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# URGENT NEED FOR PETTY PATENTS IN INDIA

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## ABSTRACT

*The utility model, or petty patent, which fosters participation from local small-scale enterprises and individuals in the process of economic growth in a competitive market environment, by encouraging them to innovate, is becoming recognized as an essential component of intellectual property rights for developing countries like India, China, and South Korea. Especially India, where the process of industrialization has accelerated in recent years, and which is the throbbing hub of a multitude of micro, small and medium sized (MSM) industries, which make every effort to outperform the competition and maintain their position in the market by enhancing the quality of their products through ingenuity and establishing viability. However, in India, the Indian Patent Act, 1970 awards patent rights only for new processes, products, or manufactured goods that the meet onerous and lengthy criteria for patent eligibility. Only the big companies who can afford to pay for patent registration fees, attorneys, and other expenses will be able to get this protection. Small and medium-sized businesses, which are a large majority, are left without any assistance. There is no legal framework or legislation that allows for the acquisition of a utility patent or petty patent, a second tier, more accessible form of patent protection. This article addresses the need of the hour by highlighting why India should legally endorse petty patents, as a developing nation primarily comprising of small and medium-sized industries. Besides that, the article explores the historical milieu and global perspectives surrounding petty patents. It also examines the requirements and benefits of acquiring a utility model, emphasizing its special qualities, such as less stringent definition of innovation and a less intricate registration procedure. The article also maintains that a second-tier patent system, such as utility models, might promote innovation more by offering protection more quickly and cheaply, particularly for incremental breakthroughsthat are vital to small and medium-sized enterprises.*

**Keywords:** Petty Patent, Intellectual Property, Startup, Innovation, Registered Right.

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## INTRODUCTION

Petty patent is a registered right that gives the holder exclusive commercial use of a technical invention. The privilege is only available for a short time, to ideas that do not meet the requirements for full patent protection and is provided in return for public disclosure of the invention's operation. Previously, the phrase “petty patent” was used to describe a short-period patent that otherwise doesn't differ all that much from a complete patent.

The justifications for patent protection have their roots in the state privileges of ancient Europe, which bestowed an exclusive right with the intention of promoting domestic innovation and technology exploitation. In fact, “inventive activity” was not a prerequisite, as the value was found in the propagation of the knowledge that the patented technology contained.[2]

Moreover, the dominant mercantilist mindset of the day acknowledged the notion that an exclusive privilege system would foster inventive endeavors, ultimately advancing the nation's economic prosperity. The mercantilist believed that the state was the best tool for advancing the welfare of his nation; in his opinion, the nation was seen as a unit with national interests, independent of the interests of specific groups of people. This meant that the state used its resources, expertise, and output under its control in order to further its own goals and make money. Within the ambit of mercantilism, patent privileges were just one species among a genus of privileges that also included charters, franchises, licenses, and rules given by the Crown or municipal governments. By the end of the eighteenth century, most people agreed—supported by Jeremy Bentham and Adam Smith, among others[3]—that the incentive theory provided justification for the patent regime.

According to the most recent revision of the idea, patents are instruments for economic growth that should work towards improving society, utilizing the broadest accessibility feasible of brand-new, practical products, services, and technical data originating from creative endeavors, and the maximum degree of economic activity feasible, centered on the creation, dissemination, and advancement of these products, services, and knowledge. It is thought that the potential for obtaining financial gains stimulates innovation. Nevertheless, these legal protections eventuallyexpire, leaving the innovations unsecured and open to use and improvement by others. It is a requirement that patents be transient exclusionary rights.[4]

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[2] Carla A. Hesse, *Intellectual Property 700 B.C. – A.D. 2000*, Daedalus, Journal of the American Academy of Arts and Sciences, 2002, *available at : https://www.amacad.org/sites/default/files/daedalus/downloads/Daedalus_Sp2002_On-Intellectual-Property.pdf*. (Last visited 13th October 2023)

[3] Intellectual Property rights: A utilitarian perspective, *available at : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3842429*. (Last visited 13th October 2023)

[4] P.A Geroski, Intellectual Property Rights, Competition Policy and Innovation: Is there a problem?, 2004, *available at* .

## CRITERIA FOR OBTAINING A PETTY PATENT

Generally, protection under the current petty patent system will be given if the utility model is both "novel" and "utility-rich." It requires less innovativeness than what is needed for a typical patent. In order to establish the presence of an "inventive step" in a patent, a person knowledgeable in the art must demonstrate that the invention is not obvious after assessing the "state of the art". Because "evaluation" is so subjective and ambiguous when determining "obviousness", it creates the greatest amount of doubt when patents are granted and, as a result, is frequently to blame for the lengthening of patent battles.[5] This significant obstacle for innovators is removed by utility models, which offer protection for applications whose subject matter is not substantially different from that of known or previously existing art.

According to patent laws, an invention is not 'the new use of a known substance or of the mere use of a known process, machine, or apparatus unless such known process results in a new product.'[6] However, petty patents will provide protection for all these novel applications, creative concepts, and cutting-edge goods where the obviousness of ingenuity is not very apparent. Unlike the typical patent model, the utility model gives the inventor a clear and unambiguous entitlement to the commercial use of their invention or innovation. "Incremental invention" or "small innovation" refers to a modification of an already-existing invention, which is eligible for protection under a utility patent.[7]

Both the originality and non-obviousness requirements must be met in this case, although the requirements vary from country to country. While a patent typically grants protection for twenty years, a utility patent frequently grants protection for a shorter period and varies by nation to nation. A single claim preferably, or a limited number of claims, may be permitted under a utility model. The applicant is permitted to file up to ten claims[8] in Thailand, five claims in Australia[9]and only one independent claim in China.[10] Consequently, the typical utility patent will protect the article for six to fifteen years. The utility model registration process requires less time to complete than those of other patents. Indian startups and companies must get utility patents from

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https://era.ed.ac.uk/bitstream/handle/1842/2521/61_geroskicompetitionpolicydec04.pdf?sequence=1&isAllowed=y. (Last visited 13th October 2023)

[5] W.R. Cornish, *Intellectual Property*, 1999.

[6] Indian Patent Act, 1970, s.3(d).

[7] Petty Patent can Boost R&D, *available at:* https://www.thehindu.com, (Last visited 13th October 2023)

[8] Australia's New Innovation Patent System, *available at* : www.halfords.com. au/ innovation_patent.htm.

[9] Arts. 1.2 & 4 of the Paris Convention for the Protection of Industrial Property, 1883 mention utility models. Utility models are one of the 'objects' for the protection of industrial property along with patents, industrial designs and other intellectual property. Art. 4 gives priority to a person who has filed an application for the grant of a utility model in one of the convention for the purposes of filing in other countries.

[10] Number of utility claims one can file in China, , *available at :* https://www.lehmanlaw.com/resource-centre/faqs/intellectual-property/patent/chinese-utility-model- (Last visited 13th October, 2023) patents.html#:~:text=What%20is%20the%20requirement%20for,include%20only%20one%20independent%20claim. (Last visited 13th October 2023)

other countries due to lack of legal acceptance of utility patents in India.

In terms of the previous criteria about art, several nations do permit some exemption from some of these requirements for utility models in order to demonstrate whether the 'innovation' is original or not. Thus, required novelty does not have to be absolute. The nature of the patent system in question determines the subject matter of protection with respect to usefulness. In contrast to an invention patent, which needs to have 'a prominent substantive feature' and demonstrate 'remarkable advancements,' the law requires 'a substantive feature' indicating 'a remarkable advancement' for a petty patent.[11]

It is evident that utility models have not evolved a uniform or fixed framework. Every nation has laws that are in effect. Thus, in order to have a more comprehensive understanding of how petty patents work, it is crucial to have comparatives from different countries to pit against and evaluate.

## INTERNATIONAL OVERVIEW OF UTILITY MODELS

Regardless of the exact language used, a utility models are an exclusive intellectual property right granted in some countries for a technical innovation, usually relating to a product or a device, for a limited period depending on the country, and giving rise to priority rights under the Paris Convention.

### I. CHINA

The Chinese patent system offers utility models in addition to so-called "invention patents", which can be applied to goods, techniques, or processes. Utility models have a ten-year duration and solely provide protection for items. Moreover, utility models focus on "the shape, the structure, or their combination, of a product",[12] excluding non-fixed shapes like powder or liquid as well as a substance's molecular makeup.

The extensive substantive review process necessary for an innovation patent application does not apply to utility model applications. Rather, all that is required for a utility model application to be granted is the preliminary assessment process. Inventiveness is not considered while pursuing a utility model application; rather, it can be evaluated later if the inventiveness is being questioned in the court of law. If one or more obvious flaws are prima facie found in the application, the Examiner may issue an office action that includes a denial.[13] The prosecution of utility model applications often takes less than a year.

[11] China's Utility Model System, *available at :* https://www.twobirds.com/en/insights/2021/china/utility-model-patents-in-china. (Last visited 13th October 2023)

[12] Utility Model System in China, *available at:* https://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_kul_12/wipo_ip_kul_12_ref_t3d.pdf. (Last visited 13th October 2023)

[13] Difference between Priority Examination and rapid pre-examination of Chinese patents, *available at:* https://www.sohu.com/a/447292932_120309538. (Last visited 13th October 2023)

An invention patent application and a utility model application addressed to the "identical invention-creation" may be filed "on the same day" for domestic filings in China and inbound applications.[14] If the applicant states at the time of filing, that they will renounce the utility model, which was granted earlier and is still valid, the invention patent may still be awarded.[15] This tactic enables the applicant to secure early protection prior to the innovation patent being awarded, which usually takes several years.

Only one "entry" per PCT or Patent Cooperation Treaty international application is permitted when it enters the national phase in China, making the above tactic useless. Stated otherwise, a single PCT international application may yield just one national phase application, which may include either an inventive patent application or a utility model application. Moreover, a divisional application must be the same kind as the original application.[16]

Because of the low bar set by the statutory requirement, it is difficult to invalidate a utility model on the grounds of obviousness, which contributes to its ever-rising popularity. Another factor in this trend is the relatively short period of time taken to grant it. Utility models make it simpler to compare goods to suspected counterfeits and demonstrate infringement since they concentrate on the structure or shape of items that are depicted in at least one drawing.

## II. JAPAN

Any device that "relates to the shape or structure of an article or combination of articles and is industrially applicable" is protected under the Japanese Utility Model Act (JUMA).[17] As with utility model laws in other nations, the JUMA does not provide protection for methods, such as manufacturing processes. The term for Japanese utility models is ten years. In Japan, certain circumstances should be met by a utility model application to become a patent application or even a design application or vice versa. However, it is not feasible to pursue protection of the same subject matter by filing both utility model and patent applications owing to a double patenting issue.[18]

As with utility model systems in other jurisdictions, applications for Japanese utility models may be registered without a substantive examination if they satisfy the fundamental conditions outlined in JUMA Article 6-2. Due to the non-substantive examination system, the Japan Patent Office's "Report of Utility Model Technical Opinion", which is an assessment report on the registrability of utility models, is used to warn potential infringers and restrict the

[14] Paris convention for the Protection of Industrial Property, 1883, art. 6.
[15] Patent Law of the People's Republic of China, art. 9(1).
[16] China National Intellectual Property Administration (CNIPA) As Designated (Or Elected) Office, *available at:* https://www.wipo.int/export/sites/www/pct/guide/en/gdvol2/annexes/cn.pdf. (Last visited 13th October 2023)
[17] Japanese Utility Model Act, 1959, art. 3(1).
[18] Japan Patent Act, arts. 39(3) and (4) and Japanese Utility Model Act, 1959, art. 7(3).

enforcement of utility models.[19] The right holder may be required to pay damages resulting from the warning and enforcement given to the accused infringement if the warning is not based on a positive evaluation of the report and the utility model is ultimately shown to be invalidated.[20]

Furthermore, once a utility model application is filed, there is only one opportunity to change the specification, claims, and drawings—although it is possible to repeatedly cancel claims—due to the lack of a substantive assessment mechanism. The scope of such rectification is restricted to limiting the scope of claims, correcting mistakes, clarifying an unclear statement, and converting dependent claims into independent claim format.[21] As a result, the Japanese utility model system has certain drawbacks, and applicants discover that utility models are less beneficial than patents.

## III. EUROPE

Unlike patents, which can be protected in several countries, utility model rights are not established by an international agreement in Europe. Thus, the only utility models that are accessible are national ones. Based on the number of submissions made each year, the most significant European nations are, in this order, Germany, Italy, Spain, and the Czech Republic.[22]

## IV. FRANCE

The French equivalent of utility models, known as certificats d'utilité (utility certificates), are far less common than those seen in Germany and Italy. The primary cause of this more restricted application of utility models is that that they have a 6-year term,[23] are not directly enforceable in the absence of non-relevant prior art and are subject to the same substantive standards as patents, including those pertaining to inventive step. A search report from the French Patent Office must be filed with the French Court in order to initiate an infringement case in France based on a utility model.

## V. GERMANY

Germany, on the other hand, leads all of Europe in the quantity of filings made each year. [24]German utility models are non-examined, have a 10-year duration from the filing date, and

[19] Japanese Utility Model Act, 1959, art. 29(2).
[20] Japanese Utility Model Act, 1959, art. 29(3).
[21] Japanese Utility Model Act, 1959, art. 14(2).
[22] World Intellectual Property Organization IP Facts and Figure, 2015, *available at:* https://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2015.pdf. (Last visited on 13th October 2023 at 4.30 p.m.)
[23] Patent Protection Strategy in France, *available at :* https://www.casalonga.com/documentation/brevets-ccp/certificat-d-utilite/?lang=en#:~:text=The%20revision%20of%20the%20french%20Patent%20Law&text=The%20duration%20of%20French%20utility,utility%20certificates%20not%20yet%20expired. (Last visited 13th October 2023)
[24] World Intellectual Property Organization IP Facts and Figure, 2015, *available at:*

have a quick registration process that can take, on average, one month to four months to complete.[25] The rights they give rise could offer the same kind of relief as a patent. German utility models must satisfy the same substantive standards that apply to patents in order to be accepted, even if they are not reviewed.

The literature and case laws suggested for a long time that the inventive step requirement was smaller than that of patents. Except for processes, which can be secured by patent protection, any technological invention may be protected, including pharmaceutical compositions and, at least in part, their usage. Additionally, German utility models can offer protection even in situations where the invention is no longer protectable elsewhere because there is a 6-month novelty grace period.[26]

If an applicant owns a pending German application or a pending European or PCT patent application designating Germany, they always have the option to use a German utility model.[27] One or more German utility models may be sought from any of these pending applications through the process known as "branching off".[28] It is also possible to request a simultaneous protection via one or more utility models, to have a fallback to rely on in case of necessity, since a simultaneous protection of the same innovation by a patent and by a utility model does not give rise to double patenting issues in Germany. Nevertheless, branching out a utility model from a patent application allows for customization of the utility model claims depending upon the product.

## VI. Italy

According to the WIPO, about 3,000 direct applications were submitted in Italy in 2015, making it the second-highest filing nation in Europe. Italy's legal system clearly distinguishes between utility models and patents. Utility models are intended to protect "new models" (in the sense of structures or forms) "suitable to provide machines or parts thereof, tools or objects with a particular effectiveness, usefulness or ease of application",[29] whereas inventions are only protected by patents under Italian law. Since this distinction is not often clear-cut in practice, inventions can also be protected by a utility model if they do not involve a technique or process, a chemical product, or an electronic circuit—all of which are not covered by utility

https://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2015.pdf. (Last visited 13th October 2023)

[25] German Utility Model, *available at:* https://www.dpma.de/english/utility_models/index.html. (Last visited 13th October 2023)

[26] Petty Patents around the World, *available at:* https://www.obwbip.com/newsletter/petty-patents-around-the-world#:~:text=The%20substantive%20requirements%20are%20novelty%2C%20inventive%20step%20and%20industrial%20application. (Last visited 13th October 2023)

[27] Utility Model Protection in Germany, *available at:* https://media.bardehle.com/contentdocuments/broschures/Utility-Model-Protection-in-Germany_BARDEHLE_PAGENBERG_IP-brochure.pdf. (Last visited 13th October 2023)

[28] German Utility Model Law, 2017, s.5.

[29] Italian Utility Model, *available at :* https://www.sib.it/en/patents/inventions-insights/utility-model/ (Last visited 13th October 2023)

model protection. Utility models are valid for ten years in Italy. They are not subject to examination, but they are nonetheless enforceable—if their validity is not contested in an infringement action.

The three main criteria are industrial use, creative step, and uniqueness.[30] Utility model owners benefit greatly from the fact that the standard for creative step is typically lower than for patents. It is also possible to convert a patent into a utility model. The law expressly provides for the simultaneous protection of an innovation by a utility model and a patent. In contrast to Germany, utility model applications are not eligible for direct entrance into the PCT national phase in Italy due to the closure of its national route. As a result, in order to get protection at the national level, a PCT application must first be entered into the European regional phase.[31]

## NEED FOR UTILITY MODELS IN INDIA

Intellectual property rights may become strict to the point that the owner of the property becomes the only monopoly of discoveries or ideas rather than "inventions".[32] What would happen to future generations of innovators who would need to use these fundamental building blocks for more inventive endeavors if we let every idea or discovery to be completely protected under intellectual property rights?

They would either need to pay for licensing or other transaction charges in order to get authorization to use these building blocks, or they may try to get around the issue by trying to hide any appropriation of such blocks, which could result in the expense of legal action. Working around the protected building blocks would be the last resort, requiring expensive study methods. There would be negative consequences if the cost of inventing anything new went up.[33]

Any advantages to society and financial gains from a patent regime would be lost if the structure of patent protection necessitated the sacrifice of limited resources. These same considerations serve as the foundation for the need under patent law of a high degree of innovation in order to prevent the protection of conventional, obvious, or just workshop discoveries. Therefore, too restrictive laws like the functional Indian Patent Laws, will discourage future artists or innovators. Certain fundamental components of creativity must remain in the public domain.

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[30] Italian Utility Model, *available at :* https://www.sib.it/en/patents/inventions-insights/utility-model/ (Last visited 13th October 2023)

[31] Italian PCT National Phase Entry, *available at:* https://www.ip-coster.com/IPGuides/pct-italy (Last visited 13th October 2023)

[32] Zia Qureshi, Intellectual property, not Intellectual Monopoly, 2018, *available at*: https://www.project-syndicate.org/commentary/intellectual-property-regime-tends-toward-monopoly-by-zia-qureshi-2018-07 (Last visited 29th February, 2023)

[33] Vijay Govindarajan, The Gap between Large and Small Companies is growing. Why? 2019, *available at:*https://hbr.org/2019/08/the-gap-between-large-and-small-companies-is-growing-why (Last visited on 29th February, 2024 at 4:30 p.m.

Free access to technical knowledge may promote the development of technology more in nations with low levels of creative activity, rather than strong proprietary rights over that information. Rather than attempting to promote local innovation by granting everyone broad legal rights, it may be more effective to require foreign technology holders to transfer their innovations on benevolent conditions in order to increase technical capacity.[34] This means that until their economies are more developed, emerging nations should exercise caution while developing their IP rights.

Utility model systems are said to be extremely helpful for SMEs, especially in developing nations like India. For starters, it is quite probable that SMEs are well-represented in fields where unfair copying is common and cumulative innovation is the norm.[35] In fact, it is frequently suggested that SMEs, particularly those involved in an ongoing process of invention and adaptation, would benefit from a quick and inexpensive second tier patent regime. This is especially true for some product categories where incremental or improved innovation is more important than ground-breaking technological advancements. For instance, the need for a quick and affordable regulatory framework to safeguard small breakthroughs in the following fields: optics, micro-technology, micromechanics, clock and watchmaking, and toy production is one of the driving forces behind the drafted European Commission Directive.[36]

For a second reason, it is possible that SMEs produce more breakthrough and incremental discoveries than big international enterprises.[37] If this is the case, it's critical to assess how well the present patent system serves the requirements of SMEs and the kinds of ideas they generate. Many ideas that come from SMEs are less imaginative than those that come from larger companies, making them easy targets for rivals to take advantage of. Utility models may therefore be very pro-innovation and advantageous to the Indian economy.

Utility models might also benefit small and medium-sized enterprises (SMEs) because the expense of utilizing the patent system could prevent them from using it as often as they would want. Because the second-tier patent regime is designed with small and medium-sized enterprises (SMEs) in mind, including financial considerations, it is thought to be the best option.

With the existing patent laws in the country, which are very strict, the SME industries lose out on

[34] Aqib Aslam, Globalization helps spread Knowledge and Technology Across Borders, 2018, *available at:* https://www.imf.org/en/Blogs/Articles/2018/04/09/globalization-helps-spread-knowledge-and-technology-across- borders (Last visited on 29th February, 2024 at 8:30 p.m.)

[35] Government of India, Research and Development Statistics (Ministry of Science and Technology, 2020), *available at:* https://dst.gov.in/sites/default/files/Research%20and%20Deveopment%20Statistics%202019-20_0.pdf (Last visited on 29th February, 2024 at 4:30 p.m.)

[36] Utility Models – European Commission, *available at:* https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/patent-protection-eu/utility-models_en (Last visited 29th February, 2024)

[37] Sarah Iqbal, Why are small businesses more Innovative? 2022, *available at:* https://www.myhrtoolkit.com/blog/why-are-small-businesses-more-innovative (Last visited 29th February, 2024)

accessibility to resources required to inspire innovation due to relatively less amount of investment in it. Also, they cannot employ attorneys who are thorough with the complexities of IP laws, nor do they are considerable sum of money to invest into acquisition of patents. Besides, innovation or existing processes and such likes of rediscovery is not supported by current legislation due to extremely large set of requirements, each of which must be fulfilled by the applicant. Thus, a second-tier patent regime like Utility Models or Petty Patents is the need of the hour in India.

## CONCLUSION

Utility models should be taken into consideration as an additional option to protect innovations in certain markets, especially for products with a short commercial lifetime, as their registration process may be considerably faster, easier, and less expensive than the patent grant procedure. Apart from a speedy registration process, another benefit in India might be that the level of innovation needed is lower than that of non-obviousness or inventive step needed for a typical patent. Therefore, utility models can be utilized as an alternative to patents in the event of incremental inventions or improvements that are not eligible for patent protection. Additionally, utility models created from patent applications could offer a quickly acquired legal defense against rivals' “copycat” goods.

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