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CRITERIONS OF INFRINGEMENT DETECTION (INTERPRETATION OF CLAIMS)

Iman TIRDAD*, Seyyed Hossein SAFAEI

Department of Private Law, College of Law and Political Science and Research Branch, Islamic Azad University, Tehran, Iran.

*** Corresponding Author:**
Email: imantirdad@gmail.com

ABSTRACT

To find an answer to the question as to whether a particular structure has breached the claims inserted in an invention registration paper or not, the claim has to be broken down to its specific elements and then it is these elements that are case-specifically compared with the claimed infringement elements. Of course, the comparison between the claim elements of the infringement and the claim's specific elements should be carried out in looking for answers to the following questions: Are the entire elements backing up the infringement claim existent or not? Are all the elements of the same form? Do the elements all serve one function? Is there a uniform and identical relationship between all the elements? In case that the answers to all of the above questions are positive, it is evident that the infringement has taken place. In order to validate the patent right infringement, the entire array of the measures taken should be within the domain of it; the issue is based on the interpretation of the patent document. The time scale for the validation of the patent infringement is the time after which the specifications, documents and the papers related to the invention are released. Also, there can be different solutions in order to detect and determine the infringing actions in the national rules of the countries. In the regulations of some countries, infringing of the rights is divided into inherent and original infringements and equivalent infringement or infringement under the doctrine of equivalent.

Keywords: *Infringement Detection, Inherent and Original Infringement, Equivalent Infringement, Dependent Patent, Improvement of Patent, Contingent Liability.*

INTRODUCTION

INHERENT AND ORIGINAL INFRINGEMENT OF THE RIGHTS:

There are numerous methods that an invention patent might be infringed. The first way that a patent might be intentionally infringed by a third party is that s/he may make an exact copy of the patent without making any change therei (WIPO, 2004). In such imitation of the patents, no change is made in the invention. The commodity subject of infringement is exactly the same as the original invention. The detection of such an infringement is easy and straightforward. It is the duty of the patentee to prove the imitation measure of the infringer and there is no need for justifying the correspondence of the commodity subject of infringement and the original one with the proposed claims. In such a type of infringement, the infringer is rather a reckless one or s/he might reckon that the patent right is faulty hence inauthentic (Vesali, 2011).
In such types of infringement, the sole verification of the patent right and the commitment of an action leading to the infringement by the infringer suffice the affirmation of the breaching of the right.

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In inherent infringement, the courts, in their struggle for the detection of infringement, compare the claim elements inserted in the registered patent document with the elements of the infringement claim and then rule the infringement only in case that the elements described in the registered claim are found existing in the infringing product. For instance, let's suppose that the individual A has invented a bicycle and claims that the individual B who has constructed a tricycle has infringed his exclusive rights in the making of the tricycle. Now, imagine that beside the front and rear cycles, the bicycle features elements like a saddle, the rod on which the saddle is mounted and the wheel axle. In such assumptions, the court investigates to see if the tricycle possesses these same features or not? In the course of investigation, the court finds out that the tricycle has all the features plus one extra cycle. In such cases, the court adjudicates that the evidence does not indicate any inherent or original infringement

EQUIVALENT INFRINGEMENT:

The second state of the infringement of the patents is that the third parties copy the invention in its pattern. This is called equivalent or indirect infringement and it is defined as stated in the following words: "the infringer's action in line with breaching the rights of a patented invention in its essence along with the exertion of some changes in the accessory parts of the original invention" (Zain, 2000).

Such a type of infringement occurs when the invention is introduced within the society by the press, documents or via the production of a merchandise that comprises the invention and this makes the others to copy the invention in its essential model because the publication of the invention reveals the form and the solution for making a copy of the patented invention to the general public. This way, the others may be encouraged to take advantage of the invention model to make their own equivalent samples and earn some economical interest. And, these imitation interventions usually end in if not whole but part of the invention patent infringement. This latter equivalent infringement of the patented inventions is the most substantial reason behind the infringements of the patented invention rights within the society and it has given rise to the emergence of a great deal of lawsuits (WIPO, 2004).

The detection of such infringements is more difficult in respect to the original infringements of the patented inventions. In such infringements, there is a need for making use of the offered criteria and the main requisitions posed for the patent right acquisition should be matched with the infringement perpetrated as well as with the lawsuit subject matter, if the invention is found infringed in its essence and origin, albeit differences existing in the accessories of the original invention.

In regard of the complaints filed by the patentee, it has to be noted that the possessor of the invention license might naturally imagine that his innovation has been copied hence violated in his first confrontation with another commodity or subject that is consisted of his invention but this cannot necessarily be considered a infringement of the patent because there are numerous individuals in the society that at the same time with the owner of the license are endeavoring to solve the problems and in doing so they might come to results that may be similar to the licensee's results. Therefore, although the licensee might feel that his innovation has been copied hence infringed, in fact, another person might have reached to a solution similar to the subject as outlined in the license via making use of other different methods and

this might be possibly not inspired by the innovation and the idea of the licensee (WIPO, 2004).

In the infringement under the doctrine of equivalent, the court does not compare the elements; rather, the court pays more attention to the role, the method and the result of the two compared inventions. In other words, the court evaluates the idea that whether the two products serve the same function or not and/or whether they both produce the same result or work identically or not. In this case, if the court in its investigations comes to the conclusion that the two instruments perform the same task and their product is seminally similar, then the two products will be considered the same and resultantly the court arbitrates the infringement under the doctrine of equivalent, though the products of the two being found different in form and elements. Inversely, if the ordinary investigations by the court unravel that the two products serve numerous functions and produce numerous results and therefore their differences are in this regard serious and essential, then the court sentences the no-infringement rule.

Thus, corresponding to the equivalent theory, the products and the processes that do not literally fall within the domain of the jargon and the expressions of the license subject, but are similar and equivalent to the elements of the invention as inserted in its patent and, in the meantime, this can be vividly verified, are to be placed inside the inclusion circle of the license hence are supported thereby (Salehi Zahabi, 2009).

INFRINGEMENT AND ASSOCIATED INVENTION (DEPENDENT PATENT):

It cannot be denied that the sciences are associated with one another and every invention advances the science one step forward and brings about improvement in the people's lives and welfare. Inter alia the exclusive conditions pertaining to an invention is that it has to be demonstrative of a new innovation. The phrase "the novel innovation" conveys the idea that the thing that has been created should have not been previously existent in the technology and/or industry and it should not be clearly and vividly discernible for an individual possessing an ordinary skill in the intended technology. The prior industry means the very former inventions. The use of the former invention might be yet in the jurisdiction of its inventor or it might have been publicized. According to the rapid progress made in the science, it is quite likely that a new invention be innovated before the former one being publicized. It is evident that the sciences are conjoined like chains.

The dependent patent pertains to an invention the use of which without making use of the dominant invention is not possible.

There is no independent and clear-cut definition specified in the invention, trademark and industrial plans' registration law, approved in 2007, and the guidelines related thereto. Unlike the complementary invention whose conditions are expressed in the guideline, the stipulations related to the dependent patents and inventions are not pointed out, but it can be discerned from the Part H of the Article 17 of the invention, trademark and industrial plans' registration law, passed in 2007, that the legislator has authenticated the dependent invention and patents.

The dependent invention should feature all the verdicts and the conditions specified for an original invention with the only difference that the uses of the forthcoming inventions should be dependent on the original one and that the use of the upcoming invention has to be pendent upon the original prototype.

Infringements are proved hence liabilities have to be imposed in case that the patentee of the dominant invention breaches the rights of the dependent invention or conversely in case that the patentee of the dependent invention abuses the rights of the dominant invention. The sole registration of the dependent invention is no license for the owner to make use of the dominant invention and in case such a use is required there is a need for an agreement to be reached with the dominant invention licensee.

Corresponding to the paragraph (1), Part (H) of the Article (17), of the invention, trademark and industrial plans' registration law, enacted in 2007, the dependent invention can be utilized in case that a utilization license is issued for it on the condition that it is claimed at the time of registering the dominant invention that there is no possibility for making use of the dependent invention without first making use of the dominant invention. Also, the dependent invention as compared to the dominant invention should have the capacity for technical advancement of considerable economic importance (Ghorbanifar, 2008). Corresponding to the paragraph (U) of the Article (31) of the TRIPS Agreement, compulsory issuance of dependent patents' licenses are amongst the license issuance cases. Therefore, the breaching of the dominant patentee's rights by the licensee of the dependent patent or vice versa is an example of infringement and can be sued.

INFRINGEMENT AND IMPROVEMENT OF PATENT:

In case that a subsequent invention completes a former invention it is considered as an improvement to a patent and a patent improvement license is granted for it. This expression has been utilized in paragraph (4) of the Article (1) of Paris Convention. According to this paragraph, by the invention papers, the various types of industrial inventions considered authentic by the country members to the union are intended such as the imported inventions' papers and the complementary inventions' papers and invention papers in general as well as the appended licenses and so forth (Islami, 2009).

Any sort of augmentation made to a former invention is called addition. But, if a latter invention brings about improvement in a former one it is considered a complementary invention.

The developed countries have authenticated in their statutory provisions the topic of improvement to a patent and it is granted a license in case that an inventor expresses his will for continuing his enjoyment of the exclusive rights he has in an important and profitable invention even after the expiration of the original invention paper. In such an assumption, the inventor can, under certain circumstances, register a great many of small improvements to the original prototype of the invention.

It is evident that accepting the registration of such inventions is very dangerous for the developing countries, especially in the area of pharmacy that it provides the large pharmaceutical companies with the authority to succeed in acquiring a license for an improvement in a patent via making a trivial improvement therein and this way they can extend the duration of the original invention's terms. Thus, in order to fight the abovementioned misuses in the developing countries, the complementary patents will last no longer than the expiration of the original invention term.

Paragraph (2) of the Article (28) of the invention law, approved in 1931, has authenticated the complementary inventions posed in the form of improvement in the patents, but for preventing

any misuse and in regard of extending the expiration date of the original invention, it is stated in the article (35) of the amended rules of procedure, enacted in 1931m that the complementary invention paper cannot last any more than the original invention paper expiration. And, corresponding to the Article (37) of the aforementioned rules of procedure, there is predicted a possibility for applying for the registration of a complementary invention by any person other than the invention owner and the patentee of the complementary invention paper can make use of the original invention patent and vice versa provided that an agreement is concluded between the parties. In the present discussion, there is made more emphasis on the infringements to the patents by the patentees of the complementary inventions or original inventions. Despite the explicit stipulation of the conditions on complementary invention papers in the invention law, passed in 1931, there is made no explicit reference to the complementary inventions in the invention law approved in 2007 (Mirhosseini, 2008).

The rules of procedure define the statutory provisions pertaining to the definition and conditions thereof in details. Corresponding to the article (64) of the invention law approved in 2007, the duty of preparing the executive guidelines for the inventions, trademarks and industrial plans' registration has been assigned to the Instruments and Landed Properties Registration Organization of the country. These statutory provisions concerning the inventions, trademarks and industrial plans are to be enacted by the head of judicature. The rules of procedure have to only express the quality of law enforcement and they cannot contain rules generating rights. According to the fact that any wording regarding the complementary intervention is missing from the statutory provisions but the rules of procedure seem to have had the possibility to express the regulations related thereto, so in not doing so the rules of procedure appear to have run the risk of being revoked. Disregarding what was mentioned above and corresponding to the Article (25) of the rules of procedure pertaining to the invention, trademarks and industrial plans' registration law, approved in 2007, the development or improvement of an invention can become the subject of a complementary requisition on the condition that it encompasses the supplementation and illustration of the very invention that has been mentioned in the preliminary requisition and there is also provided an opportunity for delivering an independent requisition for the registration of a complementary invention. If an invention is recorded under the title of a complementary invention, then, corresponding to the Note (2), the official in charge of issuing the license for an improvement in an original invention should follow the same regulations that are stipulated for the issuance of an original license to an original invention but the complementary invention validity term cannot extend any longer than the original invention expiration date; but, if the requisition for a complementary invention is delivered not as a complementary invention but as an independent invention, then the regulations specified for the dominant invention should not be obeyed and its validity term will be the same as the other original inventions.

There will not be caused any fault in the method it is being used in case that the requisition for registering a complementary invention is delivered by the possessor of an original invention, but in case that the complementary invention is registered by an individual other than the owner of the original patent, then this latter individual's exploitation of the original invention and the original patentee's use of the complementary invention is dependent on an agreement reached by the parties.

Infringement of the rights can be filed in case of disagreement and the utilization of each of the abovementioned individuals of the original and the complementary inventions. The enactment of the invention rights serves the creation of balance between the rights and interests of the inventor and the community's. In this regard, as well, there should be established a balance between the owner of the original invention rights and the possessor of the complementary invention rights. Considering the fact that there is this possibility of the parties' abuse to each other's rights and according to the fact that corresponding to the Act (40) of Islamic Republic of Iran's invention law "nobody can seek actualization of his rights via harming or abusing the social interests", therefore, in the problem presented herein, the solution lies in granting compulsory exploitation license as specified in Part (H) of the Article (17) of the inventions, trademarks and industrial plans' law, approved in 2007.

Paragraph (1) of the Part (H) in the Article (17) states that "in case that it is claimed in an invention license that the use of a formerly registered exploitable invention by a dependent invention of a dominant invention necessitates important technical improvement featuring considerable economic value, the industrial proprietorship office grants a license to the possessor of the dependent invention to make use of a dominant invention as far as necessity holds without asking for the permission from the patentee of the dominant invention".

It is worth mentioning that corresponding to the materials presented so far, in case that the owner of the complementary invention applies for the issuance of a compulsory patent for making use of an original invention, the owner of the original invention can, based on the Paragraph (2) of the Part (H) in the Article (17) apply for the issuance of a license for taking advantage of the complementary invention otherwise if there is not issued any license of exploitation for the possessor of the complementary invention to take advantage of the original invention the possessor of the original patent will be deprived of the same right, as well. And/or s/he has to seek other ways to acquire an exploitation license. This can be fulfilled in two ways: first of all, reaching to an agreement for conveying a license or a right to use and, secondly, the obligation that can be imposed by certain governmental authorities.

The original invention grants its patentee two separate kinds of rights:

1) The right to the inventor to make use of his own invention; and,
2) The right to exclude others from making use thereof.

It seems that the possessor of the complementary invention rights can exclusively enjoy one sort of a right and that is the right to exclude the others from using the invention and if s/he wills to make use of it s/he has to reach to an agreement with the owner of the original invention right and in case of infringement of the complementary invention rights, it seems that lawsuits can be filed by both of the patentees, i.e. the owner of the original invention right and the possessor of the complementary invention right, both of whom can independently file a claim and ask for compensation. Addition to an invention has also been specified in Paris Convention. It is stated in defining the addition to an invention that such licenses can be issued for the augmentations made to a former original invention and unlike the complementary inventions no improvement in an original invention is necessary in an addition to a patent.

CONTINGENT LIABILITY:

Corresponding to Article (61) of the inventions, trademarks and industrial plans' registration act passed in 2007, the actions specified in Article (15), if committed without the agreement of

the patentee, are punishable and according to the Paragraph (B) of the Article (15), the actions that might lead to a liability for an invention right infringement seem to be indictable in specified courts, and the initiation of the crime or the very contingent liability has also been declared punishable.

Corresponding to the Article (122) of the Islamic penal code of law, enacted in 2013, "whoever who has an intention for perpetrating a crime and begins doing so, but his or her intention is left unfulfilled via it being hindered by an external factor, s/he can still be punished". And, according to Article (123) of the same law, "the mere intention for perpetration of the crime or an operation or an intervention that is only an introduction to a crime and seems not being directly connected to the crime commitment is not initiation of a crime and thus unpunishable in this regard".

The distinguishing and determining of the actions that are enumerated as crime initiation from the actions that are only introductions to a crime and are not directly connected to the crime initiation is not always as easy. The objective and subjective theory is inter alia the theorems that are put forth in line with making a distinction between the preparatory measures from the commencing of a crime perpetration. Corresponding to the objective theory, the initiation to perpetrate a crime is actualized when the doer commits one of the actions that are specified in the legal definition of crime, whether as constituent element and/or as intensified quality of the crime. So, the other actions that are not mentioned in the legal definition of crime are to be considered as preparatory actions based on the foresaid theory. For example, in case that an invention is a product then it has to be exclusively imported by the owner or via acquiring an agreement and if a product is in the customs offices and about to enter to the country and the patentee somehow learns about the issue and files a lawsuit, it seems that the import of the goods through the customs office can be considered some sort of initiation of crime and hence punishable corresponding to Article (123) of the Islamic penal code of law.

Corresponding to the subjective theory, the initiation of a crime is some sort of resorting to actions that mark the perpetrator's decisive and firm decision for committing a crime. In other words, whatever the action willed and actualized by the perpetrator to accomplish his or her objective should be considered as initiation of crime and there is also suggested a third theory that is a combination of objective theory and considers the psychological status of the perpetrator. Thus, to distinguish between the preparatory actions from the initiation of a crime, the theory should make a difference between the Univoque Actions and Equivoque Actions. The initiation of a crime is an action that is undoubtedly indicative of the malevolent intention by a perpetrator and it is closely correlated with the actualization of a crime; whereas, the preparatory actions are ambiguous and interpretable (Ardabili, 2003). For instance, if the purchase of some raw material is solely and exclusively applicable for the purpose of manufacturing the subject of the invention license paper and there can be no other use envisaged for it, it has to seemingly be considered as an initiation of a crime hence a contingent infringement and it can be punished corresponding to the Article (61) of the invention registration law but, if the purchased raw material is deemed applicable to other uses, including for the fabrication of the subject of the patent, then it cannot be considered as contingent infringement and hence not punishable.

According to what was mentioned above, the sole initiation of a crime that will definitely result in a breach to an invention right should be considered contingent infringement hence

punishable and the mere perpetration of preparatory actions that are not envisioned having anything to do with an infringement are not to be regarded crimes leave alone punishable.
The difference between failed offence and the initiation of crime or an attempt is that firstly like the impossible offence the barrier to the actualization of a failed offence is a privative and preventive hindrance but the barrier to the actualization of a crime in an attempt is an affirmative and positive hindrance and secondly in the failed offence the culprit has advanced in the actualization of the crime to the extent that there is no hope in his or her voluntary withdrawal from the perpetration of a major crime but the culprit's intervention in an attempt are advanced to the extent that there is the hope that s/he can voluntarily withdraw from the perpetration of a major crime (Soltani, 2012).
Corresponding to the Article (124) of the Islamic penal code of law, if anyone attempts a crime and leaves it on his own will s/he will not be sued in accusation for the initiation of a crime unless the action taken by him are found to the extent that it can be per se considered an independent offence and according to the Article (122) of the Islamic penal code of law, if the culprit's will and intention for attempting a crime are suspended by an external factor (suspended crime) then it can be recounted as an attempt and based on the Note to the same law if the perpetration of a crime is deemed impossible (impossible offence) it can be considered as an initiation of an attempt to a crime and the offended can be punished accordingly.
In the end, it has to be said that because the punishments mentioned in the Article (61) of the invention, trademark and industrial plans' registration law, passed in 2007, are considered as degree seven punishments based on the Article (19) of the Islamic penal code of law and considering the fact that the offences punishable by degree seven punishments are not punishable according to the Article (122), thus it seems that attempting to breach an invention right cannot be a crime hence punishable, though it is preventable and the patentee can refer to the perpetrator of the contingent infringement for a compensation.

CONCLUSION:

Detecting and defining infringement in the national laws of the countries has different strategies. The simplest form of that fundamental infringement is that the copying (without any change) is identical to the invention. Modeling invented in infringement of the equivalent of third parties. In another respect, the offense of the invention of the future to the rights of the inventive invention and vice versa is an infringement of and prosecution. If the subsequent invention ex invention is complementary to said additional patents and patent materials, to improve an invention is granted. This term is used in paragraph (4) of the article (1) of the Paris Convention.

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