



## I P BULLETIN

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# ANALYSIS OF RECOMMENDATIONS MADE ON LAW OF PATENTS IN 161<sup>ST</sup> PARLIAMENTARY REPORT

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### ABSTRACT

*One of the principles of good governance requires a continuous or regular refinement of the laws of the country, in order to bring the laws on an equal footing with the emerging societal needs and technological trends. They should be improved and revised in such ways that they can assist the governments in delivering an intellectually sound and flourishing domain for technological advancements as well as for the efforts put into the research and development of the same. Thus, the responsibility to bring about such vital and legitimate modifications rests with the concerned parliamentary committees and departments by organizing and carrying out meetings for deliberating the above issues circling the laws of Intellectual Property, the rights of the people associated with it, and its role in country's economy.*

*Through the study made in the following paper, the author has made an attempt to summarise and analyse the crucial proposals presented before the parliament by different departments regarding the laws of Patents in India and recommendations made by the Department Related Parliamentary Standing Committee on Commerce to the respective departments, following on the same. It discusses in brief the concerns and the suggestions to resolve those concerns as put forward by the DPIIT, Ministry of Commerce and Industry, and other prominent law firms in India about all the necessary modernization required in the selective sections and clauses of the respective act or acts governing the practice of obtaining and granting of patents in the country.*

## **INTRODUCTION**

The Parliament of India, through its One Hundred and Sixty-First report, provides a 'Review of the Intellectual Property Rights Regime in India'. The report was presented and laid before the Rajya Sabha and Lok Sabha respectively on 23<sup>rd</sup> July 2021. A rigorous review of the different categories of IPR legislations in India was taken up and presented before the parliament. The Department Related Parliamentary Standing Committee on Commerce prepared and presented the 161<sup>st</sup> report on the Review of IPRs in India, headed by Dr. V.V. Reddy. Various current and possible future issues were taken up in the IPR policy review.

The Department for Promotion of Industry and Internal Trade (DPIIT) briefed the committee through its report, about the lack of awareness of IPRs in the country. It presented a tally of patent filings by Indian and Foreign entities where it was noticed that the patent filings made by Indian entities amount to only 36% of the total share while the rest of the majority of patent filing, comprising 64% was done by the foreign entities. The reason behind such low filings by Indian entities, as the committee was made aware of was due to the lack of a fixed criterion to decide upon the novelty of products or measure the creativeness of the product in question. There is an absence of proper knowledge about IPRs amongst the countrymen, along with scientific temperament. However, imparting such knowledge of establishing novelty in any creation or innovation in India is inadequate.

## **REPORT OF THE COMMITTEE ON PATENTS AND THE PATENTS ACT, 1970**

Although the Patents Act was enacted in 1970, however, in 1995 after the inclusion of India in the TRIPS agreement, the Indian patent regime observed significant changes and thereafter, the Patent (Amendments) Act, 2005 was enacted that came into force on 1<sup>st</sup> January 2005, in order to meet with the requirements of the TRIPS agreement. The committee was advised that since the amendment took place 15 years ago, it is now time to modify the act of 1970 to make it more compatible with the current and dynamic pace of the world of patents. Following suggestions have been provided to the committee:

1. Section 3(b) of the act provides wide discretion to the Controller to cease the usage of any technology without any guidelines for refusal and safeguard against any arbitrary prohibition by the controller that might lead to refusal of use of socially useful technology like the nicotine chewing gum, that has been denied patent protection under the said section. The committee has recommended to the department to amend the provision to the extent of limiting the arbitrary powers of the collector, to provide a

safeguard mechanism against the refusal. But such amendments should be made keeping in mind that such technologies, which have been barred by the law for the time being in force, shouldn't slip through the crack provided by the amendment.

The department is rightful in proposing limitations on the wide powers vested in the hands of a single authority. It could be misused not only by the controller itself but also by concerned parties in deviating the control in their interest. In this way, the abuse of such wide powers without any supervising mechanism, can take place within the staff members and also on orders of any external stakeholders. The controller could also be threatened and forcibly influenced to either refuse the application of a socially beneficial invention or accept such invention that goes beyond the fetters of law, against the laws of nature, or such inventions that could cause public disorder by malignant forces. In case an occurrence of unjustified rejection of application takes place, the department and the committee have carefully considered the same and deliberated over the creation of mandatory guidelines that need to be abided by the controller, in order to ensure the honest exercise of powers vested under section 3(b). The department within the mandatory guidelines, could also set a fixed amount of penalty to be paid by the controller or any such necessary term of imprisonment, in case it is found to have used its discretion ultra vires the statute or as a result of the baseless and illegal refusal, an unfortunate incident is caused.

2. Section 3(c) of the act prohibits the protection of patents to the discovery of any scientific principle, abstract theory, and discovery of any living or non-living thing. The department has been recommended by the committee to look into the possible viability of granting patent protection to the discoveries of the occurrence of non-living substances in nature and the impact of the protection on public interest.

The culture of a provisional patent, for the protection of abstract theories and discovery of non-living things, must be provided to the patentee. The department should formulate the procedure and rules on the basis of which the discovery of a non-living entity in nature can take place and meanwhile, the patentee can explore the practical possibilities of its idea and methods of converting it from abstract to the material form. This way, we can ensure the great minds are appreciated, encouraged and with their help, the country is pushed to the top and leads the world in terms of intellectual innovations.

The committee is right in not promptly declaring to provide patent protection to discoveries of non-living substances present in nature. They should first focus on what categories of non-living entities are available in nature and how much of it can be utilized in favour of the public and ultimately, the country. The department should look into the economical aspect that whether it will be feasible for it to grant a patent and further allow R&D into it or not. There should be enough pieces of evidence to enable the patentee to meet the criteria of patent protection for the discovery, without engaging in biasness against the ones seeking protection for their novel, original innovations. Discovery is to find something that is either old and lost or that is new and until it has been established that the discovery is novel, the protection of patent over it has to be put on hold.

3. Section 3(j) of the act prohibits patent protection for the patenting of plant seeds, varieties, species, and essentially biological processes for the production or propagation of plants. The committee was apprised that patent protection, at a subsidized rate, should be provided for the above and the government along with private entities of the country should be a stakeholder in the patent. This would result in double benefits where the farmers would be able to enjoy the benefits accrued by them after receiving the patent protection at a reasonable rate and the private entities can be charged with the market rate of the patents for using the same product. The committee, on this report of the department, recommended it to grant patents to such plants and seeds that are favourable to the economy with a pre-condition of assurance of participation of the Government in the patents. It also recommended that the department should deliberate about the same with the farmers and possible private stakeholders.
4. Section 122(2) of the act of 1970 provides for imprisonment of up to six months in case a person has furnished any false information or statement that it was aware of or believed beforehand to be false. The department informed that the imprisonment is too stringent and must be replaced with a monetary compensation/penalty. The committee has recommended the department to look into the stringency of the said imprisonment.

Many theories of crime and criminal behaviours believe that if the criminal is severely punished for an act of crime, it will discourage new crimes and criminals. However, false information on a document cannot be put at par with a heinous crime for which

there is a need for stringent punishment. Punishments and imprisonments leave a mark on the character of the person committing a wrongful act, and merely an error in documents, whether or not caused consciously, does not qualify for an act of crime needing a harsh and stringent punishment. There may be incidences where the patentee is someone else and the application is filed by a third person, who in order to sabotage the efforts of the patentee furnishes any false information. Now, since the name on the form is of the patentee and the information mentioned is false which the patentee also has full knowledge of it being false, the patentee shall be deemed to be a forger or a counterfeiter and put behind the bars for six months and during the same period, any third person may file an application for patent protection for the same product and receive a patent in his or her name. Such act of malice deserves to be punished and discouraged more than the acts making honest mistakes.

To make mistake is to humans and all humans make mistakes while filling up a form, especially the ones for which we have to be exercise extra precaution. And if one is informed immediately before filing the patent application that in case a piece of information is found to be false and within the knowledge of the patentee, the patentee will have to face six months prison time for it, the chances of making unconscious mistakes increase especially because of nervousness. They may also fall prey to committing mistakes quite nimbly if their mind is dominated by the fact that there is no second chance and only a blot on the character of becoming a criminal.

The department can put a limit on repeating the same documentary mistakes after which the same application by the same patentee can be disbarred from filing a patent application on account of regularly furnishing of false information, which may be punishment enough, along with a hefty monetary penalty. The amount of penalty can also be increased in accordance with the frequency of furnishing false information.

5. Section 11B of the Patents Act, 1970 read with Rule 24B of the Patents Rules, 2003 stipulates that a time period of 48 months is provided for the examination of a patent application from the date of filing of the application or priority after the expiry of which, the application wouldn't be examined and it would deem to be withdrawn by the applicant. The department presented that the period of 4 years is too extensive and should be reduced. The committee recommended the department reduce the time limit

in order to avoid any unnecessary delay in patent filings and examinations.

There have been several instances where the FER (First Examination Report) has been issued 10 years after the filing of the application, leading many of the applicants to abandon their applications. Sometimes it was no longer practical for applicants to continue because market conditions had changed.<sup>1</sup> After receiving the FER, the patentee has to itself go through the report, modify its application, and finally reply to objections, if any, as received in the FER. The same process might take more than months depending upon the understanding and availability of the patentee. Since the time limit for the examination of a patent application is 4 years, many officials do not even bother to start the same before the end of 3<sup>rd</sup> year. Many start the examination in the fourth year citing a backlog of applications leading the patentee to abandon the hope of fruitful returns on his or her innovations. This further creates a sense of pessimism amongst the potential future patentees and they discontinue the path of converting their innovative useful ideas into physical material. This delay would further affect the investment opportunities in the innovation, one innovation may get preference over the other. If the ideas are not converted into material or there is a significant delay, it will reach late to the market and then to the customers. A lot of start-up ideas depend upon patent protection as it makes it easy for them to secure investment and a team and facilities for research and development and in case there is an unreasonable and unexplained delay on part of the patent offices, it reflects upon the unwillingness of a country to support and promote its entrepreneurs and start-ups.

6. Section 21(1) of the act of 1970 provides that the patent application shall be deemed to be abandoned by the applicant or patentee unless the applicant has complied with all the requirements specified in the act of 1970 within a prescribed time. Such inflexibility results in less filing of patents over which the committee opined that such restrictive section that presumes abandonment of the patent application after non-compliance of only a few requirements by the applicant without hearing or allowing a petition on its

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<sup>1</sup> Joginder Singh & Piyush Sharma, *Compensating delays in granting Patents*, LexOrbis (Sep. 12, 2021, 12:30 PM), <https://www.lexorbis.com/compensating-delay-in-granting-of-patents/>.

behalf is demoralizing and discourages the patentees to file for an application. It recommended the department revise the section and allow some space for minor errors by making it more flexible and a minor penalty or fee must be decided as a consequence of non-compliance with a few requirements of the act to avoid outright rejection of the same.

Apart from the delay that is usually caused on the part of the patent law offices while the examination of the patents, stringency to comply with every detail and specifics within a specified time period without any extension during the filing of a patent application, causes the decline in the interest of the applicants in filing for patent protection. Section 21(1), as mentioned by the department, is rigid and leaves no space for an extended period for complying and submitting all the required documents by the book. A window of the extension needs to be provided before declaring the application to be abandoned. There should be alternate options in case the specific document is not present with the patentee and a reasonable time for either filing a petition or an application for extension of time in order to provide all the relevant details should be provided.

7. Section 106 of the act disallows the filing of any suit for a declaration under 105 and for relief under section 106 or a suit for infringement of a patent in any court inferior to a district court. The department apprised the committee of the over-burdened responsibility of the judiciary and for the establishment of a zone-to-zone IPR dispute resolution centre consisting of experts to conclude the disputes fast. The committee, keeping in mind the rapid growth of technologies in the country leading to an increase in IPR disputes, recommended the department to modify section 104 promoting the inclusion of ADR in dealing with IPR disputes followed by the setting up of local IPR mediation or arbitration centres.

A lawyer isn't a person whose professional description includes possessing the knowledge of all laws of the land but instead, it includes the application of those laws, that is, how to apply those laws and, not every lawyer can be expected to know the application of all the laws. Similarly, when a matter falling within the domain of the infringement or any other issue of IPR is brought before a district judge which has no or very less expertise in the subject, it cannot be expected by the judges to provide

expedited justice through immediate judgments and orders without first thoroughly reading about the subject matter that they might not be regularly accustomed to. Since IPRs involve a lot of inquiries into technologies and their legal dimensions, it is more expedient to settle the disputes, whether it is a suit for declaration or a suit for infringement, before a person who possesses proficiency and good command over the matter and laws of patent. For the same, it is better to establish local ADR centres. There already exist various mediation centres under different HCs in the country for resolving disputable matters relating to business, family matters, etc., and hence, similar ADR centres, in order to lessen the burden of the judiciary providing arbitration, mediation, etc., for settlement of patent disputes, can also be set up at local levels to dispose the matters and deliver justice to the aggrieved without any hassle. This will inspire even the students pursuing legal and technical courses to take more interest, study more about IPRs and proceed their career into the field of IPR without any worries about the scope of the future in the same.

8. Further interactions between the committee and department raised the issue of the complaints made by various IPR firms expressing the complexity of the information available on the websites of Indian patent law offices that makes it cumbersome for the people to file patents and conduct an online search. The committee recommended the department modify and upgrade the website in order to make it user-friendly and offer the users easy travel through the website.

A person in its nascent stage of patent application might find it hard to easily comprehend the legal language present on the website of patent law offices. In fact, the person might not be even aware of whether the novel creation made by it is covered or is qualified for patent protection or not. The websites should be required to display their services, offers, and about themselves keeping in mind that the applicant may not be well versed in the legal world. Therefore, instead of going through the tiresome process of first acquainting themselves with basic legal language, they prefer not to indulge themselves in the filing of applications. The websites should avoid the use of any heavy vocabulary just for the sake of providing a high profile, illustrious, and professional image of their websites. They can decrease the intricate language and help their websites by simply using visual images to guide the first-time users of the websites.



The department can help set up an online/offline desk similar to customer services or service centres of huge industries where such patentees who are either not very fluent in the online search or are not able to understand the language of the patent law websites can contact them and are able to receive step by step guidance to read, understand and file the patent applications. The establishment of such centres can create more job opportunities for people as well.

Apart from the above specific observations made and deliverance of the most suitable suggestions for amendments in the Patent Act of 1970 by the concerned parliamentary authorities and other connected departments of the country, the committee was apprised of the provision of ‘Patent Pending’ that is provided under the Patent laws of the USA. Patent Pending, as informed by the various stakeholders to the committee, is the status that is provided to an innovative product that indicates the existing patent application applied for it under the office of USPTO (United States Patent and Trademark Office). Once this status is granted to an applicant for its product, it can sell its product in a safe market. Upon the inquiry of the committee over the absence of such provision India, it was provided with two reasons, one being the lack of awareness of IPRs in India as compared to the USA and the secondly, section 11A of the act of 1970 was already in place providing a safe haven to the applicants. The section provides the applicants with the same set of rights granted to a patent holder from the date of publication of the patent application till the date of grant of the patent, except for the right to initiate any proceedings for patent infringement of its product until it receives the patent for it.

The benefits of the status and provision of ‘Patent Pending’ as informed to the committee is that it encourages the applicants or the patentees to notify the public about the patent status of their product, further discouraging the potential patent infringers and informing them about their liabilities of paying damages once the patent is granted and also of seizure, and injunction. Hence, the label would not only avoid unnecessary infringements but advantageously could be a good marketing tool that would establish authenticity and genuineness of the product thereby encouraging further inventions and innovations in the country.<sup>2</sup>

Taking into consideration the above advantageous outcomes of obtaining a status of ‘Patent

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<sup>2</sup> Parliament of India, “161<sup>st</sup> Report on Review of the Intellectual Property Rights Regime in India” (Department Related Parliamentary Standing Committee on Commerce, 2021).

Pending’ the committee recommended introducing and implanting the same provision in Indian patent laws as well. The committee held the view that it could successfully act as a deterrent to IP crimes of unauthorized copying or counterfeiting of products and avoiding unnecessary infringements which will only further the credibility, its legitimacy, and validity that in turn would generate maximum possible economic benefits of the patents and make it market-friendly.<sup>3</sup>

## CONCLUSION

The importance and necessity of introducing regular amendments in the written and codified legislative statutes can be put on an equal pedestal to an old property that has been awaiting renovation for a long time. In order to continue to stand up for a fair share of future years and survive any blow due to natural calamities or cause the minimum damage to the property due to such disasters, it has to have a strong base along with modern recast to it. The house, when introduced with the latest redesigns, offers greater strength and robustness to the base whereupon the house is fabricated while at the same time refreshes the structure with the most recent everyday expectations, in terms of technology laced with innovations, of the people living in it. Remodelling the house, amongst the many important and beneficial reasons, enhances the living conditions for the people living inside the house and helps the owners build a decent impression of themselves in their neighbourhood, these being the foremost reasons for renovating one’s house.

For instance, the kitchens in houses are now being restructured in such a way so as to include in it chimneys. Chimneys help suck the lingering smell of the food and the smoke that emanates from usually grilled food, ensuring that the smell doesn’t spread to the living area, bedrooms, or any other parts of the house and even outside the house through windows. Earlier without chimneys, all the members in the house had to forcibly absorb the smoke and heat of the cooked meal, making them nauseous and the kitchen walls had to endure oil. Now, all of this can be avoided by simply installing auto-clean chimneys in their houses. Similarly, if new legislation like resolving the patent disputes through the various methods of ADR, reduction of patent examination from 48 months to a sufficient period, and other such amendments have to be inserted in the statutes in order to save the statute from becoming ineffective and a mere piece

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<sup>3</sup> *Ibid.*

of paper.

Obsolete legislation that has not been implemented for a long time, can put the country at risk and collapse the long-standing pillars of good governance. They may lead to a significant non-compliance of the legislation to work with the currently relevant laws and regulations. Further, those archaic legislations may not be able to throw enough focus on the new technologies resulting in inconsistent and outdated practices of the country,<sup>4</sup> which may sway away the foreign investors to participate and take interest in investment policies of that country. While the core elements of policies and procedures may stay the same the details should change according to industry standards, organizational needs, or legal requirements. In addition, policies should line up with the country's mission, vision, and values.<sup>5</sup>

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<sup>4</sup> PowerDMS, <https://resourcingedge.com/hr-services/the-importance-of-reviewing-policies-and-procedures/> (last visited Nov. 29, 2021).

<sup>5</sup> Kimberly D. Gray, *The importance of reviewing policies and procedures*, Resourcing Edge (Nov. 29, 2021, 20:46 PM), <https://resourcingedge.com/hr-services/the-importance-of-reviewing-policies-and-procedures/>.