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Interplay between IPR and RTI with Special Reference to Patent Law in India: An Unfolding

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Open government, accountability, transparency in administration and the right to information are considered the foundational tenets of democracy. The Right to Information Act, 2005 ensures transparency, accountability and public participation in the governance of the country. Every citizen of India is authorized to seek information under the control of public authorities. The Right to Information Act, 2005 exempt's information related to IPR from being disclosed with certain exceptions. Although, the Patents Act, 1970 provides an information dispensation mechanism. This paper unfolds the interplay between the information dispensation mechanisms under the Right to Information Act, of 2005 and the Patents Act, 1970. Further, a suitable information dispensation mechanism for patents is identified with the help of doctoral research methodology.

Keywords: Disclosure of Information, Information Dispensation Mechanism, Patents Act, 1970, Right to Information, 2005, Conflict between Public & Private Interest

All around the world, the work of human intelligence is recognized as intellectual property rights (IPRs). Salmond stated that, "the unnatural product of a man's brains may be as valuable as his hands or his goods".[1] An exclusive right to a creator over the use of their creations *viz*., ideas, inventions, images, symbols, names, literary and artistic work etc. is provided under IPRs for a certain period.[2] However, such rights are not similar to the natural rights but are recognized under the different IPR laws i.e., the Patents Act, 1970; The Trade Marks Act, 1999; The Copyright Act, 1957; The Designs Act, 2000, The Geographical Indications of Goods (Registration & Protection) Act, 1999; The Biological Diversity Act, 2002; The Semiconductor Integrated Circuits Layout Design Act, 2000 and The Protection of Plant Varieties and Farmers' Rights Act, 2001 etc.[3] Moreover, the rights related to intellectual property are categorised into (i) Industrial Property and (ii) Copyrights. Industrial property includes industrial designs, patents, trade secrets, trademarks, and geographical indications etc. Copyrights protect rights relating to literary works and performance rights of artists, rights of film and phonograms producers, recording and broadcasting rights.[2]

A wide scope of intellectual property (IP) is accepted all over the world. The main object of the entire legal paradigm of IPR is to protect incorporeal property/assets from being misused. To achieve the above-said object legal recognition has been provided to prevent the misuse of these rights. Based on this recognition and protection, a right to raise claims against the violators of this right is available to the owner under the various the IPR legislations. Hence, the main focus of IPR law is to prevent the relevant information from being public.

Moreover, selective information in the control of public authorities can be claimed as a right while harmonising conflict between the individual's right to know and right of the competitors to maintain the confidentiality of sensitive information.[4]

An information dispensation mechanism is provided under the patents law and the information law. Right to Information Act, 2005 (RTI Act) give to the citizens of India a privilege to access specific information concerning IPR under the control of governmental authorities on the ground of public interest. However, an information dispensation mechanism is also made available to the public under the Patents Act, 1970[5] and under the Patent (Amendment) Rules 2016.[6] At the time of filing an application for provisional specification or complete specification of a patent, the applicant is required to furnish the entire relevant information about the patent thereof. Every application is expected to"…

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fully and particularly describe the invention and its operation or use and the method in which it is to be performed; disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection".[7]

Further, all the relevant information pertaining to names and address of patentees, assignment notification, information regarding extension and revocation of patents along with information effecting the validity of patent granted entered in the register of patents may be made available to the public under Section 67 of the Patents Act, 1970.

Recapitulating the availability of information dispensation mechanism under both the laws, it is imperative to state that there is still a need to address some specific issues (i) to what extent the information pertaining to the registered patents be made available to public? (ii) Which law the RTI Act, 2005 or the Patents Act, 1970 will prevail over the other in the case of patent information disclosure? Therefore, this paper aims to unfold the interplay between information dispensation mechanisms under the Right to Information Act, 2005 and the Patents Act, 1970 and to identify suitable information dispensation mechanism in relation to intellectual property with the help of doctrinal research methodology.

Intellectual Property Rights

In today's era intellectual property rights have become one of the most deeply rooted aspects in India's business fraternity. It has evolved an interesting paradigm in the realm of incorporeal property law through its various new statutes and judicial pronouncements. Intellectual property pertains to the creations of the mind in the form of inventions, literary and artistic works, and symbols, names and images.

As per the views of Salmond, IPRs also known as incorporeal property can be categorised into (i) *Jura in aliena* (ii) *Jura in re properia. Jura in aliena* can be both over the both material and immaterial things. For instance, lease, mortgages, servitudes etc. *Jura in re properia,* can be only over the immaterial things like patents, copyrights, trademarks etc.[8]

According to World Intellectual Property Organisation (WIPO), Intellectual property (IP) refers to *"creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce"*.[9]

Article 2 of the Patents Act, 1970, patents are considered as rights conferred for an invention in the field of technology having three main features (i) novelty (ii) involvement of inventive steps and (iii) receptive to industrial application etc.

Patent Law

Patents are considered as encouragement tool for development of the nation. The term "patent" referred from the word i.e., "patere" meaning thereby "to lay open". In the other words the term of the patent is "to make available for public inspection". Patent is a right of an inventor for his/her new invention, non-obvious process, useful, machine, composition of matter and article of manufacture for a period of 20 years.[10] For the purpose of enjoyment of the right an invention must be a "new product or process involving an inventive step and capable of industrial application".[11]

Initially, the Act of 1856 took initiative to encourage new intentions and useful manufactures and facilitate them to make their inventions public. The Act was amended in the years 1857, 1859, 1872, 1883 and 1888. However, these all the laws were repealed by the Patent and Design Act, 1911. The Act of 1911had been replaced by the Patents Act, 1970 on the recommendation of Ayyangar Committee Report. In 1972, the Patents Rules came into force in 1972. The Patents Act, 1970 was again amendment in the year of 2005 to extent the product patents in the sphere of food, medicine, microorganism, chemistry and technology.[12]

Right is conferred by the Government (Patent Office) upon the owner of the subject. There are certain specifications that need to be proved like it has to be a new invention, non-obvious and capable of industrial application. Once the right is granted the holder possess exclusive right pertaining to use, sale and other rights related to patent.[13] A patent issued in favour of patentee may be revoked on the ground "mischievous to the State" or "prejudicial to the public" under the patent law.[14]

Information Dispensation Mechanism: Patent Law

Information Dispensation mechanism refers to a process via which a relevant information/data is disclosed to the general public to serve a larger public interest. Such information is not just any other information but information which was created to be kept as confidential and hidden from the rest of the world. Desired information may be valuable and may cause a huge loss to its owner if disclosed otherwise. Patents Law provides this mechanism under two heads (i) Disclosure at the time of seeking grant

(ii) Disclosure to the public once protection has been granted.

Disclosure at the Time of Seeking Grant

As per the rules of Indian Patent and Trademark Office (IPO) a patent applicant is required to submit material information known to the applicant. It is made duty of an applicant to disclose all the relevant information in his/her knowledge at the time of filing an application. On the point, the High Court of Delhi observed that "in order to avoid revocation of a patent on procedural grounds, one should be cautious enough to disclose all the possible material information which is in their knowledge and under their control to the IPO".[15]

According to the Patents Act, 1970, an Indian applicant shall provide "detailed particulars" with regards to the application filed by an outsider who is not an Indian national.[16] However, the law is silent on the point that what types of information to be furnished under the head of "detailed particulars" under the law.[17]

Disclosure of Information after Grant of Patent

All the information filed at the stage of filing of an application is recorded and made available to the information seeker. Further, after the grant of patent, information can be availed under the Patents Act, 1970,[5] the Patent Rules 2003[6] the Patent Rules (Amendment) Rules 2016. However, the similar information may be availed under the Right to Information Law on the ground of public interest.

Specific Law (Patent Law)

Information disclosure mechanism is made available under specific law with the incorporation of provisions pertaining to opening of register for inspection and receipt of certified copies on the payment of requisite fee under the patent act, 1970.[18] Further, the entire certificates received from the Controller and entries are accepted evidence of entries, documents thereto under the Act.[18] Patent Rules, 2003 and 2016 also provides for the information discloser mechanism.

The Patent Rules 2003 as amended in 2016

All the records recorded in any form computer floppies, diskettes or any other electronic and certified copies of entries, certificates of and extracts are made available from the office after payment of requisite fee.[19] The new amended rule in 2016 provides a specific time limit i.e., one week on the making of request with the specified fee.[20]

Information Dispensation Mechanism under RTI Act, 2005

Right to seek information is ensured to all the Indian citizens. Citizens may seek the information under the control of public authority for strengthening democracy while promoting transparency and accountability of the Government.[20] The United Nations, General Assembly accepted the importance of right to information and stated that "freedom of Information is a fundamental right and the touchstone for all freedoms to which the UN is consecrated".[21] However, Supreme Court of India in *State of Uttar Pradesh* v *Raj Narain* considered the Right to Information as a fundamental right under Article 19(1) of the Constitution.[22]

Universal Declaration of Human Rights 1948 also gave importance to right to seek information in its provision as *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers*.[23]

But, in case of intellectual property rights certain restrictions have been imposed on right to seek the information. All the Information relating to "commercial confidence, trade secrets and IPRs are not to be made public to protect the competitive position of third party. However, such restriction is not absolute but information relating to IPRs can be availed from the competent on the involvement of larger public interest.[4]

The term 'commercial confidence' refers to a business practice under which the businessmen do not disclose relevant, vital information apprehending any possible loss to the commercial interest of the enterprise. The overall reading of Section 8 of Right to Information Act, 2005 clearly shows the two sides of the arguments in such cases. The information respecting an intellectual property can be protected and will be exempted from being disclosed if it is evidently shown that its disclosure will be causing harm to the competitive position of a third party. The burden of proof for showing that the disclosure of the information will be harmful to the competitive position of a third party shall lie on the public authority who has denied the disclosure of the information.[24]

However, if on the other hand, the party seeking the information is successfully able to show to the satisfaction of the public authority that the disclosure

of that specific information involves a larger public interest, then it shall be disclosed, even though such disclosure will be harmful to the competitive interest of a third party. Thus, the disclosure or non-disclosure of the exempted information of IPR depends on the degree and extent to which the reasoning of larger public interest has outweighed the reasoning of probable harm that may be caused to the competitive interest of a third party.

The parameters which are adopted to determine the applicability of Section 8(1)(d) of the Right to Information Act, 2005, are:

(i) To know the nature of data/information which is sought in the application i.e whether it is confidential and essential in relation to the business affairs of an entity; and

(ii) Whether its disclosure will cause any adverse effect or harm to the competitive position of a third party.

If the public information officer, after weighing both the sides, decides to disclose the exempted intellectual property information on the grounds of public interest under Section 8(d) of the Right to Information, 2005, then it has to follow a specific procedure for disclosing the information. According to this procedure, within 5 days on the receipt of an application, the Public Information Officer is required to notify the third party mentioning that information with respect to the intellectual property has been sought and intimating his own decision to disclose such information. The third party in return shall be requested to make a submission in reply to the application. The submission can be in written or oral form, mentioning whether the information sought has to be disclosed or not. The third party is given 10 days from the receipt of the notice by him to make submissions and to make any representations against the proposed disclosure.

On the receipt of the submissions by the third party, the Public Information officer shall make a decision keeping in view the competitive interest of the third party and the larger public interest that is claimed to be involved. Such a decision has to be given within 40 days from the date when information was sought/requested. Once the decision has been taken by the Public Information Officer, it shall be intimated to the third party via a notice in writing wherein it shall be mentioned that the third party is entitled to appeal against the decision of the Public Information Officer under section 19 of the Right to Information Act, 2005.[25]

Under Section 19, the third party can appeal against the decision of the Public Information officer to the First Appellate Authority within 30 days of the receipt of the notice of decision by the third party. If still not satisfied with the decision of the First Appellate Authority, the third party has an option to prefer a second appeal to the Information Commission against the decision of the First Appellate Authority.

The information shall not be disclosed until the final decision of the appeal/appeals.[26] The question, however, arises here is that what is 'public interest'. The term 'public interest' in relation to intellectual property rights and more specifically patents has nowhere been defined. This undefined ground leaves room for a lot of subjectivity in the decision-making. Any decision taken allowing disclosure of information regarding patents on the ground of involvement of larger public interest, may be prejudicial to the interest of the third party.

The question also arises that whether the term 'public interest' and section 8 have to be construed strictly, narrowly and literally as has been held by various High Courts. Section 8 of the RTI Act has been understood to be an exception to Section 3 of the RTI Act which allows the citizens to seek information as a matter of right. The rationale given for construing section 8 in literal sense and not broadly is that Section 8 restricts the fundamental freedom of speech and should not be construed broadly.[26]

On the same question, however, the apex court has a different opinion. In the case of *Central Board of Secondary Education and Anr.* v *Aditya Bandopadhyay and Ors*[27] the Apex Court disagreed with the view of restrictive scope of Section 8, RTI Act. It gave its decision taking into consideration the main objective of RTI. The Court held that RTI Act aims to maintain a balance between two competing interests: an individual's right to know and an individual's right to maintain confidentiality of information. It was opined that maintaining harmony between these two interests is relevant for maintaining the fundamental tenet of democracy.

In the case of *Institute of Chartered Accountants of India* v *Shaunak H. Satya and Ors*[28] the Apex Court opined that the information, the disclosure of which brings in transparency and improvises accountability should be differentiated from the information that has no bearing on any of these aspects.

The parameters for application of Section 8 are provided in bits and pieces and can be case specific.

The clarity on the scope and meaning of 'competitive interest of third party' and 'public interest' is needed in the light of number of RTI requests that are filed.

As per the CIC Annual Report 2019-20, the RTI requests increased from 24,436 to 13,74,315 in number from 2005-06 to 2019-2020. From 2005, different kinds of information in the control of public authorities have been made available to the applicants. During the period, a large number of applications requesting different kind of information have been received as per the CIC Annual Report 2021 (Fig. 1).

Information Dispensation Mechanism under *Patent Law* v *RTI Act, 2005*

Patent information is vital information that to be provided to the public in an easy and affordable manner. The Patents Act, 1970 ensure for a twenty-year monopoly in relation to the patented subject. However, one may have information about the patent under Patents Act, 1970. Moreover, there is Right to Information Act, 2005 providing Information dispensation mechanism for any kind of information having the public interest.

Generally, information relating to the patent is denied to public under the garb of Right to Information Act, 2005. The law, provide protections for information relating to Intellectual Property rights which are not to be made public.[29] There has been argument that in the presence of specific enactment i.e., The Patents Act, 1970, Information dispensation mechanism available under RTI Act does not apply in case of patent.

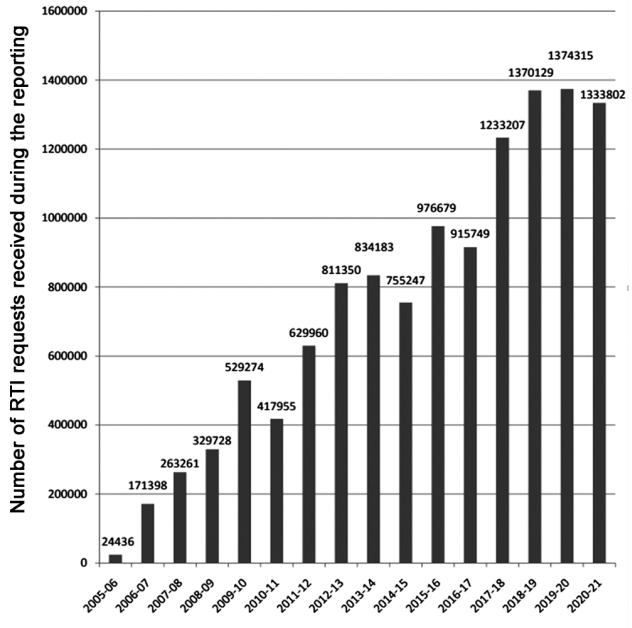

Fig. 1 ─ Number of RTI applications received during 2005-2021

Unfortunately, the information dispensation mechanism provided Patents Act has not been found satisfactory for the following reasons:

No Time Limit for Information

The Right to Information law provides a specific time period i.e., from 48 hours to 30 days for seeking the information from the public information offices under Section 7 (1) of the RTI Act.[30] However, in some case the period of 30 days may be further extended as per the requirement of the time. In case of Patents Act, 1970, prior to the Patent (Amendment) Rules 2016, no time period was provided for seeking information from the controller. After the said amendment, information relating to patents may be obtained within the one week of receipt of application by controller.[6]

No Grievance Redressal Mechanism

A grievance redressal mechanism is provided under the RTI law. Central Information Commission or State Information Commission have been empowered to penalize the public information officers in case of (i) refusal to receive an application without reasonable cause (ii) no information furnished within the specified time period, (iii) mala- fide denial of the request for information (iv) knowingly furnishing incorrect, incomplete or misleading information (v) Destruction of the desired information (vi) creating obstruction in the process of furnishing the information under Section 20 of the right to information Act.

In case of *Dr. Amitabh Kumar* v *Indo-Tibetan Border Police Force CIC/WB/A/ 2009/0056* a penalty for Rs 250/- per day till the information was furnished was levied on public information officer by the information commissioner. However, the penalty has been restricted up-to Rs. 25,000/-. Hence, Right to Information Act, 2005, provide grievance redressal mechanism in case of deficiency in providing information i.e., heavy fine and prosecution.[31] But, in case of the Patents Act, 1970, a wide discretionary power has been given to the authorities. There is absence of grievance redressal mechanism on failure to provide the information to any interested person. As the result thereto, in the absence of grievance redressal mechanism under the Patent Act, 1970, a part of population of the country is left at the mercy of authorities under the Act.

Prohibitively Expensive

Right to information Act is one of the beneficial legislations. The law enacted with the purposes (i) to improve efficiency in administration (ii) to promote

accountability in governance (iii) to ensure easy accessibility to information, (iv) to ensure public participation in governance and (v) to curb the corruption in all spheres of governance of the country. Under the RTI Act, any person on the payment of very nominal charges i.e., Rs. 10 /- may seek the information from the public authorities. However, certain categories like person below poverty line (BPL) have been exempted from payment of any fee or information is provided without any charges to BPL families. But, in case of the Patents Act, 1970, in 2014, it has been cited by a press release that

"In one such instance in 2010, the IPO demanded a fee of Rs. 1,04,000/- (One Lakh Four Thousand Rupees) for supplying certified copies of 26 documents, at Rs. 4,000 (Four Thousand Rupees) per document. Contrast this with the RTI Act wherein any amount of information can be obtained at Rs. 2/- per page. Even if one estimated that each of these 26 documents had 20 pages each, the total would only amount to Rs. 1,040/- (One Thousand and Forty Rupees). For the high fee under the Patents Act for seeking information, a large population of the country could not take the benefit of the provision. Hence, for unbeatable difference in charged fee for seeking information under the both the legislations i.e., difference between the patent office and the RTI is about a100 times"[32] creating the problem for the people.

Availability of Limited Information

RTI Act made available all kind of information into the control of public authority on the payment of nominal free. However, certain kind of information viz., (i) information impeding the process of investigation of any offence , (ii) information prejudicially affecting the sovereignty and integrity of India (iii) information confidentially shared by foreign states (iv) Information prejudicial to security, strategic, scientific or economic interest of the country (v) Information forbidden to be published by court of law or tribunals (vi) information breaches the privilege of Parliament & State legislatures (vii) information relating to cabinet papers including records of deliberation of Council of Ministers secretariat and other officers and (viii) information relating to commercial confidence, trade secrets, or IPR (if disclosure harms the interest of third party) have been exempted from being disclosed under the legislation.[33]

But, under the Patents Act, a certain kind of information can only be received on the payment of fee. Hence, the area of range for obtaining the information under the Patents Act is narrower than the RTI Act. A common man may receive only selective information under the specific legislation although RTI Act does not provide such kind of any restriction while seeking information.[32]

Moreover, a solution was provided in *Shamnad Basheer* v *Union of India &Orscase* where Right to Information law was preferred over the patent law as information dispensation mechanism by the court.[34] Hence, balance is maintained between the interest of a patent holder and general public under both the laws and information involving public interest is made available to the information seeker.

Conclusion

Intellectual properties have been one of the bases for crucial investment decisions across the world and gaining popularity. The Patents Act, of 1970 provides an exclusive right to the inventor over an invention for twenty years. It creates a monopoly over the invention for a certain period. But, monopoly and exclusive rights are not absolute at all; information relating to patent furnished at the time of filing of an application may be received after the payment of the requisite fee under Section 72 of the Patents Act, Patent Rules 2003, and the Patents (Amendment) Rules 2016. Apart from the Patents law, the information concerning the patent on the ground of public interest may be received under Section 8 of the Right to Information Act, 2005. However, under the same section, information relating to IPs has been exempted and cannot be availed for the interest of the competitive interest of the competitor. But, the same information may be furnished under the act itself on the bases of public interest. Hence, the interest of the public has always been preferred over individual rights.

Moreover, an information dispensation mechanism about the Patent has been provided under both the laws. But, this has not been made clear where to go for seeking the information for the patents. However, the information mechanism under the patent law has not been found adequate for the absence of a redressal mechanism in case of denial in furnishing information, high expenses, and a wide range of discretionary powers available to the controller, etc. On the other hand, the information dispensation mechanism available under the information law firstly makes available information relating to the patents at the payment of a fee i.e., Rs. 10/- and nominal fee i.e. Rs/ 2 per page for the copy/ excerpt of the desired document. Secondly, a penalty of Rs. 250/- up to Rs. 2500/- imposed on the concerned public information officers

on the failure and denial of furnishing the desired information. Thirdly, the range of discretionary power of the public information officers is controlled by the mechanism of first appeal and second appeals to the Central Information Commission or State Information Commission**.** Thus, the information law has been found more effective and adequate for seeking information about patents.

However, the information dispensation mechanism under RTI Law has been preferred over Patent Law by the Hon'ble Mr. Justice C. Hari Shankar in *Shamnad Basheer* v *Union of India & Ors* while observing that "*mechanism under the Right to Information Act, 2005 overrides all other mechanisms under any other statute or rule for discharge of information from public authorities to the extent of inconsistencies therein*".[35]

It is submitted that public interest has never been ignored in any legislation. In the right to information law, all the information relating to patents may be received based on public interest. Preference of the information law over the patent law has been found adequate and effective in easy accessibility, redressal mechanism, and time limit for providing information that too accepted by the judiciary. Further, there is a requirement of specifying the term "particular details" under the patent law, a definition terms i.e., "public interest" and "competitive interest" under the right to information law for strengthening the information dispensation mechanism with the patents under both the laws. But, a large public interest served on the preference of right to information law over the patents law for seeking information about patents.

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