Research Paper Law

Infringement of Patent Rights in India

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ABSTRACT

Patents are rights created by statute. Intellectual Property Rights (IPRs) have long played important roles in the innovation systems of most advanced economies. India, These are negative rights and stop everyone except the inventor to get the benefits of the invention. This paper explains about the effects of the legislative provisions concerning enforcement and litigation under Indian Patents Act and its compliance of TRIPS agreement. This paper attempts to point out several changes that should be brought about in the system or steps to be taken to provide better Patent protection to the inventors.

KEYWORDS | Patents, Infringement, TRIPS, Enforcement, Litigation

INTRODUCTION:

The Indian Patents Act 1970 does not specifically define activities that constitute infringement of patents. Section 48 of the Indian Patents Act 1970, however, confers exclusive rights upon the patentee to exclude third parties from making, importing, using, offering for sale or selling the patented invention, patented product or patented process. It can therefore be concluded that violation of aforementioned monopoly rights would constitute infringement of a patent.

Where the infringer has taken all the essential features claimed in the patent , while manufacturing an article, it will be a direct infringement.

Where the infringer uses all features claimed in the patent but alters one or more unessential features then also it will be an infringement but since it is indirect it is called colourable imitation.Copying the essential features of the invention is sometimes referred to as taking the pith and marrow of the invention.

In Lallubhai Chakubhai Jariwala v Chemical &Co, the Bombay High Court held that the essential part of the substance of the plaintiff's invention was the use of the pressure and therefore there could be no infringement unless the use of the pressure by the defendants in their process was proved.

***In Biswanath Prasad Radhey Shyam v. Hindustan Metal* Industries**, the Supreme Court of India has laid down the following guidelines to determine infringement of a patent,

(1) Read the description and then the claims;
(2) Find out what is the prior art;
(3) What is the improvement over the prior art;
(4) List the broad features of the improvement;
(5) Compare the said broad features with the defendant's process or apparatus; and
(6) If the defendant's process or apparatus is either identical or comes within the scope of the plaintiff's process or apparatus, *there is an infringement*.

Exception to the Infringement or Non-Infringing Activities:

1. Government Use
2. Research Exemption
3. Supply of Patented Drugs to Health Institutions.
4. Use of Patented Invention on Foreign Vessels.
5. Bolar-Like Provision.
6. Parallel Import.

Dispute Resolution Machineries in India:

In India, there are four dispute resolution machineries with the following powers and duties:

I. Indian Patent Office (IPO)
II. IP Appellate Board (IPAB)
III. District courts, High court and Supreme Court**:**

DEFENCES IN SUITS FOR INFRINGEMENT:

According to sec 107 every ground on which a patent may be revoked, will be available as a ground for defence. A defendant in a suit for infringement may take one or more of the defences mentioned below that:-

(i) plaintiff is not entitled to sue for infringement;
(ii) the allegation of infringement is false;
(iii) there was permission or licence to use the invention;
(iv) the principle of estoppels or res-judicata is attracted;
(v) the claims alleged to be infringed are invalid;
(vi) the existence of a restrictive contract is declared unlawful;
(vii) the act complained is covered within the scope of innocent infringement or done after lapse of patent;
(viii) the alleged infringement of the patent which is not novel or it is obvious.

In ***Cadila Pharmaceuticals Ltd v. Instance Laboratories Pvt Ltd,*** the Gujarat High Court observed that s 107 expressly empowered a defendant to defend any suit for infringement of a patent. Every ground on which a patent could be revoked under s 64 was available as a ground of defence.

RELIEFS THAT MAY BE GRANTED: S- 108

The reliefs available to a successful plaintiff in a suit for infringement include-(i)an injuction;(ii)damages;(iii)an account of profits;(iv)an order for deliver-up or destruction(v)certificate of validity; (vi)costs.

Injunction:

Injunction is a preventive civil remedy. Injunction is of two kinds. (i)Interlocutory /temporary injunction and(ii) permanent injunction. Temporary injunction is limited to a specific period or till the time the case is finally decided on merit. The permanent injunction is granted after hearing the parties on the merits of the case. The permanent injunction is limited to the duration of the patent.

Principles for the Grant of Temporary Injunction:

In ***National Research and Development Corporation of Delhi Cloth & General Mills Co Ltd,*** the following principles emerge for the grant of temporary injunction from the judgment:

(I) the plaintiff has made out a prima facie case;
(II) the patent is valid and infringed;
(III) the patent is sufficiently old and has been worked;
(IV)the balance of convenience is in favour of the injunction is

not granted;
(V) the plaintiff will suffer an irreparable loss if injunction is not granted.

In ***Cadila Pharmaceuticals Ltd v. Instacare Laboratories Pvt Ltd***[1], the Gujarat High Court while denying the remedy of temporary injunction opined that patent certificate was not a prima facie evidence of the validity of the patent.

Temporary injunction was also denied by Delhi High Court in ***Franz Xaver Huemer v. New Yash Engineers,***[2] on the ground of non-use of patent. In this case an Australian citizen got a patent in India for certain mechanical devices used in textile industry. The patent was not used in India. The plaintiff applied for temporary injunction against the defendant, alleging that it was using his invention and infringing his patent.

2) DAMAGES OR ACCOUNT OF PROFITS:
The plaintiff is entitled to the remedy of either damages or an account of profits .The plaintiff is given the option to elect one of them.

3) SEIZURE OR FORFEITURE OF INFRINGING GOODS AND IMPLEMENTS:
Apart from the other reliefs which a court may order that the goods which are found to be infringing and materials and implements which are predominantly used in the creation of infringing goods shall be seized, forfeited or destroyed, as the court deems fit under the circumstances of the case without payment of any compensation.

Right of exclusive licensee to take proceedings against infringement:
Section 109 empowers the exclusive licensee to institute a suit in respect of any infringement of the patent committed after the date of the licence.

Right of licensee(under compulsory licence) to take proceedings against infringement:
Any person to whom a compulsory licence has been granted under s 84 shall be entitled to call upon the patentee to take proceedings to prevent any infringement of the patent.

4) CERTIFICATE OF VALIDITY OF SPECIFICATION:
If any proceedings before the appellate board or a High Court for the revocation of a patent under s 64 or s 104, the validity of any claim of a specification is contested and that claim is found by the appellate Board or the high court to be valid , the appellate Board or the high court may certify that the validity of that claim was contested in those proceedings and was upheld.

5) COSTS OF SUITS FOR INFRINGEMENT AFTER OBTAINING THE CERTIFICATE:
The person shall be entitled to an order for the payment of his full costs , charges and expenses of and incidental to any such suit or proceeding properly incurred so far as they concern the claim in respect of which the certificate was granted , unless the court trying the suit or proceeding directs.

ROLE OF INDIAN JUDICIARY IN PROTECTING INVENTORS:
Since the new law came into effect on January 1, 2005, there have been serious concerns regarding the role of the domestic Indian generic industry in the new product patents regime. Infringement litigation will follow a standard civil suit path through the courts, with appellate authority vested in the High Courts and ultimately in the Supreme Court.

JUDICIAL TRENDS:
In *Bajaj Auto Limited V. TVS Motor Company Limited* [3]dispute over Patent for the Use of Twin-Spark Plug Engine Technology was decided by the Apex Court. The Supreme Court of India by this landmark judgment has directed all the courts in India for speedy trial and disposal of intellectual property related cases in the courts in India.

In Bayer Corporation Vs. Union of India[4] the Hon'ble High Court of Delhi held that there is no Drug- Patent Linkage mechanism in India as both the Acts have different objectives and the authority to determine patent standards, is within the exclusive domain of the Controller of Patents. It further held that the market approval of a drug does not amount to infringement of patent. Therefore, the patent infringement cannot be presumed, it has to be established in a court of law. Such adjudication is beyond the jurisdiction of Drug Authorities.

In Novartis v. Union of India[5] the decision was on rejection of a patent for a Drug which was not 'inventive' or had an superior 'efficacy'**.** The Supreme Court rejected their application after a 7 year long battle by giving the following reasons: Firstly there was no invention of a new drug, as a mere discovery of an existing drug would not amount to invention. Secondly Supreme Court upheld the view that under **Indian Patent Act** for grant of pharmaceutical patents apart from proving the traditional tests of novelty, inventive step and application, there is a new test of enhanced therapeutic efficacy for claims that cover incremental changes to existing drugs which also Novartis's drug did not qualify. *This became a landmark judgment because the court looked beyond the technicalities and into the fact that the attempt of such companies to 'evergreen' their patents and making them inaccessible at nominal rates*.

CONCLUSION:
Simply winning the legal war is not going to serve the purpose. That win must translate into something good for the business. Otherwise, it is almost a futile fight to establish one's right. That may not be a good idea for businesses. In such a scenario, it is better to let the market decide as to whose product is better As the protection of intellectual property is becoming stronger, patentees will surely like to challenge infringement. The troubling part is that procedural issues are getting more importance than the substantive issues. It is high time that procedure is simplified for patent litigation.

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