

**Course Name- B.A.LL.B 4<sup>th</sup> sem / LL.B 2<sup>nd</sup> sem**  
**Subject- Cyber Law**  
**Teacher- Mrs. Aakanksha**  
**Concept- Patent (Indian position)**

## **Introduction**

A patent is a form of intellectual property that gives its owner the legal right to exclude others from making, using, selling and importing an invention for a limited period of years, in exchange for publishing an enabling public disclosure of the invention. In most countries patent rights fall under civil law and the patent holder needs to sue someone infringing the patent in order to enforce his or her rights. In some industries patents are an essential form of competitive advantage; in others they are irrelevant.

The procedure for granting patents, requirements placed on the patentee, and the extent of the exclusive rights vary widely between countries according to national laws and international agreements. Typically, however, a patent application must include one or more claims that define the invention. A patent may include many claims, each of which defines a specific property right. These claims must meet relevant patentability requirements, such as novelty, usefulness, and non-obviousness.

Under the World Trade Organization's (WTO) TRIPS Agreement, patents should be available in WTO member states for any invention, in all fields of technology, provided they are new, involve an inventive step, and are capable of industrial application. Nevertheless, there are variations on what is patentable subject matter from country to country, also among WTO member states. TRIPS also provides that the term of protection available should be a minimum of twenty years.

## **Definition**

The word patent originates from the Latin *patere*, which means "to lay open" (i.e., to make available for public inspection). It is a shortened version of the term *letters patent*, which was an open document or instrument issued by a monarch or government granting exclusive rights to a person, predating the modern patent system. Similar grants included land patents, which were land grants by early state governments in the US, and printing patents, a precursor of modern copyright.

In modern usage, the term patent usually refers to the right granted to anyone who invents something new, useful and non-obvious. Some other types of intellectual property rights are also called patents in some jurisdictions: industrial design rights are called design patents in the US, plant breeders' rights are sometimes called plant patents, and utility models and *Gebrauchsmuster* are sometimes called petty patents or innovation patents.

The additional qualification *utility patent* is sometimes used (primarily in the US) to distinguish the primary meaning from these other types of patents. Particular species of patents for inventions include biological patents, business method patents, chemical patents and software patents.

## **History**

The history of Patent law in India starts 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 microorganisms. 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 have been also introduced.

An invention relating to a product or a process that is new, involving inventive step and capable of industrial application can be patented in India. However, it must not fall into the category of inventions that are non-patentable as provided under Section 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 Grant of a Patent in India**

After filing the application for the grant of patent, a request for examination is required to be made for examination of the application by the Indian Patent Office. After the First Examination Report is issued, the Applicant is given an opportunity to meet the objections raised in the report. The Applicant has to comply with the requirements within 12 months from the issuance of the First Examination Report. If the requirements of the first examination report are not complied with within the prescribed period of 12 months, then the application is treated to have been abandoned by the applicant. After the removal of objections and compliance of requirements, the patent is granted and notified in the Patent Office Journal.:

### **Filing of Application for Grant of Patent in India by Foreigners**

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 routes 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 twelve months from the date on which the basic application was made in the Convention Country i.e. 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.

### **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.

### **Grounds for Opposition**

Some of the grounds for filing pre-and post-grant opposition are as under:

- Patent wrongfully obtained;
- Prior publication;
- The invention was publicly known or publicly used in India before the priority date of that claim;
- The invention is obvious and does not involve any inventive step;
- That the subject of any claim is not an invention within the meaning of this Act, or is not patentable under this Act;
- Insufficient disclosure of the invention or the method by which it is to be performed;
- That in the case of a patent granted on convention application, the application for patent was not made within twelve months from the date of the first application for protection for the invention made in a convention country or in India;
- That the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention; and
- That the invention was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

### **Term of Patent**

The term of every patent in India is twenty 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 twenty years begins from the priority date.

### **Payment of Renewal Fee**

It is important to note that a patentee has to renew the patent every year by paying the renewal fee, which can be paid every year or in lump sum.

### **Restoration of Patent**

A request for restoration of patent can be filed within eighteen months from the date of cessation of patent along with the prescribed fee. After the receipt of the request, the matter is notified in the official journal for further processing of the request.

### **Patent of Biological Material**

If the invention uses a biological material which is new, it is essential 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 located at Chandigarh is known as Institute of Microbial Technology (IMTECH).

### **What are the Rights granted by Patent?**

If the grant of the patent is for a product, then the patentee has a right to prevent others from making, using, offering for sale, selling or importing the patented product in India. If the patent is for a process, then the patentee has the right to prevent others from using the process, using the product directly obtained by the process, offering for sale, selling or importing the product in India directly obtained by the process.

Before filing an application for grant of patent in India, it is important to note "What is not Patentable in India?" Following i.e. an invention which is (a) frivolous, (b) obvious, (c) contrary to well established natural laws, (d) contrary to law, (e) morality, (f) injurious to public health, (g) a mere discovery of a scientific principle, (h) the formulation of an abstract theory, (i) a mere discovery of any new property or new use for a known substance or process, machine

or apparatus, (j) 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, (k) a mere arrangement or rearrangement or duplication of known devices, (l) a method of agriculture or horticulture and (m) inventions relating to atomic energy, are not patentable in India.

### **Maintainability of Secrecy by the Indian Patent Office (IPO)**

All patent applications are kept secret up to eighteen months from the date of filing or priority date, whichever is earlier, and thereafter they are published in the Official Journal of the Patent Office published every week. After such publication of the patent application, public can inspect the documents and may take the photocopy thereof on the payment of the prescribed fee.

### **Compulsory Licensing**

One of the most important aspects of Indian Patents Act, 1970, is compulsory licensing of the patent subject to the fulfillment 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 fulfillment of following conditions, i.e.

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

It is further important to note that an application for compulsory licensing may be made by any person notwithstanding that he is already the holder of a license under the patent.

For the purpose of compulsory licensing, no person can be stopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not available to the public at a reasonable price by reason of any admission made by him, whether in such a licence or by reason of his having accepted such a licence.

The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price, may order the patentee to grant a licence upon such terms as he may deem fit. However, before the grant of a compulsory license, the Controller of Patents shall take into account following factors:

- The nature of invention;
- The time elapsed, since the sealing of the patent;
- The measures already taken by the patentee or the licensee to make full use of the invention;
- The ability of the applicant to work the invention to the public advantage;
- The capacity of the applicant to undertake the risk in providing capital and working the invention, if the application for compulsory license is granted;
- As to the fact whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions;
- National emergency or other circumstances of extreme urgency;

- Public non commercial use;
- Establishment of a ground of anti competitive practices adopted by the patentee.

The grant of compulsory license cannot be claimed as a matter of right, as the same is subject to the fulfilment of above conditions and discretion of the Controller of Patents. Further judicial recourse is available against any arbitrary or illegal order of the Controller of Patents for grant of compulsory license.

### **Infringement of Patent**

Patent infringement proceedings can only be initiated after grant of patent in India but may include a claim retrospectively from the date of publication of the application for grant of the patent. Infringement of a patent consists of the unauthorized making, importing, using, offering for sale or selling any patented invention within the India. Under the (Indian) Patents Act, 1970 only a civil action can be initiated in a Court of Law. Further, a suit for infringement can be defended on various grounds including the grounds on which a patent cannot be granted in India and based on such defense, revocation of Patent can also be claimed.

### **SOFTWARE & IT Patents**

The members of our Software and IT team draw upon their extensive industry experience in diverse fields and prosecute patents in all aspects of computer software and IT applications such as:

- Internet
- Data processing
- Computer system architecture
- Internet commerce
- Location based services
- Network security
- Search engine technology
- Data communication
- Social networking
- Web services
- Bioinformatics
- Biometrics
- Database systems
- Electronic design automation
- Smart phone applications
- Cloud computing and applications

Our software and IT team comprising of patent attorneys, registered patent agents and patent associates work in tandem to helps international companies, domestic inventors and foreign law firms to secure their patent rights in India.

### **The Indian Patent Law**

While the basic criteria for patentability viz. Novelty, Inventive Step and Industrial Applicability remains the same, the relevant provision under the Indian Patent Law that

governs patentability of software related innovations is Section 3(k) which specifically states that “computer program per se” is not a patentable subject matter.

Indian Patent office released Draft Guidelines for Examination of Computer Related Inventions (CRI’s) in 2013 with a purpose to provide some clarity around patentability of computer related inventions. The guidelines advise Examiners to carefully consider how integrated novel hardware is with the software and emphasize that any general purpose known computer does not meet the requirements of the law and is not patentable unless there is some hardware associated with it. The guidelines also emphasize that the hardware portion has to be something more than a general-purpose machine.

### **Current Scenario in India**

Indian position has been quite similar to EPO over the patentability of software related inventions. Unlike USPTO, India does not have a very liberal approach towards software patenting.

However, in a recent judgment (Intex Technologies (India) Ltd v. Telefonaktiebolaget LM Ericsson), the Delhi High Court dismissed the arguments of the defendants on the count of the non-patentability of computer programmes under Sections 3(k). This case has laid a position of law regarding the patentability of software which is exact opposite to the draft guidelines. Justice Manmohan Singh in his order stated “thus, it [...] appears to me prima facie that any invention which has a technical contribution or has a technical effect and is not merely a computer program is patentable”.

Thus, the Act and the guidelines have clearly excluded “computer programmes per se” from the realm of patentable subject matter in India. However, in practice Indian Patent office has been granting patents to what would normally be perceived as software innovations. We therefore may say that the approach towards computer implemented inventions in India is somewhat closer to the position of EPO, where for a patent to be granted for a computer-implemented invention, a technical problem has to be solved in a novel and non-obvious manner.

### **Software/IT Industry**

The Indian IT industry has witnessed tremendous growth in the past couple of decades, resulting in large IT companies and inceptions of several promising start-ups. Today India is home to some of the finest software companies in the world. The software companies in India are reputed across the globe for their efficient IT and business related solutions.

- The largest private sector employer in India
- Bangalore continues to rule the software and IT hub followed by Hyderabad, Chennai, Delhi NCR, Pune, Kolkata, Chandigarh, Mohali and Mysore.
- The IT industry accounts for 6 percent of India's GDP
- Earned revenue of over US\$ 109 bn during the Financial Year 2014
- USA accounts for about 53% of the export revenue followed by the UK and Europe, with 15% and 10% respectively
- At the end of Financial Year 2014, India's share in the global outsourcing market stood at 55%
- Expected to maintain a growth of 13-15% in Financial Year 2015
- Adopting the global delivery model and setting up development centers in Latin America, south East Asia and European countries.

### **Trends in IT patent filing and top IT companies**

As per recent study maximum patents have been filed in data processing (31 per cent), computer system architecture (26 per cent), data communication work (17 per cent) and application of IT in other sectors (15 per cent).

### **Top Indian Applicants for Patents in field of IT**

- Tata Consultancy Services Limited
- Samsung R&D Institute India
- Infosys Limited
- Samsung India Software Operations Private Limited
- Wipro Limited
- Indian Institute of Technology (Collective)

### **Top Foreign Applicants for Patents in field of IT**

- Qualcomm Incorporated
- Telefonaktiebolaget LM Ericsson
- Samsung Electronics Co. Ltd
- Sony Corporation