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EXPLORING THE REALMS OF THE LAW OF PATENT IN INDIA TO UNDERSTAND THEIR EFFECT ON THE CORPORATE REGIME

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ABSTRACT

The scope of the study is to understand the current realm of patent law in India. The study also aims at comparing the development of the said laws in India as compared to the international standards and the benchmarks set. The study is mainly limited to the laws in India and comparison is done from other countries time and again wherever felt necessary. The study also looks into the international development of patent law at the international level.

INTRODUCTION

A patent gives an inventor a privilege or right to utilise his creation exclusively for his own financial gain for a predetermined amount of time. The invention is made available for public use after the necessary amount of time has passed, ending the inventor's control over it. The government or the competent sovereign authority issues an instrument known as a patent to the inventor. Any country's success depends on entrepreneurship and innovation. It is essential for the quick development of a developing nation. When an inventor is permitted to benefit from their innovation, the spirit of entrepreneurship is fostered and even applauded. The role of patent law is now clear. Making the

inventor's intellectual talent his "property" and granting it protection from being used by others protects the innovator's profits. A spirit of entrepreneurship is encouraged as the inventor gets fairly compensated for his idea. The entrepreneur wouldn't be compensated for his innovation in the absence of a proper and established patent law, which would demotivate and dissuade future entrepreneurs from pursuing their original ideas as a business.

A patent provides a privilege or a right to an inventor, in the form of a monopoly, to use his invention for a certain period of time, for his own personal financial gain. After the passage of appropriate time, the invention is made open to public use and the inventor loses his monopoly over his invention. Patents are granted to the inventor by the government or an appropriate sovereign authority in the form of an instrument. The Supreme Court in *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*,¹ “stated that the object of patent law is to encourage scientific research, new technology and industrial progress”.

Innovation and entrepreneurship are the key to success of any nation. It is crucial for the fast-paced development of a growing country. The spirit of entrepreneurship is encouraged and even rewarded when the entrepreneur is allowed to make profits from his or her invention. Here is where patent law comes in. It secures the profits of the innovator by making his intellectual genius his ‘property’ and grants it protection from being used by others. As the innovator is properly rewarded for his invention, there is a spirit of entrepreneurial growth. In the absence of proper and well-established patent law, the entrepreneur wouldn't be rewarded for his innovation and would demotivate and discourage other entrepreneurs from pursuing their innovative idea in the form a business. To that effect, the Supreme Court in *Rai Prakash v. Mangat Ram Chowdhry*,² said, “The effect of grant of patent is the *quid pro quo*. Quid is the knowledge disclosed to the public and quo is the monopoly granted for the term of the patent.”

WIPO³ defines patent in the following words:

“A patent is an exclusive right granted for an invention, which is a product or a process that provides,

¹Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries (1979) 2 S.C.C. 511.

²Rai Prakash v. Mangat Ram Chowdhry A.I.R. 1978 Del. 1.

³ WIPO, Patents, *What is a Patent?* <https://www.wipo.int/patents/en/>.

in general, a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application.”

When it comes to creative innovations and manufacturing processes, patent protection is awarded for a duration of twenty years. What it is, in essence, is a territorial protection that may be purchased or licenced. Patent protection ensures that inventions cannot be commercialized without the prior written consent/authority of the patent owner, who is known as the patentee. When an innovation is protected by various patent regulations, the owner of the patent has the ability to determine who may or may not be allowed to commercially use the protected inventions, depending on the conditions. A patent serves as an incentive for the innovator to continue working on his or her invention.

In order to obtain a patent, an application must be submitted to the patent office. It is the responsibility of the national patent office or the regional patent office to grant patents on the basis of applications that have been filed to the competent authorities. It should be noted that every country has its own national patent office as well as its own national patent law when it comes to the protection of original ideas. After being issued, patents offer holders exclusive rights to the invention for a defined period of time. During this time, others are prohibited from copying, using, or selling the invention.

It is possible to obtain patent protection for inventions that provide solutions to specific problems in the field of science and technology. Product or method development are two examples of inventions that are commonly made. In order for an invention to be patentable (i.e., novel, non-obvious, innovative step, utility, and so on), an application must be filed with the patent office, and the invention must meet all of the requirements for being patented in order for it to be patented.

Patents are intended to encourage disclosure, rather than concealment, of intellectual property. A patent application is published as a patent document, and a patent is subsequently issued by the patent office as a patent. A patent application is published as a patent document. Patents cover a wide range of items, including processes, commodities, apparatus, and industrial uses, as well as inventions that are associated with them. Patents as an Intellectual property right are essential in encouraging the growth of innovation, which in turn acts as the foundation for the formation of new companies.

A 'right' in the normal sense of words is an 'entitlement' over something or someone. They are the underlying normative principles that govern what is expected of or due to persons under an existing legal system. In the words of the famous jurist of Analytical School of Law, John Austin,

"A party has a right when another or others are bound or obliged by law to do or forbear towards or in regards to him".

Ihering also defines rights in a simple manner as "legally protected interests". The Supreme Court defined a 'right' in correlation to duties in the landmark case of *State of Rajasthan v. Union of India*⁴ as:

"In strict sense, legal rights are correlatives of legal duties and are defined as interests whom the law protects by imposing corresponding duties on others. but in a generic sense, the word 'right' is used to mean an immunity from the legal power of another, immunity is exemption from the power of another in the same way as liberty is exemption from the right of another, Immunity, in short, is no subjection."

Although rights have been categorised in many ways and types, for the purpose of this research study, we look at the following categorisation of rights Tangible Rights are often also called proprietary rights. These rights are those rights which an individual has over tangible things. These rights are over tangible property and are associated with the same. Tangible property, as opposed to intangible property (which is dealt in intangible rights) is such which can be seen and felt, such as rights arising from ownership of land, houses, car or other such property and related to the same. Intangible rights are those rights which are granted in relation to intangible property. Intangible property is characterised as the creations of the mind of an individual which the individual seeks to protect through the process of law. Such rights arise over the creations of the mind and seek to protect the same. These are also known as the intellectual property rights which are protected by law. At the very basic level, these are of three types- Patent, Copyrights and Trademarks.

A patent provides a privilege or a right to an inventor, in the form of a monopoly, to use his invention for a certain period of time, for his own personal financial gain. After the passage of appropriate time, the invention is made open to public use and the inventor loses his monopoly over his invention. Patents are granted to the inventor by the government or an appropriate sovereign authority in the

⁴State of Rajasthan v. Union of India, A.I.R. (1977) S.C. 1361.

form of an instrument. The Supreme Court in *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*,⁵ “stated that the object of patent law is to encourage scientific research, new technology and industrial progress”.

Innovation and entrepreneurship are the key to success of any nation. It is crucial for the fast-paced development of a growing country. The spirit of entrepreneurship is encouraged and even rewarded when the entrepreneur is allowed to make profits from his or her invention. Here is where patent law comes in. It secures the profits of the innovator by making his intellectual genius his ‘property’ and grants it protection from being used by others. As the innovator is properly rewarded for his invention, there is a spirit of entrepreneurial growth. In the absence of proper and well-established patent law, the entrepreneur wouldn’t be rewarded for his innovation and would demotivate and discourage other entrepreneurs from pursuing their innovative idea in the form a business. To that effect, the Supreme Court in *Rai Prakash v. Mangat Ram Chowdhry*,⁶ said, “The effect of grant of patent is the *quid pro quo*. Quid is the knowledge disclosed to the public and quo is the monopoly granted for the term of the patent.”

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⁵Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries (1979) 2 S.C.C. 511.

⁶Rai Prakash v. Mangat Ram Chowdhry A.I.R. 1978 Del. 1.

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In order to obtain a patent, an application must be submitted to the patent office. It is the responsibility of the national patent office or the regional patent office to grant patents on the basis of applications that have been filed to the competent authorities. It should be noted that every country has its own national patent office as well as its own national patent law when it comes to the protection of original ideas. After being issued, patents offer holders exclusive rights to the invention for a defined period of time. During this time, others are prohibited from copying, using, or selling the invention.

It is possible to obtain patent protection for inventions that provide solutions to specific problems in the field of science and technology. Product or method development are two examples of inventions that are commonly made. In order for an invention to be patentable (i.e., novel, non-obvious, innovative step, utility, and so on), an application must be filed with the patent office, and the invention must meet all of the requirements for being patented in order for it to be patented.

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Statement of Purpose

The scope of the study is to understand the current realm of patent law in India. The study also aims at comparing the development of the said laws in India as compared to the international standards and the benchmarks set. The study is mainly limited to the laws in India and comparison is done from other countries time and again wherever felt necessary. The study also looks into the international development of patent law.

Research objectives

- The aim of this particular research is to understand the system of Patent Law in India and to study in depth the effect patents have on the business and corporate regime in India.

- This research study explores the path the international law took while development of patent law.
- This research study examines in depth the development of patent law in India.

The study also aims at exploring the current remedies available for the infringement in patent law.

Interdependence between business strategies and IPR

The definition of a strategy is "a method or plan chosen to bring about a desired future, such as the achievement of a goal or solution to a problem." It is "the art and science of planning and marshalling resources for their most effective and efficient use." It is a broad strategy for achieving one or more objectives amid "uncertain conditions."

Max McKeown contends that "strategy is about shaping the future" and is the human endeavour to achieve "desirable ends with available means," whereas Henry Mintzberg describes strategy as "a pattern in a stream of decisions" to contrast with a view of strategy as planning. Strategy is described by Dr. Vladimir Kvint as "a system of finding, formulating, and developing a doctrine that will ensure long-term success if followed faithfully."⁸

Any company or corporation must have a plan since the resources at their disposal to accomplish their own objectives are sometimes extremely restricted.

- Setting goals,
- deciding on steps to attain the goals, and
- mobilising resources to carry out the activities are typically included in strategy.

A strategy explains how the means (resources) will be used to accomplish the ends (goals). This usually has to decide on a plan. Creating a patent strategy is a crucial part of the business plan for many organisations. The following are the explanations for why a corporation should have a patent strategy.

⁸Barad M. (2018) Definitions of Strategies. In: Strategies and Techniques for Quality and Flexibility. Springer, Cham. https://doi.org/10.1007/978-3-319-68400-0_1

- 1- Patents help a company build its own market share and cover margins,
- 2- Patents help a company defend the market share it has created for itself against rivals and infringers.
- 3- Patent research helps greatly in enhancing the R & D and product development efforts.
- 4- Patent can help cement joint ventures, strategic partnership and acquisitions.
- 5- Patents can also help a company in securing finance, reducing the cost of capital, and help for development of different sources of revenue.

Hence, a patent strategy means aligning business ambitions with the patenting efforts. Patent strategy is a real and definable aim and goal for organizations that wish to engage in the effort.

Simply put, a company's patent strategy is the alignment of patents with the scope and content of a business ambition associated with a particular commercial activity.

It can be said that, patent strategy = business ambition + patents aligning this ambition.

The patent strategy specifies the primary corporate objectives of the corporation beginning in the development period. A long-term roadmap to direct the creation of a profitable patent portfolio is provided by well defined business objectives. A corporation should have the following in mind in particular while developing such strategies:

- List the company's business objectives;
- identify key industry participants (competitors, partners, customers);
- identify technology and/or product directions (within company within industry);
- meet with attorney to discuss core patent strategy;

decide whether a patent portfolio will be used offensively, defensively, for marketing purposes, or a combination of these.

The Offensive Blocking Patenting to mount attack on competitors ('Sword' strategy)

For a certain period of time (twenty years), the patent holder is the only one permitted to use, market, and import the protected item or procedure. One or more of such rights may be delegated by the patent holder to a third party through a licence. The pinnacle of intellectual property is a patent that covers a core component of an original technological development. These types of patents can be utilised to introduce a successful product, boost operational income during lean periods, or even earn a profit with no product at all.

Some businesses provide its research and development department (R&D) adequate funding so that they may invent new things, rely on them to develop new goods and services, and generate royalties. When a corporation aggressively licences its patents to rivals, it deprives the competitors of funds that they would have used for initiatives like their own R&D. This is also referred to as "the \$ 2 swing"—that is, every dollar in incoming licencing from a rival firm subtracts \$1 from that competitor's programmes and adds \$1 to the licencing company's. This results in a relative difference of two dollars between the two businesses.

The pharmaceutical industry's efforts to safeguard the novel medications they release on the market serves as an example of an offensive portfolio. The time it takes to bring a new product to market, from idea to pharmacy, is typically 12 years. The average cost of research and development for each product is above \$1 billion, even though only approximately 5,000 of them reach the market. To guarantee market exclusivity for a while, drug manufacturers rely on their offensive patent portfolios patents on key aspects of the new medicine, such as its active component composition and mode of use. This enables pharmaceutical corporations to make a profit, repay their investment, and capture market share.

Examine the strength of rival patent portfolios for the offensive portfolio (the sword) to uncover the possibility of rival counterattacks. Analyse rival goods for potential infringement with regard to the Sword portfolio and weigh the benefits and risks of a stop and desist order.

Defensive Patenting to defend oneself from infringement actions (Shield' strategy)

A defensive patent is one that is primarily used to protect a business against a lawsuit for patent infringement. A defensive patent can defend the patent holder by enabling it to file a countersuit following an infringement lawsuit or even if the rival files a lawsuit for another reason.

A defensive patent is one that is registered for defence purposes rather than to be enforced to collect royalties or to bar rivals.

Defensive patents provide their owner two types of protection.

- 1- In addition to permitting the patent holder to countersue, this clause also forbids others from submitting applications for identical or related inventions.
- 2- Patents can occasionally serve as effective defences against patent-holding rivals who might be reluctant to sue you for infringement for fear that you would suit them back.

A patentee's defence against his own rivals may occasionally be provided by a patent or bundle of patents.

The defensive patent can safeguard a company's future development route for continuing growth and expansion, while the offensive patent can generate more money.

A defensive patent strategy is accumulating a lot of patents to use as defence in the event that a business is sued by a rival. This tactic can be used to negotiate litigation settlements. This could comprise:

1. A corporation facing litigation may utilise its own collection of patents to compel a swift settlement.
2. A corporation that is being sued may respond with patents from its own library.
- 3- As a type of settlement, a piece of a company's patent portfolio may be licenced.

Defensive patenting is a tactic that is generally used by businesses that are well-known for producing a certain kind of product. These businesses acquire patents that are slightly relevant to the primary invention in addition to patents that are comparable to the primary patent. This makes it tough for

other companies to produce identical goods without stealing the innovator's ideas. Additionally, this guarantees their market debut will be delayed; Defensive patents offer their owner protection in the methods listed below.

- Against a counter-claim, the full range of patents can be employed as a defensive tool;
- Cross-licensing is one way to boost a company's negotiation position with regard to rivals;
- Used defensively when a rival threatens the patentee in a relevant technological field;
- To prevent future applicants from entering the field;
- To ensure freedom of operation; or
- To prevent competitive goods from reaching the market.

Design Around Techniques

A design-around strategy entails identifying the patent's indication of claim coverage. Design around usually entails a thorough examination of the patent specification, a close examination of the prior art that was cited and used in support of the patent application, and a close examination of the prosecution history of the patent application to determine whether the applicant made any damaging admissions about the invention during prosecution.

The terms used in the patent's claims are precisely defined by the patent agent performing the design around analysis by applying the laws governing patent claim construction or claim interpretation in the forum jurisdiction; claim interpretation varies from jurisdiction to jurisdiction. Use "means plus function claim language," advises the patent agent.

The attorney will likely prepare his analysis in the form of an opinion'. Such opinions may be quite helpful in jurisdictions that recognize some form of 'wilful infringement". In U.S. patent agents are not allowed to prepare opinions.

A patent application should certainly protect what the inventor is doing and what they want to do. The goal is not to create an invention that is cool, the goal is not to get patent, but rather the goal is

to make money. So, one must consider what it is one wants to do with a patent as a part of an overall business strategy.

The main purpose of this chapter is to summarise the findings, reach conclusions, and provide relevant, reasonable ideas and recommendations based on the complete research study and the individual analysis of the findings of the prior chapters.

After going through the various legal resources available and looking at the facts and data available at hand, it is quite clear that the Patent Law in India is well established. Recent amendments in the legislations also show that significant efforts are being made on a regular basis to facilitate and streamline the patent filing process and reduce the costs of filing patents. In spite of the current standing fact, it is also true that we still have a long way to go in terms of international standards, given the rate at which the developed countries and their multinational corporations and huge conglomerates are filing patents and constantly looking for new things to patent and creating new trends in the patent law on which we are sometimes lagging behind.

At the onset of this research study, **Introduction**, defines what constitutes a right and how a patent is regarded as an intellectual property right. It enables the reader to completely comprehend the definition of the term 'right,' which is frequently used in a variety of contexts, and it then goes on to link that understanding of a right to Intellectual Property Rights, as well as introducing the patent as an intellectual property right.

The next part of the research study, **Interlinkage of patent law with business and corporate** makes a connection between the fields of patent law as an area of study on the one hand, and the interests of business and corporate strategy on the other in this chapter. This part goes on to explain the significance of strategy formulation in an organisation, as well as how patents are used at various times and in various ways to attain the final goals of an enterprise or organisation at the conclusion of the chapter. The sword and shield strategies of patenting which are used by the organisations are explained. The sword and shield strategies of patenting are the very basic strategies which are followed by organisations while deciding their business strategies around patent filing.

SUGGESTIONS

After thoroughly going through each and every facet of law relating to patent in India, the researcher through the medium of this research study humbly proposes the following suggestions and guidelines for the various stakeholders in the field of law to study and improve upon the current situation.

1. Although the situation regarding patent filing has improved tremendously in the past few years, the situation is still far from pleasant. It still takes an average time of 2-4 years to get a pending patent approved in India. During this time duration, even after receiving a receipt of patent pending from the respective patent office within a few weeks, there is no remedy as such available to the party who has filed a patent. A suit for infringement of patent can only be brought forward when a patent has been granted. A claim cannot be made if a patent is pending before the patent office. As such, the situation becomes very demotivating for the party who has filed the patent as the tag of 'patent pending' is insufficient to drive away those who seek to infringe the invention sought to be patented. Thus, an important step to rectify the situation could be that some legal weightage could be awarded to the receipt of 'patent pending' by the patent office keeping in mind the priority date on which the application was made. This would be a critical step in improving the situation as at the very least in cases of infringement at least a suit for injunction can be brought forward and locus standi for that suit would exist. If the injunction is to be granted on the infringement or not would then depend upon the facts of the case and be upon the court to decide. Thus, in such a scenario, the party filing their patent before the patent office can easily rest assured and focus on the patent application and invention without worrying about their invention being infringed as the title 'patent pending' would have legal weightage.
2. The last few years have shown the reduction in pendency of patent applications. But still, the number of pending applications is still quite high. In 2017, the number of pending patent applications before the patent office was 2,32,000. This number saw a reduction as in 2020, the number of pending patents was 1,15,750. Although the number has gone down by quite a margin, but 1,15,750 is still a huge number. The load on the patent offices is still quite huge and there is a need to improve the workforce to ensure that the pendency of patents can go down further and the examination of patent applications can be done extensively. The current load on the patent office may also lead to situations where the current workforce is being

overburdened with work and as a result, the quality of examination of patent applications may go down. Thus, increasing the workforce and bringing in skilled employees can certainly help in reducing the pendency of patents as well as improving the quality of examination of patent applications so that the claims raised in the future can be settled easily and disposed of readily.

3. The conditions of work and pay scale of the Indian patent examiners also needs an overall improvement. The workers have a huge workload and the pay offered for the services is quite low as compared to the payment and other job benefits of their foreign colleagues in developed countries. The workload which an employee in a patent office as a patent examiner has to face is also quite high as compared to the European Patent Office or the United States Patent and Trademark Office. While a patent officer in the above two organisations would handle an average of 7-8 patent applications a month, a patent examiner in India may have to handle at least 40 patent applications a month. This amount of workload is huge and puts undue pressure upon the patent examiners currently employed by the IPO. This is one of the factors which leads to high patent application pendency and may also sometimes lead to bad patent examinations or bad patents being granted which may cause a problem when claims for the patents are filed and suits are filed before courts for the enforcement of the patent.
4. The pay scale of the patent office employees and opportunities of promotion also need improvement. A patent examiner in India is paid almost less than one third of what the patent examiners in developed countries and well-established patent offices (USPTO or EPO) get paid. The gap in payment is huge and can be demotivating for the employee, especially considering the huge workload he already has to deal with. The criteria for promotion of talent is also quite unclear at the moment in patent offices in India. Many patent examiners have claimed that the patent office is not offering performance-based growth opportunities as are available in other institutes and scientific organisations or even the private sector. This often leads to lower level of job satisfaction for the patent examiners and a high attrition rate in patent offices. This issue needs to be resolved and job satisfaction and growth opportunities in patent offices need to be improved. Creating such opportunities in the patent office would attract more skilled employees into the system. With more skilled employees and lesser workload, the pendency of patents would reduce and the quality of examination of patent

applications would also see a huge improvement. As a result, it would lead to an overall improvement of the system.

5. The international community is growing with leaps and bounds with regards to patent law and we need to catch up with them. New trends are being seen, one such being the patentability of blockchain programs. As already seen in the, blockchain programs are growing at a steady pace and defining the new benchmarks of technology. Many companies are now using blockchain programmes in different and innovative ways to improve upon their products and services provided. The developed countries which started the trend are already riding on it with many patents filed which seek to protect their blockchain programs. In India, however, the situation regarding the patentability of blockchain programmes is still not so clear. Section 3(k) of the India Patents Act lists that ‘computer programmes, per se’ are not eligible for patent protection. Currently, computer programmes are eligible for protection under copyright laws. There are many debates and judicial interpretations around the words ‘per se’ in the language of Section 3(k) but there is no clear path yet as to the patentability of blockchain programs. At such a time, the legislature needs to step in to clarify the situation. An amendment in Sec. 3(k) is required so as the controversy and doubt surrounding the words ‘per se’ in the section can be resolved. With a clear path, India would also be able to ride the train of patenting blockchain programs with full force.

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