India shows U.S. path to patent standards

By: Swaminathan S. Anklesaria Aiyar – May 6,2013

Headlines have been trumpeting the Indian Supreme Court's decision [2] to deny a new patent for the cancer drug Gleevec as an attack on intellectual property [3] rights and a win for patients in need of cheap drugs. Those headlines are misleading.

What the ruling actually demonstrates is that India has set a high bar for determining what is "innovative." The United States could learn a thing or two from India – particularly since Washington's excessively liberal patent system led to a ridiculous spat last year between Samsung and Apple over whether a rectangular cellphone screen with rounded corners was patentable.

To understand the dynamics of this uproar, a brief history lesson is required. Novartis patented Gleevec in 1993, a time when India did not grant product patents for drugs. After Indian law changed to allow them in 2005, Novartis came up with a variation of Gleevec, claiming this improved the drug's effectiveness – and so qualified for a patent.

The Indian Patents Office rejected the claim as insufficiently innovative. Other appellate bodies and the Supreme Court concurred.

The response from patient and pharmaceutical advocates alike has been loud – but misguided. Y.K. Sapru, of the Cancer Patients Aid Association in Mumbai, declared: "We are happy that the apex court has recognized the right of patients to access affordable medicines over profits for big pharmaceutical companies through patents."

The court did not recognize any such "right." It judged that the new variation of the drug was not innovative enough.

On the other side, Chip Davis, with the Pharmaceutical Research and Manufacturers of America, described it as "another example of what I would characterize as a deteriorating innovation environment in India [5]."

That characterization is unfounded. The court clarified it was not against patenting drugs but was just insisting on a proper standard for innovation.

The court's ruling has highlighted the fundamental point that patents are monopoly rights – which should not to be granted too liberally. Competition must be promoted and monopolies penalized, with the exception that temporary monopolies are strongly justified to reward innovation. This includes rewarding true drug innovations, not the tweaking or "evergreening" of old patents through slight variations.

In stark contrast to India, Washington grants patents liberally, with a low bar [6] for deciding what is innovative. As a result, the U.S. patent office has been snowed under by an avalanche of patent applications it can hardly scrutinize thoroughly. This has three unfortunate consequences.

First, many new initiatives (especially in software and business processes) attract dozens of lawsuits, making innovation risky and expensive. The winners are those with the best legal brains and largest budgets, not the best innovations.

Second, liberal patents hamper follow-on innovations. Unlike Isaac Newton [7], today's innovators cannot stand on the shoulders of giants without being hit by lawsuits for patent infringement.

Third, liberal patent-granting policies spur patent trolls [8] and defensive patenting [9]. Patent trolls buy quantities of patents, often from ailing or bankrupt companies, with no intention of using them. Instead, the trolls aim to sue actual producers in the relevant fields, forcing them to settle to avoid heavy legal costs. Patent trolls imposed an estimated $29 billion in direct costs on producers in 2011, according to a Boston University study.

Google, for example, paid $12.5 billion for Motorola's smart-phone business [10] – largely to get access to the latter's multitude of patents. Many are of uncertain value and may ultimately be struck down by the courts, but they constitute powerful legal ammunition. Most creative U.S. companies are spending far too much time litigating instead of innovating.

Google justifies its patent arsenal by saying it has to fight similar stockpiles owned by Microsoft and Apple. A group of companies headed by Microsoft had earlier bought 6,000 wireless patents from Nortel for $ 4.5 billion. This had nothing to do with innovation – and everything to do with avoiding possible litigation in future.

While the Indian Supreme Court verdict on Gleevec is not directly related to patent issues affecting software, wireless and business processes, it is an important reminder of the need to go back to basics. Monopolies are inherently bad since they lead to high prices and exorbitant profits unrelated to efficiency or innovation. It should be no surprise that even well-intentioned monopolies, like patents, produce a welter of adverse consequences.

The solution is to set high standards for patents. This means abandoning broad patents and rejecting patent claims for minor or incremental improvements. It means rewarding true innovators while discouraging those seeking to reap rents from practices like patent trolling.

Washington has long lectured India and other developing countries on the need for high standards globally in labor and environmental matters. Why not for patents too?