

## **Intellectual Property issues: A comparison between India and the U.S.**

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### **Abstract**

Intellectual Property as a whole may seem to consist of original creations, but these creations themselves are divided into two main categories depending upon their nature – those creations being used for Industrial purposes and those creations that are Copyrighted material. A Patent is a legal monopoly which is granted for a limited time by a country to the owner of an invention. Merely to have a patent does not give the owner the rights to use or explore a patented invention: that right may still be affected by other laws such as health and safety regulation, or the food and drugs regulation or even by other patents. The patent in the law is a property right and it can be given away, inherited, sold licensed and can even be abandoned. As it is conferred by the state, it can be revoked by the state in certain cases even after grant, and whether or not it has been in the meantime sold or licensed. A patent obtained in one country is not enforceable in any other country unless the patent has been granted in that country. Patent rights are therefore territorial in nature and inventors / their assignees have to file separate patent applications in different countries for obtaining patents in those countries.

Keywords: - Patent, property, licensed, regulation, Copyrighted.

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## **Introduction**

Creative outputs of the human mind, like novels, music, motion-pictures, industrial designs that are used for commercial purposes etc. fall under the title of Intellectual Property.

Intellectual Property as a whole may seem to consist of original creations, but these creations themselves are divided into two main categories depending upon their nature – those creations being used for Industrial purposes and those creations that are Copyrighted material.

Intellectual property is a “product of the mind” It is similar to the property consisting of movable or immovable things like a house or a car wherein the proprietor or owner may use his property as he wishes and nobody else can lawfully use his property without his permission. The Convention establishing the World Intellectual Property Organization in 1967, one of the specialized agencies of the United Nations System, provided that “intellectual property shall include rights relating to:

- (i) Literary, artistic, and scientific works
- (ii) Performance of performing artists, photographs and broadcasts
- (iii) Inventions in all fields of human endeavor
- (iv) Scientific discoveries (No national laws or international treaties give any property rights to scientific discoveries)
- (v) Industrial designs
- (vi) Trademarks service marks and commercial names and designations (vii) protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.

## **1. Forms of Protection**

- Patents
- Copyright
- Trademarks
- Designs
- Know-how

Of these, patents are the most important form of protection for R&D organizations. In certain areas like computer software, copyright protection is most often sought. More recently patenting in the field of biotechnology has become important.

## **2. Important Legislations**

- The Indian Patents Act, 1970 (with amendments to the Act in 1994)
- The Designs Act, 1911
- The Trade and Merchandise Act, 1958
- The Copyright Act, 1957

### **What is Patent?**

A Patent is a legal monopoly which is granted for a limited time by a country to the owner of an invention. Merely to have a patent does not give the owner the rights to use or explore a patented invention: that right may still be affected by other laws such as health and safety regulation, or the food and drugs regulation or even by other patents. The patent in the law is a property right and it can be given away, inherited, sold licensed and can even be abandoned. As it is conferred by the state, it can be revoked by the state in certain cases even after grant, and whether or not it has been in the meantime sold or licensed. A patent obtained in one country is not enforceable in any other country unless the patent has been granted in that country. Patent rights are therefore territorial in nature and inventors / their assignees have to file separate patent applications in different countries for obtaining patents in those countries. A patent is a government granted and secured legal right to prevent others from practicing i.e. making, using or selling the invention covered by the patent. A patent is a personal property which can be licensed or sold like any other property.

Industrial Property consists of patents or inventions, trademarks, industrial designs and geographical indications of source. Patents are rights that are granted exclusively for inventions – inventions being a product or a process. The process itself must be a whole new approach or method to do something. A trademark on the other hand is a symbol or a word or a name that is put on goods in the marketplace that indicates its source. Service marks are given to services as opposed to products – the services being provided by the same source.

Trademark rights ensure that the symbol, word or name that identifies the source of the product is not duplicated – though the product can be marketed under a different mark. Copyright has been devised to protect the authors of original works of art, music, film as well as literary outputs.

### **The history of the Patent System**

In India, the Patent system was instituted by the British based on their own patent system in 1856, to protect inventions. This act was gradually modified in the years to follow.

Intellectual Property Rights as a vital law to protect inventions and artistic creations was adopted after India becoming a signatory in the TRIPS (Trade- Related Aspects of Intellectual Property Rights) agreement initiated by the World Trade Organization, the WTO, which was signed in Marrakesh, Morocco, on 15 th April 1994.

These patents and trademarks are granted in India by the Patent offices in the metropolitan cities of Delhi, Mumbai, Chennai and Kolkata, which come under the jurisdiction of the Office of the Controller General of Patents, Designs and Trademarks. Patent applications can be filed through post or in person at these offices. The Office has revamped the whole IP system and a whole new organization called IP India or Intellectual Property India has been established.

The first provision in the nature of exclusive right in India was introduced in 1856 when India was under the British rule. This Act was repealed in 1857 since the earlier Act was introduced without the sanction in the Queen. In 1859, the previous Act was amended in order to remove certain provisions unfavorable to the rulers and under this Act the monopolies were styled "EXCLUSIVE PRIVILEGES". Further this Act which was amended in 1872 in order to add further provisions in respect industrial designs is known as "THE PATENTS & DESIGNS PROTECTION ACT". In 1883 the Act was further amended. Ultimately all the three Acts of 1859, 1872 and 1883 were superseded by Act V of 1888. This Act was also repealed and after further modification and amendments the Indian Patents & Designs Act 1911 came into being, the said Act being designed on the British Patents Act. This Act was amended several times in 1920, 1930, and 1945. The Registration of Industrial Design Acts of 1911 with little modification is still in force. The Controller of Patents administers the Act. After independence in 1947, it was realized that the Act of 1911 was not fulfilling the requirement of the country. The Central Government appointed as a committee of inquiry to suggest the modification and alternations in the existing Act in order to have most suitable Act for promoting industrial growth as well as self reliance to the country. Based on the interim report the Act was modified regarding the working of inventions in 1952 and 1953. The Controller was empowered to grant license on food, medicine etc. Based on the final report, the new Patent Bill was introduced in Parliament in 1953. However this Bill could not be passed in Parliament. Mr. Justice (Retd.) N. Raja Gopala Aiyangar was requested to advise the Central Government regarding the revision of the Act. He submitted the report in 1959. A joint Committee of Parliament was constituted to make recommendations on the basis of the report submitted by Mr. Justice (Retd.) N. Raja Gopala Aiyangar. Based on the report submitted by joint Committee, Indian Patents Act, 1970 was passed on February 27, 1970. The same was put into effect from April 20, 1972. From the history of the patent system in India, it can be said that importance of such a system for protecting inventions has been felt for last 140 years. What is considered as the date of patent? The date of patent is the date of filling the complete specification. This is an important date because it is from this date the legal protection of an invention covered in the patent takes effect. The term of the patent is counted from this date. What is the cost of filling a patent application In India? The Government fee for filling a patent application (Complete / Provisional) in India is

Rs. 1,500/- for individuals and Rs.5, 000/- for legal entries. A sealing fee of Rs.1500/- for individuals and Rs.5, 000/- for legal entities has to be paid at the time of grant (sealing) of patent.

### **Indian Patent Law**

The first provision in the nature of patent right in British India was enacted in 1856, but without the previous sanction of the Queen of England. This Act was therefore formally repealed in 1857. In 1859, another Act free from the defects of 1857 Act was passed in which the monopolies were styled as “exclusive privileges”. The Act of 1859 was further supplemented by the Patents and Designs Protection Acts of 1859, 1872 and 1883 were superseded by Act V 011888 which was further revised and replaced by the Indian Patents and Designs Act 1911. This Act was amended from time to time (In 1929, 1930, 1945 etc).

### **When writing a Patent Application you must keep two *things* in mind**

- a) There overdoes not know your mind
- b) You are the specialist and have to explain your invention just like a teacher teaches his student In short you should define:

### **How the Patent Act has benefited us**

The adoption of the TRIPS agreement has made India’s IP system more ironclad, ensuring that the creative and scientific communities are given the right kind of assurance that their life’s work will be protected.

Further amendments to the Patent act has also ensured that traditional knowledge of the Indigenous sciences – especially herbal and Ayurvedic medicines, which had not been patented so far are also in the process of being registered as local, traditional knowledge. This began after reports of patents were requested by citizens of other nations, for the indigenous medicines and herbs of India. These medical preparations or herbs cannot of course be registered to individuals or even pharmacological companies since they are the empirical knowledge of thousands of years of research and treatment in traditional societies.

But the fact that Intellectual Property rights are being given more importance and their necessity is being highlighted as more and more research is being done in various fields of learning in India gives hope that Indian inventors and creative minds that help society to grow can indeed work in this country knowing that their government intends to give them every sort of support possible.

The United States on the other hand has a had a long tradition of encouraging inventions and the United States Patent and Trademark Office (USPTO), which is an agency of the Department of Commerce is the governing body that oversees the IP rights issues in the country.

### **How to take that first step**

To apply for a patent, one has to fill in a form and send it in to the USPTO with the stipulated fees. After a maximum period of 18 months, the patent is granted if approved. Trademarks and Copyrights as well as domain names are also to be registered at this office.

### **In case of violation**

In the US, infringement of patents, trademarks and copyrights are much more litigious issues than in India, where the Patent system and Copyright rules were only recently overhauled. While the violation of copyrights and other IP rules often lead to large amounts of litigation in the US, India is still in its infancy with regard to the enforcement of the TRIPS agreement.

India has succeeded to a large extent in clearing the market of pirated films and music. Software is still a thorny issue and one that has caused a lot of rifts with other world economies that are major IT players. In a study commissioned by the US government, the percentages of pirated material categorized by Industry in the year 1997 were as follows:

Motion Pictures – 80%

Music and Sound Recordings – 40%

Business Software Applications -76 %

Entertainment Software Applications – 82%

A loss of around \$300 million was calculated in 1997 alone to US businesses. Though raids on merchants happen on a regular basis, the fact that the enormous population and the proliferation of computer technology in a nation as large as India have made institution of the copyright laws very difficult.

Another bone of contention between the US and Indian governments has been the pharmaceutical industry. Patent violations by Indian pharmaceutical companies that

produce drugs at lower prices have been regulated more strictly since the full ten-year transition period granted by the TRIPS agreement lapsed on January 1 2005. Section 84 of Patent Act 1970 and the Clause 35 of Patents Act (second amendment) Bill 1999 states that compulsory licenses may be granted to manufacturers if a certain product is available in the market to the public only at unreasonable prices.

The US Health GAP coalition have demanded that such consideration as the state of the economy of the country and the health concerns be regarded as recommended by President Bill Clinton on December 1, 1999 when it comes to formulation trade policies and investigating infringement of Patents and Trademarks.

But following the conversion of The Patents (second Amendment) Bill 1999 into law, the Government of India and especially the office of Intellectual Property India is making sure that IP issues are sorted out and the office plans to fast-track Patents, Trademarks and Copyright applications, improving connectivity between all the major patent offices and networking the whole system as agreed in TRIPS agreement and on the recommendations of the WIPO/UNDP.

### Patent Documentation

#### Internet sites for Patent Search

| Name of country   | Country Code | Nature of Information Carrier | Range                        |
|---|--------------|-------------------------------|------------------------------|
| United State <i>of</i> America                                | US CD-ROM    | Microfilm 1993 Onwards        | 1951-1992                    |
| United Kingdom  | GB EP        | Microfilm CD-ROM              | 1952-1992<br>1979to1998      |
| European Patent Office<br>(16 European Countries as Members)  |              | iiofiIm CD- ROM               | 1978-1984<br>1985 Onwards    |
| Patent Co-operation Treaty (PCT)<br>(98 Countries as Members) | WO           | CD-ROM                        | 1978 Onwards                 |
| Australia   | AU           | Microfilm CD-ROM              | 1975 to 1998<br>1999 Onwards |
| India   | IN           | Paper                         | 1912 Onwards                 |

|       |           |        |                                      |
|-------|-----------|--------|--------------------------------------|
| Japan | <b>JP</b> | CD-ROM | 1994 Onwards<br>(In Japanese<br>Lge) |
|-------|-----------|--------|--------------------------------------|

### Patent Search Tools

| SL No | Name of the Tools                          | Nature of Carrier | Contents   | Range        |
|-------|--|-------------------|--|--------------|
| 1.    | EPIOOS-INPADOC<br>IIMC&IMAI<br>IVIL_INffl) | Microfiche        | Bibliographic data including title of Patents from 86 countries        | 1968 to 1998 |
| a     | <i>US-APUSICAPS</i>                        | CD-ROM            | Bibliographic data and Abstract of US Patents                          | 1975 Onwards |
| 3.    | CASSIS-BIB                                 | CD-ROM            | Bibliographic data of US Patents                                       | 1969 Onwards |
| 4.    | GLOBAL PAT                                 | CD-ROM            | Bibliographic data and Abstracts if CF-I, DE, EP, FR, GB. USWO Patents | 1971 to 1997 |
| 5.    | ESACEIACCESS                               | CD-ROM            | Bibliographic data Abstract of EPO Patents and PCT applications        | 1978 Onwards |
| 6.    | INDIA PATENTS                              | Paper             | Bibliographic data and Abstract! Claims of Indian Patents              | 1962 Onwards |
| 7.    | GAZETTE OF INDIA                           | Paper             | Notifications issued by Patent Office's regarding Indian Patents       | 1963 Onwards |
| 8.    | PATENT ABSTRACTS OF JAPAN                  | CD-ROM            | Bibliographic data and Abstracts of Japanese Patents                   | 1976 Onwards |

### Internet Sites for Patent Search

<http://pk2id.delhi.nic.in>

<http://www.patents.ibm.com>

<http://www.uspto.gov>

<http://www.library.ubc.ca/patscan/>

<http://www.pic.moc.go.th/search5.html>:

<http://pctgazette.wipo.int>

**Requirement for Filing A Patent Application:**

1. Application form in triplicate
2. Provisional or complete specification in triplicate accompanied by drawing if any.
3. Particulars regarding filing in foreign countries , in duplicate
4. Priorities document
5. Power of Attorney
6. Abstract of the Invention
7. Filing Fees

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