



Patent Right in Indian legal System

Ravish Kumar

Assan Kalan, Panipat-132105, Haryana (India)

E-mail- ravishkangra1988@gmail.com

Abstract: The intellectual property right is a legal right that is granted to the inventor to protect his or her invention. It is a legal right of the owner that protects the creation, invention, symbol or design, etc. of the one who created them so that they can enjoy their property without the disturbance of others by preventing anyone from using or copying them for a specified time. Intellectual Property is an intangible property that is a result of human creativity. There are several types of Intellectual Property for eg. Patent, Trademark, Copyright, Geographical Indication, etc. Intellectual Property Right gives a person an exclusive right to use his or her creation which means that no one can copy or use that creation without the prior permission of the creator or inventor. In this article, we will only discuss types of patents and laws related to them in India.

[Kumar, R. **Patent Right in Indian legal System**. *Researcher* 2023;15(5):1-6]. ISSN 1553-9865 (print); ISSN 2163-8950 (online). <http://www.sciencepub.net/researcher>. 01.doi:[10.7537/marsrsj150523.01](https://doi.org/10.7537/marsrsj150523.01).

Keywords: Patent, Right, Legal system, India

INTRODUCTION A patent is a branch of intellectual property rights like Trademark, Copyright, etc are. The word "patent" is derived from the Latin term "patere" which implies "to lay open," i.e. to make available for public inspection. A patent is a license that confers an exclusive right or title to the owner for a limited or specific period of time to exclude others from making, using, or selling an invention and the violation of these exclusive rights or title of the patent holder is known as patent infringement. In India, the act that govern the patent is Patents Act, 1970. The main motive behind the enactment of the Patent Act is to encourage people to come up with new ideas in their field by awarding them exclusive rights over their inventions. A patent is a right offered to the originator to prevent other people from using, making, or selling an invention for a certain timeframe. Patents are also attainable for added expansion of their earlier design. The primary goal of endorsing patent legislation is to inspire innovators to donate more to their profession by providing special rights to their ideas.

In modern parlance, patenting is a privilege awarded to an inventor to invent any fresh, useful, non-obvious technique in a machine, a product of manufacture, or substance composition. The term "patent" comes from the Latin verb "patere," which translates "to lay open, in English. For any innovation to be patentable, it must pass three basic tests:

- Firstly, the creation must be novel, which does not already exist.
- Second, the creation must be non-obvious; it should be a considerable advance over the prior one; a

slight modification in technique will not issue the product the right to a patent.

- Third, the innovation must be beneficial in a legitimate manner, which means that it must not be exclusively employed in any unlawful work and must be valuable to the world in an honest way.

An invention is new if it is not known to the public. Anything known to the public domain is not inventive. The patent has a duration of 20 years, which begins on the day of the patent application. As a result, it can only be used in the country where it has been issued. As a result, any legal action for infringement or violation of patent rights may only be brought in that nation.

Each nation must file for a patent to acquire protection in other countries. The PCT (Patent Cooperation Treaty) provides a method for filing an international patent application. A patent may be submitted in many nations using a single application. The PCT is at the discretion of the patent office only after the application is submitted.

A Brief History of Patent

Act VI (1856) was stated to be the earliest stage in India's patent process. The legislation's primary goal was to stimulate the respective innovations of new and valuable industries and motivate inventors to divulge their thoughts and make them accessible to the public. Act IX of 1857 abolished the Act since it had been approved without the permission of the British Crown. Act XV of 1859 provided new regulations for awarding "exclusive privileges."

This legislation modifies the previous ruling in specific ways, such as granting exclusive paybacks to only valuable innovations and extending the priority tenure from 6 months to 1 year. Importers were exempt from the demonstration of an originator under the Act. Later, the Act was revised three times in 1872, 1883, and 1888.

All primary legislation was abolished by the **Indian Patent Laws** and Design Act of 1911. The Patents Act of 1970, coupled with the Patent Rules of 1972, was put to work on April 20, 1972, and it changed the 1911 Indian Patent and Design Act. The Patent Act is based mainly on the suggestions of Justice Ann's Ayyangar Committee, which Rajagopala Iyengar chairs. One of the suggestions was to grant patents under process for inventions relating to pharmaceuticals, medications, food, and chemicals.

The Act VI of 1856 was the first legislation in India regarding the patent which was afterward repealed by Act IX of 1857 since it's been enacted without the approval of the British Crown. In 1859, another legislation was introduced for granting 'exclusive privilege'. This legislation is known as Act XV of 1859. This legislation undergoes some changes of the previous legislation, namely, granting of exclusive privileges to useful inventions only, an extension of priority period from 6 months to 12 months, excluding importers from the definition of investors. In 1872, the Act of 1859 was combined to provide protection relating to designs. The act was renamed "The Patterns and Designs Protection Act" under Act XIII of 1872 which was further amended in 1883. This act was remained in force for 30 years and was again amended in 1888.

The Indian Patent and Design Act, 1911 repealed all the previous acts that have been enacted. The present Patent Act, 1970 came into force in the year 1972, further amending and combining the prevailing law relating to Patents in India. This act was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to all or any fields of technology including food, drugs, chemicals, and micro-organisms. This amendment repealed provisions relating to Exclusive Marketing Rights (EMRs) whereas a provision for enabling grant of compulsory license and pre-grant and post-grant opposition has been introduced.

CONDITIONS FOR PATENTABILITY IN INDIA

Not each and every invention get patented. A patent is granted to the owners once their invention satisfies the conditions of patentability. Section 3 and Section 4 of the Patent Act, 1970 provides the list of exceptions that are not considered as inventions and hence are non-patentable. There are three conditions that need to be

satisfied by the inventor to get his invention patent. These are as follows-

1. The invention should be novel, which implies that it should not be in existence.
2. The invention should be capable of commercial application.
3. The invention should be non-obvious, which means that there should be a significant improvement to the previous invention.

PERSONS ENTITLED TO APPLY FOR PATENT

Section 6 of the Act specifies the persons who are entitled to make an application for a patent for an invention. With subject to the provisions contained in section 134, the following persons are entitled to make an application for a patent -

1. The application can be made by any person claiming to be the true and first inventor of the invention;
2. It can be made by any person being the assignee of the person claiming to be the true and first create in respect of the right to make such an application;
3. It can also be made by the legal representative of any deceased person who immediately before his death was entitled to make such an application.

TYPES OF PATENT

A patent protects the inventor's invention and new discoveries that are new and non-obvious. There are three types of patents and each type of patent protects a specific invention. However, it is possible for one invention to have more than one type of patent available for it. These three types of patents are explained below-

1) Utility Patents

This type of patent covers processes, compositions of matter, machines, and manufacturers that are new and useful. This is the most common sort of patent that people seek. It can also be obtained for new improvements to existing processes, compositions of matter, machines, and manufacturers. As an Indian innovator looking to file a utility patent, one can apply for utility patents in countries such as Australia, UAE, China, Germany, France, and a number of other countries within the European Union.

2) Design Patents

Design Patent is defined as the "surface ornamentation" of an object, and it can also include the shape or configuration of an object. This type of patent can only be obtained where the design is inseparable from the object. This type of patent only protects the object's appearance. If an individual wants to protect the functional or structural features of an object, he or she must also file for a utility patent.

3) Plant Patents

Plant patents are often obtained to protect new and distinctive plants. In order to obtain this type of patent the plant should not be a tuber propagated plant (i.e. an Irish potato), the plant should not be found in an uncultivated state, and the plant can be asexually reproduced. Asexual reproduction means that instead of being reproduced with seed, the plant is reproduced by grafting or cutting the plant. Like Utility patents, currently, there is no provision for plant patents in India and you can apply for the same in Australia, the USA, and several European countries.

TYPES OF PATENT APPLICATION UNDER THE PATENT ACT, 1970

1. Provisional Application

It is a preliminary application that's filed before the patent office so as to claim the priority. Basically this type of application is filed when an inventor requires additional time to improve his or her invention. This application is beneficial because the Indian Patent Office follows the 'First to File system. By early filing, the inventor prevents any other related inventions from becoming prior art to the inventor's application.

In this type of application, a complete specification should be filed within 12 months from the date of filing of provisional application and failure to do so will result in the cancellation of the application.

2. Ordinary Or Non-Provisional Application

A non-Provisional Application is filed before the patent office by the applicant if he or she doesn't have any priority to claim. This application must be accompanied by a complete specification depicting the invention in detail.

3. Conventional Application

An application for patent filed in the Patent Office, claiming a priority date based on the same or substantially similar application filed in one or more of the convention countries, is called a convention application. In order to get the status of convention, an applicant should file the application in the Indian Patent Office within 12 months from the date of initial filing of a similar application in the convention country.

4. PCT International Application

It is a streamlined patent application process in many countries at one go. It is governed by the Patent Corporation Treaty and is valid in up to 142 countries. The advantage of filing this type of application is that only a single international patent application is required and can be filed in order to seek protection for an invention in up to 142 countries throughout the globe.

5. PCT National Phase Application

This type of application is filed by the inventor in each country in which he or she wants to seek protection. This application must be filed within 30 or 31 months

from the priority date or the international filing date, whichever is earlier.

6. Application for Patent of Addition

This type of application is made, when an applicant comes up with an improvement or modification in his invention described or disclosed in the main application for which he or she has already applied for or has obtained a patent.

A patent of addition can only be granted after the grant of the parent patent, hence there is no need to pay a separate renewal fee for the Patent of Addition during the term of the main patent.

7. Divisional Application

When an application made by the applicant claims more than one invention, the applicant on his own or to meet the official objection may divide the application and file two or more applications, that will be applicable for each of the inventions. This type of application, divided out of the parent one, is known as Divisional Application. The priority date for each and every divisional applications will be the same as that claimed by the Parent Application (Ante-dating) The term of a patent for a divisional application shall be twenty years from the date of filing of the main application.

PROCEDURE FOR GRANT OF PATENT

Once the application for grant of the patent is made, a request for examination of the application is to be made before the Indian patent office within 48 months from the date of priority of the application or from the initial date of filing of the application. Once the examination of the application is done, the first examination report is issued, and the applicant is given an opportunity to meet the objections raised in the report. The applicant has to comply with all the requirements within 6 months from the issuance of the first examination report which may be extended for further 3 months only on the request of the applicant and if all the requirements of the first examination report are not complied with, within the prescribed period of nine months, then the application is treated to have been abandoned by the applicant. Once the objections are removed and all the requirements are complied, the patent is granted and notified in the Patent Office Journal.

OPPOSITION TO GRANT OF PATENT

Section 25 of the act deals with the opposition to the grant of patent. There are two types of oppositions-

1. Pre-grant Opposition

Section 25(1) of the act deals with Pre-grant Opposition. It states that after the publication of the application and before the grant of a patent, any person in writing can raise his or her objection against the grant of patent.

2. Post-grant Opposition

Section 25(2) deals with Post-grant Opposition. These are the objections that are raised after the grant of the patent to the applicant. These objections are supposed to be raised within one year of the publication of the notice of grant of a patent by way of giving notice of opposition to the Controller. The notice of opposition must disclose the following items:

The nature of the opponent's interest;
The facts under which opposition is done; and
The relief which the opponent seeks

GROUND OF OPPOSITION

Pre-grant opposition can be made on the grounds that are listed under section 25(1)(a) to (k) of the Patent Amendment Act, 2005:

- Wrongfully obtaining the invention
- anticipation by prior publication
- anticipation by prior date, Prior claiming in India
- Previous public knowledge or public use in India
- Obviousness and lack of inventive step
- non-patentable subject matter insufficiency of a description of the invention non-disclosure of the information as per the requirement or providing materially false information by an applicant
- A Patent application that is not filed within 12 months of filing the first application in a convention country
- nondisclosure or incorrect source of biological material
- Invention anticipated with regard to traditional knowledge of any community, anywhere in the world.

Similar to the pre-grant opposition as mentioned above, a post-grant opposition could also be filed on a number of grounds as specified under section 25(2) of the Act. It is to be noted that several of the grounds are similar to the grounds required for filing pre-grant opposition.

PATENT INFRINGEMENT

Patent infringement is the violation of the exclusive rights of the patent holder. As discussed earlier, a Patent is a license conferring an exclusive right or title to the inventor for a set period of time to exclude others from making, using, or selling an invention and the violation of these exclusive rights or title of the patent holder is known as patent infringement. It involves the activities like unauthorized use, production, sale, or offer of sale of the subject matter or Invention of another person's patent. There are two kinds of patent infringement that are mentioned below-

1. Direct Infringement

Infringement is said to be direct when a product that is substantially close to a patented product or invention is marketed, sold, or used commercially without permission from the owner of the patented product or invention.

2. Indirect Infringement

Indirect infringement occurs when some amount of deceit or accidental infringement happens without any intention of infringement.

REMEDIES FOR PATENT INFRINGEMENT

Section 108 of the act deals with the reliefs that a court may grant in any suit for infringement include an injunction subject to such terms, if any, as the court thinks fit and, at the choice or option of the plaintiff, either damages or an account of profits. The court may also order that the goods which are found to be infringing and materials and implements, the predominant use of which is in the creation of infringing goods shall be seized, forfeited, or destroyed, as the court deems fit under the circumstances of the case without payment of any compensation.

EXCEPTIONS OR LIMITATIONS TO PATENT RIGHTS IN INDIA

1. Compulsory Licensing- It is the authorization given to the third party by the government to make, use or sell a particular product or use a particular process that has been patented, without the prior permission of the patent owner. There are certain prior conditions, mentioned under sections 84-92, which are needed to be fulfilled if a compulsory license is to be granted in favor of someone.

2. Exception on Experimental / Scientific Research- Section 47(3) deals with the exception of the experimental and scientific use of Patented invention. The use of a patented invention for experiments/ scientific research's and teaching purposes does not come under infringement.

3. Exception Regulatory use or Private use- The section which deals with the exception of regulatory use or private use is section 107A of the Indian Patent (Amendment) Act, 2005. It is also referred to as bolar provision. Under this exemption, there are certain act that does not amount to infringement of patent if they are performed solely for uses reasonably related to the development and submission of information required for obtaining regulatory approval for the manufacture, use, construction, sale or import of any product. This provision helps the prompt availability of the products, particularly generic drugs immediately after the expiry of a patent.

4. Foreign Vessels, Aircraft, or Land Vehicles- This exception is covered under Section 49 of the Indian Patents Act. When the foreign vessels, aircraft, or land vehicles accidentally or temporarily comes or enter in India, the patent rights granted to the inventor are not

infringed when the patented invention is used exclusively for the needs of foreign vessels, aircraft, or land vehicles and other accessories of alike nature.

LANDMARK JUDGMENTS

1. Hoffmann-La Roche Ltd vs Cipla Ltd., Mumbai Central¹

After independence, this was the first case of patent infringement. In this case, the plaintiff pleaded that an interim injunction order should be passed against the defendant's selling of a generic form of the drug. The court rejected the plaintiff's plea by saying that the sale of the plaintiff's patented product was for public interest and also a case of a counterclaim for the revocation of the patent was ongoing in another court proceedings.

2. Dr Snehlata C. Gupte v. Union of India & Ors²

In this case, the court cleared the the most important point that is related to the date as to when the patent could be considered to be granted. According to some person's the patent is granted as soon as the decision for its non-rejection from the patent granting authority comes. However the court in this case held that the issue of a certificate in case of granting patents is a mere formality which means patent could not be considered to be granted. The application for the grant of a patent would be considered to be accepted once the controller passes the order.

The Patentee's Rights and Obligations

Here are the rights and obligations of a patentee that you need to be aware of:

Patentee's Rights

Right to Patent Exploitation: A patentee has all the rights to use, make, exercise, distribute, or sell the patented substance or article in India or exercise or use the process or technique. This privilege may be utilised by the patentee personally and by his licensees or agent. The patent holder's rights are only exercisable during the life of the holder.

Right to Issue License: The patent owner can give licenses, transfer rights, or set foot into other arrangements for a fee. An assignment or claim must be penned and verified with the Controller of Patents to be valid and genuine. The patent assigned document is not admissible as proof of an individual's patent ownership until registered. It applies to the assignee rather than the assignor.

Surrendering Rights: A patent holder can submit their patent; however, before accepting the surrender offer, a notice related to submitting is sent to all people whose names are listed in the register. The surrender application is also documented in the Official Gazette so the interested parties can object.

Right to Take Legal Actions for Patent Infringement: The patent holder has all the rights to file a lawsuit for the patent violation before a District Court with jurisdiction to hear the case.

Patentee's Obligations

Patents Used by the Government: A patented innovation may be utilised or even bought by the government for its purpose solely; however, it should be noted that the government may also ban or restrict the use of the patent under certain conditions. Suppose a drug or medication has a patent; in that case, the government may import it for its distribution or use in any hospital, dispensary, or other medical facility established on behalf of the government.

The usage mentioned above is permissible without the approval of the patent holder or royalty payment. Aside from that, the government can sell the object produced by the patented technique on royalties or may need a patent in exchange for the appropriate remuneration.

Compulsory Licensing: If the patent satisfactorily does not work to fulfil the legitimate needs of the general population at a fair price, the Controller can issue compulsory licenses to applicants. Mandatory licensing is a clause in the Indian Patent Act that gives the government the authority to require a generic drug manufacturer to create low-cost medicine in the public's interest, even if the item has a certified patent.

Compulsory licensing can also be secured in the case of linked patents, where one invention cannot work on without using the associated patent.

Patent Revocation: A patent can be withdrawn if there has been no work or the public's demand for the patented innovation has been poor.

Innovation for Defence Purpose: These patents are subjected to particular confidentiality requirements that disclosure of the creation can be barred or forbidden by Controller order. If such prohibition or restriction on publishing or transmission of the patented product is maintained, the application is prohibited from using it. The Central Government may use it in exchange for royalties paid to the patent applicant.

Restored Patents: Patents that have lapsed can be revived, provided that limited restrictions are put on the patent holder's rights. The patent has no power to take legal steps for infringement if the infringement occurred between the announcement date and the violation date of the application for restoration.

CONCLUSION Enactment of patent act helped in protecting new inventions resulting in the growth of commerce and technology in India. Patent Act, 1970 also provided patent holder with numerous rights in order to protect and promote their invention. This act helps in encouraging people to come up with new ideas in their field by awarding them exclusive rights over their inventions. If a person wants to patent his or her invention he or she has to go through a detailed procedure which is mentioned in the act.

Conclusion

- [1]. History of Patent System, India: Intellectual Property India, Ministry of Commerce and Industry; c2004-2008 [cited 2008 Apr 2] Available from: <http://www.patentoffice.nic.in/ipr/patent/history.htm>.
- [2]. Joshi M, Leela G. International Treaties and Conventions on IPR. Hyderabad: NALSAR Proximate Education, NALSAR University of Law; p.7-13.
- [3]. Convention Establishing the World Intellectual Property Organization Geneva: World Intellectual Property Organization; c2005 [cited 2005 Jan 20], Available from: http://www.wipo.int/treaties/en/convention/pdf/trtdocs_wo029.pdf.
- [4]. Dunkel. General Agreement on Tariffs and Trade, Final Act of Uruguay Round in Marrakesh. New Delhi: Vidhi Publishing. p. 1-4.
- [5]. The Concept of Intellectual Property. Geneva: World Intellectual Property Organization; c2005 [cited 2005 Jan 20] Available from: <http://www.wipo.int/about-ip/en/iprm/pdf/ch1.pdf>.
- [6]. Summary of the Convention Establishing the World Intellectual Property Organization [Internet]. Geneva. World Intellectual Property Organization; c2005 [cited 2005 Jan 15] Available from: http://www.wipo.int/treaties/en/convention/summary_wipo_convention.html
- [7]. World Intellectual Property Organization. J Intellect Prop Rights 1998;3:27-8.
- [8]. Grag RA, editor. The Patents Act, 1970. Delhi: Commercial Law Publishers Pvt. Ltd; 1970.

3/12/2023