

Intellectual Property Law: A Brief Introduction

IPR laws in India

India has done so far, a lot to protect and manage Intellectual Property Rights.

Here Intellectual property is classified into Patents, Trademarks, Copyrights, Industrial Design and Geographical indication.

These intellectual properties except Copyright are administered by the Comptroller General of Patents, Designs and Trademarks which is under the control of the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry. Copyrights and its related issues are regulated by the Ministry of Human Resource and Development.

India is a signatory to Trade Related Aspects of Intellectual Property Rights (TRIPS), which is the most vital and compendious agreement on Intellectual Property Rights.

It lays down minimum standards for protection and enforcement of IP rights in member countries which are required to promote effective and adequate protection of IP rights with a view to curb impediments to international trade.

Copyrights:

To begin with copyrights, The Copyrights Act, 1957, regulates it. Registering for copyright is done through the procedure established by this enactment.

In India, copyrights can be availed for artistic works, dramatic, musical, literary works.

Some major amendments were made in the Act in the year 2012. Registration under the Copyright act works as an evidence that the person in the register is the original owner or author of the work.

Infringement of copyright avails the owner to some remedies like damages and injunction of the activity.

Registration of Copyright protects the owner of the work from copying of his work without having prior consent from him. Copyright protection commences the moment a work is created, and its registration is optional.

The protection granted by this statute is not limited only to India but it extends protection in several countries, this is by the virtue of Berne Convention of which India is one of the members. The period of allotment of copyright varies for different type of works, like for literary and musical it extends to lifetime of author plus fifty years. Anonymous works and works of International organization are given copyrights for fifty years from date of its publication.

Trademark:

The Trademarks Act of 1999 govern registration of Trademarks in India.

This act was amended as to make it TRIPS compliant. A registry of trademarks has been established by the act to register and grant protection of the trademarks, which is headed by the Registrar of Trademarks. “Mark” as defined under the Trademarks Act includes “a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or, combination of colours, or any combination thereof.”

Any mark, which is fit for categorizing as a graphical representation and in some manner indicates its connection with trade, is entitled to get registered as trademark.

The Act facilitates registration of trademarks for goods as well as services. Registration of trademarks that are counterfeit of some other trademarks are not permitted. An appellate board has been set up for speedy disposal of appeals and applications.

Patents:

Patents in India are subject matter of The Patents Act of 1970, the last amendment to this act was made in the year 2005 to make it TRIPS compliant. The term “invention” is defined under Section 2(1) (j) of the Patents Act as “a new product or process involving an inventive step and capable of industrial application”. Recognition of product patent protection under this act is provided for 14 years except for food, pharms and chemical products for which the protection is only for 7 years. The patent is to ensure commercial returns to the inventor for the investment in whatsoever form he has made for making a new product. Three types of patents are granted by this act, Ordinary patent, Patent of Convention and Patent of Addition.

Design:

The Designs Act of 2000 incorporates the minimum standards for the protection of industrial designs, in accordance with the TRIPS agreement. The act defines design as “The features of shape, configuration, pattern, ornament or composition of lines or colours applied to any ‘article’ whether in two or three dimensional forms, by an industrial process which appeals to the eye can be registered under the said Act.” To acquire registration of design under this act, the design must be applied to an article. In other words, a mere painting of a natural scene or its presentation on paper is not entitled for registration under this act. Application for registration can be made only when it is not published previously in any country and is not contrary to public order and morality.

Salient features:

- Patent laws in India provide for both the product as well as the process of making the product.
- The Patent Act has a provision which allows secrecy in inventions related to defence purposes.
- The recent amendment in the copyright laws has given the right to store. This right is available for artistic works,

cinematography and sound works. This right includes “storing of it in any medium”.

- The trademarks act has enhanced the protection of well-known trademarks. The proprietor of well-known mark will be entitled to prevent use of identical or similar trademark in connection with goods or services.
- Under section 21 of the Copyright Amendment Act 2012, the author has an option to relinquish his copyright by way of public notice.
- The Design Act, 2000 uses Locarno classification in which the classification is based only on the subject matter of design. Under the previous provisions, the classification was made on the basis of the material which has been used to make that material.
- Getting GI tag registered in the name of an individual is not possible, but any association of individuals, producers or any authority recognized by law can apply for it. Also, there is no expiry for GI tag.

What is a Patent?

A patent is an exclusive privilege given to the author by the State to prohibit anyone from utilizing, creating, and selling an invention for a specified duration of time. It applies to a monopoly right on an invention. However, not all inventions are patentable and nor is it essential that inventions be protected solely by patent.

Other forms of intellectual property rights can protect the final product which results from an invention. The primary objective for enacting

patent law is to encourage inventors to make a greater contribution to their field by granting them exclusive rights to their inventions.

In India, an innovation referring to a new product or procedure that involves the inventive phase and is capable of industrial use can be patented. Nonetheless, this does not, therefore, come under the scope of innovations which are non-patentable as provided for in sections 3 and 4 of the (Indian) Patents Act 1970.

A patent application can be filed, either alone or jointly, by true and first inventor or his assignee.

The Patents act, 1970

The history of patent law in India begins with the enactment of the Indian Patents and Designs Act in 1911. Subsequently, in 1972, the current Patents Act 1970, came into effect, amending and consolidating the established patent legislation in India. The Patent Act essentially is based on the Justice Ann report 's recommendations, an Ayyangar Committee led by Iyengar Rajagopala. One of the recommendations was the granting of process patents in relation to drug, drug, food, and chemical inventions. The Patents Act, 1970 was amended once again by the Patents (Amendment)

Act, 2005 concerning the extension of product patents in all areas of technology including food, medicine, chemicals, and microorganisms.

Patents act is the subset of the Intellectual property laws and a branch which deals with new inventions. According to the Patents Act 1970, there are two types of patents i.e. product patents and process patents. The product patent is the end result or the output produces of a product and the process patent is the journey of a patent being produced. Under the Patent Act, both processes and products are entitled to qualify as inventions if they are new, involve an inventive step, and are capable of industrial application.

Who is a Patentee?

Patentee is an individual who is registered in the patent registry as the grantee or patent proprietor for the time being. The patentee shall have the right to deal with his property in the same manner as the owner of any other movable property dealing with his property.

Rights of Patentee

Section 48 of the Act, talks about the rights granted to a patentee.

- . A patentee has the exclusive right to make use, exercise, sell or distribute the patented article or substance in India, or to use or exercise the method or process if the patent is for a person. This right can be exercised either by the patentee himself or by his agent or licensees. The patentee's rights are exercisable only during the term of the patent.
- . A patentee has the discretion to transfer rights or grant licenses or enter into some other arrangement for a consideration. A license or an assignment must be in writing and registered with the Controller of Patents, for it to be legitimate and valid. The document assigning a patent is not admitted as evidence of title of any person to a patent unless registered and this is applicable to assignee not to the assignor.
- . A patentee has the right to surrender his patent, but before accepting the offer of surrender, a notice of surrender is given to persons whose name is entered in the register as having an interest in the patent and their objections, if any, considered. The application for surrender is also published in the Official Gazette to enable interested persons to oppose.

- A patentee has a right to institute proceedings for infringement of the patent in a District Court having jurisdiction to try the suit.

Requirements to Qualify as Invention

- The invention must be new i.e. the invention must be novel, meaning that the Invention must not be in existence;
- The invention must be non-obvious i.e. the invention must be a significant improvement to the previous one; a mere change in technology will not give the right of the patent to the inventor;
- The invention must be useful in a bonafide manner i.e. invention must not be solely used in any illegal work and is useful to the world in a bonafide manner.
- An Invention must involve an inventive step;
- The invention must be capable of industrial application or utility;
- The invention shouldn't come under the inventions which are not patentable as defined under Section 3 and 4 of the Patent Act of 1970.

Under Section 2(l) of the act, the Novelty or the new invention or the new product is any invention or the technology and is not anticipated by the prior publication in or outside India. The novelty shall not fall in public domain or form part of any prior art. Patents can be globally registered. The patent is always given for new inventions. It shouldn't have been invented in our country or outside of our country so that it becomes a novelty. If a pen is invented, and it has not been anticipated anywhere else, then it'd be considered a novelty.

Term of Patent

In India, the duration of each patent is 20 years from the date of filing the patent application, irrespective of whether it is filed with provisional or full specification.

However, in the case of requests submitted under the Patent Cooperative Treaty (PCT), the 20-year period begins from the international filing day.

Patent filing application

The patent can be filed by the two ways namely; provisional specification and complete specification.

The patent will be published right after 18 months from the date of filing.

If the person wants to get the patent published before 18 months, he will have to pay the statutory fee for the publication.

A requisite form can be filled or a fee can be paid for the same.

The rule of jurisdiction has to be followed and the application will be filed accordingly, as per the jurisdiction.

The second step for publication is that the request for examination shall be in 48 months.

The third step is the examination and it's not automatic unlike the publication and the applicant will have to fill the requisite form for the publication.

Anyone can file it on behalf of the applicant.

Timeline is 48 months for filing of the application from the priority date.

The patent examiner will be according to the patent orientation.

The patent examiner will check the patent database and other credentials on the three important criteria for the patent.

The examiner will check the applicability under sections 3 and 4 respectively. The examiner will check the clerical mistakes as well.

The drawing sheets and formatting guidelines are to be followed as well.

The first examination report will be created after the patent is being ensured as authentic by the examiner.

A reply shall be given within the 6 months of the first examination report by the applicant.

After the reply given for the examination, if the examiner needs further clarification for the invention, he shall have the applicant present physically or via video conference.

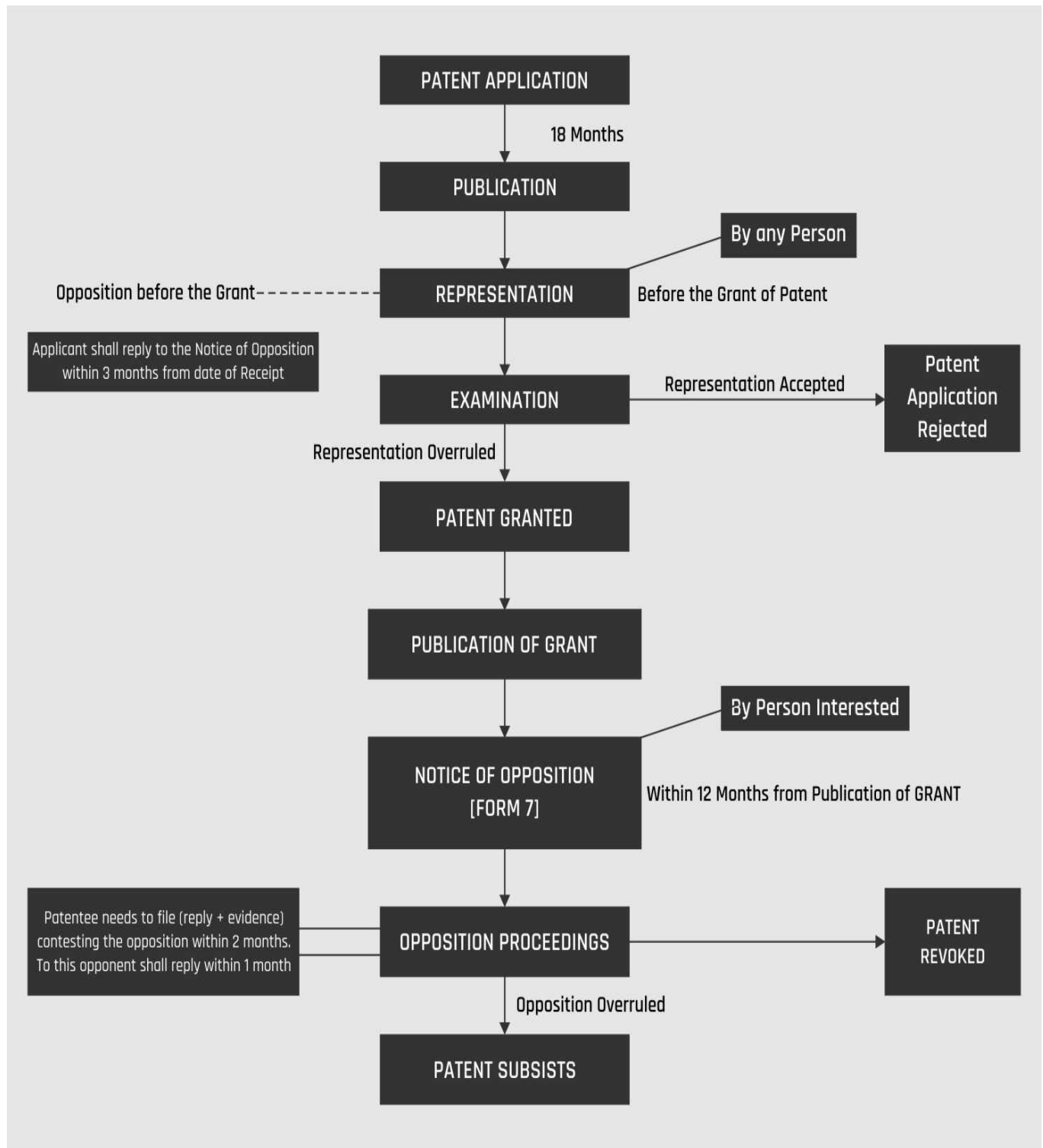
A parallel system runs in the patent application for the opposition of the patent.

There can be two types of opposition, namely, the pre-grant opposition and the post-grant opposition.

The pre-grant opposition is filed after the publication and before the grant of the patent and it can be filed by anyone, whereas the post-grant opposition can be filed only by the person skilled in the art.

The oppositions shall be substantiated by the evidence and the grounds must be followed before the filing of the opposition.

The timeline for filing post-grant opposition is one year after the grant of patent and not after that.



The sections associated with the patent application are: –

Sections 6 and 7 specifically related to the application. The application can be filed by three persons namely the True and first inventor; the assignee of the first inventor; and the legal representative of the deceased person who was about to make the application.

Section 9 and 10 deals with the provisional and complete specifications respectively.

Section 11 deals with the priority date. If a person is directly filing under the complete specification, then the priority date will be the filing of the complete specification, whereas if the person has filed a provisional specification and then the complete specification after 12 months of the former, then the priority date will be the date of filing of the provisional specification.

Section 11A talks about the publication. From the date of publication, the patent is being protected.

Rights such as rights of infringement and authority ownership are given.

Section 11B talks about the examination of the patent.

Section 25 deals with the opposition proceedings namely pre-grant and post-grant opposition.

Section 43 talks about the grant of patent.

Section 45 talks about the date of the patent.

Date of the patent will be the priority date only, but the date of the patent is the filing of the application for calculating the term of 20 years of the patent.

Infringement of patents

Patent infringement is a crime concerning the unlawful use, produce, sell, or offer or sell of the subject matter or proprietary invention by another. There are several various patent forms of utility patents, design patents, and plant patents. The fundamental principle underlying patent infringement is that unauthorized persons are not able to use inventions without the consent of the proprietor. Patent infringement occurs directly or indirectly.

Direct patent infringement: The most common form of infringement is direct infringement, where the Invention that infringes patent claims is actually described, or the Invention performs substantially the same function.

Indirect patent infringement: It is divided into two types: –

- . Infringement by inducement is any activity by any third party that causes another person to infringe the patent directly. This may include selling parts that can only be used realistically for a patented invention, selling an invention with instructions to

use in a certain method that infringes on a method patent or licenses an invention that is covered by the patent of another. The inducer must assist intentional infringement, but does not require intent to infringe on the patent.

- . Contributory infringement is the sale of components of material that are made for use in a patented invention and have no other commercial use. There is a significant overlap with indications, but contributor violations require a high level of delay. Violations of the seller must have direct infringement intent. To be an obligation for indirect violations, a direct violation must also be an indirect act.

Remedies

- . Monetary Relief: It is a form of compensatory damages are available to prevent patent infringement.
- . Equitable relief: Orders are issued by the court to prevent a person from doing anything or Act. They might be in two forms – **preliminary injunction** which are orders made in the initial stage of lawsuits

or lawsuits that prevent parties from doing an act that is in dispute (such as making a patent product). A **permanent injunction** is a final order of a court that permanently ceases certain activities or takes various other actions.

Case Laws

Hoffman vs. Cipla

Case filed by Hoffman against Cipla Ltd and an enhanced version was produced by Cipla Ltd. Product vs Substance dichotomy case. Meaning of Substance? When a substance becomes a product and how it becomes patentable. Substance and enhanced efficacy lead to a new product and novelty come up. Substance per se not patentable but a new product with enhanced efficacy is patentable. This case is also called the la Hoffman case.

Diamond vs Chakraborty

This case is on micro-organisms. Genetically engineered bacteria. Process patent was demanded over. A patent was claimed over the process, product, and components.

First issue: -Bacteria is a living thing, then can it be patentable. SC said that human-made organisms are patentable and the second thing stated was that subject matter to include anything made by man is patentable. Only micro-organisms in living beings are patentable.

Windsurfing International Inc. vs Tabur Marine.

Pozzoli test

To identify person skilled in the art and then identify the inventive concept which cannot be readily construed. Are these differences any obvious differences or not. It is a four-step test to test the inventive step.

Dhanpat Seth vs. Union of India

Dhanpath produced Kilta alike device using bamboo, which can be used for manual agriculture and it was light in weight and they started to produce and manufacturing and Neel Kamal plastic started using that without paying the royalty to Dhanpath and it forms the traditional knowledge. Dhanpath said that the original Kilta was painful and heavy to use and for this reason only, they started using the basket. Whether valid patent lies with Dhanpath Seth?

The second issue in the case was Injunction and the third was Infringement.

Court held that bamboo baskets don't complete the novelty step and the traditional knowledge clause. It was a mere duplication of Kilta and the usefulness was not shown and there is no inventive step and it reiterates the property.