# CHAPTER 1
# Intellectual Property

## 1. Intellectual Property

Intellectual property is a legal concept which refers to creations of the mind : inventions, literary and artistic works, and symbols, names and images used in commerce. It is a blanket term for a variety of assets created by the mind otherwise classified as intangible property. Intangible assets are rights, privileges, and competitive advantages that result from the ownership of long-lived assets that do not possess physical substance. Intangibles may arise from Government grants such as patents, trademarks, and trade names. The expression "intellectual property" connotes a string of rights available for the protection and exploitation of technology, design, secrets, etc. Such property has come to be known as intellectual property because it is born of the intellect and requires for its exploitation and use, again the intellect.

A right is legally protected interest and its object is the thing in which the owner has interest. The existence of object is no longer an important characteristic, in the context of the intellectual property. Rights relating to these properties exist without objections as understood in common parlance, such as copyright or a right of a patentee. Intellectual property rights are negatively available, protected by law against imitation and piracy. Obligation is fastened on persons other than the owners to take care against imitation, piracy or plagiarism. Infringement by them involves liability for damages or invites penalty, fine or prosecution.

Unlike in the case of material or tangible objects, intellectual property laws protect specific concepts - in the case of trademark, distinctiveness, in copyrights, originality of an expression, in the case of patents, inventiveness and in the case of industrial design, attractiveness. Just as the owner of real property, or a material object is entitled to legitimately assert his domain over it, and protect it from unfair appropriation by another, the intellectual property owner is, by these laws, enabled to protect unwarranted exploitation or unauthorized use of what are his property rights for which exclusive rights are recognized. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works, discoveries and inventions, and words, phrases, symbols, and designs. Intangible intellectual property rights and the tangible or physical manifestations or embodiments of those rights are distinct property interests. A purchaser of a particular tangible manifestation or embodiment of intellectual property acquires only property rights in that manifestation or embodiment and does not acquire any rights to the underlying intellectual property.

Common types of intellectual property are of two kinds i.e.,

- industrial property (chiefly covering patents, rights in technological inventions, rights in trademarks, industrial designs, appellations of origin etc.) and,
- copyrights (covering musical, artistic, literary and photographic work).

industrial property are also referred to as commercial intangibles. They are categorised into two groups –

1. Trade intangibles, such as patents, designs and models;
2. Marketing intangibles, such as trademarks and trade names.

Trade intangibles are basically concerned with the production of goods and provisions of services, e.g., patents: while marketing intangibles are concerned with the promotion of sales, e.g., trademarks.

Various intellectual property laws are enacted by the Government of India such as: Copyright Act, 1957; The Patents Act, 1970; The Trade Marks Act, 1999; The Geographical Indications of Goods (Registration and Protection) Act, 1999; The Designs Act, 2000; Semiconductor Integrated Circuits Layout-Design Act, 2000; Protection of Plant Varieties and Farmers' Rights Act, 2001; The Protection of Plant Varieties and Farmer's Rights Rules, 2003; etc.

There is general view that a patents give temporary protection to the technological inventions, designs give right to the appearance of mass-produced goods, copyrights give case long-lasting rights in, for instance literary, artistic and musical creations; trademark are protected against imitations so long as appearance as it continue to be employed in trade and there is no single generic term that satisfactorily covers them all. Now people use "Intellectual Property Rights". It is said that this is a branch of law which protects some of the finer manifestation of human achievements. The United Nations Organisation has established an organisation for this purpose, i.e. called World Intellectual Property Organization (WIPO).

## 2. Characteristics of Intellectual Property

The intellectual property is unique in that it is devised by the individual out of his own ingenuity. It relates to literary, artistic and scientific works, performances or performing artists, phonograms, broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial design, protection against unfair competition, and all other activities in the industrial, scientific or artistic fields. A copyright is the result of a work of art or any other work, involving originality and creativity. A patent for invention is the result of inventive skill. A design relates to the share or configuration of a finished article. A trade mark is not always the result of inventive skill or a product of imagination but it may be a word or device of some commonplace, thing used or proposed to be used by him on the goods to be manufactured.

With the development of society, new discoveries and inventions are made, thus widening the items that fall under the category of intellectual property. As novel ideas and their products emerge, they have to be accommodated. This is, therefore, a dynamic area in human life which also requires dynamic regulation in terms of law. The rapidly changing technology during the last few decades led to the latest concept of intellectual capitalism. Capital is no longer in banks, but in minds. Brain and not the bucks, is the source of new enterprise. In the context of technological revolution, it is the brainpower, and not the money, which is scarce. The return on intellectual capital is considerable and not measurable by any standard. The Intellectual Property Right comes into existence if there is spent sufficient labour, effort, time, etc., whereby it can be said that consequently a new creation has come into existence, i.e., in essence there is required existence of innovation which is an Intellectual Property Right. It is because an Intellectual Property Right comes into existence that there is hence an entitlement to protection thereof and so that the creator is granted monopoly with respect to use of the new/original product.

The major tool for the intellectual enterprise is the information and knowledge. New information is capable of providing tools for the enterprise to make use of new technology.

The rights in a patent, design or copyright are for a limited period of time, whereas the owner of a trademark, subject to certain conditions, gets a perpetual right for its exclusive use. Thus, temporary protection to technological invention is given by patents. Registered design gives protection to the novel appearance of mass produced goods. Copyright gives longer lasting rights in literary, artistic and musical creations. Trademarks are protected against imitation. Such protection cannot, however, endure in perpetuity. The object of protecting it is to enable its acquirer to secure a "fair" value for investment of his intellectual efforts, capital and labour. A balance is to be drawn between rewarding its owner for investment of the society as a whole in the economic and cultural development. Various branches of intellectual property law – patents, trademarks, registered designs, copyrights, confidentiality and confer legal exclusivity in the market place.

## 3. International Treaties

The laws of a country relating to intellectual property are generally applicable to acts accomplished or committed within that country. To promote the smooth flow of technology transfers beyond the frontiers of different countries, certain international conventions and treaties have been created at international level. The International Union for the Protection of Industrial Property, popularly known as Paris Convention, was signed in 1883 in France (revised in 1957). The International Union for the protection of literary and artistic work, popularly known as Berne Convention was signed in Switzerland in 1886 (revised in 1971). Pursuant to the Paris and the Berne Conventions, another convention for the establishment of World Intellectual Property Organisation (WIPO), was signed in Stockholm on the 14th July, 1967. There are some other conventions on the subject, *viz.,* Madrid Agreements, 1891; Nairobi Treaty, 1981; Patent Co-operation Treaty, 1970; Budapest Treaty, 1977; Trade Mark Registration Treaty, 1973; Lisbon Agreement, 1958; The Hague Agreement, 1925; The Strasbourg Agreement, 1971; Nice Agreement, 1957; Locarno Agreement, 1968; Vienna Agreement, 1973; Rome Convention, 1961; Geneva Convention, 1971; Brussels Convention, 1974, Treaty on the Intellectual Property in respect of Integrated Circuit, 1989, signed in Washington; Protocol relating to Madrid Agreement, 1989.

The inter-governmental co-operation in the administration of intellectual property consists of the activities, for example:

- collection of patent documents used for search and reference and devising means of easier access of the information contained in the patent documents;
- the maintenance and updating of international classification systems;
- the compilation of more and more sophisticated statistics;
- regional surveys of industrial property and copyright law administration.

## 4. World Intellectual Property Organisation (WIPO)

The World Intellectual Property Organisation (WIPO) is the United Nations' specialized agency for inter-governmental co-operation in "industrial property" (patents and other rights in technological inventions, rights in trademarks, industrial designs, appellations of origin, etc.) and "copyright and neighbouring rights" (in literary, musical and artistic works, in films, performances or performing artists in phonograms, etc.).

WIPO carries out a substantial programme of activities in the field of intellectual property to promote creative intellectual activity, protection of intellectual property, international cooperation and the transfer of technology, especially to and among developing countries.

Another function of WIPO is its registration activities which are concerned with receiving and processing of international applications under the Patent Co-operation Treaty (PCT) or for the international Registration of Marks or deposit of industrial design.

## 5. Patent Cooperation Treaty (PCT)

The Patent Cooperation Treaty (PCT) was signed in Washington on June 19, 1970 and entered into force on January 21, 1978. The Treaty was subsequently amended in 1979 and modified in 1984 and 2001. A contracting State to the Paris Convention for the Protection of Industrial Property can become member of the PCT. A majority of the world's countries are signatories. One of the main advantages of the PCT is that the inventors in any of the signatory countries can file a single application for patent rights in some or all of other States. The first step of the PCT procedure (or international procedure) consist in filing an international application with a suitable patent office, called the receiving office, his application is then processed by a single international searching agency and then published by International Bureau of World Trade Intellectual Property Organization (WIPO) in Geneva. When an examination is demanded by the contracting states for which the examination is demanded are called elected offices, otherwise they are called designated offices. Thereafter, however, for the patent to be granted, applicants must deal directly with patent offices in the countries where they are seeking patent rights. In view of this, the provisions relating to convention countries have been amended.

## 6. Doha Declaration

The Doha Declaration was issued in 2001, which indicated the TRIPS should not prevent from dealing with public health crises. An agreement was reached on August 30, 2003, for implementation of the Doha Declaration on TRIPs and Public Health. According to para 6 thereof, compulsory license can be granted for export of medicines to countries which have insufficient or no manufacturing capacity to meet emergent public health situations.

## 7. Uruguay Round (GATT)

The Uruguay Round under the GATT (General Agreement on Tariffs and Trade) concluded on December 15, 1993. An overall agreement covering *inter alia* trade in goods, trade in services, trade related intellectual property and trade related investment measures was arrived at for adoption and ratification by the Governments of 117 countries. The agreement was signed in Marrakesh, Morocco, in April 1994; and it operative with effect from 1-1-1995. The treaty roughens up protection of patents, copyrights, rights of performers and producers of sound recording, trademarks and label of origins. It improves patent and copyright protection for the intellectual property. The GATT has now become a permanent world body that covers goods, services and intellectual property. A World Trading Organisation (WTO) implements the results of the Uruguay Round making dispute settlement and arbitration decisions easier and binding. The adoption by India of international standards in IPRs (Intellectual Property Rights) protection would enhance flow of foreign direct investment and technology.

The Uruguay Round Agreement, 1994, relates to trade in goods, trade in services, trade-related intellectual property rights (TRIPS), trade-related investment measures (TRIMS), trade in textiles and trade in agricultural commodities, apart from reduction in tariffs. The TRIPS aimed at developing standards of protection for copyright, patents, trademarks, geographical indications, neighbouring rights, integrated circuits, industrial designs and trade secrets. As regards patents, there is general obligation to comply with the substantive provisions of the Paris Convention (1967). In addition, the agreement requires that 20-year period of protection be available for all inventions, whether products or processes, in almost all fields of technology. Invention may be excluded from patentability if their commercial exploitation is prohibited for reasons of public order or morality, otherwise, the permitted exclusions are for diagnostic, therapeutic and surgical methods, and for plants and (other than micro-organisms) animals and essentially biological processes for the production of plants or animals (other than microbiological processes). Plant varieties, however, must be protectable either by patents or by a *sui generis* system (such as breeder's rights provided in a UPOV Convention). Detailed conditions are laid down for compulsory licensing or Governmental use without the authorization of the patent owner. Rights conferred in respect of patents for processes must extend to the products directly obtained by the process; under certain conditions alleged infringer may be ordered by the Court to prove that they have not used the patented process. Articles 27 to 34 of the Agreement of the TRIPS deal with patents. Articles 70.8 and 70.9 deal with grant of exclusive market rights during the interim period.

- **Patentable subject-matter**

Article 27 provides that patent shall be available for any inventions, whether products or processes, in all fields of technology, provided they are new, involve inventive step (non-obvious) and are capable of industrial application (useful).

Exceptions are diagnostic, therapeutic and surgical methods for the treatment of humans and animals; plants and animals other than micro-organism and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. Inventions are excluded from patentability if their commercial exploitation is prohibited for reasons of public order or morality. Plant varieties are protectable either by patents or by a *sui generis* system (such as breeder's rights provided in UPOV Convention).

## 8. Uruguay Round - TRIPS Agreement - Basic Principles

The Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an attempt to narrow down the gap in the way these rights are protected around the world, and to bring them under common international rules. The agreement covers five broad issues:

- How basic principles of trading systems and other international intellectual property agreement should be applied.
- How to give adequate protection to intellectual property rights.
- How countries should enforce those rights adequately in their own territories.
- How to settle disputes on intellectual property between members of the WTO.
- Special transitional arrangements during the period when the new system is being introduced.

When an inventor or creator is granted patent or copyright protection, he obtains the right to stop other people from making unauthorised copies. Society at large sees his temporary intellectual property protection as an incentive to encourage the development of new technology and creations which will eventually be available to all. The TRIPS Agreement recognises the need to strike a balance. It says that intellectual property protection should contribute to technical innovation and the transfer of technology. The agreement says that both producers and users should benefit, and economic and social welfare should be enhanced.

The second part of the TRIPS agreement looks at different kinds of intellectual property rights and how to protect them. The purpose of it to ensure that adequate standards of protection exist in all member countries. Here the starting point is the obligation of the main international agreements of the WIPO that already existed before the WTO was created:

- the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc.);

- the Berne Convention for the Protection of Literary and Artistic Works (copyright).

Some areas are not covered by these conventions. In some cases, the standards of protection prescribed were thought inadequate. So the TRIPS Agreement adds a significant number of new higher standards.

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# PART-II

# THE PATENTS ACT

CHAPTER

# 2 Patents-General Concepts

## 9. Patent - Meaning and Concept

A patent is a set of exclusive rights granted by a Government to an inventor or applicant for a limited period of time. The word "patent" comes from the practice of monarchs in the Middle Ages conferring rights and privileges by means of "open letters", that is documents on which the royal seal was not broken when they are opened, as distinct from "closed letters" that were not intended for public view. Open letters were open to inspection by any interested person. In Latin, the language of Government in medieval England, "open letters" were '*litterae patentes*' and as English took over from Latin for official purposes, the documents became known as 'letters patent'. Then in time 'letters patent' or just 'patents' became terms most frequently associated with inventions. Thus, the term "patent" originated from the term letters patent which originally denoted royal decrees granting exclusive rights to certain individuals and from the term patent which means to lay open to public inspection. The theory of the patent legislation, as per the word's original definition, is to induce the inventor to disclose knowledge for the advancement of society in exchange for a limited period of exclusivity.

Patent protection rests on the concept of a bargain between the inventor and the public. In return for disclosure of the invention to the public, the inventor acquires for a limited time the exclusive right to exploit it. It was ever thus, even before the *Statute of Monopolies* (1623), the Crown rewarded an inventor with a limited monopoly in exchange for public disclosure of "a new invention and a new trade within the kingdom ... or if a man hath made a new discovery of anything": *Clothworkers of Ipswich Case* (1653), Godb. 252, 78 E.R. 147, at p. 148, where the court went on to say that the effect of an unjustified monopoly was "to take away free-trade, which is the birthright of every subject".

A patent is an invention which involves the manner of manufacture, machine by which manufacturing is done or the substance produced as a result of manufacturing. Manufacturing involves making a product, using a process, exercising an operating mechanism and selling the end product.

A patent is a monopoly right to "make, use, exercise or sell", which expression comprehends the manner of exploitation appropriate to all manners of manufacture; if a product can be made, if a process can be used, if an operating mechanism it can be exercised to secure the promised result, and whenever there is an end product, that can be sold (see *Pfizer Corporation v Ministry of Health* (1963) RPC 173].

Patents relate to new, useful, and non-obvious processes, machines, manufactures, composition of matter, plants, or design. Another form of technology is, which is more frequent, is the undisclosed proprietary information (know-how) which is superior to the ordinary level of information in the industry concerned. Any invention which places major emphasis upon the theories, understanding, and principles of a wide body or subject-matter is not patentable. Since they add to the understanding of the subject, they lack utility. A patent is situated in the country where it is registered (see *English, Scottish & Australian Bank Ltd. v. IRC* (1932) AC 238).

In the famous words from *Brenner v. Manson* (1966) 383 US 519: "a patent is not a hunting license. It is not a reward for the search, but compensation for its successful conclusion." For that reason a patent must deliver some current benefit at the claim date. Further, it is not enough that that utility is known only to the inventor. It must also be known to the skilled reader: "It should not be left to the skilled reader to find out how to exploit the invention by carrying out a research programme". If the description does not state a utility and the utility would not be apparent to a skilled person in light of common general knowledge, the patent will be invalid for lack of industrial application, whether or not there is a use known to the patentee

A patent may be defined as a statutory privilege granted by the Government to inventor, and to other persons deriving their rights from the inventor, for a fixed period of years, to exclude other persons from manufacturing, using or selling a patented product, or from utilising a patented method or process. At the expiration of time for which the privilege is granted, the patented invention is available to the general public or, as it is sometimes put, falls into the public domain. A patent is a statutory right. It is a legal monopoly granted to the owner of a new invention which is capable of industrial use, for a limited period of time. It is a property which, like any other business commodity, may be bought, sold, hired or licensed. These are various features of a patent granted under the Patent Act, 1970. The expression "patent" has, therefore, been defined in section 2(m) of the Act "to mean a patent for any invention granted under this Act". It refers to the right granted to anyone who invents any new, useful, and non-obvious process, machine, article of manufacture, or composition of matter.

## 10. Patent – *quid pro quo* of the Right to Exclude

A patent is a legal agreement between Government and an inventor which gives the inventor the right to exclude others from making, using or selling the invention for a limited time in the country, in exchange for disclosing his invention The disclosure of invention required by the Patent Act is the *quid pro quo* of the right to exclude. The basic *quid pro quo* for granting the patent monopoly is the benefit derived by the public from an invention with substantial utility (see *Brenner v. Manson* (383 US 519 (1966)). The disclosure is extracted from the patentee in exchange for a right to exclude. It is the price paid for the exclusivity secured. Before granting the right, the Act requires observation of strict conditions. If an invention is already commonly known and used when the patent is sought, the patent is not granted because of the absence of the *quid pro quo*.

The effect of the grant of a patent is *quid pro quo*. *quid* is the knowledge disclosed to the public and *quo* is the monopoly granted for the term of the patent. A patent once granted confers on the patentee the exclusive privilege of making, selling and using the invention throughout India and of authorising others so to do. This is the *quo*. The *quid* is compliance with the various provisions resulting in the grant of the patent.

The requirement of *quid pro quo* distinguished the patent law from the copyright law, though in both disclosure is required. For the author seeking copyright protection, the disclosure is the required objective, not for something extracted from him in exchange for the copyright. Copyright gives no monopoly on knowledge to its holder. Anyone may make use of any fact or idea acquired by reading the author's writings. The grant of patent, on the other hand, does prevent full use by others of the inventor's knowledge. Copyright is not a monopoly, but the patent right prevents full use being made of knowledge.

The patent law requires the patentee to disclose his invention fully and define clearly the exact invention. What he is required to disclose are :—

- Bibliographic information;
- Description of the invention;
- Summary of the invention;
- Brief description of the drawings;
- Detailed description of the invention;
- Claims.

Since the Indian Patents Act, 1970 provides various checks to prevent invalid patent being granted which does not involve any inventive step or a manner of new manufacture or improvement, detailed scrutiny is done as the patents office and objections invited from the public. As soon as the application for patent is advertised as accepted, the patent office makes the complete specification filed in pursuance of the application open for public inspection and prints the same for public distribution.

## 11. Patent - A Document

A patent is a document issued by the Government office, which describes an invention and creates a legal situations in which the patented invention can normally be exploited (made, used, sold, imported) with the authorisation of the patentee.

Document includes any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of the means which is intended to be used, or which may be used, for the purpose of recording that matter [General Clauses Act, section 3(18)]. Any decipherable information which is set down in a lasting form is a document (see *Public Prosecutor v. T. Amrath Rao,* AIR 1960 (AP) 176). It is something on which things are written or inscribed, which gives information capable of being used as evidence. It is something which is available for future reference and use and acceptable to the public authorities and courts. Document includes an electronic document.

## 12. Patent Rights - Nature of

Grant of a patent, essentially, provides the grantee, the right to exclude others from using the patented invention for the specified period; it does not provide the grantee (patentee) the right to use the patent but merely a right to restrain others from doing so. In *Bayer Corporation and Ors. v. Cipla, Union of India (UOI) and Ors.*: 162 (2009) DLT 371, the Delhi High Court had described "patents" as under:-

> "Patents are monopoly rights granted to those who invent or discover new and useful processes, products, articles or machine of manufacture, or composition of matter, or any new and useful improvement of any of those. It is not an affirmative right to practice or use the invention; it is a right to exclude others from making, using, importing, or selling patented invention, during its term. They are property rights granted by states to inventors in exchange with their covenant to share its details with the public."

The US Supreme Court has described the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (*Kaiser Aetna v. United States:* 444 U.S. 164, 176 (1979). The US Patents

Act now expressly states that "patents shall have the attributes of personal property" (35 U.S.Code § 261).

The patent law is one creating a true monopoly granted to sub serve a broad public policy. The monopoly extends to the right of making, selling, and using and each is separable and substantial right. The patentee may exclude from the use of his invention, absolutely or upon terms.

## 13. Patent – Subject-matter and exclusion of Right

The specific subject-matter of a patent is "the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by grant of licences to third parties as well as the right to oppose infringement" [see *Centrafram v. Sterling Drug* (1974) ECR 1147; (1974) 2 CMLR 480]. Thus, the subject-matter is putting into circulation for the first time patented products. That right is exhausted once the product has been placed on the market.

## 14. Patent - A Property

A patent has the attributes of personal property, protected against appropriation both by individual and by Government [see *Hartford – Empire Co. v. United States* 323 US 386 (1945)].

A patent is viewed as a property providing to its owner exclusivity against other potential users of that source in the same way a real property provides to its owner its exclusive use and enjoyment. Patent is a property which like any other business commodity, may be bought, sold, hired, or licensed. Its owner has a right of exclusivity. That right is not, however, unrestricted. As most properties, it is also subject to limited restrictions essential for the maintenance of an ordered society for the benefit of the public. An owner of intellectual property does not have absolute right to use it in any manner without restriction (*U.S. v. Microsoft Corp.* 253 F.3d 34 (*D.C. Cir.* 2001). Patent does not fall within the traditional concept of property. Although patent grants its holder the right to exclude others, it also protects his right to use, make or sell the invention himself; the Government does not hold such right itself. The Government only issues but does not sell the licence in the ordinary commercial sense. The "licence" is not a property in the hands of the Government which it "transfers" for a consideration in the traditional sense of the property transfer. The State does not have any property right in the licence so much as it does not have any property rights in driver's licences, medical licences and other licences requiring an upfront fee- licences [see *Cleveland v United States,* 531 US 12 (2000)]

Patent rights not merely enables a person the right of using technology or know-how for the production of or the process of production of a product or service but it also excludes competition. It is itself a valuable right. They are not actionable claims as for the exercise or protection of which an action has not be initiated in the court of Law.

## 15. Patent - Whether Goods

The intellectual property rights fell within the expression 'goods' under the Sales of Goods Act (see *Tata Consultancy Services v State of Andhra Pradesh:* AIR 2005 SC 371) The term 'goods' had been defined in Clause (12) of Article 366 of the Constitution to include all materials, commodities and articles. Commodity is an expression of wide connotation and includes everything of use or value which can be an object of trade and commerce 'Goods' in Sales of Goods Act means every kind of movable property. Property has been defined therein to mean the general property in goods and not merely a special property. 'Goods' would comprehend tangible and intangible properties, materials, commodities and articles and also corporeal an incorporeal materials, articles and commodities.

The Delhi High Court in *Telefonaktiebolaget Lm Ericsson v. Competition Commission Of India* (2016) SCC Online Delhi 1591, observed.

> "103. As noted above, the nature of patent rights - right to exclude without the right to use - does not in any manner exclude patent rights from the scope of 'goods' as defined under the Sale of Goods Act, 1930. All kinds of property (other than actionable claims, money and immovable property) would fall within the definition of 'goods' and this would also include intangible and incorporeal property such as patents."

The Delhi High Court further observed, "Since grant of licence does not extinguish the rights of a patent holder in the subject-matter, it may not amount to sale of goods."

## 16. Patent Property Rights – Subject to Competition Law

It would violate the 16th competition law if a company possessed monopoly power and there is wilful acquisition or maintenance of that power which an enterprise as distinguished from growth or development as a consequence of superior product, business acumen or historic accident (see *U.S. v. Grinnell Corp.* 384 US 563 (1966)). Although a contract is regard to use of patent may include restrains which causes or likely to cause an appreciable adverse effect on competition within India, if it involves only reasonable and legal conditions imposed under the patent law, it is not within the prohibition of the Competition Act.

But if they effect the market place which led to market distortion and interfere with competition (such as manipulating market demand or erecting barriers for the competitors to enter the market) such restrictions are subject to competition law especially when the person possesses monopoly power and there is wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen and historic accident.

### 16.1 *Patent – Two aspects*

A patent has two aspects – First, it provides a statutory right to the owner of the patent for a certain length of time. Second, this right is conditional. The patentee has to disclose his invention in sufficient detail so as to enable a person, who is conversant with the field of technology, to practice that invention and make it work. The Indian Patents Act, 1970 as amended by the 1999, 2002 and 2005 Act, deals with the first facet. The second aspect is the object of the patent system. The purpose of the Indian patent system is-

- first, patent law seeks to foster and reward invention;
- second, it promotes disclosure of inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires;
- third, the stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the free use of the public.

## 17. Patent Law – Object of

The object of the patent law is to:

- encourage scientific research, new technology and industrial process;
- grant exclusive privilege to own, use, or sell the method or the product patented for a limited period. The price for the grant of the monopoly is the disclosure of the information to the patent office;
- stimulate new inventions of commercial utility;
- pass the invention into the public domain after the expiry of the fixed period of monopoly.

[See *Biswanath Prasad Radhey Shyam v H.M. Industries* (AIR 1982 (SC) 1444)]

A fair indication of the above object of the Patents Act, 1970 is found in the statement of objects and reasons of the Patents Bill, 1970, "a need for a comprehensive law so as to ensure more effectively that patent rights are not worked to the detriment of the consumer or to the prejudice of trade or the industrial development of the country was felt in 1948". The patents law is also kept in line with the "development of technological capability in India, coupled with the need for integrating the Intellectual Property system with international practices and intellectual property regimes" as stated in statement of objects and reasons of the Patents (Second Amendment) Bill, 1999

The purpose of the Indian patent system is defined in section 83 of the Patents Act, 1970. It provides :

- that the patents are granted to encourage inventions and to secure that the invention are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;
- that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;
- that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;
- that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio-economic and technological development of India;
- that patents granted do not in any way prohibit Central Government in taking measures to protect public health;
- that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and
- that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.

Patents are granted for promotion of technological innovation, patent has to be worked in India and patent granted shall not prohibit government from taking measures to protect public health.

## 18. Patents – Kinds of

There are three types of patent:

(1) Utility patent;

(2) Design patent;

(3) Plant patents.

The utility patent are for machines, products or processes; design patents are patents on the appearance when the design for useful and manufactured item; and, plant patents are for asexually produced plants. The additional qualification utility patent is sometimes used (primarily in the US) to distinguish the primary meaning from these other types of patents. Particular species of patents for inventions include *biological patents*, *business method patents*, *chemical patents* and *software patents*.

## 19. Patents – Means for Transfer of Technology

Patents are the means for transferring technology from industrially developed countries to those not so developed. They play an important role in technology transfer because of their following characteristics:-

- They are technologically self-contained, containing information for their implementation;
- They are in convenient document from, which could be easily transferable like a movable property;
- They serve as a basis for innovation;
- They serve as a basis for new development and research as they disclose historic development in the area of technology as well as up-to-date information and knowledge;
- They permit a planned programme of development in the areas of technology as they cover a wide range of technologies;
- They allow the transferee to ensure what he is buying and giving ample opportunity for negotiation unlike in the case of know-how.

Patent documents - Important source of information in the area of development of technologies.

The patent law requires the patentee to disclose his invention fully and define clearly the exact invention. What he is required to disclose are :-

- Bibliographic information;
- Description of the invention;
- Summary of the invention;
- Brief description of the drawings;
- Detailed description of the invention;
- Claims.

Since the Indian Patents Act, 1970 provides various checks to prevent invalid patent being granted which does not involve any inventive step or a manner of new manufacture or improvement, detailed scrutiny is done as the patents office and objections invited from the public. As soon as the application for patent is advertised as accepted, the patent office makes the complete specification filed in pursuance of the application open for public inspection and prints the same for public distribution. The Act provides publication of notifications. These relate to:-

- Filing of application
- Opposition proceedings
- Grant of patents
- Renewal fee payment
- Amendment proceedings
- Compulsory licence proceedings
- Non-working patents
- Change in the name of inventor / applicant, dating of applications, restoration proceedings, patent ceasing.
- Declaration of intention by the Central Government of taking action regarding revocation of any patent which it considers necessary in the interest of the security of India.

The obligatory disclosure by the patentee, examination of the application in the patents office and also involvement of the public in the matter of objecting the application provide enough technical and technological material for evaluating the stage of the development of the technology as also for doing R&D. All the information belongs to the public domain.

Patent documents disclose technological information by describing the invention and by indicating the claimed novelty and inventiveness by reference to the existing state of the art. They are thus the source of information what is not only new but also what is already known or worth knowing. History of the technological progress in some of the cases are given in summary form. Patent documents are published. These contain material with reference to which novelty, inventiveness and utility are claimed and examined. Patent documents are published. These contain material with reference to which novelty, inventiveness and utility are claimed and examined. Patent documents disclose information which could not be easily available in any other form of literature with regard to what the technology had been in the past, what it is now, and what it would be in future. Since the information is not secret, it can freely be used to support research and development.

## 20. Patent law – Interpretation

Statutes are the embodiment of authoritative formula and the very words which are use to constitute part of law. By interpretation or construction is meant the process by which the courts seek to ascertain the meaning of the Legislature through the medium of the authoritative form in which it is expressed. The law is deemed to be what the court interprets it to be. As long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent becomes impermissible (*Seshavji Ravji Co. vs. CIT* (1990) 49 Taxman 87 (SC)). The very concept of interpretation connotes the introduction of elements which are necessarily extrinsic to the words in the statute. Though the words "interpretation" and "constitution" are used interchangeably, the idea is somewhat different. "Construction" suggests that something more is being got out in the elucidation of the subject-matter than can be got by strict interpretation of the words used. In the very full sense of the "construction" judges have set themselves in this branch of law to try to frame the law as they would like to have it (see *CWT v. Hashmatunmisa Begum* (1989) 176 ITR 98 (SC)).

The legislature defines the limits of patentability. Once the legislature has spoken it is the province and duty of the court to say what the law is. The patentable subject has been defined by the Patents Act. Every invention, excepting those specified in section 3, is patentable if it involved inventive step and is capable of industrial application. It may be a product or process. The court while construing the language employed by the Legislature takes the statute as it finds it, guided, if ambiguity appears, by the legislative history and statutory purpose. The Patent Act has defined patentability in broad terms, because inventions are unforeseeable. Everything under the sun made by a man is patentable, with the exceptions in section 3. The underlying principle of section 3 is that "ideas" or products or phenomena in nature cannot be patented. Unless otherwise defined, the words are interpreted as taking their ordinary, contemporary and common meaning. The court should not read into the patent laws limitations and conditions which the legislature has not expressed (see *United States v. Dubilier Corp.* 289 US 178 (1933). The conditions are novelty, utility and non-obviousness and the limitations (as per section 3) laws of nature, physical phenomena, abstract ideas, mathematical calculations or algorithms.

Once the patent is issued, it is to be strictly construed (*United States v. Masonite Corp.* 316 US 265 (1942)). It cannot be used to secure monopoly beyond that contained in the patent (*Morton Salt v. G.S. Suppiger Co.* 314 US 488(1942).

Although an inventor is indeed free to define the specific terms used to describe his or her invention, this must be done with reasonable clarity, deliberateness, and precision. "Where an inventor chooses to be his own lexicographer and to give terms uncommon meanings, he must set out his uncommon definition in some manner within the patent disclosure" so as