



Is It Immoral To Expect Your Patent Rights To Remain Immortal?



Evergreening of Patent Rights in India

Whether Immortality is a blessing or a curse is open to debate. But when it comes to patents, the owners must be drooling to have never expiring patent rights. But we all know the patent right is valid for 20 years, it is open to the public and the exclusivity is gone to the wind. Yet, does it stop the patent owners from exploring a way around methods to keep their patent rights? The answer is a big NO. Many pharmaceutical industries use strategies to claim unconditional and irrevocable rights on their inventions or discoveries.

Medicines and pharmaceutical products being the most important survival kit of all living beings, the entire health industry is dependent on three main factors:

- Medicine,
- Medicinal Apparatus, and
- Medicinal Process.

Any new disease affecting the society at large, with the minimal medicinal cure for the disease, requires urgent attention of all the scientists and research institutions. Once the remedy is discovered, these research institutes start claiming proprietary rights over the invention. They apply for intellectual property rights, and once their invention fulfills the basic criteria of novelty,

originality, and industrial application, there cannot be any reason to refuse patents to them. The patent granted is valid for 20 years, and upon nearing the expiry of the validity, these institutes renew/ reapply for the patent by making minor and significant changes, and the process is never-ending.

This process of continuous renewal of patents and to ensure the life of the patents immortal and forever in existence is legally termed as [Ever-Greening of Patents](#).

Etymology:

As the term suggests- [EVER-GREENING](#)- means life is always young and green. The term was coined keeping in mind the nature of the plants – when something, say trees, leaves, or plants is green; it is considered to be alive, the same way the patents, if renewed often, ownership shall remain with the inventor and thus his rights over the invention being immortal.

Ever-greening of patents- in a nutshell:

To start off, a patent is an exclusive right given to the inventors of the product or process. In other words, granting a property right by a sovereign authority to an inventor. The patent grant provides the inventor exclusive rights to commercialize the patented process, design, or invention for a period of 20 years in exchange for a comprehensive disclosure of the invention.

The patent grant, as mentioned earlier, is valid for 20 years, and after the expiry of the said period, it is available in the public domain and can be used by anyone. To preserve the ownership over the patent, these inventors started this unusual practice of making modifications in the patented inventions, and when the validity expires, they reapply for the patent with new modifications and extend the ownership over the patent for another 20 years. Thus, their rights over the patent are evergreen (something which never dies).

To understand the concept better, we have framed an illustration with certain premises.

A research institute (A) has invented a medicine/ medicinal process for the treatment of chronic disease and applied for the patent. The applicant was granted a patent (X) for the discovery in the year 2020. As we all know, the patent is valid for 20 years, so A's right over X will be for 20 years, i.e., 2040.

Now in the year 2038, when the X is about to expire, A makes some modifications in the invention and reapplies for the patent (Y). By doing so, A is able to retain its ownership over Patent X in the form of Patent Y.

The above illustration goes with two undisputed premises.

- *Y satisfies the criteria of patentability- novelty, originality, and industrial application.*

- *The modification in Y does not take away the basic structure of X and confines it to minor modifications in composition.*

With the above premises being true and applying the same to the above illustration if the patent is granted to Y, the term of the patent extends to 18 more years- 2058. Thus, the chance of patents entering the public domain reduces.

Need for an invention to enter the public domain:

Considering the three most important factors of life- health, money, and food and placing foremost importance on health, the majority of the ever-greening of patents takes place in the pharmacy sector. No doubt, the invention takes away a lot of time, money, and resources of the inventors, and for which patents have to be granted, and yes, they are granted for 20 years, after which it should rightfully fall into the public domain category. But, no, these inventors are not ready to lose their control over the patent and keep reapplying it. There is some serious need to block the ever-greening of patents:

1. **Reduce unfair trade practices:** Some of the generic medicines required to treat chronic diseases are available in the market after the patent expires. Ever-greening restricts the patent to come into the public domain, promoting monopolistic and unfair trade practices.
2. **Reduction in the price of the product:** Being in the public domain, a lot of options from different companies are available to customers. Competition in the market, increase in supply automatically reduces the price of the product. But, when the product is in a cocoon, the prices are at their peak, and royalty rates touch the sky, making it unaffordable for all.
3. **Lower the risk to the life of the common public:** There is no question of argument that medicines constitute the major budget of livelihood and take away a majority of our spending. Blocking the ever-greening of patents brings a sigh of relief among the poor and middle-class people, making medicines affordable and accessible.

Indian Patent Law on Ever-Greening of Patents:

Chapter II of the Indian Patent Act, 1970, prohibits the ever-greening of patents in India. It explicitly bars patent of "*the mere discovery of a new form of a known substance or mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant*" (**Section 3(d) of the Indian Patent Act, 1970**). In India, ever-greening of patents cannot be obtained, contrary to other countries which allow such practices, the reason being, when laws were drafted, India was not that developed in terms of technology and inventions. Being a mere user of technology, IPR Laws were quite weak in according protection. However, as time passed by, we are now well-trained and major

producers of technology, thus requiring utmost protection to our inventions. This major shift was outshined in the famous [Novartis Case](#) in the year 2005.

This case not only recommended strong protection for our inventions and genuine inventors but also brought a new wavelength in the drug industry. A brief outline of the case is noteworthy at this juncture.

The Bottom Line:

Post [Novartis judgment](#), the Law concerning Ever-greening, was clearly established. This judgment undoubtedly contributed to the affordability of drugs. Obtaining patents became more difficult. But it should be remembered that until and unless a compulsory license is granted to the non-patent holders to manufacture the drug, the drugs which are under product patent will continue to have a high price. The problem of the ever-greening of patents was never-ending. Even after strict laws, the availability of medicine at affordable rates was a matter of concern. [The Doha Declaration on TRIPS And Public Health](#) was enacted to address the issues but did little benefit to the people. Therefore, the TRIPS allows its signatories to make laws compatible with the situation and condition of their country, and thus as far as India is concerned, evergreening of patents is still on the block list. **So, to answer the title of this article, it may or may not be immoral but definitely illegal.**

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