

The Progress and Value of Patents in India

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Over the last decade, intellectual property (IP) has emerged as an important business tool for companies in India. Many companies have during the period managed to overcome the challenges posed by the Indian IP regime and devise strategies to derive business and competitive value from their IP assets. The progress of intellectual property law, policy and systems has instilled confidence in IP holders and noticeably furthered their commercial interests. Intellectual property awareness, knowledge and culture improved significantly during the period, and IP has now become an important assessment parameter for research and educational institutions, academics and corporate employees. Among researchers, engineers and technologists, intellectual property registration is today recognized as a valid criterion to measure ability, achievement and progress.

Intellectual Property

At a general level, intellectual property is understood to protect products of the mind or intellect. There are however some variations to the general rule, and protection of knowledge, information, association, representation and others have over the years been incorporated within the scope of IP protection. As it stands today, there are more than 10 forms of IP that protect different manifestations of the mind and other subjects as well. Inventions are protected as Patents, aesthetic product designs as Industrial Designs, business representations as Trade Marks, expressions as Copyrights, secret information as Trade Secrets or Confidential Information, and so on.

With some exceptions, Intellectual Property grants exclusive rights for a limited period of time. Once the term of IP expires, the subject of protection enters the public domain. The term of IP protection varies from one form of IP to another. For example, the term of patents and industrial designs are twenty and fifteen years, and the term of trademarks and trade secrets, if maintained, can be perpetual. Registration is compulsory for forms such as patents and industrial designs, and is not mandatory for forms such as copyrights and trade secrets. Also, protection afforded by most forms of IP is territorial, which means it is limited to the country in which it is registered. Some exceptions to this general rule are copyrights, famous trademarks and trade secrets, whose protection extends beyond boundaries if certain conditions are satisfied.

Patents

Patents are considered to be the most important forms of intellectual property for scientists, technologists and engineers as they protect inventions. Unlike in the United States, the scope and extent of patent protection is not very broad in India. It is limited by exclusions to patentable subject matter in the form of a long list of non-patentable inventions. Irrespective of their novelty, inventiveness and usefulness, inventions that fall within the scope of excluded subjects are not patentable. 'Computer programs Per Se,' 'Business Methods,' and 'New Pharma Forms' are examples of some contentious subjects that are excluded and not patentable. Though the meaning of a few exclusions such as 'Computer Programs Per Se' have been interpreted narrowly to allow patentability of many types of computer program inventions, the scope of patentable subject matter continues to be relatively narrow in India when compared to other countries such as United States, United Kingdom, and Australia.

If it is not an excluded subject, an invention is granted patent protection if it satisfies the requirements of novelty, usefulness and inventive step. The Indian Patent Office (IPO), which has offices at Delhi, Mumbai, Kolkata and Chennai, examines patent applications and grants patents only to inventions that satisfy all the patentability requirements. The term of a patent is twenty years from its filing date, and has to be renewed every year to keep it alive. It takes about three to five years to acquire a patent in India through the normal route. However, by filing for expedited examination, which route is available only for start-ups and certain PCT applicants, a patent grant may be acquired much faster. During the last two years, IPO has granted patents in as short a period as 7 months through the expedited route.

Patent Process

The process of acquiring a patent involves four basic steps before the patent office; filing, examination, publication and grant. A patent application may be filed by the inventor or the company where the inventor is employed. The application may be a provisional application or a complete application. A provisional application is normally filed when the invention has been conceived, but has not been perfected yet. If a provisional application is filed, the applicant gets twelve months to file the complete application. Provisional specifications cover the invention broadly and may be filed quickly and inexpensively. Many applicants file provisional applications to get an early priority date, and take time to file the complete application once the date is secured.

After filing, the patent application will be examined by the IPO. Unlike in the United States, the process of examination is not automatic in India. It will be initiated only if the applicant requests for examination within forty-eight months of filing. Most applicants file the request for examination at the time of filing the patent application to kick start the examination process immediately. After examination, a patent will be granted only if the invention satisfies all patentability requirements and other statutory requirements. If the applicant does not satisfy any of the requirements, the application will be rejected.

A patent application will normally be published within eighteen months of filing. Once a patent application is published by the IPO, the application will be open for opposition by third parties. A granted patent will also be open for opposition by persons in the field of the invention for a period of twelve months from the date of grant. Once a patent is granted, it must be renewed every year in order to keep it alive for twenty years. Many patents lapse and expire due to non-payment of renewal fee. For example, in the financial year 2016/17 alone, more than 19 thousand patents lapsed, expired or ceased.

Patent Statistics

As per the Annual Reports of the IPO, 4,39,590 patent applications were filed between the financial years 2006/07 and 2016/17. The number of patent applications increased by 57% from 2006/07 to 2016/17. Electronic/electrical patent applications increased during the said period from 8193 in 2006/07 to 10584 in 2016/17, which is an increase of about 29%. In 2006/07, the share of filings originating from India was 18%. This increased to 29% in 2016/17.

The table below shows year wise patent filings between 2006/07 and 2016/17. The data has been extracted from the annual reports of the IPO, which are available until 2016/17.

Table 1 – Year Wise Patent Filing Statistics

| Sl. No. | Year | Total Patent Applications filed | No. of patent applications relating to electrical technology | No. of patent applications relating to electronics |
|---------|---------|---------------------------------|--|--|
| 1 | 2006-07 | 28940 | 2371 | 5822 |
| 2 | 2007-08 | 35218 | 2210 | 4842 |
| 3 | 2008-09 | 36812 | 2319 | 7063 |
| 4 | 2009-10 | 34287 | 2376 | 7646 |
| 5 | 2010-11 | 39400 | 2719 | 9594 |
| 6 | 2011-12 | 43197 | 4160 | 4225 |
| 7 | 2012-13 | 43674 | 3568 | 4424 |
| 8 | 2013-14 | 42951 | 4371 | 4410 |
| 9 | 2014-15 | 42763 | 4031 | 4285 |
| 10 | 2015-16 | 46904 | 4102 | 5988 |
| 11 | 2016-17 | 45444 | 4141 | 6443 |

Overall, the number of patent applications filed in India increased steadily until 2012-13, but has been stagnant thereafter. Compared to 2006, the IPO is today more transparent, organized and technologically advanced, but its traditional lethargy, apathy and inaction continue to subsist in some quarters.

Patent Fee

The fee for acquiring a patent is divided into two types, statutory fee, payable to the IPO and professional fee, charged by the patent attorney. The basic statutory filing fee for individuals and startups is 1600 INR and it is 8000 INR for large entities. This fee is for patent specifications that do not exceed thirty pages and ten claims. The fee charged by an attorney varies based on the experience, expertise and stature of the attorney and ranges between 1 to 5 lakh rupees. For startups, attorneys empanelled by the IPO offer services without charging any professional fee, which may be claimed by the attorney from the Government.

The Table hereunder provides the basic statutory fee applicable to different entities.

Table 2 – Basic Statutory Fee

| Sl. No. | Entity | Action | Statutory Fee |
|---------|------------------------|--|---------------|
| 1 | Start-up / Individuals | Basic filing fee | 1600 INR |
| 2 | Start-up / Individuals | Fees for each page in excess of 30 pages | 160 INR |
| 3 | Start-up / Individuals | Fees for each claim in excess of 10 claims | 320 INR |
| 4 | Start-up / Individuals | Filing a request for examination | 4000 INR |
| 5 | Small Entity | Basic filing fee | 4000 INR |
| 6 | Small Entity | Fees for each page in excess of 30 pages | 400 INR |
| 7 | Small Entity | Fees for each claim in excess of 10 claims | 800 INR |
| 8 | Small Entity | Filing a request for examination | 10000 INR |
| 9 | Large Entity | Basic filing fee | 8000 INR |
| 10 | Large Entity | Fees for each page in excess of 30 pages | 800 INR |
| 11 | Large Entity | Fees for each claim in excess of 10 claims | 1600 INR |
| 12 | Large Entity | Filing a request for examination | 20000 INR |

The specific statutory fee applicable may be accurately calculated based on the type of applicant and number of pages/claims in the specification.

Commercialization and Enforcement

Though the patent protection system has improved appreciably in India over the last decade, the extent of commercialization and licensing of patents has not progressed significantly. With a few exceptions, the patent licensing/commercialization market has not matured enough to facilitate and enable licensing transactions. Experts attribute quality of patents, weaknesses in the enforcement system, dearth of professionals and other reasons for the same. Though licensing transactions are few and far between, some companies have started using patents effectively as a part of their marketing, financial, and corporate transactions.

Like other countries, India also witnessed patent actions around Standard Essential Patents relating to mobile technologies during the last 5 years. Ericsson sued Micromax, Intex and others for infringing its patents that form part of standards relating to 2G and 3G technologies. Following initial orders in its favour, Ericsson was able to convince some companies to acquire licenses over its patents.

Recent judgments indicate that the understanding and perspective of Indian Courts with respect to patent disputes has changed over the last decade, and they are no longer perceived to be biased against enforcing patents. Several patent holders were able to get favourable judgments against infringers, and many companies have developed patent strategies specific to the Indian IP system. Though it is not as easy as it is in the United States or United Kingdom, patent holders have shown that patents can be enforced effectively for business benefit in India as well.

Value and Performance

Patents have today emerged as indicators of value and performance among corporates and academic institutions in India. Number of patent filings and grants are recognized by corporates and research institutions as indicators of innovation, technological excellence and product quality. Patents are today important parameters in valuation and evaluation of organisations. They are used to measure progress in several aspects ranging from Research and Development output to standards of education.

At the individual level, patents are recognized as important parameters for making hiring decisions, measuring employee performance, and deciding on promotions/increments. They have also been recognized as valid alternatives to publications, and form part of parameters for performance review of academics and researchers at educational institutions. The awareness of patents among the general public has significantly increased during the last decade, and many people have started relating patent holdings to the quality and credibility of products, companies and individuals.

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About the author



Dr. Kalyan Kankanala is an accomplished and respected IP attorney in India. He is the Managing Partner of BananaIP Counsels, a top ranked Intellectual Property (IP) firm headquartered at Bangalore. His book on Indian Patent Law and Practice published by Oxford University Press is among the highly referenced and cited books in patent law. Dr. Kalyan holds honorary positions with centres of IP excellence, ethics committees and non-profit organisations working for persons with disabilities. He also teaches at renowned institutions such as IIMB and NLSIU, and writes legal fiction.

With the vision of offering high quality, technology, and business driven IP law services following international standards, Dr. Kalyan Kankanala co-founded BananaIP Counsels (formerly Brain League) in 2004. The firm incubated from IIMB's entrepreneurship cell (NSRCEL) and has today emerged as a top ranked and premier IP firm in India. BananaIP differentiates itself from other firms through its achievements and accomplishments in IP services, contributions to the law and policy framework, and business-driven IP research. The firm and its partners are recognized and ranked as leaders in the IP industry. They hold honorary positions with national and international IP committees and research centres, and their views are regularly cited by leading news organizations, journals and research publications. BananaIP's Technology Team & Patent/Trademark and IP Attorneys would be happy to support the members of IEEE network on IP Strategy & Protection at special discounted pricing.

Intellectual property is an important legal and cultural issue. Society as a whole has complex issues to face here: private ownership vs. open source, and so on.

Tim Berners-Lee

Stealing things is everybody's problem. We [Apple Inc.] own a lot of intellectual property, and we don't like when people steal it. So people are stealing stuff and we're optimists. We believe that 80 percent of the people stealing stuff don't want to be; there's just no legal alternative.

Steve Jobs