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How to Obtain a Patent in India: A Critique

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ABSTRACT

Patent works as a shield for a person's new invention as it protects it from being manufactured, imported, and sold by someone else and a patent is granted for a fixed period of time by the government i.e. 20 years. If someone has made a new invention it is very necessary to get it patented because it gives one ability to protect his invention from being manufactured and sold without his/her consent from the date of issue of the patent. A patent provides the inventor exclusiveness as the inventor has the sole right of getting or obtaining profits from his invention for a period of 20 years. Patents adhere to a priority system which means that one who will get a patent for an invention first will have superior rights than subsequent patent holders. A registered patent holder has the power to grant a license to the people who want to use his invention in exchange of a royalty or fee and this feature of patent encourages people to become innovative and undertake more inventions because there is no better incentive than money which they can earn from licensing their patents.

In its very inception of the research paper, the authors have dealt with the meaning and types of patents. Further, the authors have delved deep into understanding the evolution and rise of the patent regime in India. In the subsequent chapter, the process of obtaining a patent has been analyzed. The fourth part deals with the renewal process of a patent. In the fifth part, the authors have discussed about the restoration of a lapsed patent. The paper has been concluded with a critical analysis of the patent regime in India, and suggestions to improve the same.

I. INTRODUCTION

“The patent system added the fuel of interest to the fire of genius.” – Abraham Lincoln³

What is a Patent?

When a sovereign authority grants a property right to an inventor, that particular right is known as a patent. The right provided to the inventor is an incorporeal right and it is provided

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³ *President Lincoln and the “Fire of Genius”*, INTELLECTUAL VENTURES (May 17, 2020, 7:02 PM), <https://www.intellectualventures.com/buzz/insights/president-lincoln-and-the-fire-of-genius>.

to protect the invention from being manufactured and sold by someone else. Furthermore, the right is granted for a limited period of time.⁴ Patent provides exclusive rights to an inventor for 20 years. There are certain criteria that need to be fulfilled to become eligible for getting a patent. Patent is given to a person who invents or discovers any novel and useful process, machine, manufactures or composes any new matter, or produces any new and useful improvement thereof. Generally, there are three types of patents:

- **Utility Patent:** It aims to protect the invention of any novel and useful process, article of manufacture, machine or a composition of matter. In other words, a utility patent is an exclusive right given to an inventor for a process per se, meaning thereby, that it does not grant protection to products.
- **Design Patent:** It aims to safeguard original, new, and ornamental design. For illustrations: Ornamental design of furniture, jewellery, etc.
- **Plant Patent:** A plant patent aims to prevent the key features of a unique plant from being copied or stolen. It is given to safeguard the inventions of those producers who invent a new kind of plant which has the capability of reproduction.⁵

Patent work as an incentive for the people to invent more things, without fearing, that it will get stolen. If patents would not have come in picture, big havoc would have been caused because many companies that have not conducted enough research could copy the invention of any other company which had researched for that invention. However, patent being an intellectual property right prevents this from happening. Patents aids in increasing the profitability of a company by protecting their invention from being stolen. Many corporations across the globe, also use the patent as their bragging right to brag about their innovativeness.

II. Rise of patents in India

The awareness of India towards protecting their IPR's has witnessed an upward trend in recent years as more than 2000 patent applications were filed from India in 2018 at office of World Intellectual Property Organization (hereinafter referred to as 'WIPO') which is about 27% more than the stats of financial year 2017 and an increase of 27% is the highest growth rate for any country. In 2017-18 around 50000 patent applications were filed within India and these huge numbers of patent applications filing have further improved India's ranking in the

⁴ *Patents*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (May 17, 2020, 7:10 PM), <https://www.wipo.int/patents/en>.

⁵ *Patent*, INVESTOPEDIA (May 17, 2020, 8:14 PM), <https://www.investopedia.com/terms/p/patent.asp>.

US chamber of commerce's international Intellectual Property Index.⁶

If we talk about the financial year of 2019, India saw a rise of more than 50% in patent filings from the financial year of 2017. 15,284 patents were granted in the year 2018-19 which are approximately 50% more than the patents granted in the year 2016-17 i.e. 9847.⁷ The government is also taking positive steps to clear all the pending patent applications at a much faster rate by creating new posts to increase the manpower and by amending the patent rules to make the entire procedure simpler for disposal of patent applications. Most importantly, the government is adopting various information technology measures to aid the process of patent granting by making the process speedier and at the same time ensuring quality standards. With the help of the above-mentioned measures, acquiring a patent has become possible within 1 year of filing. As a matter of fact, The Indian patent office is processing foreign patent permits more rapidly so that Indian start-ups can also swiftly receive patents overseas.

Indian Start-ups are filing more patents than ever because Indian government has started providing a range of incentives to the innovators so as to encourage them to file patent applications. Some of the many incentives provided by the Union are - attractive tax rebates and speedier documentation processing services. A big reason why many small start-ups are reluctant to file patent applications is the huge cost associated with the entire patent filing procedure. If an individual files a patent application in India, he/she has to pay \$920-\$1530 as pre-filing cost and a whopping \$2300 as first action cost and another \$2300 as maintenance cost which is quite a big amount for an early aged start-up to afford. To address the problem, the government of India through its start-up India initiative is providing an 80% rebate on patent filings to Indian start-ups thereby, reducing the patent filing fee to a mere amount of \$25.⁸ The cost is reduced in order to encourage more and more people to file patent applications. Awareness about patent protection is rising, as many IP lawyers through their counseling and services are making more and more people aware of patents. Furthermore, if any start-up or small enterprise has a patent, then their credibility is ensured in the eyes of the potential investors and they rest their confidence in the respective organization having a patent as they start to believe in that particular organization's innovativeness.

⁶ R.K. Dewan and Co., *Innovative India: Rise in Patent filings in India*, MONDAQ (May 17, 2020, 8:36 PM), <https://www.mondaq.com/india/patent/813898/innovativendia-rise-in-patent-filings-in-india>.

⁷ *More than 50% rise in patents granted in FY19 over FY17*, THE INDIAN EXPRESS (May 17, 2020, 9:28 PM), <https://indianexpress.com/article/business/more-than-50-per-cent-rise-patents-granted-in-financial-year-5827263/>.

⁸ Sindhuja Balaji, *India's startups are filing more patents than before-Here's why*, FORBES (May 18, 2020, 10:33 AM), <https://www.forbes.com/sites/sindhujabalaji/2017/10/16/indias-startups-are-filing-more-patents-than-ever-before-heres-why/#3c93eec369f5>.

III. Process of getting a patent in India

On practical lines, getting a patent in India is a tedious task due to the time involved in the entire patent procurement process. As a matter of fact, it takes almost 3 to 5 years to get a patent in India, reason being the bureaucratic delays involved in the already lengthy patent granting process. In order to procure a patent in India, one needs to adhere to the below-mentioned steps:⁹

- 1) The very first step to be followed by an inventor takes place before he/she applies for a patent. This initial step is decisional in nature. It involves making the decision between two choices, i.e., whether to hire a professional or deal with the entire patent procedure on his own (Inventor), it can also be termed as *step zero*. The discretion to hire a professional vest solely with the inventor, however, it is highly recommended that one should hire a professional because they have rich experience in the field of patent technology.
- 2) The second step is more of a preliminary step. This step calls for adequate research to be undertaken before filing a patent application in order to check whether the invention done by someone is capable of being patented or not. Basically this step tells an inventor about the chances of their invention to obtain a patent. Most importantly, this preliminary enquiry prevents a person from filing a patent for something that is already in existence.
- 3) Once the application is drafted it needs to be filed and if one files a provisional application then one shall file the complete application within 12 months of the provisional filing date. If an individual wants to protect his/her invention in foreign nations, then he/she can extend the effect of the patent protection to foreign nations by filing a convention application in Paris convention members in each nation where he/she wants to seek patent protection or by adhering to the Patent Cooperation treaty (PCT) system one can reserve his/her rights in 140 member countries.

Each patent application must include the following forms:

A. **Form 1** - Application for grant of a patent

B. **Form 2** - Provisional/Complete Specification¹⁰

⁹ Vikram, *Patent Process in 7 steps-from filing to grant in India*, ZATALYST (May 18, 2020, 11:03 AM), <https://www.zatalyst.com/patent-procedure-india/>.

¹⁰ The Patents Act, 1970, No. 39, Acts of Parliament, 1970, § 7(4).

- C. **Form 3** - Statement and undertaking regarding a foreign application under section 8 of the Patent Act (only required if corresponding application is filed in any other country)
- D. **Form 5** - Declaration as to inventorship¹¹ (only to be filed along with complete application)
- E. **Form 26** - Form for authorization of patent agent (only required if one is the using help of a professional patent agent as discussed in the first step)
- F. **Form 28** - To be submitted by start-up or small entity (only if one is registering with the status of a start-up or a small entity)
- G. **Priority Documents** - Only required in case someone is claiming priority from a foreign patent application and entering India.
- 4) The next step is publication as an application is kept secret until it is published. Publication is an automatic process and no request is required to be made for publication. However, a request for early publication can be made by filling form 9 which shall reduce the publication time from 18 months to a mere 1 month. The privileges and rights of a patent holder commence from the date of publication. There are certain circumstances mentioned in the Indian Patent Act, 1970 under which a patent application may not be published or kept secret:
- Secrecy directions are imposed on an invention that falls in a category the publication of which could be against the interest of the nation.
 - Where the complete application was not filed within 12 months of the filing of the provisional application.
 - Request of withdrawal necessarily has to be made 3 months prior to publication, in standard patent filing process it is 15 months from the date of priority.
- 5) Before granting a patent, it is thoroughly examined. Process of examination does not commence automatically, and a request for the same needs to be made by the applicant by filling form 18 and the examination process follows the “*first come first serve principle*” each request is queued subsequently after the one made earlier and this process can also become fast track by filling form 18A which is an expedited examination and it is only available if an applicant is a start-up or has chosen Indian patent office as international search authority during their international application.

¹¹ The Patents Act, 1970, No. 39, Acts of Parliament, 1970, § 10(6).

- 6) After the request the application lands with the examiner, who checks the application and examines whether the application is in accordance with the patent rules of India. In other words, the examiner is entrusted with the duty to examine whether the application is satisfying the patentability criteria or not. After that, a first examination report (hereinafter referred to as 'FER') is prepared by the examiner. Ultimately, The FER is forwarded to the applicant. All the grounds of objection are mentioned in the FER. The time period to file an application for the grant after issuance of FER is 6 months which may be extended for a further duration of 3 months by filling a form of extension i.e. Form 4.
- 7) Once a patent application overcomes all the objections, then ultimately, a patent is granted and published in the official gazette.

IV. Renewal Process of a Patent

After a patent is granted it needs to be renewed after a fixed duration of time by paying the renewal fee. The Indian Patent Act has mandated all the patent holders to pay maintenance or renewal fees to keep their patent in force for the entire term i.e. 20 years from the date of filing of the application. The first renewal fee is payable after the expiry of the second year of the patent which is the start of the third year of patent and subsequently, before the expiration of the previous year of patent.¹² For instance: payment of renewal fee for the ninth year shall be made at the expiration of the eighth year. There is no separate form for renewal. A patentee can pay the renewal fee by making a request to the patent controller. If the patent holder does not pay the renewal fee in the prescribed time, then a late fee is charged from the patent holder as a sort of fine.

V. Restoration of a Lapsed Patent

Restoration of a lapsed patent is a very time-consuming and expensive process. For restoration, form 15 (which is required to be filled for the restoration of the patent as per the Patent Act) must be filed within 18 months from the expiry of patent and a month's extension may be granted depending upon the sole discretion of the controller whether to grant the extension or not. In addition, to form 15, substantial evidence must also be provided in order to establish that the non-payment was intentional. Evidence may be adduced in the form of a deed, document, letter, etc. The examination of the evidence shall be conducted by the controller.

¹² Dezan Shira and Associates, *Patent Renewal in India-Fee and Procedure*, INDIA BRIEFING (May 19, 2020, 10:25 AM), <https://www.india-briefing.com/news/patent-renewal-india-fee-procedure-17752.html/>.

It is important to note that, a restoration application can be opposed by filing form 14 with fee within two months of the date of the publication of the application and both of them will be heard simultaneously in front of the controller and the decision of the controller will be final.

VI. Conclusion

While the Patent and Intellectual property sector have grown a lot in India and the government is also making various reforms to make the patent system less complex and speedier, however, there are still many challenges faced by the patent system in India.

After becoming a member of the World Trade Organisation (WTO) and thereby a signatory of TRIPS, India's IPR regime witnessed a sharp shift to product patent from process patent which made it very difficult for pharmaceutical and food products to procure patent. As per section 3d of Patent Act of 1970, Multinational corporations (hereinafter referred to as 'MNC's) cannot evergreen their patent by incorporating minor changes; they have to show some "*Therapeutic Efficacy*". This provision poses a serious challenge for all the MNC's operating in India or willing to undertake operations in India. With the provision of computer licensing, India can mandate many companies to produce in reserve a product irrespective of its patent holder's consent. This may result in huge losses to the patent holder.

Another hurdle in the attainment of an efficient Patent regime in India is the lack of awareness and respect for IPRs and access rules. Lack of efficient application and control of these regulations further adds to an already inefficient patent regime.

These issues can be solved by formulating comprehensive Patent policies for various sectors and by training more and more people in IPR Management. Access and training should be provided so that one may learn to handle patent information databases.

Most importantly, keeping in view of India's large agricultural population, a patent cell should be created at ICAR (Indian Council for Agricultural Research) to give patent literacy to its scientists in order to formulate a clear cut IP policy at the ground level.
