



PATENT INFRINGEMENT IN INDIA

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A patent is one of the important forms coming under the head of intellectual property where the inventor is given a set of rights after the public announcement of the invention is made. This patent protection is given for 20 years where any third person is prevented from taking over the patent rights of the owner¹. It denotes the creativity of the inventor and the patent gives an identity for the same so that it will not be taken away by any other person. But in case any third party intentionally infringes the patent then strict action will be taken as per the patent infringement laws. Every human being has the right to have an identity in society and to live with dignity which cannot be violated due to the action of a third person. The need to respect every individual is seen through patents as it ensures this respect and recognition protecting them from the unlawful actions of the violators. Patent infringement has been an issue for a long time and it is continuing but the legal provisions and rules have brought it down to some extent.

PATENT INFRINGEMENT- OVERVIEW

The patent is a concept introduced to protect the invention of the inventor by giving an identity to every invention. Efforts and talent of the inventors are recognised and protected through patents. Patent right is a tool for preventing any other person from stealing the invention without the consent or permission of the inventor². The concept of copying is not morally or legally right as it violates the right of the owner to use his or her invention as required³. It prevents the inventor from using their invention where the efforts and creativity go in vain without any recognition. The similarity in the process used for manufacturing the product, nature of product and materials present in the product determine the patent infringement. In *Ravi Kamal Bali v. Kala Tech*⁴, it was held by the court that the differences in the material particulars of the products in question are irrelevant making it a patent infringement. The doctrine of equivalence was first applied in India through this

¹ James H. Neu, The Rights of a Copyright Owner, 9 CURRENT LEGAL THOUGHT 7 (1942)

² Jason Rantanen, The Malleability of Patent Rights, 2015 MICH. ST. L. REV. 895 (2015)

³ Julie S. Turner, The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement, 86 CALIF. L. REV. 179 (1998)

⁴ 2008 (110) Bom.L.R.2167



case where the similarity in the process and materials were considered as significant and not just the product as a whole. Patent infringement can be defined as a prohibited act where the rights of the owner are violated concerning the invention. If a person makes, use, offer to sell or sell any product which contains the elements of any other patented product without the permission of the owner, then the person is liable for patent infringement which is a punishable offence⁵. In simple words, it can be said as the intervention of a third party over the patent rights of the owner whose patent is legally valid and enforceable as per the law in a particular jurisdiction. The place of such action is also important as the presence of a patent protection law is required to take action in case of any violation of patent rights.

Infringements of various types

While dealing with patent infringements, it can be seen that there are various types of infringements beginning with direct and indirect infringement. Direct infringement is a common type where there is a sale, use or marketing of the exact patented product or invention⁶. It is further divided into literal infringement and doctrine of equivalence where literal infringement deals with the usage of every element of the patent product on the infringed product. In *Polaroid Corp v. Eastman Kodak Co*⁷, the Eastman Kodak company was made liable for literal infringement of the “instant camera technology” of Polaroid which is a landmark case of patent infringement where the elements of the patent claim were proven to be infringed. In *Lemelson v. United States*⁸, it was held that every little element of the invention is significant and hence the plaintiff has to prove the existence of each element in the infringed product to consider it as infringement.

The doctrine of equivalence or non-literal infringement focuses mainly on the process used to make the product rather than the product itself. When the processes are carried out, in the same way, giving the same functions and obtaining the same result (Triple Identity test) then the claim can be infringed as per the application of the doctrine. In *Graver Tank & Manufacturing Co. v. Linde Air Products Co*⁹, the welding process was said to be infringed as the elements used had similar properties

⁵ Ronald D. Hantman, Patent Infringement, 72 J. PAT. & TRADEMARK OFF. Soc'y 454 (1990)

⁶ Robert L. Harmon, Direct Infringement of Patents, 58 J. PAT. OFF. Soc'y 739 (1976)

⁷ 641 F. Supp. 828 (1986)

⁸ 752 F 2d 1538

⁹ 339 U.S. 605 (1950)



(Manganese and Magnesium). The court applied the doctrine of equivalence stating that the alternative used was obvious which shows the intention to infringe without actually infringing the patent rights of the owner. Usage of obvious alternatives was said to be an infringement as the method or process. The similarity in the products and functioning is the main factor considered under the doctrine of equivalence. In the case of indirect infringement, the involvement of a third party can be seen who either induces or contributes to the infringement being a direct infringer. Induced infringement and contributory infringement are the two types of indirect infringement where a person induces another person with intention and knowledge to infringe a patent through assisting, encouraging and aiding in induced infringement.

In *Global-Tech Appliances, Inc. v. SEB*¹⁰, the respondents sued petitioners for induced infringement of patent of a deep fryer used in the kitchen. A third party was induced to commit patent infringement by manufacturing a similar deep fryer as that of the respondents. In *Akamai Technologies Inc v. Limelight Networks Inc*¹¹, the presence of a direct infringer was questioned to prove induced infringement. The claim made by Akamai was based on the fact that the limelight had copied all the steps except one, involved in the web development and has caused infringement by inducing the customers to infringe the same. The court held that there was no inducement on the part of the limelight as they did not direct or control the customers to infringe the patent in any manner. In contributory infringement, there is the active participation of the person in the process of infringement rather than inducement resulting in vicarious liability of the same. Even in case of assistance with knowledge will also result in contributory based on the nature of the act. In *Bristol-Myers Squibb Co v. FH Faulding*¹², it was held that the usage of the patented ingredient for the manufacture of a drug and mentioning it in the product guide will make the company liable for contributory infringement because it can make others infringe by following the direction in the guide.

Inventions are defined under the Patents Act as a new product or process which involves an inventive step and can be used in industrial applications¹³. This signifies the importance of novelty and utility in any new invention. Novelty is an important factor in patents as an invention that was in

¹⁰ 563 U.S. 754 (2011)

¹¹ Fed. Cir. Aug. 13, 2015

¹² (2000) 46 IPR 533

¹³ Section 2(1)(j), Patents Act 1970

use earlier cannot be considered as a patent. Publication of the patent is done to avoid any repetition of the inventions where earlier patent will prevent from granting a patent for the same product or process in the future. When dealing with the aspect of inventions, it has to be seen that all the inventions cannot be considered as an invention within the meaning of the Act depending on the nature and sector of the inventions. Certain sectors are omitted from the definition of the invention which includes horticulture, medicinal treatments etc along with the nature of the inventions which are exempted due to their frivolous nature or usage of a known process.

A PEEP INTO THE PATENTS ACT, 1970

In India, patents are dealt with under the Patents Act, 1970 where the legal provisions concerning patents and infringement along with remedies are mentioned which has undergone various changes with the changing time. If the history of patents is analyzed it can be seen that the patent law was introduced in India a long time back in 1911 when the Indian Patents and Designs Act, 1911 was enacted¹⁴. The introduction of the 1970 Act was the result of amending and consolidating the existing laws in India. The Patents Act has undergone various amendments with the changing circumstances to ensure smooth functioning of the regulatory framework of patents where rules were also put forward for the same. There have been three amendments in 1999, 2002 and 2005 resulting in developments in the sector by incorporating new features and widening the scope¹⁵. Every amendment dealt with new sectors implementing convenient methods for the proper application of the law. The 2002 amendment dealt with computer programmes involving technical features where the question of patentability came up in such applications.

The debates are still going on as developments continue to happen to result in changes every minute of the day. Amendments were made in the pharmaceutical sector concerning the patents of certain drugs. In *Novartis AG v. Union of India*¹⁶, an Indian patent application was filed by Novartis for a drug manufactured by them as it was rejected from granting patent due to its lack of invention in the drug. The court held that there was no invention in this new drug and it was just a mere discovery of an existing drug that will not come under the definition of the invention. The need to have superior efficacy in the case of pharmaceuticals was also lacking in the drug which was put

¹⁴ Vidya Sunderam, The Patent Act, 1970 and the Flexibilities Available in the TRIPS Agreement, 1 GNLU J.L. DEV. & POL. 55 (2009)

¹⁵ Patent Law, 11 INTELL. PROP. L. & POL'y 341 (2010)

¹⁶ AIR 2013 SC 1311



forward by the court concluding that the drug does not qualify for a patent. The 2005 amendment widened the scope of product patents to areas of food, drugs, chemicals and micro-organisms¹⁷. The provision for compulsory licensing was also put forward by this amendment.

Acts not considered as infringement

A product or process is said to be infringed only when the patent rights granted specifically to the patent holder is used by a third party without the consent of the holder. Even though the Patent Act does not mention the acts resulting in infringement, it can be seen that the acts which are not considered as infringement is mentioned under the Act. Once the patent is made public through publication, then any third party can use these specifications of the patent reasonably to develop the patent further by conducting experiments on it¹⁸. Such acts are normally seen in the sector of drug manufacturing where the patents are analyzed and researched to improve the patent further. In *Roche Products v. Bolar Pharmaceutical*¹⁹, an exception for Section 107A was brought which was later termed as Bolar Exemption. In this case, Roche filed an infringement suit against Bolar over the patent of the drug manufactured by Roche. It was held that the use of the drug for experimenting purposes is not infringement as there was no commercial intention concerning the drug leading to the introduction of an exemption in this regard.

Another defence for patent infringement is mentioned under Section 107A (b) of the Act where the importation of patented products are discussed stating that the importations which are duly authorised will not come under infringement of patent rights²⁰. The importation of patented products from one country to another is legal if there is authorization to do so. Apart from the Patents Act, other legal provisions are focusing on patents which include Patent rules, 2003 and Patent Amendment Rules, 2016. The authorities have put forward various rules and regulations to ensure smooth functioning of each sector involving patents, designs, copyright etc. The principle adopted in the patents is based on “first-come, first-serve” where the first person who applies for the patent will be granted. If a similar invention is brought for application, it will not be considered based on the same principle.

¹⁷ Peter Ollier, Controversy over Drugs Patent Linkage in India, *MANAGING INTELL. PROP.* 16 (2009)

¹⁸ Section 107A (a), Patents Act 1970

¹⁹ 733 F 2d 858 (Fed. Cir. 1984)

²⁰ Section 107A(b), Patents Act 1970

RELIEFS FOR PATENT INFRINGEMENT

Patent infringement is an unauthorised act that has to be regulated by the authorities to ensure the smooth functioning of the system. Reliefs are granted in various forms to make sure the victims are compensated through injunctions or profit to a certain extent. In case of patent infringement, the patent holder can sue the infringer for attaining relief which is a remedy given by the Court of Justice based on the injury caused in the cases²¹. Section 108 of the Patents Act gives a clear idea about the reliefs in the suit for infringement where injunction and damages or account of profits are mentioned.

Injunctions

An injunction is a court order given to prevent a person from infringing the rights of the patent holder by using the product or process of the owner. The injunction is granted in cases of patent infringement where the act of infringement is restrained from continuing based on reasonable grounds²². Interlocutory injunctions are commonly granted in infringements where the acts which result in infringement are prevented from continuing further. In *Nikky Tasha India Pvt. Ltd. v. Faridabad Gas Gadgets Pvt. Ltd.*²³, the court held that the plaintiff can claim restraint against the others who were involved in business till the design of the plaintiff is cancelled as per the court proceedings.

When a new product is launched by the companies, it has to be seen that the products are not a part of any infringement even by any minute similarity with the existing patents in the particular jurisdiction along with the use of advanced technology and resources. These patent infringement suits are time-consuming and expensive as it is a serious issue concerning the patent rights of an individual, hence it is better to stay out of it and prevent the harm before it happens. In *Franz Xaver Huemer v. New Yash Engineers*²⁴, it was held that a temporary injunction cannot be given by the court for a party who has registered the patent in India but has not started using it as the people are not

²¹ Elizabeth Siew-Kuan, *Evolving Landscape of Patent Remedies in a Changing Marketplace*, 24 SAclJ 634 (2012)

²² Shreya Prakash, *Injunctive Relief for Standard Essential Patent Holders: A Comparative Analysis*, 11 NALSAR Stud. L. REV. 53 (2017)

²³ AIR 1985 Delhi 136

²⁴ AIR 1997 Delhi 79

aware of the patent. A similar decision was given in *Sandeep Jaidka v. Mukesh Mittal & Anr*²⁵, where an injunction was not granted as the plaintiff did not commercially exploit his patent (4D movie experience) and the defendant cannot be made liable for the same.

Damages or account of profit

In infringement cases, an account of profit is one of the most used remedies where an action is taken against the defendant by the plaintiff to recover the profits gained from the infringement which is also keeping a check on unjust enrichment. In the remedy of an account of profits, it will appear as the plaintiff was dealing with the business and gained those profits while the defendant will pay for the wrongful actions²⁶. In certain other cases, the court may also order to seize the products and other infringed goods which contributed towards infringement without compensating for the same.

Burden of proof

The burden of proof is the concept of having an obligation to the other party to provide evidence to the court to corroborate their pieces of evidence²⁷. In patent infringements, the burden of proof is on the plaintiff if the patent is about a product and if it is a process, then the burden of proof shifts to the defendant as the plaintiff may not be able to evaluate the end products and find the similarity of the same based on the process used. When the plaintiff files a suit for the infringement of patent rights, the defendant has to defend by proving his innocence showing that there was no involvement in infringing the rights of the plaintiff²⁸.

CONCLUSION

A patent is an identity that shows the invention of a person where the talent and creativity of the inventor are recognised. The patent holders have the right to protect their inventions from any kind of infringement or misuse. Patent infringement is a punishable offence that has to be regulated appropriately to ensure the protection of the rights of the patent holder. As time goes on, developments happen in various sectors which can have an impact in various ways. In the case of

²⁵ CS(OS) No.1900/2010 Delhi High Court

²⁶ Michael Halewood, *Regulating Patent Holders: Local Working Requirements and Compulsory Licences at International Law*, 35 Osgoode HALL L. J. 243 (1997)

²⁷ Mohan Dewan, *How to Handle India's Patent Working Requirements*, 242 MANAGING INTELL PROP. 16 (2014)

²⁸ Section 104A, Patents Act 1970



patents, every invention has to be respected and protected by making sure no other person copies or manipulates with an ill intention to destroy the other. Inventions are important for the development of society and secure laws encourage the people to come forward with their inventions resulting in a better tomorrow.

