue bars: "Costa Rica, Malaysia, Uruguay, Brazil, Philippines, Poland, Hungary, Thailand, Spain, Slovakia, Czech Republic, and Ukraine"

⁶²⁸"Petty Patent (Utility Model) Protection - The Current Situation Worldwide". Ladas and Parry 2012, available at:

<http://www.ladas.com/Patents/PatentPractice/PettyPatents/Index.html>

⁶²⁹Discussions of the core group established by FICCI-IP division, year 2012

been carried out to understand how other countries have been able to address this issue. Findings suggest that these concerns find no base and countries have been able to successfully address this issue by implementing the measures. Japan follows the system of generating the search report or technical opinion from IP office without which UM owner cannot sue alleged infringers for UM infringement. Further, in case technical opinion generated is negative and UM owner decides to file a suit then in case of losing the case there is a huge penalty levied on UM which to a great extent ensures that frivolous litigations are not filed⁶³⁰. In Germany which is known as cradle of UM System has not witnessed an increase in litigation at all in case of UM system⁶³¹. In Germany, the cost of filing frivolous litigation is so high that it puts effective deterrence on frivolous litigations as the party is forced to pay entire court cost besides paying the entire cost of winning party (the alleged infringer)⁶³². Hence UM related litigations have not been witnessed in Germany to a noticeable extent⁶³³. In Australia also, the litigation trend in case of 2nd Tier patent protection is negligible (2.27% as against the litigations under standard patent system).

⁶³⁰ Article 29(3) of UM legislation of Japan through a email reply by representative from Japan Intellectual Property Association: "Japanese UT Act says that Article 29-3: *Where a trial decision to the effect that the utility model registration is to be invalidated (excluding those rendered on the ground of Article 37(1)(vi)) has become final and binding after the holder of utility model right or exclusive licensee exercised his/her right against, or gave warning there of to, an Infringer, etc., the holder or exclusive licensee shall be held liable to compensate damage sustained by the Infringer, etc. as a result of the exercise of his/her right or the warning; provided, however, that this shall not apply where the holder or exclusive licensee exercised his/her right or gave warning there of based on the Utility Model Technical Opinion stated in the Report of Utility Model Technical Opinion (excluding those to the effect that the device claimed in the application for a utility model registration or the registered utility model cannot be registered pursuant to the provision of Article 3(1)(iii) and (2) (limited to its application based on a device falling under Article 3(1)(iii)), Article 3-2, and Article 7(1) to (3) and (7)) or with other reasonable care.*"

⁶³¹ Response on Email Interview with Ms. Britta GEORGIAN, Deputy Head of the International Industrial Property Section, German Patent and Trade Mark Office: "There are no indications that registered utility models are being used excessively for bringing infringement or (interlocutory) injunction actions. This might, above all, be due to the fact that such actions pose considerable risks for the owner of the utility model, since he has only obtained an unexamined IP right. In contrast to the assertion of patent rights, a utility model owner may face challenges in infringement proceedings based on absolute grounds for refusal and, in addition, cancellation proceedings before the DPMA which involve considerable costs for the losing party. As a rule, owners of utility model rights will carefully consider, in their own interest, whether it is useful to go to court and assert claims, which might not be founded, on the basis of a utility model registration"

⁶³² China's Utility Model System: Innovation Driver or Deterrent, by Thomas T Moga, published by US Chamber of Commerce, November 2012. "The holder of a clearly invalid German utility model is not likely to bring an action in the German court as the party will likely be forced to pay the court costs incurred by the accused infringer. The potential high cost acts as a deterrent to filing questionable actions". "Also unlike China, where the winning party receives only partial reimbursement, in Germany, the successful party in an invalidation proceeding may claim full "reimbursement of costs. This means that the owner of an invalid utility model may have to cover not only his own costs but also the costs of the winning party, creating a major deterrent to the improper use of junk UMPs. However, the reimbursement cost is limited by an official tariff for attorneys at law."

⁶³³ Email interview with official from Germany patent Office, dated: 6th March 2012, "there are no indications that registered utility models are being used excessively for bringing infringement or (interlocutory) injunction actions. This might, above all, be due to the fact that such actions pose considerable risks for the owner of the utility model, since he has only obtained an unexamined IP right. In contrast to the assertion of patent rights, a

With regard to the type of innovation (breakthrough or incremental) it is understood that adaptation and improvement is the road taken by many developed countries in the early stages of their development. The National Knowledge Commission report⁶³⁴ analyzed the potential of Indian companies in terms of the generating various types of innovations and determined that “while 37% of the Indian companies introduced breakthrough innovations in recent years, no fewer than 76.4% introduced incremental innovations. In order to spur domestic innovation, protection of IPR plays an equally important role. India has a huge innovation potential and large set of innovations are emanating from the country which are highly useful though lacks sufficient inventive step to warrant grant of IPR protection under the standard patent system which is today used more by the foreign community. Various interviews have proved that lack of Patent protection acts as a great disincentive to the innovator community. Today, India stands least in the rank when it comes to domestic patent filings. Out of the top 10 countries in terms of filing of patent applications, India’s rank is 8th⁶³⁵. Protection of IP plays a significant role in boosting inventive endeavour failing which innovations stands the risk of remaining as trade secrets which comes at a cost of social good that deprives society from the fruits of innovation. Review of the available Controller General of Patents, Designs and TMs from year 2009-2013 revealed that approx. 45% of the patent applications filed by Indian applicants have been rejected from grant on the grounds of their inability to satisfy the conditions of inventive step enshrined under the Standard Patent system (which requires Non-obviousness). Further, survey has revealed that approx. 90% of the inventions emanating from mechanical, electrical and IT sector are envisaged to have low shelf life in lieu of the fact that the technology may become obsolete soon. It is understood that such improvements/modifications are basic in nature and may further be improvised easily by a person skilled in the art thus making such improvements having lesser shelf life. It has also been understood through the survey that the shelf life of majority of such innovations has lesser shelf life since further improvements can be further easily made by a person skilled in that art. These being incremental in nature do not require 20 years long term protection as provided under the Patents System. Further, many of such inventions are subject to rejection on the grounds of Obviousness, with no importance paid to

utility model owner may face challenges in infringement proceedings based on absolute grounds for refusal and, in addition, cancellation proceedings before the DPMA which involve considerable costs for the losing party. As a rule, owners of utility model rights will carefully consider, in their own interest, whether it is useful to go to court and assert claims, which might not be founded, on the basis of a utility model registration”.

⁶³⁴ Innovation in India, National Knowledge Commission Report, 2007

⁶³⁵ http://www.wipo.int/export/sites/www/ipstats/en/wipi/2014/pdf/wipi_2014_patents.pdf

utility of such inventions which can enhance the performance of the product or increase the ability of the product to be useful for solving an issue for which it did not have ability earlier. Thus, due to non-availability of appropriate environment/legislative route to protect innovations, the inventor community deters from marketing the product due to fear of getting copied or infringed thus leading to hampering progress of Science & technology. As a result, it's not only is leading to huge losses to Exchequer (that may vary to the tune of 10-30% per product revenue) but also losses to the inventors to the tune of 10-15% per product. Implementation of effective legislation in India which can protect domestic innovations is need of an hour. It would thus be in interest of India to develop a system, in line with several other countries, namely 2nd Tier patent protection in the form of Utility Innovation Act which can protect incremental inventions and spur domestic innovations. Such a system must not only come to the rescue of innovators but must also be considerate about the patentees on whose inventions increments may be made. Further, the new system must be in a position to ensure the benefit of public at large by incorporating provisions that demand commercialization thereby addressing the issue of defensive filings.

5.2. RECOMMENDATIONS

The law (proposed legislation for 2nd Tier Patent Protection) adopted should be such, which can reconcile the needs of both the Patents and Design alike. It is seen that the protection of small innovations, especially those which have practical utility; are unable to meet strong inventiveness criteria and have a short commercial life, garner a protection in many countries across the globe, through the establishment of a system either as a part of their patent law or a sui-generis (independent) system. This enables the right holders to commercialize the products of such innovations at early stage of development of technology. The system is said to be useful for the domestic applicants to protect their small and incremental innovations particularly in developing countries.

In India, the inventions are protected through patents under the patent law. On similar lines, the inventions relating to industrial designs are protected under the design law. The inventions before being granted patents are subjected to substantive examination as to their patentability aspects such as novelty, inventive step and industrial application. Additionally, it is also considered whether such inventions attract any of the provisions relating to non-patentability as stipulated in the Act. Any invention which is being considered for patent, the inventive activity generally relates either to improvements with regard to functionality or techniques to produce the improved products or sometimes the products and processes are entirely new but these improvements relating to functionality or techniques or newness itself must be non-obvious to the person skilled in the art. Hence, the inventive ingenuity or the degree of inventiveness plays a very important role, in addition to its newness, in acquiring the patent rights for these kinds of inventive activities. On the other hand, it is to be noted that the industrial designs, are considered for registration of the inventive activity with regard to their shape, configuration, and patterns relating to ornamental or physical aesthetic appearance only. However, it does not protect any inventive activity relating to any mode or principle of construction or anything which is a mere mechanical device involving scarce inventive ingenuity but having a useful practical advantage. This is the grey area which can be supplemented with the advent of the new legislation.

It has been observed that, with the dismal rate of Indian domestic applicants who file for patents and designs, the need for bringing a 2nd Tier patent protection system is felt (Namely 'Utility Innovation Act'). Such a low filing rate of applications by domestic applicants also does reflect the true research and development activities in India. It is no secret that there is extensive research work being engaged in the country from all the sectors. This can be

observed by the number of research paper being published every year by the researchers. Hence, the natural corollary being drawn here is that research is being done but there is no protection under the current Patent system.

The domestic innovators particularly those who are engaged in innovative activities which result into practical usefulness in the existing products seems to be reluctant to file application for protecting these kind of activities due to the fact that such innovations have very thin inventiveness which is not able to meet strong requirement of inventive step under the Patents Act. Furthermore, section 3 of the Act excludes certain kinds of inventions from patentability. The basic requirement for these innovators is that they would like to commercialize them quickly as the commercial life of such innovation is also very short due to tough competition not only within the country but also from abroad. Also, it is seen that the patenting system takes not only long time as compared to the commercial life of the innovation but, is also expensive. Alternatively, under the design law, the protection is available within six to twelve months but the law provides protection only to the features of shape, configuration, pattern or ornament relating to aesthetic appearance of the products. Conclusively, it can be inferred that this does not protect the features or activities relating to any mode or principle of construction or anything which in substance is a mere mechanical device. Therefore, such inventions or innovative activities relating to mode or principles of construction of mechanical devices which are otherwise excluded from the purview of registration under design law and either excluded under the provisions of section 3 or unable to meet the inventiveness criteria under of the Patents Act 1970 need to be protected in order to promote and encourage the intellectual property creation as well as protection culture among the domestic inventors and small innovators including SMEs which are playing very crucial role in the economical as well as technological development of the country.

Keeping in mind the above analysis, the insufficiency of the existing provisions of the patent law and the design law have been sufficiently highlighted as being incapable of protecting and promoting such kind of business oriented small innovative activities.

Patents Act has a rigid criterion for novelty. Hence, inserting a new chapter that is actually an exception to the previous one, would not be legally and logically consistent with each other. Presently, the inventions in India, receive protection under the Patents Act, 1970 with respect to their technical features or improvements, provided they meet the requirement of novelty, inventiveness and industrial application. On very similar lines, the features related to outer

shape, configuration, pattern, ornament of designs are protected under the Design Act, 2000. The lacuna here is that any mode or principle of construction or anything which is in substance a mere mechanical device cannot be protected under the design law and therefore incremental innovations based on utility functions of the product are non registerable.

Therefore, the Law in this aspect must be examined on two different planes:

1. Introducing new provisions in the existing patent law

This is a system that has been commonly observed in numerous countries like Republic of China including Taiwan, Brazil and Australia which have utility model protection system inbuilt within their patent law and no separate law exists for protecting small or incremental innovations.

In case India decides to follow such a path of adoption of this system, India has an option to incorporate the provisions relating to the grant of utility model protection in the patent law by amending the Patents Act, 1970. This must be realized either by incorporating a separate chapter on utility models or by integrating the inbuilt provisions for such protection by amending the existing provisions. An amendment of the patent law, it is envisaged, may cause other many issues to crop up in the process and thus it does not present itself to be a very feasible option. Further, amendment of patent law also requires harmonization and synchronization of other provisions, a huge exercise is required to be done.

2. Amendments in the existing design Law⁶³⁶:

Since the amendment in Patent Law may present difficulties, another option that might be considered is the amendment of the Designs Act in a similar fashion. However, the similar problems of basic conflict in ideologies of the two enactments would crop up again in this case also. Hence, this would also not present itself as the best option.

3. New sui-generis utility Innovation Act⁶³⁷:

⁶³⁶Utility Model and Invention in developing countries, UNCTAD, Uma Suthersanen, page xiv, Available at unctad.org/en/Docs/iteipc20066_en.pdf: “*Accretion approach - A developing country can adjust the existing intellectual property regime without introducing a utility model right. This can be done by extending existing intellectual property rights to new subject matter (such as sub patentable or functional innovation) by re-defining an existing right to encompass the new material*”.

⁶³⁷ Utility Model and Invention in developing countries, UNCTAD, Uma Suthersanen, page xv, Available at unctad.org/en/Docs/iteipc20066_en.pdf: “*Emulation approach - Emulation involves creating new hybrid rights. If a developing country does not have such a right, it would be the most expensive option in the short run. However, this expense is an immediate real cost which may be offset by long term benefits to the industrial environment such as increased international licensing opportunities*”.

It is to be noted that the countries like Japan, South Korea, Germany, and also some other countries in the world have separate legislation that offers 2nd Tier Patent protection. While establishing separate law, they have also ensured mutatis mutandis application of a number of laws.

This would be a solution that would be most suited to the present scenario. The separate code altogether would ensure that the specific requirements with regards to the novelty criteria, inventive threshold, grace period, period of protection etc, is safely met without diluting the underlying criteria of the Mother Act. Also, in order to ensure the success of the model, it is required that the set of guidelines be so exhaustive that it covers each and every aspect of the system with fine precision so that no stone is left unturned so as to ensure its consequent success. The Japanese Utility Model Law is a glaring example of this aspect which has a very detailed and extensive code on the subject and consequently, has most successfully implemented the Utility Model Concept than any other nation in the World. While implementing the system of 2nd Tier Patent protection, the legislator must draw the provisions such that the domestic applicants are the major beneficiaries. Including the provision of "Rewards" will be useful in offering incentives to inventive community in bringing more innovations. Including the system of "Formality Check" over the substantive examination is also advocated keeping in view the international experience and to ensure that the quick grant is given to such inventions which have lesser shelf life and are best suited for protection under the proposed 2nd Tier Patent Protection system. The system of formality check can be supplemented with generating Technical Evaluation Report to ensure that the legal rights granted basis formality check are not misused and also to ensure that the rights are not granted to frivolous inventions. It will be equally important to keep the measure of checking inventive threshold for innovations at low as compared to that measured under the standard patent system so that both the systems do not start competing with each other. The proposed system must explicitly consider imposing deterrent punishment on the parties involved in frivolous litigations as seen in case of Japan and Germany failing which the system will cause a huge burden on Indian Judiciary by taking frivolous litigations to the toll. In order to ensure that the new system is not used for defensive filings hence the provisions of Compulsory Licensing and mandatory commercialization of innovations must be included so as to ensure that the interests of public and that of holder of IP rights must be met. It is understood that the new system is primarily to protect invention which are incremental in nature, it is envisaged that many of the inventions will be improvement on existing products for which patent term has not yet expired, thus it will be important to compensate the IP right holder of the basis

invention on which improvement is made. Thus, the system must include the provision of benefit sharing. This will incentivize the original innovator whose invention served as a base for the incremental innovation. Likewise other countries, which have implemented various reforms which could satisfy the needs of their domestic applicants, it will be in interest of India to implement 2nd Tier Patent protection system to boost domestic innovations.

Researcher, basis the complete study of various countries that have adopted Utility Model Legislation has taken into consideration the evolution of such a law in all of these countries in terms of how it has fared well, has drafted a model 2nd Tier patent protection legislation for India.

While drafting such a law for the country, the socio-economic needs of the country were well considered including various developments that have been made in India with regard to boosting entrepreneurship and creativity.

For India, it is now high time to take existing stock of situation and amend the laws which can offer protection to domestic innovations. Today, when we look at the patent statistics, the ratio remains 80:20 where 80% is the foreign filing and 20% is the filing by domestic applicants. It has been understood that while patent system has been effectively used by international community, however it has failed to offer adequate protection to the kinds of innovations emanating domestically that are incremental in nature. For India to realize the dream of “Make in India” it will be important that the innovations are given adequate thrust by offering adequate protection.

The draft code for such a system is as follows: