CHAPTER -3

LEGAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN INDIA: POST 1970 DEVELOPMENTS

3.2 - INTELLECTUAL PROPERTY RIGHTS IN INDIA

The origin of patent system was based on economic aspect of patent grants can be traced back to monopolistic grants made in England and Europe in the middle ages. Although there is evidence suggesting that something like patents was used among some ancient Greek cities but patents in the modern sense originated in Italy. The first patent law was a venation statute of 1474. According to this act, in Republic of Venice, they issued a decree by which new and inventive devices, once they had been put into practice had to be communicated to the republic in order to obtain legal protection against potential infringers.

The origin of patents for invention is not clear and no one country can claim to have been the first in the field with a patent system. However, Britain does have the longer patent tradition in the world. Its origins can be traced back to the 15th century when the Crown started making specific grants of privileges to manufactures and traders. The earliest known English patent for invention was granted by Henry 4th To Flemish born, John of Utynam in 1449. It gave 20 year monopoly for his invention.\(^\text{72}\)

A patent is in the form of industrial property, or as we commonly known as intellectual property. A patent is a monopoly right granted to a person who has invented a new and useful article or an improvement of an

\(^{72}\text{Elizabeth Verkey. On Law of Patents, Eastern Book Company,KolkataFils and Edison-2005 pp. no 11-23}\)
existing article or a new process of making an article. It consists of an exclusive right to manufacture the new article invented or manufacture an article according to the inventive process for a limited period. Patents are only granted after the applicant satisfies the requirements of registration. The registration process imposes a number of limits and safeguards on the types of inventions that are patented, the scope of monopoly granted, and the nature of information that is disclosed in the patent. During the term of the patent the owner of the patent i.e. the patentee can prevent any other person from using the patented invention.

The rights granted to a patent owner cover most commercial uses of the patented invention. The owner of a patent has the power to sell the whole or the part of its property and can also grant licenses to others to use and exploit it. A patent granted in one country cannot be enforced in another country unless the invention is patented in that country also.\(^\text{73}\)

### 3.3 - PATENTS IN INDIA

In *M/s.Bishwanath Prasad RadheyshyamvsM/Hindustan metal industries*\(^\text{74}\), it was held that, the object of patent law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the patent office, which, after the expiry of the fixed period of the monopoly, passes into the public domain.\(^\text{75}\)


\(^{74}\) AIR 1982 SC1444 at1447

The fundamental principle of patent law is that a patent is granted only for an invention\textsuperscript{76} which must be new and useful. That is to say, it must have novelty\textsuperscript{77} and utility\textsuperscript{78}. It is essential for the validity of a patent that it must be the inventor’s own discovery as opposed to mere verification of what was already known before the date of the patent.

In India patent system emerged when India was a colony of the British and thereafter for the first Indian patent act was drafted on the lines of British Act of 1852. Indian act for exclusive privileges was passed in 1856 certain exclusive privileges were granted to the inventors of the new manufactures for a period of 14 year. The question whether to grant patents in India were of interest to the Government as early as 1832 is difficult to ascertain. A bill was put fourth which empowered the Governor General of India to grant Patent Right.\textsuperscript{79} The original goal of the bill was to extend, the protection of patents granted in England, to India but this did not take effect due to legal uncertainties associated with extending such rights to India. In 1856 (Act VI of 1856) Act is the first codified statute awarding protection to inventions. The Act of 1857 and 1859 afforded protection only to inventions later in order to grant protection to Patents and designs, the Patents and Designs Protection Act 1872 was passed.\textsuperscript{80}

\textsuperscript{76} 2(j) of Patent Amendment Act 2002 invention means a new product or process involving an inventive step and capable of industrial application
\textsuperscript{77} Novelty means what is new and original, never seen or done before. An invention is taken to be new if it does not form a part of the state-of-the-art. In order to be patentable, the new subject must involve invention over what is old. It is not essential that the invention should be anything complex or complicated. It must merely be of such nature that it involves a technical advance as compared to the existing knowledge.
\textsuperscript{78} It is pertinent to note that utility was not a requirement for patentability under the Patents and Designs Act, 1911. In Bishwanath Prasad’s case, the Supreme Court recognised utility as one of the grounds on which a patent can be revoked
\textsuperscript{79} D.N.Chowdhary, Evolution of Patent Laws: Developing countries perspective, 13-14 (Central law house of Delhi 2006).
\textsuperscript{80} P. Narayana patent law 6(4th ed eastern Law house Calcutta 2006). pp no
The Act was modified in 1859; however, a full -fledged legislation was passed later in 1911. It was called Indian Patents and Designs Act. The Indian patents and Designs Act 1911, it provided for product and process patents with a term of 16 years from the date of filling the patent. In addition there were provisions for extension of the term of the patents by 5 years and in exceptional cases by 10 years.  

Most patents granted during this period went to foreigners. At the time of independence India’s pharmaceutical sector was dominated by MNCs with limited participation by domestic firms. It is that during this period 1947-57, ninety-nine percent of the 1704 drugs and pharmaceutical patents in India were held by foreign multinational Enterprises (MNEs) which controlled 80 percent of the market share. To study patents and provide suggestions on the type of patent system that India should implement, two expert committees were established in independent India.

### 3.4 - NATIONAL LEGISLATIONS ON PATENTS

It is only after independence the government appointed the Patent Enquiry Committee (1948-50) reported that,

> “The Indian patent system has failed in its main purpose, namely to stimulate inventions among Indians and to encourage the development and exploitation of new inventions for industrial purposes in the country so as to secure the benefits thereof to the largest section of the public.”

The development of the Indian patent system, post-independence can be attributed to, the recommendations of committees appointed by government of

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India. A Patent Enquiry Committee under the Chairmanship of Dr. Bakshi Tek Chand in 1949 recommended changes to Indian patent laws to make them more conducive to national interest. Based on this report the patent bill 1953 was introduced but it ultimately lapsed.  

The second committee was appointed in 1957, this patent enquiry committee was formed under the chairmanship of Rajagopal Ayyangar submitted a report on 14 September 1959 is an example of Classic analysis of the conditions of a country that just moved out of the colonial legacy, to establish a patent system of its own. This committee made observation that foreign patentees were acquiring patents not “in the interests of the economy of the country granting the patent or with a view to manufacture there but with the object of protecting an export market from competition from rival manufacturers particularly those in other parts of the world”.  

The report also throws light on various factors contributing towards designing of a proper system of patent law for independent India. The Ayyangar Report also produced an exhaustive Scenario of the global status of patenting. This Committee Report contained two parts. The first part dealt with general aspects of the patent law and the second part gave detailed note on the several clauses of the lapsed bill 1953. The first part also dealt with evils of the patent system and solutions with committee recommendations with regards to the law.

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83 Supra note 79

The report was inspired by the Indian constitution which ensures social and economic justice. Article 21 of the Indian constitution which ensures the right to health to citizens was the guiding philosophy behind Ayyangar committee recommendations. This led to the structure for the ‘Process Patenting’ in India. This report was submitted in Lok Sabha (Lower House of Indian Parliament) in 1966. The committee recommended retention of the patent system, despite its shortcomings on the recommendations of the committee the patent Act 1970 was passed. This Act was brought in to force on 20th April 1972 with Publication of the patent rules 1972. The Patents Act of 1970 was designed perfectly in tune with our then national ideology of planned development. This was the time when there was socialistic planning. Since then India has underwent an absolute economic enhancement. India has taken up the strands of globalization and liberalization.

The patent Act was hailed as a four balance between investor and consumer interests, as it promoted industrial growth, and plants and’ animals were restricted, so that they could not be patented, moreover food products, chemical inventions and drugs were eligible for only process patents. Patents were deemed to be valid for 7 years after their date of application. In terms of agricultural IPR legislation and to the benefit of majority of Indians the 1970 patent Act is regarded to be extremely restrictive. However, the entire scenario

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86 See supra note 80
87Vinod K umar,Narendra Yadav Dinesh Kumar Patidar, Pradeep Sharma, Indian Patents and PharmaceuticalIndustry. IJPBA 2010, Vol 1(4), 399-403
changed when India entered a new phase of economic liberalization in the hope of being embraced as a viable international trading partner.\textsuperscript{89}

The Indian patents Act (1970) which replaced the inherited British colonial law regarding intellectual property rights specifically excluded pharmaceutical product patents and only admitted process patents. The two stated objectives of the 1970 Act were: The development of an indigenous pharmaceuticals industry and the provisions of low cost access to medicines for Indian consumes. Along with these major objectives a number of other measures were introduced drug price controls, restrictions on capacity expansion limits on multinational equity shares etc. They want to keep Pharmaceuticals prices low and on the other, encouraged the development of the Indian Pharmaceuticals industry. This lifted pharma industry with marked acceleration in the pace of liberalization during the 1990s.\textsuperscript{90}

The 1970 Act imposed substantial limits on patent rights; these limits were intended to encourage indigenous inventions and secure their productions in India on commercial scale.\textsuperscript{91} First and most importantly Pharmaceutical products could not be patented; secondly firms were permitted to patent only a single process for making a pharmaceutical firm could not block competitors by patenting all possible process for making a drug. Third, the term for pharmaceuticals process patents shortened to 5 years from the grant of the patent or seven years from application filing.\textsuperscript{92} Whichever was less, compared


\textsuperscript{91}Sec.83 of Indian patent Act

\textsuperscript{92}Katherine ConnerLinton and Nicholas Corrado, “ A Calibrated Approach : Pharmaceutical FDI and the Evolution of Indian patent law, United States International Trade Commission,
to 14 years from application filling, for all other inventions and Fourth the Act imposed very broad compulsory licensing provisions for pharmaceutical process patents within three years of the grant, the patents were deemed licensing of rights meaning that anyone could use the process, if they paid a royalty.93

3.5 - EXAMINATION OF PATENT POLICY TILL 2005

The major achievements that accrued from application of the 1970 Act was that based on the process only patent framework products developed by advanced nations with their legacy of outstanding science and technology caliber and financial resources could be indigenized and produced locally to meet India’s needs both on the strategic (e.g. specialty chemicals including polymers and propellants, advanced materials and metal alloys) as well on the civilian (Drugs and Pharmaceuticals agrochemicals catalysts and so on) side. These enabled the nation to concentrate on other important aspects of development on the one hand and also on healthcare and food security front; at reasonable cost.94 But this IPR policy was not truly forward looking and self-reliant, science and technology cum industrial policy approaches did not promote innovation through original patentable inventions, this has lead to stagnancy in the research community.

93 Sudeep Chaudhuri, The WTO and India’s Pharmaceutical Industry Patent Protection, TRIPs and Developing Countries, oxford, England, Oxford University Press. 2005

It is over the years the Indian Pharmaceutical industry has grown rapidly to the point where it is now the world’s largest producer of the formulations in terms of volume and one of the world’s largest producers of bulk drugs. The structure of the industry has also evolved. In 1970 the industry was dominated by multinational subsidiaries; by 2001 India owned firms were not just the leading players in the industry many had also become major exporters.

India signing World Trade Organization Treaty and the (General Agreement on Tariffs and Trade at Marrakesh in April 1994 which lead to the setting up of World Trade Organization in January 1995. The relevant section for the protection of intellectual property Rights in GATT is covered under TRIPs, according to which India has been given time till January 2005 to implement globally harmonized patent system. The basic requirement and obligations that India has to meet relate to providing for grant of product patents, patent validity period to be extended to 20 years, imports to be considered equivalent to working of the patent, compulsory licenses to be granted only in extreme cases of emergency and the onus of proving non-infringement to rest with the defendant.

The TRIPs agreement covers all aspects of intellectual property which includes copyright, trade-marks geographical indicators, industrial designs, patents, layout designs of integrated circuits and trade secrets. For each area WTO members are required to enact domestic legislations for the protection of

95 Bulk drugs are the therapeutically relevant active pharmaceutical ingredients that are combined with a variety of inactive ingredients to make the formulations that are ultimately consumed by patients. Firms in the pharmaceutical sector can be of one of three types bulk drugs producers pure formulators, or integrate firms which produce both bulk drugs and market formulators.

96 Supra note 84, page no 7

intellectual property and also have to provide administrative as well as judicial system for the implementation of TRIPs provisions.

The TRIPs agreement provides a three stage frame for developing countries to comply with its obligations.

1. Introduction of a mailbox facility starting from 1995 to receive product patent application in the field of pharmaceuticals. An exclusive marketing Right (EMRs) for a period of 5 years or till the product patent is granted or patent application is rejected.

2. Rights of Patentee, term of patent protection compulsory licensing reversal of burden of proof, etc. are to be complied as on January 01, 2000.

3. Introduction of product patent protection in all fields of technology from January 01, 2005 including food, drugs, and Pharmaceuticals and chemicals.

The patents (Amendment) Act, 1999 added a new chapter IVA consisting sections 24-A to 24-F, with retrospective effect from 01-01-1995 which deals with the exclusive marketing Rights (EMRs). The second stage of Amendment took place in the year patents (Amendment) Act 2002. This Act introduced certain important changes, such as TRIPs mandated 2 year patent term for all inventions to be applied to Pharmaceutical patents at the conclusion of the transition period.

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98EMR to Sell or distribute on article or substance in India. A claim for patents and invention for a substance itself intended for use, or capable of being used as medicine or drug with certain exceptions.
The Amendments also include new compulsory license provisions.\textsuperscript{99} These provisions permit a compulsory license application three years after a patent is granted if the reasonable requirements of the public regarding the invention not been satisfied, the invention is not available at a reasonably affordable price or the invention is not being worked or produced in India.\textsuperscript{100}

The Law also provides for immediate compulsory licensing in case of a Governmental notification of a public health crisis or public non-commercial use or where the products will be exported to countries with insufficient manufacturing capacity to address public health problems.\textsuperscript{101} The compulsory license provisions of Indian law are for the broadcast of all the world patents system.\textsuperscript{102}

After three stage amendments process, since entry to WTO in 1995, India entered into TRIPs compliance of new patents regime with effect from 1 January 2005. The main aspects of the new regime are:

1. Product patenting permitted on all items valid for 20 years, circumvention of process patent made difficult, with no exception for drugs and food articles, including the new genetically modified (GM) items.


\textsuperscript{100}Sec-84 of Indian patents Act 2005.

\textsuperscript{101}Sec.92-A of Indian patents Act 2005

2. Special powers of government are subjected to emergency reasons only for all areas except those converted under Indian Atomic Energy Act 1962. Patent validity not conditional to working of patents.

3. Breeders’ rights guaranteed for new plant varieties. Paris convention with facilities under the patent cooperation Treaty made applicable to all member countries. Services Sector also to be subject to similar IPR conditional, be they land, space, telecommunications, satellite images, banking and consultancy service and so on.\textsuperscript{103}

The TRIPs provides minimum standards for the protection of IPRs within all WTO members. However, such standards are considerably a detailed one in the patent field. The aim of the TRIPs is not harmonization, but fixing minimum standards.

The Indian Law stressed on the obligations of the Patent holder and had strong provisions that prevented the abuse of the Patent holder's monopoly rights. One of the important factors that contributed the growth of Indian pharma industry was the fact that the Patent Act 1970 did not provide for monopoly rights in the area of drugs and agro-chemicals as only process patents and not product patents were recognized. Thus, by allowing only process patent India today witnesses a thriving generic pharmaceutical industry that is capable of exporting generic drugs to certain underdeveloped countries. India since 1957 has started to give importance to patents and in the slow pace but suited changed political situation and economic needs for providing impetus technological development by promoting inventive activities in the country.

\textsuperscript{103}See supra note 89, pp 417
In India, these rights or this concept of IPR became famous and we have statutory framework only after British came to India. After the establishment of TRIPs all the member states of UNO are found to accept this agreement and modify their National laws in tune to TRIPs. The trade related intellectual property rights have expanded the definition of trade and services by including intellectual property rights and also have lots of implications on not only on the trade but also on the society in respect of inflations in the medical items and leaving gross effect on the human beings in the under developed country and developing countries. 

The development requires an appropriate positive development in respect legal protection to the intellectual property holder and as well as to the human beings in the society, who will be the end consumers of the invention and its benefits.