

“After being successfully invented, can the Covid-19 Vaccine be protected through the Patent Laws?”

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Suppose the much-awaited medicinal drug formula for the vaccine of Covid-19 has been invented by someone in India; can he resist giving the Covid-19 vaccine drug formula to the government of India and prohibit its production, distribution and sale by shielding it through the “Patent Laws”? The present blog provides the legal answer to the same through the laws related to Intellectual Property Rights, specifically patent laws.

Can the Covid-19 Vaccine Medicinal Drug be patented?

To answer the same, it is necessary to understand the concept of Patents and whether the medicinal drugs or their formulas can be patented or not. According to Section 5 of the Thai Patent Act, 1979, patents are granted only to the “inventions” that satisfy three norms. One, the invention must be new. Two, the invention includes an inventive step. Three, the invention can be used for industrial applications. Keeping Covid-19 Vaccine in mind, the said Covid-19 Vaccine will surely be new as no one has invented the same yet. The Covid-19 Vaccine will be an outcome of several formulated experiments and will surely be a result of several inventive steps. Once tried and tested, the Covid-19 Vaccine holds the potential for industrial application in order to generate applicability of the same at the global front. Hence, if invented, the Covid-19 vaccine will satisfy all the three norms necessary for an invention to be patented. This means technically, Covid-19 Vaccine can be termed as a medicinal drug and is capable of being protected by Patent Laws. Significantly, a “Covid-19 Vaccine subjected to the Patent Protection” can lead to severe consequences. The patentee (the one who holds the patent right) can either monopolize the said vaccine and make a fortune out of it or can simply deny providing the vaccine formula for its mass production to check the spread of the virus. As obvious, in such a situation, the Government needs to overrule the patent rights granted to the patentee and save the citizens. The question that arises is whether the Government can overrule the patent rights granted to the patentee of the vaccine without infringing any patent laws or not.

Laws Granting Power of Government to overrule the patent right of the Covid-19 Vaccine:

According to Clause 4, Section 47 of the Indian Patent Act, 1970, when a medicinal drug is already patented, the government of India has the right to import any medical drug for its own use or for distribution in any dispensary, hospital or an institution that is maintained by the Government or anywhere else in regard to the “public service”. Further, Section 100 of the Indian Patent Act, 1970 provides authorization to the government to use, generate and sell the said vaccine without the consent of the patentee with a condition that the same exercise must be done on a “Non-Commercial Basis”. Meaning thereby, if the government starts

using, producing or selling the said patented vaccine and proves the same to be done on “Non-Commercial Basis” i.e. for the public health without any economic motive, Section 100 of the Indian Patent Act, 1970 can be invoked and the same will be justified without infringing the Indian Patent Law. Similarly, in a discussion endorsement document of World Health Organization’s Health Systems, it has been clearly stated that those medicines are not confined through patent laws and the generic versions of such medicine can be produced without violating any patent rights as the case of Covid-19 vaccine will be. The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) is a governing international document that has its validity on all members of the United Nations including India. Article 31 of the TRIPS Agreement talks about the usage of patented inventions without the authorization of the “Right Holder” and serves an exception in the case of “National Emergency”. The said article says that if there is a national emergency, the patented invention can be used without the authorization of the patentee (Right Holder). Whether the outbreak of Covid-19 has created a situation of national emergency or not is a matter of record in regard to the said provision.

The question of legal obstruction stands no ground in order to stop the vaccine from reaching out to the common people. Hypothetically, if such legal battle is initiated, the patentee will hold no firm legal ground to stop the government from the mass production of the vaccine and its distribution. Summarizing the topic, it shall be considered that factually, the Covid-19 Vaccine will be capable of being patented and the inventor of the vaccine will get the rights to prohibit its production, usage, or sale without his/her permission or authorization. But in addition to the same, Government has been already provided with the required domestic and international laws to mark the vaccine as an exception and use it “Non-Commercially” for the public health and manoeuvre its production to reach mass availability.