



BY JEFF OOI

Internet and e-business consultant in Kuala Lumpur.
 jeffooi@usj.com.my

Will innovation and IPR suffer if technology is patented?

PATENT & FTA

When countries negotiate in the bilateral and multi-lateral trade agreements, I worry about rising economic divide if we are not careful when dealing with issues involving patents, copyrights and intellectual property rights.

Thus it is quite disturbing to hear that Malaysia will pass the Patents Act (Amendment) Bill as the country has decided to accede to the Patent Co-operation Treaty (PCT) by the end of 2006.

As it is, apart from the PCT, Malaysia is also acceding to three additional treaties of the World Intellectual Property Organisation (WIPO), namely the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) and the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure, or in short, the Budapest Treaty.

There is sufficient evidence to support the argument that patents escalate costs in building quality of life, especially among patented drugs and medicines. Patented anti-retrovirals administered on AIDS patients used to be US\$ 15,000 per patient annually. The generic versions, which are just as safe and effective, are a mere US \$150 per patient every year.

In the recent past, the United States has been updating its copyrights protection laws vis-à-vis its trading partners. An example is the general extension of the term of protection from 50 years to 75 years. In the specific case of the US-Oman FTA, copyright extension is stretched to 90 years!

Powerful economic blocs appear to be driving these treaties. Such dominant drivers take the forms of industry lobby groups, direct demands by certain developed countries' governments, and even the WIPO Secretariat.

Observers in the local technology industry are concerned that Malaysia has rushed into acceding to the four WIPO Treaties while we not yet adequately mapping out a National Intellectual Property Policy, which embraces and protects the collective interests of the nation in the field of technological innovation.

WIPO is entrenched in its dominance subsequent to the Uruguay Round in the 1980s. WIPO had led industries in developed countries in lobbying for the inclusion of intellectual property in the negotiation of trade agreements. This

precipitated in the adoption of the Trade Related aspects of Intellectual Property rights Agreement (TRIPS). All members of WTO, of which Malaysia is a signatory, have to accept the TRIPS conditions by default.

The immediate outcome is that a less powerful economy, like Malaysia, has to bear with more expensive medicines, educational materials and more licensing and royalty payments for the use of technologies. The arithmetic is simple.

According to a World Bank study, US\$ 60 billion a year is spent for developing countries to implement TRIPS. The beneficiaries to receive patent rents mandated by TRIPS, according to a World Bank report in 2002, are the US, Germany, Japan, France, UK, Switzerland and several others, raking in a total of US\$ 41 billion. In contrast, developing countries that will incur major annual net losses in patent rents include South Korea, China, Mexico, India and Brazil, to name a few.

It must be stated that the implementation and enforcement of TRIPS standards remain within various economies. In the case of patents, the basic rule and practice is that applications are made to national patent or IP offices, and these offices will then examine and decide whether a patent can be granted, in accordance with the criteria of novelty, inventive step and industrial applicability of the invention.

A good model of such regional IP offices is the EU. There is a regional patent treaty, with one patent office, taking care of the interests of the patent owners vis-à-vis the patent subjects. This protection is, however, non-existent in ASEAN as a regional group, hence Malaysia has to resort to national patent office to protect its interest. Unfortunately, we do not have a national IP or patent policy although we have long been a signatory to the Berne Convention that governs copyrights issues in the protection of Literary and Artistic Works.

Since Malaysia is banking on technology as a key economy driver under the 9th Malaysia Plan, let's focus on the area of digital technologies, especially those related to the Internet and ICT. The relevant treaty is the WIPO Copyright Treaty, or the WCT.

I met several respected Open Source software engineers recently who create generic technologies to provide the same functions as patent-protected software. When patents are enforced, these Open Source developers risk getting arrested for violating the FTA. Now, how do you like that? **mb-e**