

Comparing the Evolution of Patent System with the Current Patent Regime: With Emphasis on the Rationale with which the Patent System was Introduced in India

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Abstract

Introduction to Intellectual Property: The term “intellectual property” refers to those cluster of legal doctrines that regulates the use of different sorts of ideas and insignia. Intellectual Property gives negative as well as positive rights to the holder, thus only owner, has the right to exploit the subject-matter and stops others to exploit it in any manner whatsoever. **Jurisprudence of Intellectual Property Rights:** As we know the meaning of jurisprudence is ‘Science of Law’. The Social and Economic benefits associated with the Intellectual Property (hereinafter be referred as “the I.P”) which helped society to grow and inspire to do innovation and ultimately lead to the industrial revolution not only in western world but in whole world at large. Thus some theories linked to the literature of economic theory are like, Natural Theory which treats everything in nature belongs to every human being, to which Justice Burger held in *Diamond v. Chakrabarty*, that Chakrabarty deserved a patent for his bacterium because it was his own handiwork, and not “a manifestation of nature, free to all men and reserved exclusively to none”. Locke’s Labour Theory which relates to the property belongs to such person labours upon natural resources available to every individual. The rationale for the I.P is to provide necessary incentive to the holder and for Patents its’ to provide necessary incentive for putting labour to bring the new technology to the society for its betterment and growth. The other theories related to sociological and economic jurisprudence of IP are Incentive theory i.e. incentive to innovate, incentive to invent; Prospect theory i.e. for post invention innovation, especially in the Patents.

Keywords: Jurisprudence, IPR, patent, trips, copyright

INTRODUCTION OF PATENTS IN INDIA

History of Patent system in United Kingdom dates back to the 15th Century, when the Crown started giving grants and privileges to the manufacturers and traders, which further developed with enactment of the Patents Act of 1902, which instituted a limited investigation into the novelty of the invention before a patent was granted [1]. India was one of the British Colony during 19th Century

during which the British introduced their own system of Patents in India by Act VI of 1856 for the protection of Inventions, which granted exclusive privilege to the inventors for a period of 14 years [2] and this Act was based on the British Patent Law of 1852. Subsequent to this Act VI of 1856 for the protection of Inventions was repealed and new Act of 1859 came into effect which granted exclusive rights to the inventor to sell, make or use their inventions in India. The main purpose of the Crown to introduce this Act of 1859 is to capture the Indian market by the British patent holders and to make importation of technologies

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Received Date: June 14, 2021

Accepted Date: October 23, 2021

Published Date: December 30, 2021

Citation: Varun Mudgil. Comparing the Evolution of Patent System with the Current Patent Regime: With Emphasis on the Rationale with which the Patent System was Introduced in India. *Journal of Intellectual Property Rights Law*. 2021; 4(2): 1–4p.

and inventions difficult for the Indian subjects. The Patents and Designs Act was enacted in 1872 and the Protection of Inventions Act was enacted in 1883, then both these acts were consolidated into the Indian Patents and Designs Act, 1911. The term of Patents granted under the Act of 1911 was of 16 years after the filing date, which is extendable to 7 years in some cases [3]. Generally, all the Laws pertaining to the Patents which were enacted by the British in India allowed the product patents in all fields of technology, including pharmaceuticals [4].

ENACTMENT OF THE PATENTS ACT, 1970 IN INDIA

Though, the Indian Government started the process of amending the Act of 1911 suitable to the growth of India, accordingly the Government of India constituted a committee under the chairmanship of Justice (Dr.) Bakshi Tek Chand, a retired Judge of Lahore High Court in 1949 [5]. The Committee submitted its' interim report on 4th Aug, 1949 and suggested some amendments in the line of United Kingdom Act of 1919 and 1949 like endorsement of the patent with words '*licences of right*', working of inventions and compulsory licence/revocation.

The Government of India appointed Justice N. Rajagopala Ayyangar Committee, in 1957, to examine the revision of the Indian Patent Law [6]. Based on the report of this committee the Patents Act, 1970 got enacted by the Indian Parliament. The Rules based on this Act passed in 1971 and the Act along with the Rules came into force in 1972. This Indian legislation stood firm at the times despite the Super and Special 301 and threats from United States of America [7].

Post TRIPS Amendments of 1999, 2002, 2005 in the Patents Act, 1970

Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) was one of the most extensively debated issue in the Uruguay round of multilateral trade negotiations, which was ultimately ended up at Marrakesh in 1994 [8]. Thus as a result of this the commitments of TRIPS Agreement compelled the Indian Parliament to amend the provisions of the Patents Act, 1970 in 1999, 2002 and 2005. Initially facility of "mail-box" applications were introduced for the filing of pharmaceutical patent applications and the applicants were given EMR (Exclusive Marketing Rights) for a period of 5 years or till the product patent granted or the patent application rejected. In Amendment of 2002 most of the provisions of the Patents Act, 1970 was brought in terms of the TRIPS Agreement i.e. the term for Patent Protection increased to 20 years from the date of filing, Amendment of 2005, offered patent protection to pharmaceutical products.

Relevancy of the Rationale with which the Patent System was introduced in India with the present status of Patent Law

At the outset before having a sound patent granting system in a country, a country must be technologically and scientifically advanced to work the invention [9]. In India the Patent System was introduced by the British Government by introducing the Act VI of 1856 for the protection of Inventions, which led to the enactment of the Indian Patents and Designs Act, 1911. The main purpose of the British Government was to secure the Indian market for their British inventors and subjugate the Indians by capturing the technological growth, as majority of the Patents were granted to the foreign inventors.

Even after the Independence of India in 1947, the drug and pharmaceutical industry were in very bad shape due to the direct result of the Indian Patents and Designs Act, 1911. As the 1911 Act provided the '*Product Patent*' to the inventors, the Indian pharmaceutical companies were prevented to make and manufacture the reverse-engineered drugs at very cheap prices to the Indian market. Most of the product patents were controlled by the Multinational Companies and Indian generic drug manufacturing were in bad shape. In a case of *Farbwerke Hoechst & Bruning Corp. v. Unichem Lab* [10], Hon'ble High Court of Bombay held that that the defendant had wrongfully infringed upon their patent by manufacturing, preparing, and selling Tolbutamide, an anti-diabetic drug, by the use of the invention disclosed in the plaintiffs' patent.

Process Patents vs Product Patents

Does restricting the patents to process claims promotes innovation and encourages invention?

Certainly, at the time when India was a under-developed economy and struggling to progress in the areas of science, technology and research, changes made by the Patents Act, 1970 to grant only process patents was the need of the hour. As the process patent conferred an exclusive right on the patentee to vend the product made by the patented process which should possess the patentable characteristics of novelty and subject matter. The product which an individual could get with employing different process can apply for the process patent, as the product patent granted to the individual creates a monopoly and hinders the growth of economy and innovation.

Thus, to control the complete monopoly of the patented product, the Government of India adopted the Process Patent method of granting patent for the inventions.

‘Licences of Right’

The endorsement of ‘Licences of Right’ means granting automatic compulsory licence for non-working of patented inventions by after the lapse of 3 years of non-working of the invention, by the Central Government. The reason of introducing such type of provisions is to stop the foreign patents in this country and making it compulsory for the inventors to use, manufacture the inventions in this country for which cooling off period of 3 yrs were given to the inventors after the date of sealing of patent. This provision was deleted by Amending Act of 2002 and strengthened the provisions of Compulsory Licences in the Patents Act, 1970, by introducing provisions of Public health emergency, etc. to grant the Compulsory Licences.

Post TRIPS Agreement Changes in the Patents Act, 1970

Invention

The amendment of 2005 in Section 2(1) (j) [11] amending the definition of invention. Now the invention means a new product or process involving an ‘inventive step’ and ‘capable of industrial invention’. Indian legislature has tried to add two new criteria in addition to non-obviousness requirement.

Section 3(d) [12] of the Patents Act, 1970

Amendment of this section by 2005 Amending Act, to make Indian Patent law compliant with the Article 27 of TRIPS Agreement was a bold legislative move of the Indian Parliament to stop the ‘evergreening’ of Patents [13].

Pre-Grant and Post-Grant Opposition

To stop the menace of Non-Practicing Entities (NPE) which is termed as “Patent Trolling” [14], by amending section 25 [15] by Amending Act of 2005, adding post-grant opposition in the Act which discourages the patent trolling activities.

Bolar Exemption

Five types of protection given to the Patent holder i.e. making, using, constructing, selling and importing of their patented invention. The rule of international exhaustion of patent rights. The Amendment Act of 2005 inserted this provision under section 107A(a) in the Patents Act [16], by adding “selling or importing”. Which means once a patented drug is sold with the patentee’s approval outside the Indian Territory, the subsequent importing of that patented article in India will not amount to the infringement of that patented drug in India. This has strengthened the position of India in making access to the expensive drugs to the people of this country, which couldn’t afford otherwise. Even Article 6 of the TRIPS Agreement is also silent on the issue of international exhaustion of Intellectual Property Rights.

CONCLUSION

With the passage of time the Indian Patent Law has gone through many changes i.e. Since the Act VI of 1856 to the Present Patents Act, 1970. Grant of Product Patent was introduced by British when India was its colony. Then eventually time period for the grant of patent was also increased from 14 years to 20 years (present). When India was struggling very hard to come out of the shackles of some many years of subjugation by Foreigners, Islamic Rulers etc., and the need for Patent Law reformation was needed for the economic progress of the country as well as for the development of science and technology. That is what Justice Ayyangar Committee suggested to abolish granting Product patent and amended the Patent Law to grant only the Process patent. As India was an Developing and Indian Pharmaceutical industry was badly hit by the monopoly granted to the Multinational Companies to manufacture the patented drugs. After 1970 the generic drug companies started flourishing. Post TRIPS Agreement, Indian Patent Law needed to be complied with the provisions of TRIPS. India made those changes in its patent law by way of three amendments i.e. 1999, 2002, and 2005, thus made a mark in the World by not only amending the provisions of Patents Act 1970 to the tune of TRIPS Agreement but advanced its basis for granting patents to the inventions i.e. for new process or product. The introduction of new definition to the 'invention', post-grant opposition, granting of first compulsory licence [17] for not working of the patent is reflected to the world, India's strong Intellectual Property Laws and its evolution with the changing times.

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