ANALYSIS OF PATENT LAW IN INDIA

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PATENT

Patent means a commercial monopoly granted by the Govt. to the inventor of an invention, which is new, useful and industrially applicable, for a limited period of time.

It confers on the true and first inventor the exclusive right to Make, use, exercise and vend (sale) his invention. It is a kind of limited monopoly granted to the true and first inventor as a reward for the creation of something new and useful which might benefit the public.

<table>
<thead>
<tr>
<th>Countries</th>
<th>2006</th>
<th>2007</th>
<th>2008 (estimated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Americans</td>
<td>35.70</td>
<td>34.5</td>
<td>33.1</td>
</tr>
<tr>
<td>United States</td>
<td>32.70</td>
<td>31.4</td>
<td>30.1</td>
</tr>
<tr>
<td>Asia</td>
<td>36.90</td>
<td>38.8</td>
<td>40.8</td>
</tr>
<tr>
<td>China</td>
<td>13.50</td>
<td>15.6</td>
<td>17.9</td>
</tr>
<tr>
<td>Japan</td>
<td>13.00</td>
<td>12.8</td>
<td>12.4</td>
</tr>
<tr>
<td>India</td>
<td>3.70</td>
<td>3.7</td>
<td>3.7</td>
</tr>
<tr>
<td>Europe</td>
<td>25.20</td>
<td>24.6</td>
<td>23.9</td>
</tr>
<tr>
<td>Rest of world</td>
<td>2.20</td>
<td>2.2</td>
<td>2.1</td>
</tr>
</tbody>
</table>

Source: Global R&D Report 2007 (www.rdmag.com)

Low investment in R&D is an indication that India is still involved in activities that are not creating higher value at different levels. This assertion can be made as expenditure in research is an indication of commitment of a firm/research organization to search for novel ways of producing/creating new products.

Figure-1 Share of Global R&D spending
Source: Global R&D reports 2007

Figure-2 US patents granted to inventions of various countries
Source: R&D India, Newsletter October 2006, DSIR, New Delhi
According to patents granted during 2005, India’s position is weak in comparison with other emerging economies of Asian origin e.g. Taiwan, Korea, and China. One major difference noticeable in Figure-2 is that most of the patents granted to inventions are for respective local firms (e.g. country institutions) in case of Israel, Korea, and Taiwan.

NEED OF PATENT
- Patent add fuel to the fire of genius
- Possibility of commercial monopoly stimulates further invention
- It encourages research & invention
- It is an incentive to invest money to develop new products
- It is an incentive to invest money in R&D
- Patent law prevents theft of other persons inventions
- Worldwide method to reward the inventors
- Give enforceable exclusive statutory rights
- Substantial commercial benefits
- Exclude the chances of repetition
- Economic growth

CHARACTERISTICS OF INVENTION FOR OBTAINING A PATENT
1. It should be novel
2. Invention should be a product of inventive activity, product of human intervention (Non-obvious)
3. Should have Utility
4. Should be related to a process or manufacturing activity or product of such process
5. It should not be contrary to the provisions of the laws of the country

Patents are NOT GRANTED for the following:
1. Invention which is frivolous
2. The purpose would be contrary to law/morality or injurious to public health
3. Discovery of the principles & formulation of abstract theory
4. Inventions relating to atomic energy

NON-PATENTABLE INVENTIONS
1. The mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus (unless such known process results in a new product or employs at least one new reactant)
2. A substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance
3. The mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way
4. A method of agriculture or horticulture
5. Any process for the medicinal, surgical, curative, prophylactic (diagnostic, therapeutic) or other treatment of human beings or any other process
6. Plants & animals in whole or any part thereof (other than micro organisms)
7. A mathematical or business method or a computer program or algorithms
8. A literary, dramatic, musical or artistic work or any other aesthetic creation including cinematographic work & television production
9. A mere scheme or rule or method of performing mental act or method of playing game
10. A presentation of information
11. Topography of integrated circuits
12. An invention which, in effect, is TRADITIONAL KNOWLEDGE or which is an aggregation or duplication of known properties of traditionally known component of components

TYPES OF PATENTS
1. PROCESS PATENTS
2. PRODUCT PATENTS

I. APPLICATION
Following persons can file patent application
1. Any person claiming to be the true & first inventor of the invention;
2. An assignee of the true & first inventor
3. Legal representative of the deceased true & first inventor

Patent Application must be filed in the PATENT OFFICE
- Must be filed by a competent person in the Patent Office in prescribed form (available in patent office) With relevant documents/evidence. Every application must be accompanied with provisional or complete specification. Separate application for each invention. Statement regarding possession of invention & name of the true & first inventor
  - Patent Office (H.O.) Calcutta
II. SPECIFICATION

Contents of the specification
1. The opening line should read as, "This invention relates to (Title of the Invention)
2. Technical field of invention.
3. Prior art with short comings
4. Problem with the existing art.
5. Proposed technical solution.
6. Brief description of the accompanying drawings, if any.
7. Detailed description of the invention
8. Examples
10. Every complete specification must fully & particularly describe the invention & is operation or use & the method by which it is to be performed
11. Disclose the best method of performing the invention which is known to the applicant & for which he is entitled to claim protection
12. Define the scope of the invention for which protection is claimed

DRAWINGS
1. No drawings, or sketch, which would require a special illustration of the specification, shall appear in the specification itself.
2. At least one copy of the drawing shall be prepared neatly and clearly on a durable paper sheet.
3. Drawings shall be on standard A4 size sheets with a clear margin of at least 4 cm on the top and left hand and 3 cm at the bottom and right hand of every sheet.
4. Drawings shall be on a scale sufficiently large to show the inventions clearly and dimensions shall not be marked on the drawings.
5. No descriptive matter shall appear on the drawings except in the flow diagrams.
6. Drawings shall be sequentially or systematically numbered and shall bear---
   i) in the left hand top corner, the name of the applicant
   ii) in the right hand top corner, the number of the sheets of the drawings, and consecutive number of each sheet; and
   iii) in the right hand bottom corner, the signature of the applicant or his agent.

PURPOSE OF SPECIFICATIONS:
1. PROVISIONAL:--To claim priority date.
2. COMPLETE:--To make available the invention to the public on the expiry of the term of the patent. To facilitate examiners to examine patent application. To facilitate interested persons to take objection (if any)
3. EXAMINATION OF APPLICATION
   a. Begins with the request of the applicant.
   b. FORMAL EXAMINATION:
      i. Which determines whether the application complies with the prescribed form, fee, particulars to be furnished & documents to be submitted.
   c. SUBSTANTIVE EXAMINATION:
      i. Which determines whether the matter is an invention & whether specific requirements under the Act are complied with. This includes a search to determine prior use, prior claims, prior publication & prior public working.
4. ACCEPTANCE of complete specification
   • If any objection in the application is notified by the controller to the applicant-----
   • The applicant must comply with the objection
   • IF NOT COMPLIED:---
      o The application will be deemed to be abandoned.
   • IF COMPLIED SATISFACTORILY:---
      o The controller of patents may accept the complete specification, & must give notice of such acceptance to the applicant, & must publish (advertise) it in the Official Gazette for public inspection.

III. OBJECTION to Grant of Patent
"Opposition" under the patent law is the provision for any one "interested" in a particular patent to oppose the "grant" of such patent on specific grounds under the Patent Act.

Pre-Grant Opposition: -
Means opposition filed after the publication of the patent application but before the grant of patent.

Post-Grant Opposition: -
Means opposition filed after the grant of patent but before the expiration of a period of one year from the date of publication of grant of a patent.
REQUEST FOR WITHDRAWAL
1. A request for withdrawal of application should be made in writing. (No specific form) Fee is Rs 1000 / 4000
2. If request is made at least 3 months prior to the expiry of 18 month publication period, the application will not be published.
3. Applicant gets a chance of refiling the application and please note that no priority will be given in such case.
4. Request for withdrawal of application can be made even after publication, in such situation applicant looses the right of refiling the same invention.
5. When form – 18 is not filed within the stipulated period, the application is treated as withdrawn and shall proceed for publication.

IV AMENDMENT
To meet the Objections

V PUBLICATION
In Gazette of India

VI. GRANT OF PATENT
1. Where the application is accepted, either without any opposition or has been accepted after the opposition proceedings have concluded with a decision in favor of the applicant the patent shall, on request being made in a prescribed form, be granted to the applicant and the patent shall be sealed with the seal of the Patent Office. The date on which the patent is sealed shall be entered in the Register maintained in the Patent Office.
2. FEES
a) Fee payable under the Act may either be paid in cash or by bank draft or cheque payable to the Controller of patents and drawn on a scheduled bank at the place where the appropriate office is situated.
b) The amount specified in Cheques and drafts should include the correct amount of commission.
c) Where a fee is payable in respect of a document, the entire fee shall accompany the document or shall be paid within one month from the date of filing the document.
d) Note that the fee once paid for any proceeding shall not be refunded irrespective of whether the proceeding has taken place or not.
3. REGISTER OF PATENTS
a) After the grant of patent the details such as the date of patent, the name of the patentee, address, nationality, address for service, title of the invention, patent number and the status of renewal fee will be entered in the PATENT REGISTER.
b) Post grant actions such as change in the name of applicant, change in service of address, further assignors, if any, payment of renewal fee, expiry of term of patent etc., are entered in the register
4. RENEWAL FEES
a) To keep a patent in force, the renewal fee should be paid at the expiration of second year from the date of patent or of any succeeding year and the shall be remitted to the patent office before the expiration of the second or succeeding year. (advance payment)
b) The 12 month period is extendable by another 6 months by filing form – 4. This can be paid on or before the expiry date of the extended period requested.
c) While paying the renewal fee, the number and date of the patent concerned and the year in respect of which the fee is paid shall be quoted.
d) The annual renewal fees payable in respect of 2 or more years may be paid in advance.

1.Major Changes Introduced by the 2005 Amendment Act
1. Extension of product patent protection to all fields of technology
   • The most prominent and controversial change of the 2005 Amendment has been the deletion of section 5 of the Act, thereby paving the way for product patents in the area of pharmaceutical and other chemical inventions.
2. No Swiss Claims and Expansion of Exclusion under Section 3(d)
   A ‘Swiss Claim’ is a claim for patent wherein the use of a substance or composition that has already been used for a medical purpose is intended or specified to be used for a new medical purpose. Section 3(d) as amended by the 2005 Amendment clarifies that mere discovery of a new form of a known substance, which does not result in the enhancement of the known efficacy of that substance is not an invention and therefore not patentable. For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substances are to be considered to be the same substances, unless they differ significantly in properties with regard to efficacy.
3. Software Patentability
   Section 3(k) of the Patents Act, 1970 excluded “a computer programme per se” from the scope of patentability. This exclusion met with conflicting interpretations at the patent office, with some examiners granting patents to software combined with hardware or software with a demonstrable technical application of some sort. The 2004 Ordinance therefore qualified this exclusion by stating that software with a “technical application” to industry or when “combined with hardware” would be patentable.
4. Deletion of the provisions relating to Exclusive Marketing Rights (EMRs)
   Section 21 of 2005 Amendment deleted the Chapter IVA of the Act. The 1999
Amendment inserted this chapter in the Act to provide that applications claiming pharmaceutical inventions would be accepted and put away in a mailbox, to be examined in 2005. These applications are commonly referred to as ‘mailbox applications’.

This amendment was in pursuance of a TRIPS obligation aimed at preserving the novelty of pharmaceutical inventions in those developing and least developed country (LDC) members that did not grant product patents for pharmaceutical inventions in 1995

By virtue of this ‘mailbox facility’, applications would be judged for ‘novelty’ on the basis of the filing date and not with reference to 2005, the year in which product patents were first incorporated into the patent regime.

5. Compulsory Licensing Regime

Section 84 of The Act provides for the grounds on and procedures by which, a compulsory license will be granted. The 1999 Amendment adds an entire chapter to the Patents Act on the working of patents, compulsory licenses, and revocation of licenses.

In respect to the 2005 Amendment following amendments have been made in respect of compulsory licencening regime -

a) Automatic Compulsory Licences for Mailbox Applications
b) Compulsory Licences for Exports

6. Other Amendments

There are many changes brought by the 2005 Amendment in the provisions of the Act, that can be summarized as follows -
a) The 2005 Amendment amend the definition of “New Invention”, “Inventive Step” and insert a new entry of “Pharmaceutical Substances” in the definition clause.
b) Provision of ‘acceptance of specification’ and its advertisement have been deleted.
c) Modification in the provisions relating to opposition procedures with a view to streamlining the system by having both Pre-grant and Post-grant opposition in the Patent Office.
d) Application for patent will be published in Official Journal. At that time opposition can be made on limited grounds but hearing is not mandatory. e) After grant of patent, opposition can be made within 12 months.
f) Suit for infringement of patent cannot commence before date of publication of publication of the application.
g) Penalties enhanced substantially.
h) Strengthening the provisions relating to national security to guard against patenting abroad of dual use technologies.
i) Rationalisation of provisions relating to time-lines with a view to introducing flexibility and reducing the processing time for patent applications, and simplifying and rationalising procedures.

2. Critical evaluation of the Patent (Amendment) Act, 2005

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Conclusion & suggestion

Patent law is a specific area of law that encompasses the legal regulation, jurisprudence, and enforcement of specific intellectual property rights known as patent rights. A patent is a government issued right granted to individuals or groups that protects their original inventions from being made, used, or sold by others without their permission for a set period of time. While patents can be legally obtained without the use of an attorney, an attorney who specializes in patent law can help ensure that their client’s patent is enforceable by law. Because patent law pertains to intellectual property, which is like any other property in that it can be legally sold, exchanged, traded, or abandoned, the finer points of patent law are frequently amended as technology changes. This is another reason why an attorney specializing in patent law is of significant use to those seeking a patent.

REFERENCES

BOOKS

WEB-SITE
1. www.patentoffice.nic.in