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Patent Legalities in India

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The study of history and other backgrounds of the patent, its laws described in the act, the ways to file for the patent, other patent rights, and remedies to know beforehand for patent are the topics which are described in this paper. A Patent provides one with all the authorities and rights on the product made by them and to enjoy its royalties even for a certain period of time. This paper presents all such details about patents from history to the current time in a concise form. As per WIPO statistical database 2018, 45,379 patent applications were filed in India. Out of which 29,789 applications were withdrawn or abandoned by the applicants, 12,387 applications were granted and 3203 were rejected on the ground of non-fulfillment of patent criteria by the invention that is novelty, non-obviousness, and industrial applicability as mentioned under Sections 3 and 4¹ of the Indian Patents Act, 1970. The main objective of Patent laws is to promote innovation and the development of new technologies.

Keywords: *patent, WIPO, IPR, innovation, novel.*

INTRODUCTION

The first-ever Patent was granted to *Samuel Hopkins* in 1790 for making *Potash*, an ingredient used in fertilizer. As for India, *George DePenning*, Calcutta in 1856, petitioned the Government of India for a grant of a patent for his invention of the '*Punkah Pulling Machine*'. The patent is

¹ Indian Patent Act, 1970, s 3 and s 4

one such area where Indian Laws were not in accordance with WTO obligations, one of them was TRIPs (Trade-Related Intellectual Property Rights). TRIPs actually lay down the minimum standards to be adopted by the member countries for the protection of IPRs (Intellectual Property Rights). Earlier there were no such laws to get authority over newly invented products or even over the agricultural produce of one's own in India. There have been many such cases where numerous varieties of 'Basmati Rice' and 'Haladi or Turmeric' were tried to be patented by the companies of the USA. This is termed '*BIOPIRACY*' in the agricultural field. But now we have patent laws to provide safety and security to such new inventions and even to promote the inventors to work more on inventing new useful products.

SO WHAT BASICALLY IS A PATENT?

The term 'Patent' is derived from the Latin word '*patere*' which means "*to lay open*" i.e. it should be open and available for the public. A **Patent** is a grant of proprietary right from the government or any such sovereign authority to the inventor. A Patent provides the exclusive rights to the inventor on the entire patent process, design, or invention for a certain period of time in exchange for the complete disclosure of the invention. The invention is finding out or making something that has not been found out or made by other people. Also, the term '**Invention**' is defined under *section 2(j)² of the Indian Patents Act, 1970* i.e. *an invention is any new or useful art, process, method or manner of manufacture, the machine, apparatus, or another article, substance produced by a manufacture, and includes any new and useful improvement if any of them, and an alleged invention.*

A mere combination of two known devices or substances cannot be called an invention and thus it is not liable for a patent. An Invention to be able to get a Patent should be something more than just a meager improvement and shall produce new results or articles. This was held in the case of *Biswanath Prasad RadheyShyam vs Hindustan Metal Industries*³.

² Indian Patent Act, 1970, s 2(j)

³ *Biswanath Prasad RadheyShyam v Hindustan Metal Industries* (1979) 2 SCC 511

ESSENTIALS OF AN INVENTION

There are always certain chances where many inventors make the same discovery, but that does not prevent one from getting a patent who first applies for it. A patent represents a *quid-pro-quo* where *Quid* is the monopoly of the patent and *Quo* is the new knowledge provided to the public that they have not known. An invention is the manufacture of a new substance with the use of known materials with a new method for a useful purpose. The mere application of a known old hypothesis for a new product cannot be called an invention. Even though there is the use of old methods and products, it does not mean that there is no new inventive step used in the invention and thus it cannot be rejected as an invention.

BACKGROUND OF PATENT LAWS

The Act VI of 1856 on the protection of inventions was based on the British Patent Law of 1852, which provided patent rights for a period of 14 years. Then there were certain amendments over years. Until the Amendment of 2005, the right to patent was not applicable for pharmaceuticals, food, and chemical-based products. These sectors were covered by process patent only. After the 2005 amendment to the Patents Act, the patent was extended to all the fields of technology including drugs, food, and chemicals industries.

MAIN FEATURES OF THE PATENTS ACT, 2005

- The Patent has been extended to all the fields of technology including food, drugs, chemicals, and microorganisms.
- A provision of a grant of compulsory license has been introduced.
- The provisions related to *pre-grant* and *post-grant* opposition have also been introduced.
- The term of the Patent provided is for 20 years.
- The Patent is provided for both the product and process.
- There are provisions made for the protection of biodiversity and traditional knowledge.

AMENDMENTS AFTER 2021

- ***Patent fees for educational institutes reduced:*** Students and teachers or professors engage themselves in making new technologies or products in educational institutes. Patent on such inventions costs a fortune, which is quite a hard task. Thus the amendment of 2021 has provided the benefit of an 80% reduction on fees for patent filing.
- ***Extension of Expedited Examination System:*** Earlier this facility was provided to startups only with a speedier grant to Patent. One such fastest grant was provided in 41 days of the filing. Now, the Expedited Examination System is granted to 8 more categories of patent applicants like Small Medium enterprises, Females, Government departments, Institutions established by the Central or State Act, Government companies, institutions wholly or substantially financed by the Government, and applicants under *Patent Prosecution Highway*(PPH).

TYPES OF PATENT

There are two basic types of Patent:-

- ***Product Patent:*** It provides absolute protection to the patented product. This lets the product enjoy a monopoly in the marketplace and command high prices.
- ***Process Patent:*** It provides for the protection of the method and technology used in the manufacturing of the product. Process Patent also promotes a competitive environment and exercises some check on prices.

INGREDIENTS OF PATENTABILITY

- It should consist of a subject matter which is patentable and should be supported by its description of it.
- It should involve an inventive step that is not obvious to anyone.
- It should be useful and capable of industrial application.
- It should be novel i.e. new and previously unknown to the public.

PROCEDURE FOR FILING A PATENT

If an inventor has created a new product or invented a process for service, which can be an original invention, should try to get it patented. Patenting an invention can prevent one's competitors from profiting through such products created by the inventor. There are certain steps that one has to follow to file a patent, they are:-

An inventor can file a patent in two ways, firstly on their own and secondly can take the help of a professional or any patent filing agency. If one is filing the Patent on their own then they have to be very careful and should submit and complete things before the deadline. This can be a tedious and very confusing job. Thus it is advised to get the help of such professionals or firms. One has to pay the fees for their professional work and it is also necessary for the inventor to sign a Non-disclosure agreement (NDA) before disclosing their invention to the firm, as there have been many cases where these firms file the patent for the invention as their own, so the inventor has to be careful about this.

- Ensure if the invention is patentable before the registration process whether any other individual has filed for a similar technology or not.
- The next step is to draft an application, Form 1 -for every patent to be filed and Form 2 - for patent specification. All the details filled in should be correct and genuine. There is also a provisional application where one can file for the patent in advance while they are still testing the product. A period of 12 months is given to submit the completed invention for a patent.
- There are other forms too which should be submitted along with the application for filing the patent.

Form 3 – undertaking with regards to a foreign application under section 8⁴ (if the application for patent is filed in a foreign country);

Form 5 – declaration of the invention to be filed with the complete application;

⁴ Indian Patent Act, 1970, s 8

Priority documents – only if priority is being claimed from a foreign patent claim or application.

- Then the Patent Application gets published in an official patent journal after a period of 18 months approximately. Until then, all the details about the invented product are safe and secure with the Indian Patent Office. Also one can get early publishing if Form 9 is submitted, where it gets published within a month.
- The Patent application gets examined by the examiner according to the Patents Act. If no objection is found then the examiner grants the patent and it is then published in the official patent gazette.

The most important and crucial thing to remember is that one should never disclose any single information about their product to anyone before submitting the application. The entire process of patent filing is long and can take time for 3-5 years, but once done can be beneficial in a long run.

COMPULSORY LICENSE

A compulsory license is an authorization granted by the Government to the third party to produce a patented product without the consent of the patent owner, who has been taking undue advantage of the patent rights granted. It is granted under *Section 84*⁵ of the Patents Act.

RIGHTS OF PATENT HOLDERS

- The patent holders have the right to manufacture, sell, use and distribute the patented products.
- The right to Patent can prevent competitors from using one's invention for financial benefits.
- One can also file a suit against such individuals or claim compensation for misusing their invention without any approval.
- The patentee can renew their patent for a period of 20 years at a maximum from the date the patent was filed.

⁵ Indian Patent Act, 1970, s 84

- They also have the right to exploit the patent, assign the license, and surrender the patent.

LIMITATION OF PATENT RIGHTS

- The patent holder is restricted from using the invention for private purposes and non-commercial use⁶.
- Also, the Government has the power to transfer such patents to a third party by compulsory license⁷.
- Under *Section 47 (3)*⁸ of the Patent Act, an exception is provided where the patented product can be used for any scientific experiment or research without any infringement.

EXHAUSTION OF PATENT RIGHTS

After the first unrestricted sale of the product, the patent holder loses his control over it. Once the patented product is sold in the market, the patent rights of the inventor get exhausted.

LANDMARK JUDGMENTS

- *Bayer Corporation vs Union of India*⁹

Facts of the case: Bayer Corporation (the plaintiff) was granted a patent for its drug 'SorafenibTosylate', used for the treatment of kidney and liver cancer, by the Indian Patent Office in 2008. Then in 2012, Natco Pharma was granted a compulsory license to produce a generic version of the same drug by the Drug Controller of India (the defendant).

Decision: The Bombay High Court held that the acceptance of generic drugs would not amount to patent infringement. Also held, interpreting section 156¹⁰ of the Patent Act, stating DCGI cannot allow the sale of a drug patent by someone else, would be incorrect.

⁶ Indian Patent Act, 1970, s 85

⁷ Indian Patent Act, 1970, s 84

⁸ Indian Patent Act, 1970, s 47(3)

⁹ *Bayer Corporation v Union of India* 162 (2009) DLT 371

¹⁰ Indian Patent Act, 1970, s 156

- *AloysWobben vs Enercon (India) Limited*¹¹

Facts of the case: Dr. Wobben(Plaintiff) had several Indian patents. Enercon India (Defendant) was carrying out manufacturing operations according to a joint venture agreement. The agreement was terminated and so Enercon Ltd. filed 19 revocation applications before IPAB, seeking revocation of Plaintiffs India patents.

Decision: The Supreme Court held that *Section 64* however, was subservient to the provisions of the Act wherever there is a conflict and stated that both *Section 25(2)*¹² for post-grant opposition and *64(1)*¹³ for a counterclaim cannot be applied simultaneously. Thus, they held that the defendant will have to pursue the infringement suit and the counterclaim before the Delhi HC and not the revocation before IPAB.

- *Bajaj Auto Limited vs TVS Motor Company JT*¹⁴

Facts of the case: In 2007, Plaintiff filed a case before the Madras HC against the defendant for the infringement of the patent and sought a permanent injunction for the same under Section 108 of the Act. Plaintiff then also filed for a temporary injunction and also filed a second suit under *Section 106* stating that the claims made by Plaintiff were baseless and they have made improvements and changes to the patented article. The HC granted a temporary injunction to the plaintiff and instructed the defendant to execute the pending orders and not to take any new orders using this technology. However, the defendant filed a plea against the injunction and it got vacated, thus Plaintiff filed an appeal before the Supreme Court of India.

Final Decision by HC: The Madras High Court held that Plaintiff has the Patent on the DTSi technology and has been using it for five years.

The decision by SC: The Supreme Court dismissed the appeal, said that all matters related to IPR infringements must be decided by the trial courts, especially at the point of

¹¹ *Aloys Wobben v Enercon (India) Limited* (2010)

¹² Indian Patent Act, 1970, s 25(2)

¹³ Indian Patent Act, 1970, s 64(1)

¹⁴ *Bajaj Auto Limited v TVS Motor Company JT* (2009)

granting/refusing injunctions. Thus directed the Madras High Court to hear the case on a daily basis and dispose of it on or before 30th November 2009.

- *Hoffman vs Cipla*¹⁵ (*La Hoffman case*)

This was a case of substance dichotomy. The substance with enhanced efficacy can lead to a new product that has novelty, which can be patentable. The issue arose over Hoffman's drug 'Erlotinib' that was sold as 'TARCEVA'. In 2008, Cipla planned to launch a generic version of the drug. Thus they went to Delhi Court for this and later judgment was held in favor of Hoffman.

SUGGESTIONS

- About 50% of the Drugs in the world are marketed by India, but there have been no such huge numbers for their participation in the inventions and patent world.
- The government needs to provide some incentives to promote inventions. They should invest resources and capacity building to encourage innovation in the country.
- Also, the Patent Granting procedure takes a lot of time and thus the government should work in this area and get their understaffed office some more staff.

CONCLUSION

Overall the Patent laws are made to ensure the protection of the inventor's creation and other rights of the patent holder. It provides the exclusive rights to the patentee to manufacture their products and regulate them according to their own will. The Patentee gets empowered by the financial profits and also to sue those who try to infringe the patent right. Because of such patent rights and laws, new inventors get encouraged to create new products and also relieved from the worries of infringement by other competitors.

¹⁵ *Hoffman v Cipla* 148 (2008) DLT 598