

A new or unfamiliar thing or experience law commercial essay

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According to Black's law dictionary[1] Novelty means ' the newness of the information that is generally unused or unknown and that gives its owner a competitive advantage in a business field. The rationale behind the patent system is to recognize and also rewards the creativity of the inventor, but also acts as an inspiration for further inventions which ultimately contributes to the technological development of a nation and to maintain it, to find the real patent test of novelty is given. The Patent Act 1970 requires an invention to be new in the sense that the date of filing of patent application, it should not form a part of the state of art. The State of art comprises all matter made available to the public before the priority date of the invention by written or oral description, by use, or in any other way. This means that in order to be patentable, an invention should not be found in any matter whether a product, a process, information about either or anything else, which has at any time been available to the public anywhere in the world by written or oral description, by use, or in any other way. While in US law of patent, sec. 101[2]says " Whoever invents or discovers any new and useful..." as under US law, an invention is made when the inventor conceives of the invention and then reduces it to practice. Reduction to practice may be actual that is the invention is reduced to a tangible embodiment, or constructive, described with sufficient detail in a filled U. S. patent application.[3] Novelty detection is often used for the analysis of signals when little knowledge of " abnormal" signal behaviour is available. This could be the case, for example, in the analysis of systems in which the collection of abnormal data is difficult, such as when monitoring critical systems that spend the majority of their time in a " normal" condition. This includes the

analysis of data from large structures, jet engines, human hospital patients, etc. Problem for setting the novelty threshold and reach to a better conclusion can be understood with the help of Extreme Value theory: EVT is a branch of statistics concerned with modelling the distribution of very large or very small values (extrema) w. r. t. a generative distribution $p(x)$. The theory is well-developed for univariate, unimodal analyses [3, 4], where the location of the maximum of some set of data drawn from, for example, $p(x) = N(\mu, \sigma)$ is given by the cumulative Gumbel distribution, $Pe(y) = \exp(-\exp(-y))$, where $y = (x - c_m)d^{-1} m$, and where the norming parameters c_m, d_m are given [3] by, $c_m = \sqrt{2} \ln m - \ln \ln m + \ln 4\pi^{2\sqrt{2}} \ln m$, $d_m = \sqrt{12} \ln m$. (1) We call this distribution that describes the location of extrema drawn from p the extreme value distribution (EVD). Previous approaches to the use of EVT in novelty detection [5, 6] approximate the EVD $Pe(y)$ associated with a density represented by a GMM. A novelty threshold describing the extent of "normal" data space can be set by determining where $Pe(y) = \kappa$ for some desired probabilistic confidence level; e. g., a novelty threshold could be set at $Pe(y) = 0.99$. We have shown [7] that these methods do not accurately estimate the location of extreme for increasing model dimensionality n . [4] C: UsersuserDesktopimage15. jpg C: UsersuserDesktopgevtypes. jpg (Picture courtesy: www. googleimages. com) Sternberg and Lubert (1995) proposed that novelty is something which allows to explore something which is new and creative. Novelty can be the coalescence of any two or more different things or thoughts. For instance, Damien Hirst is a controversial artist who has sliced animals into fragments, but many people do not consider this creative even though it is novel and

original. Many people do not recognize the factor of appropriateness in his work and consider it to be feckless. Although creativity can be seen in the products, innovation can also be done in process. Weisberg (1986) proposes that creativity is something that can be compared to something which is the innovative use of tools and allow those tools to solve problems on different issues. Dr. Gunther von Hagens has in the past few years started exhibiting the dissected and transfigured bodies of people. Professor von Hagens is a medical professor at the University of Heidelberg who perfected plastic injection into bodily tissue. This is a novel use of tools to solve the problem of decay and distortion from old methods of preserving human tissue. The end product is creative because of the creative use of tools. Ward, Finke, and Smith (1995) defined creativity in the products made, the differences in people, the pressures that motivate, and the processes behind creativity. If the products are fresh it is the example of creativity. However, there are defining subtleties in people; for example, some people are considered to be more creative than others, and in addition to inherent differences in people, there are different motivations for creativity (e. g., some people are driven to create). Finally, the process for creativity can be different. Some people seclude themselves while others seek guidance and dialogue.[5]

CONCEPT OF NOVELTY IN INDIA---IS NOVELTY FADING AWAY?

The issue of Novelty is totally dependent on the concept of State of Art. The prior art comprises of all matters made available to the public before the date of the invention whether by written, oral description, by use or in any manner. Novelty can never be copied as creativity and innovation is in the

minds of people. It is inside the brain and cannot be detected and in order to disapprove that there is no novelty in a particular piece of work then it is required to prove that the same idea is prevailing somewhere else also. The concept of state of art is not specifically defined in both Indian and USA's law, but to gain an idea we can refer United Kingdom's Patent Act where it is mentioned that " the state of art in case of invention shall be taken to comprise all matter (whether a product, a process, information about either, or anything else) which has at any time before the priority date of that invention been made available to public by written or oral description, by use or in any other way." [6] This states that novelty is innovation and should not be copied from anywhere else and if copied severe sanction follows as when people give hard labour to create any particular thing then it should be respect and taken care of. Hence the invention of Patent Act. In the Patent Act it henceforth entails that hackers exist and hard labour is rarely respected i India if not taken precaution. So till it is totally safe and secure the process of innovation should not be revealed in front of public and the secret of producing or rather innovating a particular thing should never be revealed as innovation with a little bit of differentiation is always possible. Novelty needs to be checked and it can be done through: Prior use Anticipation

PRIOR USE

Here the term prior use refers to that innovation has been already done and the next party creating a particular thing is the second mover who does not need to do any further research for creating the product. Again it has to be noticed whether that particular innovation was done in our own country or all

over the world. It is usually the method to verify that the particular invention is not new but neither old. No search can possibly cover every single publication or use on earth, and therefore cannot prove that an invention is "new". A prior art search may for instance be performed using a keyword search of large patent databases, scientific papers and publications, and on Google. However, it is impossible to guarantee the novelty of an invention, even once a patent has been granted, since some obscure little known publication may have disclosed the invention as claimed[7]. For this it is necessary to understand the concepts of relative and absolute novelty, as for the purpose of absolute novelty it is necessary that invention is already in existence in the public domain anywhere in the world in one form or another, and if this criteria is fulfilled then, for the purpose of acquiring patent it could no longer qualify as a new invention.[8]But the concept of relative novelty is different because in cases of relative novelty the novelty is usually limited to within the country, where only local knowledge can destroy such novelty. Then in this case if an inventor discloses something outside the country, it will not hamper the patentability of invention as the disclosure made outside the counties territories will be considered as unknown to the inventors country.[9]Now if we talk about the Indian Law, then Section 2(1) (I) of Indian Patent Act introduces the standard of absolute novelty. The language of this section clearly indicates that if an invention is used in India or elsewhere in the world before the date of filing of patent application, then the subject matter of invention will be regarded as falling in public domain. The catch here is on " elsewhere in the world" as it introduces the absolute standard of novelty into the Indian Patent Act.[10]But if we look into 35 USC 102(a), then

in the beginning it is mentioned that " if the invention was known or used by others in this country", this is an indicator of United States policy of relative novelty on the matters related to prior use. The bar on prior use of invention is mentioned in Section 64(1) (e) and (f) of Indian Patent Act, as both the clauses suggests that the invention will not be regarded as new or inventive if it is been used by the public. But in the same section of The Indian Patent Act certain exceptions are also mentioned, because as per Section 64(2) it is specifically mentioned that in cases of deciding lack of novelty no account shall be taken of any document or secret trail or secret use involving the invention. If the invention is publicly known or made available to the public consequent to a secret use, then such secret use shall not be taken into account for determining the state of art.[11]Moreover in the cases of a patent for a process or for a product as made by the process, the importation into India of the product made abroad by the process shall normally constitute knowledge or use in India of the Invention. But with the introduction of subsection 3 of section 64, an exception is made where the importation is for the purposes of reasonable trail or experiment.[12]The above mentioned exception to the rule of prior use is nowhere mentioned in 35 USC 102, besides the United States Code is very vague as to what constitutes proper prior use, it just mentions the word prior use but the parameters and ambit of prior use is not clear.

2) ANTICIPATION:

Anticipation is a two-step analysis. The first step involves construction of claims of the patent in issue. In the second step, the claims are compared to the prior art. A claim will be anticipated, and therefore invalid, if the

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limitation is described in the prior art reference and the prior art is enabled such that one of ordinary skill in art could practice the invention.[13]Under the Indian law anticipation is covered in much detail as compared to the law in United States law. In India as per Section 29(2) an invention shall not be deemed to have been anticipated if the invention was published before its priority date and the applicant of the patent proves that the matter was obtained and published without his consent. This is a protective shield for the innocent inventors but this type of protection is nowhere mentioned in the United States Code. But the contrasting feature in both Indian and American Patent law is that in United States " in considering the patentability of an inventor's filed U. S patent application, the disclosure of another party's issued U. S. patent or the disclosure of another party's published U. S. application can be used as a prior art reference to anticipate the applicant's claimed invention.[14]But in India if the matter published was obtained from inventor or (where he is not himself the true and first inventor) from any person from whom he derives title, and was published without his consent or the consent of any such person[15]then in such case the complete specification will not be deemed to be anticipated. Moreover under the Indian Patent Act if the invention is being communicated to government or any person authorized by government to investigate the invention or its merits will not amount to proper anticipation.[16]Here it can be assumed that information supplied by both the parties involved in investigation is barred from anticipation. To this point United States law is clear, because as per the language of 35 USC 102(g) the unsuccessful party in the investigation proceeding is barred from obtaining the patent.[17]Indian Law

of Patent contains certain exceptions which are indeed beneficial for the inventor to judge the success of his invention because it will not be suffice if a person takes patent for a useless thing. These type of exceptions are not there in USC but it is there in Section 31 of Indian Patent Act, as it provides for four types of disclosures pertaining to inventions displayed in exhibitions or disclosures made in learned society which will not amount to anticipation of an invention, provided an application for the patent is made not less than 12 months after the opening of the exhibition or disclosure made to the learned society, as the case may be.[18]Prior disclosure is the first requirement to be satisfied for matter to anticipate an invention. To constitute a prior disclosure of an invention, the matter relied upon as prior art must disclose subject matter which, if performed, would necessarily result in infringement of the patent. This infringement test is detailed by the Court of Appeal in General Tire & Rubber Company v Firestone Tyre & Rubber Company Limited, [1972] RPC 457, at pages 485-6:- " If the prior inventor's publication contains a clear description of, or clear instructions to do or make, something that would infringe the patentee's claim if carried out after the grant of the patentee's patent, the patentee's claim will have been shown to lack the necessary novelty, that is to say, it will have been anticipated. The prior inventor, however, and the patentee may have approached the same device from different starting points and may for this reason, or it may be for other reasons, have so described their devices that it cannot be immediately discerned from a reading of the language which they have respectively used that they have discovered in truth the same device; but if carrying out the directions contained in the prior inventor's publication

will inevitably result in something being made or done which, if the patentee's patent were valid, would constitute an infringement of the patentee's claim, this circumstance demonstrates that the patentee's claim has in fact been anticipated".[19]In case of two persons making an invention differently on the same day, the person who files the first gets the seniority, this is called Striking Interference. In India a person who files the application first gets the priority. There is no concept of first to invent in India. Here patent is granted only for inventions. In India only true and first inventor or his assignee can apply for patent.[20]The CAFC's decision in Cohesive Tech. v. Water Corp.(Fed. Cir. 2008) has raised the question whether Anticipation is the " epitome of Obviousness", lately has become a topic of a hot discussion in the US patent circle . The decision relates to the notion that novelty and non-obviousness are separate and distinct inquiries and that a patent may be found anticipated yet non-obvious. The Court, through an example, illustrated that an anticipated claim might still be non-obvious. A patent claim having all the characteristics of a non-obvious invention, if inherently anticipated by a prior art reference the claim, may not be said to be obvious. Alternatively, existence of secondary consideration of non-obviousness is not relevant in an anticipated claim. In order for an invention to be patentable it must be new as defined by patent law. An invention cannot be patented if:

The invention was known or used by others in India, or patented or described in a printed publication in India or a foreign country, before the current applicant filed for his or her patent. Someone else has made the same invention as you did. The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this

country more than one year prior to the application for patent in India. You or somebody else revealed your invention more than a year ago to the public. The qualitative aspect of the difference between the claimed invention from the prior art being a determinant for non-obviousness of the invention. It is very much in consonance with the concept of 'inventive step'. An inventive step may be equated with a feature of an invention involving a technical advance as compared to the existing knowledge, which makes the invention not obvious to a person skilled in the art to which the said subject matter pertains. The phrase 'person having ordinary skill in the art' is a legal fiction where 'ordinary skill in the art' denotes a level of expertise.

[21]` NOVELTY PRIOR USE ANTICIPATION The first legislation in India relating to patents was the 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. The Act was subsequently repealed by Act IX of 1857 since it had been enacted without the approval of the British Crown . Fresh legislation for granting 'exclusive privileges' was introduced in 1859 as Act XV of 1859. This legislation contained certain modifications of the earlier legislation, namely, grant of exclusive privileges to useful inventions only and extension of priority period from 6 months to 12 months. This Act excluded importers from the definition of inventor. This Act was based on the United Kingdom Act of 1852 with certain departures which include allowing assignees to make application in India and also taking prior public use or publication in India or United Kingdom for the purpose of ascertaining novelty.[22]

JUDICIAL PRONOUNCEMENTS AND EFFICACY OF NOVELTY IN INDIA

In India " if a sample is send to prospective customer, the disclosure of which are not made a subject of confidence, before the date of the patent with a view to obtain orders for the goods when they become patented will amount to a prior use".[23]But if on the product it is marked that the manufacturer is using it as sample purpose then the interpretation of court goes to the other side as in Kolmes v. World Fibres Corpus[24]court held that " if the manufacturer uses something as for the purpose of sample selling and it also mark on the top of the product word ' sample' then it does not amount to prior use as the intention of the seller here is to use the product as for experimental purpose." This exception of experimental use is also there in Indian law as according to the Indian Patent Act " if the product is used for the experimental purpose then it will not be considered as prior use."[25]" Patent eligibility" broadly refers to the requirement that a subject matter for which a patent is sought be inherently suitable for patent protection, in the sense of falling within the scope of subject matter that patent law prima facie exists to protect. In most jurisdictions, patent eligibility manifests itself in the term " invention," i. e. a poem, though new, non-obvious and useful is still not patentable, as it is not an " invention." 75 The term " patentability," on the other hand, refers to those set of principles that inform the requirements that must be satisfied for a patent eligible subject matter (i. e. an invention) to be granted a valid patent. Principally they are the requirements of novelty, inventive step (non-obviousness), utility (industrial applicability) and sufficient description.[26]the concept in India is that "

where there has been no more than a secret use of the invention with a view
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of taking out a patent, or the manufacture for the inventor and under injunctions as to secrecy by a manufacturer, the patent will be good. But this will not be the case where the secret process has been used for the profit. Secret use or working of the invention prior to the patent for profit on a commercial scale is sufficient to invalidate the patent. If use of the invention is made in the presence of persons other than the inventor who are no way bound by any confidential relationship not to disclose the invention, and in circumstances which enable them to appreciate the essentials of the invention, the use would in general constitute publication, although it was experimental only. A secret process, of which publication has been going on for a number of years by manufacture with the aid of workmen who are not bound to secrecy, is considered no longer secret. It becomes public property." [27] This shows that Indian law is allowing the secret use of the invention but it is necessary for the inventor to take certain necessary step to make the invention secret. This exception of secret use is also there in America as in *Gillman v. Stren* [28], it was held that commercial use of an invention by another under strict secrecy did not constitute anticipation. In this case *Gillman* involved a patent on machinery which had been previously been developed by a man named Haas. The inventor had used the machinery under tight security. The output from the machinery had been sold, but the public had not been given access to the machine itself. The learned judge in this case gave very crucial judgment while holding that Haas was not the first inventor, as Justice Hand drew a distinction between a secret use and a non-informing public use. He said that here in this case it was not the inventor, but a third person who used the machine secretly and

hence the court held that there was no abandonment or forfeiture by the inventor. Where the matter was not published and completely forgotten, it was held not to anticipate the invention. From these cases on secret use it is clear that both India and America allows an inventor to use the invention secretly. But judiciary of both the countries has used strict parameters to judge the issue of secret use.

CRITICAL ANALYSIS OF THE POSITION OF NOVELTY IN U. S. A

There are some changes made in novelty which allows us to even know more about patent laws and novelty. The proposed changes include: a first-inventor-to-file system replaces the old first-to-invent system the prior art base for novelty and inventive step has been expanded the grace period has been restricted from prior disclosures made by anyone to disclosures which derive from the inventor(s) Australian applicants can avail themselves of the US grace period by filing an Australian application These changes are yet to come into effect (see below).

Implications of these changes

Moving to a first-inventor-to-file system The implications of moving to a first-to-file system have been discussed in our earlier article US Patent Reform - First-To-File. Expanded prior art base The prior art base has been broadened to include the use or sale of the invention in countries outside of the US. Previously, only a use or sale in the US was novelty destroying. This means that the sale or use of the invention in Australia before the first filing of a patent application would destroy the novelty of the claims of a US patent.

This was not the case previously. For applicants, this imposes a higher
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validity threshold. For competitors of patent holders, this provides an additional ground of attack against a granted patent. Grace period Previously, the grace period applied to disclosures (by anyone) made within the year preceding the filing of the US application. The new grace period applies to disclosures made 1 year or less before the "effective filing date" of an application, provided the disclosure was made by: the inventor a co-inventor or another who obtained the information directly or indirectly from the inventor or co-inventor These changes provide significant advantages to Australian businesses that are filing in the US. Previously, the grace period only extended for the 12 month period prior to the US application. The new grace period is based on the effective filing date. For an Australian applicant, the effective filing date is essentially the filing date of your first application in Australia. Therefore, the grace period extends for a period of one year prior to the filing of, for example, your Australian provisional application. Another interesting feature of the grace period is that any information that is disclosed by anyone after the inventor has made an initial prior disclosure can be removed from the prior art base. This means that you do not have to worry about third party prior art anticipating your claims, provided you have made an earlier disclosure. That is, if you can show that the inventor has disclosed the information previously, before a relevant piece of prior art, then that prior art can no longer be considered for the purpose of novelty.

When is this happening?

The new provisions come into effect for US applications with an effective filing date on or after 16 March 2013. Generally, the effective filing date

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equates with the priority date. This means that the old law will still apply to US and international applications which rely on an Australian priority application filed before 16 March 2013. So the changes may not be felt by Australian businesses filing in the US until after March 2014.[29]Now if we look into the United States law, then there it is specifically mentioned that if the invention is being on sale in the country then it will lack novelty.

[30]When the pendulum swings too far in one direction, the courts, Congress, and even the U. S. Patent and Trademark Office (Patent Office) seek to make adjustments through patent reform. Perhaps due to criticisms that the system has become too " pro-patent," reform efforts in recent years have led to the scaling back of patent rights. Some of these reforms have tightened the standards for patentability. Indeed, patentability has become a hot topic as reform-minded courts, in a series of landmark decisions, have relied on narrowing it to trim the scope of patent-eligible subject matter and to make patents harder to obtain (and easier to invalidate) based on obviousness. These reform efforts have rekindled broader discussions about other patentability requirements. One that has received relatively little attention in recent commentary is novelty, which is the statutory requirement that an invention be new. Determining novelty requires a comparison of the invention that the applicant seeks to patent with the " prior art," which refers to preexisting knowledge and technology already available to the public. Documents like issued patents and printed publications are common sources of prior art. A document asserted against the invention that the applicant seeks to patent is called a prior art reference.[31]if on the product it is marked that the manufacturer is using it

as sample purpose then the interpretation of court goes to the other side as in *Kolmes v. World Fibres Corpus*[32] court held that " if the manufacturer uses something as for the purpose of sample selling and it also mark on the top of the product word ' sample' then it does not amount to prior use as the intention of the seller here is to use the product as for experimental purpose." in United States of America prior secret use is also the exception to the rule of anticipation. *Gillman v. Stren*[33], it was held that commercial use of an invention by another under strict secrecy did not constitute anticipation. In this case *Gillman* involved a patent on machinery which had been previously been developed by a man named Haas. The inventor had used the machinery under tight security. The output from the machinery had been sold, but the public had not been given access to the machine itself. The learned judge in this case gave very crucial judgment while holding that Haas was not the first inventor, as Justice Hand drew a distinction between a secret use and a non-informing public use. He said that here in this case it was not the inventor, but a third person who used the machine secretly and hence the court held that there was no abandonment or forfeiture by the inventor. Where the matter was not published and completely forgotten, it was held not to anticipate the invention. From these cases on secret use it is clear that both India and America allows an inventor to use the invention secretly. But judiciary of both the countries has used strict parameters to judge the issue of secret use. USA is partially on absolute and partially on relative novelty. Because as per the America's law, a person shall be entitled to a patent unless- (a) the invention was known or used by others in this country, (b) or patent or described in a printed publication in this country or

a foreign country.[34]United State is also a follower of absolute novelty when the issue is related to printed publication. But in United States sometimes difficulty arises when issue is related to reduction to practice of invention in foreign country. For that it is necessary to refer Westinghouse Machine Co. v. General Electric Co.[35]where a person named De Kando had made the invention in a foreign country and it was reduced to practice and put to use in Italy. In 1904, Waterman had gone to Budapest and had obtained the knowledge surrounding it from De Kando and the knowledge was explained by Waterman to the American Institute of Electrical Engineers in the U. S. The defendant applied for the same invention in 1905. The question was whether the defendant, Armstrong was entitled to a patent. The complainants contended that De Kando's date of invention in U. S is May 1904 when Waterman disclosed the knowledge to others. According to the Patent Act of US, the patent taken out by an applicant for the same thing in the US shall not be void on account of such knowledge or use unless the invention has been patented or described in a printed publication. Reduction to practice in a foreign country can never operate to destroy a patent applied in the foreign in the US, however widely known such reduction to practice may be, either among foreigners or among persons living there, unless the invention be patented or described in a printed publication. It was held in this case that, for the purpose of defeating a patent application, reduction to practice in a foreign country is a nullity unless the invention is patented or described in a printed publication.[36]Through this case it is clear that USA is also a strict follower of absolute novelty in case of publication and in case of prior use it follows relative novelty.

CONCLUSION

The novelty requirement seeks to ensure that a patent will not issue if the public already possesses the invention. Although gauging possession is usually straightforward for simple inventions, it can be difficult for those in complex fields like biotechnology, chemistry, and pharmaceuticals. For example, if a drug company seeks to patent a promising molecule that was disclosed but never physically made in the prior art, the key possession question is whether a person having ordinary skill in the art (PHOSITA) could have made it at the time of the prior disclosure. Put differently, could the PHOSITA rely on then-existing knowledge in the field to fill in any missing technical details from the prior disclosure?[37]After all the discussion above, we can say that the test of novelty in India is wider in scope than the American law. The reason is that if we look into the bare provisions mentioned in the statutes of both the country then it can be easily inferred that Indian law has cover much a lot about novelty then United States law. As in India provisions like exceptions to the rule of anticipation etc. are quite broad as compared to American law because in America there is no such provision of exceptions to the rule of anticipation in the statute. Besides the exceptions to prior use as mentioned in section 64(2) also provides a complete comprehensive explanation to the rule related to the test of novelty. But again this type of precise explanation is not at all given in the United States law. Therefore it can be easily stated that Indian law is clearer on Novelty than to United States law. While looking over the law related to novelty in both the countries researchers find out that Indian law of patent on test of novelty is wider than the US law. The Indian Patent Act, 1970,

under Chapter-VI (section 29 to 34) talks specifically about Anticipation while in US law there is no provision which specifically talks about the role of anticipation while judging the novelty. Indian Law talks about the concept of absolute novelty which means the novelty of an object is checked considering the whole world but this type of logic is not accepted by United States, as the law of United State favors the relative novelty concept which is limited to within the country, where only local knowledge can destroy such novelty. Therefore in the whole paper the approach of researchers will be to find out the difference in the concept of Novelty in India and USA. Besides researchers will also focus on the opinion of judiciary of both the counties which suggests the converging aspects of law of Novelty prevailing in India as well as in US.