



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

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ISSN

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# **RESTORATION OF PATENTS**

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## **ABSTRACT**

This article discusses the restoration of lapsed patents in India. The author explains that patents are a type of intellectual property that give inventors exclusive rights to their creations for a limited time. In India, patents can lapse if the renewal fee is not paid on time. However, the Indian Patent Act also provides a mechanism for restoring lapsed patents. The article outlines the requirements for filing an application for restoration, as well as the grounds on which the Controller of Patents may grant restoration. The article also discusses some of the case law related to restoration of patents in India. Finally, the author concludes that restoration of patents is an important legal mechanism that helps to protect the rights of inventors and encourage innovation.

**Keywords:** Patent, Restoration, application, invention

## **INTRODUCTION**

From the very beginning of human existence scientific inventions are part of human life. Scientific inventions are very important because all the revolutionary changes that had taken place in this world have made significant changes in the lifestyle of humans. We humans have unique ability to invent tools and this ability differentiate us from other living species. Many atimes conflict arises among inventors of their original inventions and copying of invention arealso done by many for the sake of prestige, popularity or money. And due to these circumstances, the requirement for patent laws were felt by people in order to protect their original inventions. A Patent is a type of intellectual property and it's simply a right of an inventor over his or her inventions. When granted, gives right to the patentee to prevent othersfrom using that particular invention in the territory to which the patent applies.<sup>1</sup>

Patent gives legal right to an owner to prevent others from making, selling or using an inventionof

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<sup>1</sup> Saumya Singh and Prashant Shivam, Patent Laws and their Service for IP Rights, Manupatra (Jul. 13, 2022), <<https://articles.manupatra.com/article-details/PATENT-LAWS-AND-THEIR-SERVICE-FOR-IP-RIGHTS>>

the inventor for a limited period of time. Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.<sup>2</sup> Patents are not just mere concept but they actually play a vital role in life, we can say that patents inspire innovation and it leads to development of new technologies in almost every field. The use of Intellectual Property Rights is governed by Intellectual Property Law. Some examples of intellectual property rights are patent, trademark, geographical indications, plant variety protection and biodiversity.

The term “patent” is derived from the old Latin word “*patentem*” and old French word “*patente*”, which indicates the open letter, it was first appeared in the late 13<sup>th</sup> century. It was the 1580s when the current meaning of the term “patent” was given, which is that a patent is a government issued permit to create and sell a particular good. To register a patent an application has to be filed with the government and once the government accepts the application, the patent usually last for 20 years from the date of the application.<sup>3</sup>

Intellectual property rights (IPRs) are a set of legal rights which protects the creation of human mind, for e.g. inventions, literary and artistic works, symbols, names, images, and designs.

license, or assign their creations for a particular period of time.

There are several types of IPRs in order to provide different forms of protection for different creations, such as patents, trademark, copyrights, trade secrets, and industrial designs. The aim of IPRs is to encourage innovation and creativity which can be done so by providing a robust legal framework which can reward the creators for their effort which will further encourage them to come up with new innovative ideas. Innovation can also be encouraged by providing the creators financial incentive so that they can further invest it in research and development. Inventors have right to exclude others from using their inventions, giving them a certain period of time to commercialize their invention and hence, earn profit from it. When the inventions are disclosed to public, a balance between promoting the innovation and right of public to access the new technologies and ideas is required and the patent law is designed in such a way to seek a balance between the interests of creators and the general public.

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<sup>2</sup> What is Intellectual Property, WIPO, <<https://www.wipo.int/about-ip/en/>>

<sup>3</sup> Sneha Mahawar, What is a Patent, Ipleaders (Aug. 16, 2022), <[https://blog.ipleaders.in/patent-law-2/#What\\_is\\_a\\_patent](https://blog.ipleaders.in/patent-law-2/#What_is_a_patent)>

The process of obtaining a patent involves, a patent application must be filed by the inventor with the appropriate government agency, like the Patent Office situated in India. A detailed description about the invention must be given in the application along with any drawings or other supporting materials which are necessary for the invention to be understood. The process of filing a patent application can be complex and lengthy depending upon the reviews and amendments. Once the inventor is granted a patent, he/she must enforce their patent rights, such as filing lawsuits before appropriate authority in case of infringement of patent.

Overall, patent law plays a critical role in encouraging innovation and promoting economic growth by providing legal protections and financial incentives to the inventors.

## **AIMS AND OBJECTIVES**

- To know about the concept of restoration of patent and its potential benefits.
- To know about the different grounds for restoration of patent.
- To know about the consequences of patent lapse and importance of patent protection.

## **HYPOTHESES**

- Efficient and accessible restoration mechanisms can foster economic growth by encouraging technology transfer, licensing agreements, and increased participation in global innovation networks.

## **RESEARCH QUESTIONS**

- What are the different grounds for restoration of patent?
- What are the potential benefits of restoration of patent?
- What are the economic advantages of successfully restored patents?

## **RESEARCH METHODOLOGY**

- The researcher will be relying on Doctrinal Method of research to complete the project. These include various secondary sources of literature and insights.

## **NATURE OF RESEARCH**

- The method of research is purely doctrinal for the purpose of this project.

## **SOURCES OF DATA**

### **SECONDARY SOURCES:**

- Journal
- Articles
- Websites

### **MODE OF WRITING**

- The mode of writing employed for this project is descriptive along with analysis of the information so collected.

### **LIMITATION OF THE STUDY**

The researcher has territorial, monetary and time limitations in completing the project. For having a bird's eye view of the particular topic, effective and extended reading over a long period of time is required but after going through several articles the researcher has a clear understanding of topic but it would have been clearer if she would have read more articles and books of different writers.

### **MODE OF CITATION**

- The researcher has followed Blue Book Citation (20<sup>th</sup> Edition) in this project report.

## **LITERATURE REVIEW**

### **1. PATENT- TYPES & LAWS RELATED TO THEM IN INDIA – SHRISHTI MITTAL**

This article by the author give descriptive analysis of patent laws in India and it introduces the topic in a simplified way giving a clear meaning of the term patent. It also discusses the history and origin of the concept of patent. Next author moves forward to explain the different kinds of patent and who are the persons entitled to apply for the patent in India and types of patent application in India. This article also discuss the procedure for registration of patent and the grounds on which the patent registration can be refused. This article then dives into the topic of patent infringement and the different landmark judgements around patent infringement. Thus this paper gives an elaborate view regarding patent registration in India.

## **PATENT LAW IN INDIA**

Patents Act, 1970 governs the patent law regime in India, it also has been amended several times in order to align with international standards and norms. Patents Act, 1970 is the primary legislation which governs patents in India and this act came into effect in 1972.<sup>4</sup> This act was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to food, drugs, chemicals, and micro-organisms. The role that intellectual property plays are very crucial for fostering innovation and technological advancements, without any innovation or technological advancement a country can't aspire to grow. India, which is a rapidly developing nation recognizes the importance of role played by intellectual property in shaping the country by encouraging innovations.

Not every invention can get patented. It's very crucial that all the conditions of patentability get fulfilled only then patent is granted to any owner. Section 3 and Section 4 of the Patent Act, 1970 talks about all those exceptions that are not considered as inventions and hence are non-patentable. The invention must not fall under the non-patentable categories, such as discoveries, mathematical methods, computer programs, and methods of agriculture or horticulture. The three conditions which need to be satisfied by the inventor to get a patent and these are as follows-

1. The invention should not be in existence, it should be novel and which involves an inventive step.
2. It should be capable of commercial application.
3. The invention may relate to a product, process or a significant improvement to the previous invention, which implies it should be non-obvious.<sup>5</sup>

The application process for patent in India involves filing an application for patent with the Indian Patent Office (IPO). The duty of IPO is to examine the patent application and to determine whether the invention fulfills the patentability criteria. Upon satisfaction of IPO that the invention meets all the requirements, it grants the patent, and now the patentee can enjoy its exclusive rights upon his invention for a period of 20 years from the date of filing the application.

Compulsory licensing is also provided in the Indian patent law, which authorize a third party that he can use the patented invention even without the consent of patentee under certain

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<sup>4</sup> Shrishti Mittal, Patent- Types & Laws related to them in India, Manupatra (Apr. 16, 2021), <<https://articles.manupatra.com/article-details/Patent-Types-Laws-related-to-them-in-India>>

<sup>5</sup> Ibid.

circumstances, this can be allowed when the invention is not being used or it is not available at a reasonable price to the public.

As per Section 53 of the Patent Act, 1970, a renewal fee is required to be paid by the patentee till the date of possession given by the IPO. In case the renewal fee is not paid by the patentee within the prescribed time period then such a patent will lapse.<sup>6</sup> So certain safeguards are provided in the Patent Act, 1970 for restoration of lapsed patent in India. When the patent ceased to have effect because of non-payment of fee within the time prescribed under the Section 53 of the Patent Act, 1970, or within such time period, allowed under Section 142 of the Patent Act, 1970. The patentee or their legal representative can file an application for the restoration of lapsed patent as in provided under the Patent Act, 1970. In case of patent held jointly by two or more persons, then one or more of the joint holders of patent or without joining others can submit an application for restoration of lapsed patent, but the permission of Controller of Patents is required to file such an application for restoration of patent in case of joint holders of patent.

Such an application for restoration must be filed within 18 months from the date on which the patent ceases to have effect. However, the renewal fee for the application of restoration of lapsed patent can be paid by any person. Still, it is required that the patentee himself/herself or by his/her legal representative should file the application for restoration. The application for restoration can be filed within one year from the date on which such patent lapsed.

In conclusion, patent law in India plays an important role in encouraging innovation and it also protects the rights of inventors and creators. Over time the patent regime in India has evolved to meet the international standards and to provide a favorable environment for business to invest in research and development.

## **RESTORATION OF PATENT**

An annual renewal fee is paid to the patent office in order to keep the patent in force, if in the stipulated time period it is not paid then the patent will cease to have effect and it will eventually become a public property. Certain safeguards are provided for restoration of lapsed patent by the Act.<sup>7</sup>

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<sup>6</sup> The Patent Law, 1970 (India), Section 53, <<https://ipindia.gov.in/writereaddata/Portal/ev/sections-index.html>>

<sup>7</sup> Sakshi Sharda, Restoration of Lapsed Patent in India: A Complete Overview, Corpbiz (Apr. 30, 2020), <<https://corpbiz.io/learning/restoration-of-lapsed-patent-in-india/>>

Some of the essential requirements for restoration of patent are as follows:

1. Section 60 of the Patent Act, 1970 provides the provision for restoration of lapsed patent, it says that an application for restoration should be filed by the patentee or their legal representatives.
2. Prescribed fee on Form 15
3. Proof to show that the failure of the renewal or maintenance fee was unintentional.

Section 60 of the Patent Act talks about restoration of lapsed patent:

- (1) Where a patent has ceased to have effect by reason of failure to pay any renewal fee within the period prescribed under section 53 or within such period as may be allowed under sub-section (4) of section 142, the patentee or his legal representative, and where the patent was held by two or more persons jointly, then, with the leave of the Controller, one or more of them without joining the others, may, within eighteen months from the date on which the patent ceased to have effect, make an application for the restoration of the patent.
- (2) [Omitted]
- (3) An application under this section shall contain a statement, verified in the prescribed manner, fully setting out the circumstances which led to the failure to pay the prescribed fee, and the controller may require from the applicant such further evidence as he may think necessary.<sup>8</sup>

Although there is no requirement of additional fee to be paid for patent of addition, but it's required that the patent holder must submit each form for each additional patent individually together with the patent restoration application.

### **OPPOSITION TO THE RESTORATION OF A LAPSED PATENT:**

If after hearing the applicant if the Controller is prima facie satisfied that the failure to pay the renewal or maintenance fee was unintentional and that the application was filed without making any undue delay then he shall publish the application in the prescribed manner and any interested person may give a notice for opposition for the patent restoration within the prescribed period on either or both of the following grounds:

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<sup>8</sup> The Patent Law, 1970 (India), Section 60, <<https://ipindia.gov.in/writereaddata/Portal/ev/sections/ps60.html>>

- 1) That the failure to pay the renewal or maintenance fee was not unintentional; or
- 2) While making the application for restoration of patent undue delay has been caused by the applicant.

Only these two grounds will be considered, a notice of opposition for the restoration of a lapsed patent on any other ground will not be considered. The person who has an interest can only file a notice of opposition for the restoration of a lapsed patent.

The stipulated time period for filing the notice of opposition is two months from the date of publication and the same is filed on Form 14 along with its prescribed fee. Extension beyond the stipulated time period that is two months cannot be made. However, a petition seeking extension of time beyond two months can be filed under Rule 138 of Patent rules along with its prescribed fee.<sup>9</sup> However, the petition for extension of time period must be filed within the period of two months only. The power to grant extension under Rule 138 is discretionary power of the controller so it cannot be taken for granted.

## **RIGHTS OF PATENTEES OF LAPSED PATENTS WHICH HAVE BEEN RESTORED**

Section 62 talks about the rights of patentees of lapsed patents which have been restored:

- 1) Where a patent is restored, the rights of the patentee shall be subject to such provisions as may be prescribed and to such other provisions as the Controller thinks fit to impose for the protection or compensation of persons who may have begun to avail themselves of, or have taken definite steps by contract or otherwise to avail themselves of, the patented invention between the date when the patent ceased to have effect and the date of publication of the application for restoration of the patent under this chapter.
- 2) No suit or other proceeding shall be commenced or prosecuted in respect of an infringement of a patent committed between the date on which the patent ceased to have effect and the date of the publication of the application for restoration of the patent.<sup>10</sup>

If the patent lapses due to the non-payment of the renewal fees, the patentee will lose all

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<sup>9</sup> Priyanka Rastogi & Vijaya Singh, Restoration of Lapsed Patents: An Indian Perspective, Mondaq (May. 06, 2014), <<https://www.mondaq.com/india/patent/311398/restoration-of-lapsed-patents-an-indian-perspective>>

<sup>10</sup> The Patent Law, 1970 (India), Section 62, <<https://ipindia.gov.in/writereaddata/Portal/ev/sections/ps62.html>>

his rights and the invention will eventually become a public property. The provision given in Section 62 of the Patent Act is to safeguard the interest of those persons who after ascertain from the Register of patents that the patent has lapsed due to non-payment of the renewal fees and become public property had started commercially using the invention.<sup>11</sup>

## CASE LAWS RELATED TO RESTORATION OF PATENT

Some of the Indian case laws dealing with the restoration of patent in India are as follows:

**F. Hoffmann-La Roche Ltd v. Cipla Ltd (2009)**<sup>12</sup> – This case not just talks about the balance between the innovation and access to affordable medicines but also highlights the issues of protection of patent in the pharmaceutical industry.

In this case, the issue involved was that Roche had a patent for the drug, Erlotinib hydrochloride, which was used to treat cancer. And according to Roche, their patent was infringed by the Cipla as they manufactured a generic version of the drug and used to sell them and they used the same active pharmaceutical ingredient which was identical to Roche's drug. On the other hand, Cipla argued that the patent of Roche was invalid and therefore, it should be cancelled on the grounds that it was obvious and also lacked novelty.

The court was of opinion that Roche's patent was infringed by the Cipla so they passed an order in which Cipla was directed to stop the manufacturing of the drug and were also prohibited from selling that drug. However, the court was not satisfied with the Roche's claim for damages as his patent was expired due to the non-payment of the renewal fee. However, the patentee argued that the failure on his part to pay the renewal fee was unintentional. The court further held that if there is a bona fide mistake due to which the patentee was not able to pay the renewal fee then the patent can be restored.

**Glaxo Group Ltd v. Controller of Patents (2010)**<sup>13</sup> – This is a landmark judgment which was heard before the Intellectual Property Appellate Board (IPAB) in India in 2010. In this case an application for patent was filed by the Glaxo Group Ltd. for a drug named "lapatinib ditosylate" which was used to cure certain type of breast cancer.

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<sup>11</sup> Rastogi & Singh, supra note 1.

<sup>12</sup> CS (OS) No.89/2008 and C.C. 52/2008

<sup>13</sup> CIVIL APPEAL NO. 5588 OF 2008

The Indian Patent Office rejected the application citing the grounds of “novelty” and “inventive” step as according to them the drug did not fulfill these criteria. So, the Glaxo Group Ltd. filed an appeal against the decision to the IPAB.

The issue involved in this case was that whether the drug fulfilled the criteria of “inventive step”. The argument of Glaxo Group Ltd. was that the drug was a significant improvement over other existing treatment used to cure breast cancer, and therefore fulfills all necessary requirements of “inventive step”. On the other hand, the Controller of Patents, viewed the drug as mere “discovery” rather than an “invention”. In this case it was decided that Section 3(d) of the Patents Act, 1970 would be applicable which talks about “what are not inventions” and the drug was treated as mere discovery and not an invention therefore, the rejection of application for patent was valid.

Section 3(d) of the Patents Act, 1970 says that the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.<sup>14</sup>

## CONCLUSION

In India, restoration of patent is an important legal mechanism which helps the inventors or creators who have inadvertently allowed their patent to lapse. The efforts and investments made by the creators or inventors are acknowledged by this mechanism, which further encourages them to create more innovations, and this also protects the intellectual property rights of creators. When a secure legal environment is provided to inventors, this helps in encouraging the innovation and creativity in a country as the inventors will be assured that their intellectual property rights are protected.

There are several factors which are considered by the Indian Patent Office while examining the application of patent restoration, a rigorous examination of patent application is conducted including the reasons for the lapse of patent, the intent of inventor, reason for the delay, and its impact on public interest all are considered to make sure that only deserving patents are restored,

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<sup>14</sup> The Patent law, 1970 (India), Section 3(d), <<https://ipindia.gov.in/writereaddata/Portal/ev/sections-index.html>>

and the interest of public is not harmed.

The restoration of patent in India is a positive step, and it's very helpful in building a robust and innovative economy. It encourages creators to invest in new innovative ideas, even when there is risk because it is known to creators that their intellectual property rights will be protected. India can attract more investment and talent if fair and transparent process for patent restoration is provided, and this can position India as a hub for innovation in the global economy.

