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FIRST-TO-INVENT RULE: ANALYSING THE DICHOTOMY IN ORIENTATION AND PRACTICE

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BACKGROUND: FIRST-TO-FILE & FIRST-TO-INVENT RULE

Patents grant an exclusive right to inventors that is similar to, but not quite, a true monopoly because a patent provides for exclusion for a limited time of a thing that did not exist prior to its creation by the inventor – that is it would not exist but for the act of inventing. In light of the great commercial value of such inventions being a practice, the most fundamental question becomes regarding priority rights: who truly is entitled to the priority rights of an invention. The two methods employed are first-to-file rule and first-to-invent rule. The First to invent doctrine implies that the first conceiver of the invention is entitled to patent protection, the other doctrine of first-to-file grants patent to the inventor regardless of the date of invention and is said to be much more certain.

Today all patent regimes stand practicing the first to file doctrine, U.S. being the last to join the club. In 1989, Canada changed from first-to-invent to a first-to-file invention priority system leaving the United States and Philippines as the only countries that continue to grant patents on the basis of a first-to-invent system. Similar changes happened in the U.S. in 2011. The first-to-invent standards had been in place since 1790s, they had become subject to domestic and international criticism for many years. The Apex Court of U.S. also declared the first-to-invent standard of awarding patent rights as a proper exercise of congressional authority. Looking at the uncertainty created by the first-to-invent patent system, the Obama administration enacted the America Invents Act in March 2013 switching to the first-to-file rule.

Even the European Patent Convention has been a part of the trend. Harmonization across the globe has become a much appreciated process to reduce radical differences in patents worldwide for the same inventions

Scholars have endlessly argued against the unfairness that the first-to-file rule perpetrates. Apart from favouring large corporate houses which can afford the patent filing process better than lone inventors, it may also lead to incomplete application which lack complete specification due to pressure to file first. In its favour, simplification of the complex

filling process as well as reduced costs for inventors stands as major arguments. Further, the first-to-file rule also eliminates the chances of 'secret prior art', for which patent applications have not been filed. Preclusion of other inventors seldom happens and is of marginal advantage. It is also seen that first to invent regimes have higher page count in patent disclosure applications, indicating disclosure and protection than patents in first-to-file regimes.

The scrapping of the first-to-invent rule also entertained much criticism as the root cause for its removal i.e. opposition proceedings was never substantial. Conflict proceeding in Canada, akin to the interference proceeding in The United States, which determined in a conflict of applications as to which inventor was genuinely the first, were extremely rare. Consequentially, advocates of the changing system state that it would cause minimalistic difference where the rule would provide ample opportunity for applier to be proven otherwise, synonymously construing the two doctrines.

In the Indian Scenario, the doctrine employed is believed to be the first-to-file system owing to the language of Section 6(1) (a). An application for a patent for an invention can only be filed by any person claiming to be the true and first inventor. True and first, conjunctively would mean that he has to be the first inventor in terms of the technicalities itself, as well as should not be challenged by any other inventor.

Where the opportunity to oppose exists, do the wordings still indicate dominance of the first one to file? Hypothetical situations discussed later provide ample understanding arising out of the procedure employed in the Indian statute.

UNITED STATES AND THE PRIORITY SYSTEM

Until recently, United States was the only major economy in the world which employed 'first to invent' rather than a 'first to file' standard for the determination of the fact that which inventor amongst all the competing applications will be awarded a patent. Although, the U.S. laws establish certain presumptions in favour of the inventor who first submits an application to the Patent Office, another inventor may challenge the presumption by proving that he was the first to conceive and reduce the invention to practice. On one hand, the transformation is criticised as it's argued that the 'first to invent' rule not only rewards the original, true and first inventor but also, efficiently complies with the constitutional mandate of 'securing for limited times to ... Inventors the exclusive rights to their ... Discoveries". However, the change is appreciated by some who exclaim that inter alia, the new standard is more efficient and fairer due to the increased certainty and the fact that patent obstacles, such as, certain secret prior art may be eliminated.

RATIONALE FOR THE TRANSITION

With increased globalization and the advent of Patent Co-operation Treaty (PCT) and European patent Convention (EPC), the United States received even stronger pressure from other commercial nations to convert to a first-to-file standard, and the same was enforced as there were greater incentives seen, to achieve harmonized global patent laws. The urgent need for this transformation to a global patent system was not only felt by U.S., but it swept across all advanced industrial countries as the number of patent applicants seeking protection outside the country of origin drastically increased. Moreover, repeated petitions from multinational corporations and others involved in patent litigation also became a major

determinant in shaping the variation due to their favouritism towards the certainty that accompanies the first-to-file standard. The statutory intent underlying the change aimed at an increase in international co-operation, ensuring efficiency and reducing the expense of an inventor in judicially determining who is the first-to-invent; since the process requires a complex proof of invention, which some say creates an unfair advantage to those who can afford the costs. It was also premised on the fact that interference practice; which is an inherent part of the first to invent system, had become more and more complicated and the burden of proof had become more and more difficult, resulting in interference litigation which often went on and on with questionable results. Not only limited to this, one of the bargaining rationales supporting the advent of the new standard was that by agreeing to change provisions in its own law which other nations have a high proclivity to, the United States will receive in exchange – changes in other countries' laws that harm United States inventors and companies. However, this proposition came with much suspicion that if the advantages of having a harmonized international patent system per se do not outweigh its disadvantages, it is doubtful whether specific changes in other countries' patent systems can alone justify the changes.

Initially, since there was a chasm between the U.S. practice and the one followed throughout the world, the resultant effect was that a party first filing for a patent was able to receive a corresponding patent throughout the world based on its early filing date, but was challenged in U.S. by a party who filed for the same invention after the first party but proved in an interference to be the first inventor based on an early date of invention. This loophole enabled the Congress to enact the American Invents Act of 2011 which brings the 'first inventor-to-file' standard into effect from March 16, 2013.

OPPOSITIONS TO THE NEW STANDARDS

Opposing the winds of change, there was a major chunk of U.S. intelligentsia, who raised concerns of small businesses, universities, research organizations, and individual inventors. Their arguments also hovered around the issue that public may also suffer from a lack of adequate disclosure resulting from the race to file the application first, if the haste caused by the much endorsed 'first-to-file' standard renders the application to be incomplete and lacking in necessary details due to the undue pressure put on patent attorneys and agents to provide unreasonably fast service to their clients. This proposition was much evident when patent applications from the United States and Japan were compared and it was concluded that many Japanese applications were inadequate as a result of rushing to obtain the priority date; for the fact that Japan endorsed 'first-to-file' standards. What needs to be taken into due attention is the fact that improper disclosure, as was the result above, renders sufficient evidence to the inference that if 'first-to-file' standards are allowed to precede, the very contractual conception of patent seems to be frustrated. Moreover, there were others who casted aspersions on the proposed system stating that it is starkly inconsistent to the textual interpretation of the U.S. Constitution, as well as conceptions of justice with respect to first inventors rights to their invention. They established their position by bringing out the fact that the Constitution of U.S. under Art. I Sec. 8, grants Congress the power to secure exclusive rights, i.e. to grant patents to inventors and not to those who stand as winners of the race to the Patent Office. This calls for legislators to interpret the term – inventor – under the relevant provision, as one who invented first and distance the scope of the term from those who are first to file a patent application. Other pitfall of the proposed system which became a

celebrated cause for much hue and cry was that it leads to an expensive, lengthy, and uncertain nature of the interference proceedings and delay in grant of patents.

HISTORY OF THE TRANSFORMATION

The first-to-invent standard as was prevalent in the U.S. territory was subjected to, much domestic and international criticism for many years.. As we delve into history, it is noted that the patent board faced practical difficulties with adopting a first-to-file rule, way back in 1791 due to the dual sovereignty of states and federal government. However in 1966, the President's Commission on the Patent System recommended that United States should depart from precedent and adopt a first-to-file standard. These recommendations however, were rejected by the Congress after Industry and Bar Associations spoke out against it. Subsequent to this, in the mid 1980s, the World Intellectual Property Organization (WIPO) proposed that member countries, including the United States, adopt a first-to-file standard. At that time, the United States leadership assured the G-7 nations that the United States would be a first-to-file country before the end of the decade. As a result, the Patent Reforms Act of 2005 and 2007 came up after due pressure from the U.S. House of Representatives' Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property. In effect, the Congress redefined the term 'Inventors' as used in the Patent Clause of the U.S. Constitution, as those who first file an application in the United States Patent and Trademark Office (PTO).

THE DYNAMICS WITHIN THE SHIFT

As per the opinion of several scholars and academicians, the application of new standards has started to cast reflections over the U.S. territory in a very short time after its enactment. The reform has lead to a substantial adverse impact on domestic-oriented industries and has skewed the ownership structure of patented inventions aimed towards large corporations, away from independent inventors and small businesses. The transformational variations were brought about, as the 'first-to-invent' principle was subjected to – much opprobrium by scholars by the virtue of the fact that it didn't award the inventors with sufficient incentives to promptly reveal their inventions. On the contrary, the 'first-to-file doctrine' was expected to encourage early patenting & disclosure, accelerating the dissemination of relevant technical information and raising the level of inventive activity.

As a part of the new standard, the United States gives a one-year grace period to inventors who publish or put their invention on sale, while Europe requires that a patent application be filed before any such activity. However, the retention of 'grace period provision' as mandated by the American Invents Act of 2011, within the systemic standards will make the transition from the 'first-to-invent' priority rule to the 'first inventor- to-file' priority rule difficult because, in some instances, the date of the invention will still remain a relevant and viable issue. In addition to this, retaining the grace period provision may not promote the much acclaimed harmonization of the global patent system because most patent systems abroad do not provide for a grace period. However, the global patent law harmonization will be promoted if either the United States abolishes its grace period provision or if countries abroad adopt a grace period provision into their patent systems.

Complementing to this, scholars also argued in favour of adopting a 'prior user' right during the time the shift was being made. The prior user right is one under which a person or

company who, before a patent owner filed his or her application, began to use an invention, could continue commercial use of the invention without a license from the patent owner. Here, it was advised that prior user rights arise only in a narrow category of cases, when pre-filing date uses are not sufficiently public to constitute patent-precluding prior art. They cited the experiences of other nations to portray that prior user right recognition does not lead to extensive controversy or litigation. As a result, it was also conceived as the most reconciling solutions by groups speaking for universities and small inventors as it would introduce a new exception to a United States patent owner's exclusive rights and because universities and small inventors, who tend to license rather than directly utilize technology, would rarely benefit from a prior user right against other patents.

INDIA AND THE ENVISAGED PRACTICE

This section of the present discourse delves into the foundational nuances of owning a patent in India. Although it goes without saying that under the Indian Patents Act, the practice of 'fist-to-file' system is observed, but a second thought to the statutory assent for the ongoing manifestations is extremely desirable. To this, what necessarily follows is that while an enquiry into the letter of law is made, the absurdities couched within should be eliminated from the course of study.

The Indian Patents Act lays down the entitlement of a person to obtain a patent and mentions 'true and first inventor' to be one of the criterions for the same. However, after an analysis into the framework of sec. 6 (1)(a) which enlists both 'true' as well as 'first' inventor, it may be deduced that the person claiming the patent must have invented the invention in question by himself, without receiving any inspiration from the endeavours of another person. Also, the claimant must be the first one to drag the invention to the light of the day. Thus, what is apparent is the fact that no-where under the specified provision does the Act seems to connote a 'first-to-file' rule. This proposition gets even more validated if we thumb-through the language of Form-5 which is a declaration of inventorship and is one of the compulsory forms to be submitted along with the application for grant of patent. Having taken all this into consideration, where do we get the deduction from that India follows a 'first-to-file' rule? – When the statutory emphasis has clearly been constrained to the first person who truly invents the invention in question.

Thus as seen, the nature of requirements under sec. 6(1)(a) of the Indian Patents Act is conjunctive and thereby two-fold. The crucial implication which flows from this proposition is that although a person's claim to be the true inventor in essence is true to the circumstances; however, he may not be the first inventor of the technology in debate. This situation persists due to the fact that it might only be his belief that he is the first inventor as no one seems to have published the information pertaining to the impugned technology in public domain or has filed a patent to that effect, to the best of his knowledge. To this, it may follow that the claimant's belief is misplaced in a sense that it might be possible for the other person to prove that it was he and not the claimant who stands to not only be; the true inventor, but also the first one to invent the invention. In such cases, does it follow that the claim forwarded by the claimant is irrefutable merely because he filed the application claiming himself to be the true and first inventor of the impugned invention? Or does the Act, prescribes within its ambit – a remedy which could be brought into picture so as to prove true and first 'inventorship'?

On an analysis of scheme of the act, it is found that neither there rests a provision within sec. 25(1) or 25 (2) pertaining to objections, nor does it stands on the pillars of sec. 64 (1)(c) – which allude to a 'wrongfully obtained' invention as one of the grounds for revocation. More so, sec. 64(1)(b) which deals with revocation of patents uses the expression 'entitlement to apply for a patent' which has a direct correlation with the law as laid down under sec. 6. If this be so, then, it becomes highly clear that 'true and first inventorship' can also stand to be one of the legitimate grounds which could be raised for revocation under sec. 64.

The argument which forms the backbone of such a thesis is the fact, that if a person who is the 'true and first inventor' bears no aspiration to file a patent for his invention and lay it bare for public consumption. Also, in a large measure, whether to patent an invention or not is a pragmatic decision based primarily upon the cost of patenting vis-a-vis the commercial return either from direct commercialisation or from selling or licensing the patent. This may also include aspects such as the difficulty of enforcing certain types of patents and the 'insurance policy' nature of patent filings. In such a case, why should, public be stymied with the grant of a patent if the inventor wishes the contrary. A couple of situations which flow from the discourse as stated above, and which are potent enough to identify the loophole between the ongoing practice of law and its statutory position, are elaborated as follows-

The first position envisages an illustration where a claimant 'wrongfully obtained' the invention from its 'true and first inventor'; who delayed in applying or completely abstained from doing so – Such a wrongful acquisition is not only counted as a ground of pre-grant opposition & post-grant opposition, but also qualifies as the foundational basis for revocation of a patent. Here, it is to be taken care of that the relevant provisions for revocation would still be applicable even if the applicant who is accused of 'wrongfully obtaining' the patent might be ignorant of the obtaining. His patent by virtue of being applied first stands as a good patent, for a patent represents quid pro quo. The quid to the patentee is the monopoly; the quo is that he presents to the public the knowledge which he has got. Since this knowledge the other inventor has kept sealed in his own breasts and he therefore cannot complain that his rival got the patent.

In such case the patentee is not the 'true and first inventor' as per the principles of logical conception, and thus the declaration made by the patentee during the application, is evidently false. Thus, in cases of such a nature, the Controller of Patents – may transfer the patent in favour of the Opponent and in a situation, where the opponent has already preferred an application for the impugned invention which survives in a pending state, the earlier priority date of the wrongfully filed patent application shall be conferred upon the opponent's later filed genuine application, in a way as if the opponent filed its application on the earlier date. This analysis is clearly indicative of the fact that whenever an application for a patent is filed, the assumption stands that it is filed by the 'true and first Inventor'.

In the Second situation, we maintain a construct where an invention is independently conceived by two persons – A and B whereby A conceived the invention on June 1, 2013 and filed an application for patent on July 1, 2013, whereas B conceived the invention on March 1, 2013 and applied for the patent only on August 1, 2013. Now, since A applied for patent on July 1, 2009, technically he may be the 'true inventor' but certainly is not the 'First inventor' of the impugned invention and thereby is not entitled to make the application due to the co-extensive criterion under Sec. 6(a). What follows is the fact that novelty of B's invention gets killed on August 1, 2009 by virtue of Section 13(1)(b) of the Patents Act and is barred from passing the examination in the light of A's application as prior art. So, *prima*

facie, applications of both A and B are rendered defective which implies that none qualifies to receive the patent.

However, the way out to this problem lies in a situation, when B challenges A's application which subsequently gets transferred in B's favour and the situation to restored to the state elucidated above. Here, B will be able to proceed with the application without taking a refuge under Sec. 13(1) (b) of the Patents Act and thereby obtaining the priority date of July 1, 2009. If such is the result of the contradiction which persists within the administrative practice and statutory construction, it gets reaffirmed that India is anything but first-to-file system. However, unfortunately, the grounds of pre-grant Opposition or post-grant Opposition use the terminology 'wrongfully obtained the invention', which is not the case here. As a result, B may never be able to file a pre-grant or pot-grant opposition against A's application. But, he is still left with the option to argue for revocation under Sec. 64(1)(b), for the patent so granted, stating the ground to be the fact that the patent was granted on the application of a 'person not entitled' under the statutory provisions.

This debate and discourse which gets a proper shape within the domains of the present study primarily arose due to the fact that the Indian patents Act adopted and aligned with the practices prevalent by the British authorities pre-Independence. Moreover, if we analyse, the patent rights had their roots in the dis-honoured practice of the British Crown rewarding favoured subjects with monopolies in a variety of commercial areas, usually in exchange for payments to the Monarch. However, opposition to this arbitrary and discriminatory practice can easily be visualised to be swept out within Art. 14 and 17 of the Indian Constitution which treats all citizens as equal without conferring upon them any exclusive sobriquets. However, the dichotomy created, soon after inclusion of the socialistic ideals in the Indian Constitution; which were in full contrast to the nature and emphasis of the British policies, raises serious doubts on the validity of the ongoing practice. Since, the grant of patent procedure in India too, is governed by the constitutional mandate; by virtue of the Constitution being the law of the land. Thus, it becomes extremely pertinent for us to visulaise the Indian context with the principles of Socialism and those ensuring social justice enshrined within the constitution for the patent-grant procedures. Thus, construing 'true and first inventor' to be the first filer and thereby promoting a system inspired from European practices, where the inventor who wins the race to the Patent Office, is awarded the patent rights – seems *prima facie* unjustified and fully in contravention to the socialistic ideals endorsed within the constitutional mandate.

CONCLUSION

With U.S. being the last prominent state to adopt the first-to-file, it is apprehended that the grant of patents may turn out to be a race to the patent offices, perverting the incentive of inventing. With skewed and unfair advantages to large players in the market for whom the process is economically much more viable, whether the first to file will be disadvantageous to small time inventors or not still remains an issue of concern. Clearly, such an unnecessary change in the system is an outcome of the pressure caused by the international pressure – driving force for patent harmonization. The objectives behind the same seem simple and effective – simplification for the application process, increasing certainty and creating world-wide protection for patents.

Indian scenario seems a bit confused about its own convictions, though on a deeper analysis the hypocrisy is visible. If the first to file rule is interpreted in the same capitalistic

manner of which it is a product of, patenting process will be reduced to a race to the Patent Office. The interpretation of the process must be done in accordance with the socialistic objectives enshrined in the constitution keeping in view the nature of the Indian economy and needs of the society. The words *'true and first'* must bare the inclinations towards the first to file keeping in view whether he truly is the genuine inventor of the invention or not. The provisions which entertain objections on these grounds will ensure the just grant of patents.

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