

LAW GOVERNING PATENT IN INDIA

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ABSTRACT:

A patent is a statutory right for an invention granted for a limited period to the patentee by the Government in exchange of full disclosure of his invention for excluding others, from making, using, selling, importing the patented product or process for producing that product for those purposes without his consent. In India patent is governed by the Patent Act, 1970 which was enacted by the Parliament in order to encourage inventions by protecting the interest of the inventor. The nodal department which oversee the patent related matters is the Department of commerce and industrial policy.

Key Words: Patent, statutory rights, invention, parliament, industrial policy.

Introduction:

As technology becomes significant in the knowledge led universe and impacts societal dynamics, intellectual Property Rights (IPR) plays a crucial role in the evolution of techno-societies. A patent is defined as a grant by the sovereign or state to an inventor or to his assignee giving exclusive rights to make use, exercise and vend an invention for a limited period in exchange for disclosing it in a patent specification. Patent is an exclusive right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. Patent is a monopoly right conferred by Patent office on an inventor to exploit his invention subject to provisions of patents Act for a limited period of time. It consists of an exclusive right to manufacture the new article invented or manufacture an article according to the invented process for a limited period. After the expiry of the duration of patent, anybody can make use of the invention. The holder of the patent can exercise monopoly over the invention for a period of 20 years after which it will fall in to public domain according to the Patent Act 1970.

Patent Act 1970:

The law of patents in India is governed by the Patents Act 1970 as amended by the patents (Amendment) Act 1999. A bill named Patents (Second Amendment) Bill 1999 which had proposed substantial changes in the law was introduced in the Parliament in December 1999, and was passed as the Patents (Amendment) Act 2002. This Act was further amended by the Patents (Amendment) Act 2005. The patent ensures that the idea cannot be stolen by someone less committed or less creative, and it does this by restricting the right to sell a particular product, or any obvious derivation thereof, to the person who first came up with the idea and patented it.²⁷² The term of patent granted is 20 years from the date of filing of application. In case of applications filed under the national phase of the Patent Cooperation Treaty (PCT), the term of patent will be 20 years from the international filing date.

The Philosophy of Patent System:

²⁷² Jim J Jones, Patent law: Exclusions from patent protection.

The philosophy behind grant of patent is “suffer less evil for more good” and the purpose is to stimulate investment in industrial innovation. It seems synonymous with the utilitarian thought and the theory of social engineering.²⁷³ When somebody invents a new product or process, capable of industrial application and discloses it to the public through patent office, the government grants patent i.e. the right to exclude his competitors from commercial exploitation of the invention within the country so that the effort put in by the researcher is rewarded/recognized and expenses involved in its research and development could be recovered. By virtue of the grant, patentee gets the right to prevent third parties (not having his/her consent) from the act of making, using, offering for sale, selling or importing the patented products or processes within the territory of grant. This clearly indicates that the patentee cannot be exploited by anyone as he enjoys the exclusive monopoly right over his invention when patent is granted to him by the appropriate Government.

The principal objective of the patent system is to provide protection to inventors, encourage innovation, to promote the development of technology and also to foster the dissemination of this development. An effective patent system in combination with pro-active policy making and focused strategic planning will help the country protect its intellectual assets and thereby contribute to economic growth and wealth creation.²⁷⁴ The value of a patent is most difficult to measure in terms of quantifying data. However an analysis of the competitive advantage facilitated by the patented invention and the period for which it subsists is an indicator of its value.²⁷⁵ The

fundamental premise of the patent system is that society benefits when people conceive of new inventions; develop and commercialize new products incorporating those inventions, so that others may learn from and improve upon those inventions. This seems to be the best way of maximizing the social benefits or more precisely a method to increase the social benefits over social costs.²⁷⁶ However it is a challenging task to balance the exclusive rights and privileges granted to the patent holder with that of the conflicting societal interests. Many strategies have been devised across the globe to create and maintain equilibrium. These balancing acts are primarily based on some in-built restrictive mechanism which inter alia includes patenting of only qualified inventions, provisions for sufficient public disclosure, limited term of protection as well as exceptions made out of this monopoly of the patentee.

Rationale for Patent Protection:

The most important question is how the patent system maintains this balance. The answer is that the inventor’s interest is protected by granting him the exclusive right to make use or sell products incorporating his invention²⁷⁷ whereas the public interest is protected by ensuring that the patentee doesn’t abuse his right. The limited term of patent protection²⁷⁸, qualifying conditions for patentability²⁷⁹, exceptions to patentable subject matter²⁸⁰, mandatory disclosure of patent specifications²⁸¹ and exceptions on the right of the patentee²⁸² are all part of this reconciliation act.

Rights of the Patentee:

²⁷³ The social Engineering Theory of Roscoe Pound advocates the idea of balancing of the individual interests with that of the social interest. In case of conflict between the two, priority ought to be given to the societal interest. See Wolfgang G. Friedmann, *Legal Theory*, pg.335,336, Steven & Sons Limited, Fifth Edition (1967)

²⁷⁴ Philippe Baechtold and Tomoko Miyamoto, *International Patent Law Harmonization- A search for the Right Balance*, *Journal of Intellectual Property Rights*, pg 177-187.

²⁷⁵ Suzanne Scotchmer and Jerry Green, *Novelty and Disclosure in Patent Law*, *Working Papers In Economics (E-82-2)* January 1989.

²⁷⁶ Roger D. Blair & Thomas F. Cotter, *Intellectual Property- Economic and Legal Dimensions of Rights and Remedies*, Cambridge University Press, p.13 (2005).

²⁷⁷ Art.28.1 TRIPS Agreement speaks about the exclusionary rights of patentee with regard to product and process patents.

²⁷⁸ Art.33 TRIPS Agreement speaks about the minimum term of protection of 20 years afforded to the patentee.

²⁷⁹ Art.27.1 TRIPS Agreement deals with patentable subject matter.

²⁸⁰ Art 27.2 TRIPS Agreement says about public order and morality exclusions under the patent law.

²⁸¹ Art29.1 TRIPS Agreement mandates sufficient disclosure of invention as a prerequisite of patent grant.

²⁸² Art.30 TRIPS Agreement facilitates limited exceptions to exclusive rights granted by patent grant.

A patentee is entitled to enjoy certain rights under the Patents Act, such as;

1. Right to make; 2. Right to use; 3. Right to offer for sale; 4. Right to sell; 5. Right to assign; 6. Right to transfer; 7. Right to License; 8. Right to prevent third parties from doing these acts.

Conditions for the grant of Patent:

The patent Act of 1970 has laid down certain criteria before granting patent for any invention or process. They are

- I. Novelty;
- II. Inventive step;
- III. Non-obviousness;
- IV. Industrial application;
- V. Public disclosure of the invention;
- VI. Exclusion from patentability.

An invention is defined as follows: Invention means a new product or process involving an inventive step and capable of industrial application.²⁸³ It has been held that a method or process is a manufacture if it results in the production of some vendible product, or improves, or restores to its former condition a vendible product, or has the effect of preserving from deterioration some vendible products to which it is applied.

A patent can be obtained only for an invention which is new and useful. The invention must relate to a machine, article or substance produced by manufacture, or the process of manufacture of an article. A patent may also be obtained for an improvement of an article or of a process of manufacture. In regard to medicine or drug and certain classes of chemicals no patent is granted for the substance itself even if new, but a process of manufacturing the substance is patentable. The applicant for a patent must be the true and first inventor or a person who has derived title from him, the right to apply for a patent being assignable. He must give a full and sufficient disclosure of the invention and specify the precise limits of the monopoly claimed. The invention claimed must be novel and must not

be obvious to those who are skilled in the art to which it relates.²⁸⁴

Patent law reform:

The Patents Act, 1970, was amended in 2002 to introduce provisions that secured a defensive protection of traditional knowledge. Section 3 of the Patents Act, 1970, defines the scope of patentable subject matter. Section 3 (p) was introduced, which provided that an invention that is 'in effect, traditional knowledge, or which is an aggregation or duplication of known properties of traditionally known components, is not an invention within the meaning of the Act. This exclusion of patentable subject matter is broad and relatively indeterminate in its scope. There is no definition of traditional knowledge in the Act or in any other domestic legislation. The courts will have to decide whether this phrase refers only to published materials or to knowledge that may be preserved in oral or pictorial traditions.

Further, the courts will need to determine the number of years that knowledge must exist in order for it to be described as 'traditional'. Even if these preliminary interpretive problems were resolved, the court would have to go further to determine whether the bar in Section 3(p) is absolute, thereby rendering any invention that relies on traditional knowledge to be non-patentable, or relative, so that inventions that use traditional knowledge but nevertheless display a level of creativity and inventiveness would escape the bar. A third concern for the court to resolve is to effectively determine the level of inventiveness while comparing the different epistemological foundations of traditional knowledge and the knowledge format in which the patent application is made. In some ways, the court will have to mould the scope and effect of Section 3(p) in the manner in which Section 3(d) is presently being shaped by the courts.²⁸⁵

²⁸³ Section 2(1)(j) of the Patent Act 1970 defines patentable invention.

²⁸⁴ P. Narayanan, Intellectual Property Law, Eastern Law House, Third Edition 2001, Eleventh Impression 2015, p.17.

²⁸⁵ Sudhir Krishnaswamy, Access to Knowledge and Traditional Knowledge Protection, The Indian experience, Access To Knowledge in India, New

Sections 25(1)(k) and 25(2)(k) provide for any party to file oppositions to a patent application prior to grant of the patent on the grounds that 'the invention... is anticipated having regard to the knowledge oral or otherwise, available within any local or indigenous community in India or elsewhere. Section 64 (1) (q) provides that any person interested or the Central Government may file an application to revoke a patent that has already been granted on the same grounds. On a plain reading of these sections, it is unclear whether they seek to prevent the misappropriation of the 'traditional knowledge' sought to be excluded by Section 3(p) from patentability or deals with a different body of knowledge. This is particularly confusing as the definition of traditional knowledge adopted in academic literature more closely resembles that used in Sections 25 and 64.

The only material difference between the phrasing of the two sections is that Section 3 (p) bars those inventions that are in effect traditional knowledge, while Sections 25 and 64 refer to inventions that are anticipated by traditional knowledge. Hence, it may be useful to reconcile the two provisions by concluding that Section 3(p) only bars such inventions that make no creative or transformative use of traditional knowledge. Sections 25 and 64 go further and modify the non-obviousness limb of patent examination by requiring that the rules of anticipation accommodate these forms of knowledge that were previously.

The History of Patent Laws in India:

India, when it comes to law making, has always had a history of adopting changes, accepting them and adopting them. The adoption of many positive changes during the British regime is an example of this culture. As far as the history of Indian patent system go, the first provisions in the nature of patent rights in India was enacted during the British rule in 1856. In the Act VI of 1856, the monopolies were styled

"exclusive privileges". In the year 1911 Indian Patents and Designs protection Act was enacted. After independence it was felt that the Indian Patents and Designs Act was not fulfilling its objective. A committee headed by Justice Bakshi Tek Chand was appointed to suggest modification and alterations to the existing Act suitable for making the country self-reliant in technology.

Based on the final report (referred to as Bakshi Tek Chand committee Report), a Bill was introduced in the parliament in 1953 but the same could not be passed. Later, in 1957, Justice N. Rajgopal Ayyangar was requested to advise the Government regarding the revision of the law. He submitted a report in 1959. Based on this report and the report of the Joint Committee of the Parliament, the Patents Act, 1970 was passed in February 1972. The Patents Act 1970 came into force on 20th April 1972 along with Patent Rules 1972. Amendments were made to the legislation in 1999²⁸⁶, 2002²⁸⁷ and 2005²⁸⁸ and to the Patent Rules in 2003²⁸⁹, 2005²⁹⁰, 2006²⁹¹, 2016²⁹² and 2017²⁹³.

The Patents Act of 1970 is a landmark in the industrial development of India. The basic philosophy of the Act is that patents are granted to encourage inventions and to secure that these inventions are worked on a commercial scale without undue delay; and patents are not granted merely to enable patentee to enjoy a monopoly for the importation of the patented articles into the country. The legislation provides a reasonable balance between adequate and effective protection of patents on one hand and the technology development, public interest and specific needs of the country on the other hand.

For many years international trade was governed by GATT. The primary purpose of the

²⁸⁶ The Patents (Amendment) Act, 1999 (Act No.17 of 1999).

²⁸⁷ The Patents (Amendment) Act, 2002 (Act No.38 of 2002).

²⁸⁸ The Patents (Amendment) Act, 2005 (Act No.15 of 2005).

²⁸⁹ The Patent Rules 2003.

²⁹⁰ The Patents (Amendment) Rules, 2005.

²⁹¹ The Patents (Amendment) Rules, 2006.

²⁹² The Patents (Amendment) Rules, 2016.

²⁹³ The Patents (Amendment) Rules, 2017.

trade system developed under the GATT was to promote trade in goods through reduction or elimination of protectionist policies²⁹⁴. Countries like India, Argentina and Brazil opposed the inclusion of TRIPS in the negotiating agenda arguing that patent was a non-trade issue. But after a lot of compulsions these countries too had to accept the decision. At first India did not enact the provisions of TRIPS in the Indian Patent Act of 1970 as we felt it to be discouraging the process of research and innovation in the country.

India was of the view that it was unjust to have a uniform standard for all member countries, in matters of TRIPS because the standards vary with economic and technical development of each country. The advances in technology in developed economies could never be compared with that of the developing ones. India will therefore stand to lose. Any set back to research and innovation process will accentuate the backwardness of our agricultural sector. Medicinal services will be beyond the reach of the ordinary man as the prices of several lifesaving drugs may rise by ten to fifteen times making it practically unaffordable and inaccessible to the commons.

Conclusion:

Patent is a monopoly right granted to a person who has invented a new and useful product or an improvement of an existing product or a new process of producing a product. Under the Indian Patent Act patents may be granted to any new inventions; such as a new machine, apparatus, equipment, or even to a novel and genetically modified life form. Patents are made available for all inventions in any field of technology whether product or process irrespective of their origin or nationality. Trade Related aspects of Intellectual Property rights agreement postulates grants for any new invention irrespective of its nature. Being a signatory to TRIPS India brought changes in its

patent law in order to fulfill its obligations under TRIPS.

The object behind granting patent monopoly on invention is to encourage research and invention, so that it would lead to the development of new technology to stimulate progress in industry. Grant of patent monopoly induces the inventors to disclose his invention, instead of keeping it secret. It induces the manufacturer to invest capital in new lines of production, which might not appear profitable if many competing producers embarked on them simultaneously. However in order to grant patent any invention has to satisfy few requirements i.e., the invention must be new, must involve inventive step or non-obvious and must be industrially applicable (utility or usefulness).

²⁹⁴ Carlos m. Correa, "Implementing National Public Health Policies in the Framework of WTO Agreement", Journal of World Trade. 34(6) 2000 pg.89