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**Patent And Law**

**Keshav Pandey**

## **INTRODUCTION TO PATENTS**

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A Patent is considered as an exclusive right which is granted for invention, of a product or process, in general term, a unique way of exhibiting something, which offers technical solution to problems. In order to obtain a patent, the technical information about the specific invention made, must be disclosed to the public in a patent application.

The Patent Law comes under Intellectual Property law which deals specifically with new inventions. Only if the patent right is granted, it gives the investors the right to sell their invention for around 20 years. It is done in form of incorporeal right.

## **BACKGROUND OF PATENTS IN LAW**

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The earlier history of Patent Law in India started right from 1911 when the Indian Patents and Designs Act, 1911 was enacted. The present Patents Act, 1970 came into force in the year 1972, amending and consolidating the existing law relating to Patents in India. The Patents Act, 1970 was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to all fields of technology including food, drugs, chemicals and micro-organisms. After the amendment, the provisions relating to Exclusive Marketing Rights (EMRs) have been repealed, and a provision for enabling grant of compulsory license has been introduced. The provisions relating to pre-grant and post-grant opposition has been also introduced.

The invention which relates to a product or process, which is new, involves inventive steps, which is capable of industrial application, patented in India. However, it must not fall under the category of inventions that are non-patentable as mentioned under sections 3 and 4 of the Indian Patents Act, 1970. In India, a patent application can be filed, either alone or jointly, by true and first inventor or his assignee.

## **PROCEDURE FOR THE GRANT OF PATENT**

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Initially, the application is filed for the grant of patent, which request for examination, in the Indian Patent Office within 48 months from the date of priority of the application or from the date of filing the application. After the issuance of the first examination report, the applicant will be given opportunity to meet the obligations raised in the report. The applicant should comply with the requirements within 6 months of the first examination report, which could even extend for 3 months by applicant's request. If the requirements are not complied within the prescribed period of

9 months, then such application would be treated as abandoned. After such removal of obligations and compliance of requirements, the patent will be granted and notified in the Patent Office Journal.

In the Supreme Court case of Bishwanath Prasad Radhey Shyam V. Hindustan Metal Industries,<sup>1</sup> enumerated the object of Patent Law as:

The subject is to encourage scientific research, new technology and industrial progress. Granting of privilege to own, usage or selling the method for a limited period, stimulates new inventions of commercial utility. At which, after the expiry of the fixed period of monopoly passes into the public domain.

## **ROLE OF THE PATENT SYSTEMS**

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- To protect inventions
- To encourage inventions<sup>2</sup>
- To promote commercialization and application of invention
- To accelerate the commercialization of inventions to the larger society.

## **TERM OF PATENT**

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The term of every patent in India is 20 years from the date of filing the patent application, irrespective of whether it is filed with provisional or complete specification. However, in case of applications filed under the Patent Cooperative Treaty (PCT), the term of 20 years begins from the international filing date.

## **WHERE TO PATENT**

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The Patent Protection is important part of overall business strategy in the overall global marketplace. The patent rights are territorial – which provides protection against infringing activities, only within the country or region in which patent was to be granted, no world - wide patent is applicable, it must apply for and be granted a patent.

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<sup>1</sup> Bishwanath Prasad Radhey Shyam V. Hindustan Metal Industries, A.I.R. 1982 S.C.1444 (India).

<sup>2</sup> Bajaj Auto Limited Vs. TVS Motor Company Limited JT, AIR 2009 S.C.103 (India).



## **THINGS THAT QUALIFY FOR A PATENT**

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There are 4 types of inventions that qualify for patent protection:

Process – Also called a method, a process is a new way of doing things.

Machine – A machine is a concrete thing or device. It produces a function or creates a result.

3. Manufacture – An item or tangible object.

Composition of matter – The combination of two or more chemical compounds. A composition may be the result of chemically combined substances or a mixture.

## **PATENT INFRINGEMENT**

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Mostly, in Business, when a patent is threatened, the patent holders must take measures to protect their own interests. The Patent Litigations are the legal actions done to protect patents against infringement, which can result in monetary damages or injunctions against the infringement. There are also wider range of remedies available in law, including financial remedies, injunctions and court's powers of contempt. The International Trade Commission also plays a major part in it. If an invention does not literally infringe the patent, it infringes under the doctrine of equivalents.

The types of infringement include:

- Direct Infringement
- Indirect Infringement
- Contributory Infringement
- Literal Infringement

## **PROTECTION OF PATENTS AND COPYRIGHT IN THE U.S<sup>3</sup>**

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As per the U.S Constitution, Article 1, Section 8, Clause 8 – ‘Congress shall have the power to promote the progress of science and arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries.

As per 35 U.S.C.101, ‘Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.’”

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<sup>3</sup> Apple Inc. V. Samsung Electronics Co., Ltd, 786 F.3d 983 (2015).

## **PCT – THE INTERNATIONAL PATENT SYSTEM**

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The Patent Cooperation Treaty (PCT) assists applicants in seeking of patent protection internationally for the purpose of inventions, which helps the patent offices with grant of patent decisions, also facilitates the public access to the wealth of technical information with regarding to those inventions. By filing one international patent application under the PCT, applicants can simultaneously seek protection for invention in large number of countries.

### **FILING OF APPLICATION FOR GRANT OF PATENT IN INDIA BY FOREIGNERS**

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India being a signatory to the Paris Convention for the Protection of Industrial Property, 1883 and the Patent Cooperation Treaty (PCT), 1970, a foreign entity can adopt any of the aforesaid treaties for filing of application for grant of patent in India.

Where an application for grant of patent in respect of an invention in a Convention Country has been filed, then similar application can also be filed in India for grant of patent by such applicant or the legal representative or assignee of such person within 12 months from the date on which the basic application was made in the Convention Country, ie, the home country. The priority date in such a case is considered as the date of making of the basic application.

### **PRE-GRANT OPPOSITION**

A representation for pre-grant opposition can be filed by any person under section 11A of the Patents Act, 1970 within six months from the date of publication of the application, as amended (the 'Patents Act') or before the grant of patent. The grounds on which the representation can be filed are provided under section 25(1) of the Patents Act. There is no fee for filing representation for pre-grant opposition. Representation for pre-grant opposition can be filed even though no request for examination has been filed. However, the representation will be considered only when a request for examination is received within the prescribed period.<sup>4</sup>

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<sup>4</sup> Novartis V. Union of India, A.I.R. 2013 S.C. 6 (India).

## **POST-GRANT OPPOSITION**

Any interested person can file post-grant opposition within twelve months from the date of publication of the grant of patent in the official journal of the patent office.

## **COMPULSORY LICENSING**

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One of the most important aspects of Indian Patents Act, 1970, is compulsory licensing of the patent subject to the fulfilment of certain conditions. At any time after the expiration of three years from the date of the sealing of a patent, any person interested may make an application to the Controller of Patents for grant of compulsory license of the patent, subject to the fulfilment of following conditions, ie,

the reasonable requirements of the public with respect to the patented invention have not been satisfied;

that the patented invention is not available to the public at a reasonable price; or

that the patented invention is not worked in the territory of India.

## **PATENT RULES**

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Under the provisions of section 159 of the Patents Act, 1970 the Central Government is empowered to make rules for implementing the Act and regulating patent administration. Accordingly, the Patents Rules, 1972. These Rules were amended from time to time till 20 May 2003 when new Patents Rules, 2003 were brought into force by replacing the 1972 rules. These rules were further amended by the Patents (Amendment) Rules, 2005 and the Patents (Amendment) Rules, 2006. The last amendments are made effective from 5th May 2006.

## **RIGHTS GRANTED BY PATENT**

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If the grant of the patent is considered for a product, then the patentee has all rights to prevent others from making, using, offering, selling, importing the patented products in India.

If it is considered for a process, then the patentee has right to prevent others from using directly, offering, selling, importing the product in India.

Before filing an application for the grant of patent in India, which is not patentable in India, any invention which is considered as frivolous, obvious, contrary to natural laws, morality, injurious to

health, discovery of scientific principle, the abstract theory, discovery of new property for known substance or process, substance obtained by admixture, agreement or rearrangement or duplication of known devices, methods of agriculture or horticulture, inventions relating to atomic energy, are considered not patentable in India.

## **LICENSING AND ASSIGNMENT OF PATENT<sup>5</sup>**

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An assignment in a patent or a share in a patent or a mortgage, license or the creation of any other interest in a patent is permissible. In the case of patents, assignment is valid only when it is in writing and the agreement is reduced to the form of a document embodying all the terms and conditions governing the rights and obligations of the parties to the agreement. The application for registration is required to be made by the transferee in the prescribed form.

## **PATENT OF BIOLOGICAL MATERIALS IN INDIA**

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If the invention uses a biological material which is considered new, it is necessary to deposit the same in the International Depository Authority (IDA) prior to the filing of the application in India in order to supplement the description. If such biological materials are already known, in such a case it is not essential to deposit the same. The IDA in India is located at Chandigarh, known as Institute of Microbial Technology (IMTECH).

## **WIPO AND PATENTS**

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The WIPO works for development and balance in effective intellectual property system. WIPO's member states collaborate in various areas, which includes agreeing the treaties and conventions that underpin the International Intellectual Property system, which makes the global exchange of innovation and creativity with upgradation applicable. The IP services which WIPO offer, are the facilitation of International patent protection under the PCT System, available in all levels. Even in matters of grant or refusal of patent, yet rests with the relevant national and regional patent office.

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<sup>5</sup> F. Hoffmann-La Roche Ltd Vs. Cipla Ltd., Mumbai Central, A.I.R. 2005 (India).

## **GLOBAL PATENT AND TRADE MARK STRATEGIES:**

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Intellectual Property (IP) refers to any creation or product of the human mind or intellect. It is considered as an invention, design, practical application, marking ownership with trademark, literary and artistic work, software codes, etc. IP also has great demand with patent in cosmetics industry. Patent law rewards the inventor with a monopoly to practice his invention for a certain period of time without having to compete against (usually cheaper) copies; trademark protection. On the other hand, although it confers commercial advantages to the owner, is meant to protect the consumer against being misled by unscrupulous trade practices.

The Patentable inventions in the cosmetics industry includes new molecules to be used as ingredients, new processes (ways of synthesis, extraction, purification, solubilization, etc.), new cosmetic compositions (new presentation forms, vectorization, and delivery forms), for cosmetic purposes (antiwrinkle, anticellulite, skin toning, oil control, etc.), new applications of known (old) substances, and new packing and dispensing materials.