GOVERNMENT USE OF PATENTS: UNDERSTANDING OF LIMITS & EVOLVING JURISPRUDENCE IN A COMPARATIVE LIGHT

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Abstract

Patents form part of a statutory right of an inventor to commercially exploit the sale and licensing of his/her patent exclusively. This is of the nature of a right granted by the Government. Section 47 and 100 of the Patents Act however are powers reserved with the Central Government which permits it to use any patent of the patentee for government use. While a few cases have determined and laid down limitations to the use of such a patent by the government and circumstances under which they may not be used by the Central Government, there is still growing ideas and room for misuse and colorable exercise of power by the Government. While it is generally accepted that Section 47 is narrow in scope of power granted to government, Section 100 affords a wider range of powers calling for an analysis in order to understand how these two provisions are fundamentally different in approach and why analysis of these provisions is essential in order to arrive at a conclusion as to how powers are reserved with the Central Government over the same. Furthermore, a comparative analysis is sought to be conducted to analyze how Patent jurisprudence is evolving in India in a skewed socialist manner with Compulsory Licensing and increasing use of power by the Central Government in exercise and depriving the Patent owners a right to commercially exploit their product. The authors inter alia seek to make an analysis of the recent judgment of the Hyderabad's court on the same. The authors seek to make a research in light of emerging jurisprudence in comparative jurisdictions and also in light of the Privacy Judgment, how the courts have reemphasized the need to protect Intellectual Property Rights by way of understanding the importance of disclosure in a regime that protects Privacy.

PREFERRED CITATION

- Sameer Avasarala & Chhavi Jain, Government use of patents: understanding of limits & evolving jurisprudence in a comparative light, *The Lex-Warrier: Online Law Journal* (2018) 1, pp. 35 – 42, ISSN (O): 2319-8338

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Introduction

Intellectual Property Law, often referred to as the property resulting out of the *creations of the mind* and the rights of which do not typically surround the abstract non-physical entity or mere ideas but instead protect the manifestations of such ideas and a content-creators interest in the idea by assigning exclusive rights to produce and control such incantations and manifestations of the mind. Intellectual Properties are seen in many forms in *modern day jurisprudence*. Ranging from protection to products capable of industrial application, works of literary and cinematic value to the endemic varieties of various products, protections are granted in the form of Patents, Copyrights, Trademarks and Geographic Indicators to name a few. The IP regime in India has evolved considerably over time with the courts advancing the need of growing IP jurisprudence to further scientific innovation.

The first intellectual properties were assigned to chefs in the Greek colonies and a *typical monopoly* was granted for their culinary delights. The first constructive mention of intellectual property, dated back to 180 BC is said to arise from the revealing of an intellectual property theft by a Judge who had convicted poets for stealing the words and phrases of other poets.[1] One of the first protections to the intellectual property was afforded to *Filippo Brunelleschi*, a famous architect by the Republic of Florence on June 9, 1421 by passing a statute which allowed authors and inventors the right to reap efforts of their intellectual products.[2]

Patents & Evolution of Patents

The origin of the word 'patent' lies in the latin term literae patentes (letters patent) which means 'open letters'. This was so called in Britain as they were open **and not sealed, and it bore the** great seal at the bottom and had a proclamation from the sovereign to the subjects of the kingdom. The grant of a patent was a matter of the sovereign's grace. The letters patent would 'strictly command all subjects' that they shall not, during the continuance of the term of the patent, 'make use of or put in practice the said invention.' Any disobedience was visited by sanction in the form of 'penalties as may be justly inflicted on such offenders' for their contempt of the Royal Command, apart from damages claimed by th**e patentee**.[3]

India's growth of Intellectual Property can be predominantly traced from the

[1]Bruce Willis Bugbee, The Genesis of American Patent & Copyright Law (1967)
[2] Michael J.F. Saurez, The book: A GlobalHistory, 184, (H.R. Woudhuysen, 2013)
[3]Feroz Ali Khadar, The Law of Patents with Special Focus on Pharmaceuticals in India 2-3 (New Delhi: Lexis Nexis Butterworths, 2007).

decolonization in 1947. Colonial experience of Intellectual Property regime suggests that the British has by and large imposed laws related to IP in a bid to protect British inventors and mercantilist interests of the British empire even as the nation struggled to reckon with the staggering welfare needs of its citizens. The colonial experience of IP was indeed a dark spot owing to the virtual monopolies over the vast Indian market created owing to the enactment of the Patents Act, 1911 to merely ensure pecuniary benefits in furtherance of British interests.[4]

In a bid to remedy this situation, the Government of India constituted the high-powered committee led by an eminent jurist, Bakshi Chand. The Chand Committee's Report observed *inter alia* that the incumbent patent law provided for a strong protection given to multi-national/foreign firms while completely ignoring the however uncompetitive domestic market finding its feet.[5] The report was suggesting reforms in the Patent Act 1911 in order to ensure the domestic market's equal footing in the competitive market.

Economic Liberalisation

Liberalisation is one of the biggest economic reforms that India has underwent which led to a shift in many important policies. Liberalisation left a more or less wide impact on the Patents aspect. More than the benefits of globalization being reaped out of the expansion of the domestic industry, by way of enactment of the Patents Act, 1970, the western pharmaceutical manufacturers reaped its benefits with their golden access to the huge Indian market.

Although initially India was one among the countries which opposed the TRIPS Agreement, however due to threat of trade and other sanctions by World Trade Organization and other countries including the U.S, India found itself relenting and reversed its stance on TRIPS nevertheless continuing on balanced provisions addressing concerns of developing nations. India was a signatory to TRIPS and was required to enact an IPR legislation within a ten-year-grace period to bring the IP laws in conformity to TRIPS.

TRIPS came into force on January 1, 1995 and therefore, the TRIPS had to be implemented within a ten-year period before 2005. The Government of India enacted the Patents (Amendments) Ordinance, 1994 on December 31, 1994 to buy time while statutory changes to the law were pursued in Parliament. However, the said ordinance

[4] Basheer Shamnad, Intellectual Property Overlaps :An Indian Perspective (May1 , 2013)

[5] Janice M. Mueller, The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the rise of Indian Pharmaceutical Innovation, 491-511 (68 U. PITT. L. REV. 2006)

expired after the prescribed period and amidst growing disquiet from developing nations, the *Doha Declaration*[6] had reinforced flexibilities in TRIPS to allow member parties to mitigate hardships arising from adapting domestic patent laws to the TRIPS standards.

Statutory Provisions Analysis

Section 47: Section 47 provides that a patent when granted to the Patentee by the State allows certain uses of the Government in respect of patents. The following conditions apply

(i) Any machine, apparatus or article in respect of which patent is granted or an article made by using a process patent may be imported or made by or on behalf of the Government for the purpose of merely its use.

(ii) Any process in respect of which the patent is granted may be used by or on behalf of the Government for the purpose of merely its use

(iii) Any machine, apparatus or other article in respect of which the patent is granted or article made by use of process patent may be used by any person merely for experimental use or research including educating the pupils

(iv) In case of Patents relating to drugs, the medicine or drug may be imported by the Government for the purpose of merely its own use or for distribution in dispensary or hospital maintained by or on behalf of Government

The Bombay High Court observed that the words *merely of its own use* would mean for the use of the Government by any department of the Government and use by servants and agents of the Government in the performance of their duties/responsibilities. This would not include use by any other person indirectly affiliated with any government activity and is *restricted to direct use.*[7]All rights granted to the Patentee (Statutory & Monopoly Rights) cannot be reduced to a nullity till their validity ends unless they are subject to other provisions and Section 47. Patent cannot be used as a tool to exploit to cripple business rivals without adducing a proof of their alleged infringement. [8]

Section 100: Section 100 prescribes that the Central Government or authorized person may use the patented invention for

[6]Attaran, Amir, The Doha Declaration on the Trips Agreement and Public Health, Access to Pharmaceuticals, and Options Under WTO Law. Fordham Intellectual Property, Media & Entertainment Law Journal, 12, 859, 859-885, 2002.

[7]*Garware Wall Ropes Ltd.* v. *A. I. Chopra* 2010 (42) PTC 731 (Bom)

[8]*Telefonaktiebolaget L. M. Ericsson* v. *Intex Technologies* 2015 (62) PTC 90 (Del)

government purposes at any time after the application is filed. Before the priority date of relevant claim, where an invention has been duly recorded in a document, tried/tested by a Government or government undertaking, any use of the invention may be made by the Central Government for governmental use free of cost or royalty or other remuneration to the patentee. As far as the invention is not recorded or tested/tried by the Central Government or authorized person the agreeable terms shall be made between Central Government and Patentee as may in default be determined by the High Court under a reference under Section 103. However, in any such use of patent, the Patentee shall be paid not more than adequate remuneration in each case taking into account the economic value of the use of patent.

As per the provision, whenever a patent has been used by the Central Government or under its authority, except in case of national emergency or circumstances of extreme urgency or non-commercial use, the Government shall notify the patentee of the fact and furnish extent of use on a regular basis. Any dispute relating to the use of Central Government's powers under Section 100 or payment/consideration terms may be referred to the High Court by any party. In any proceedings to which the Central Government is a party, it may

a) If the patentee is a party, the Government may by way of a counter-claim petition for revocation of patent upon specified grounds under Section 64
b) If the patentee is not a party or is, the Government may put in issue validity of patent without petitioning for its revocation

Many government institutions including the Railways have been brought under the bracket of this provision. Further, an agreement between the Government/Agency and the patentee must be reached at in terms of compensating the Patentee reasonably for use of his invention[9] and the entire process must not prejudice the right of the patentee and the exclusivity purpose for which the patent was granted in the first place.[10] In both cases of Section 47 and 100, the Government may assail validity of patent and claim that it is not an "invention" and merely a 'workshop improvement' in order to evade the royalty payable *inter alia*.[11]

Comparative Analysis

The Section 1498 of the United States Code prescribes that a government is entitled to use a patent without license and prescribes the remedy by way of a civil action for

[9] *Chemtura Corporation* v. *Union of India* 2009 (41) PTC 260 (Del)
[10] *Pawan Deep Singh Bahl* v. *Princep Supply Agency* 2014 (58) PTC 38 (Del)
[11] *S. C. Katoch* v. *Union of India* ILR 1979 8 HP 445

recovery of a monetary sum as a reasonable and fair/entire compensation in the US Court of Federal Claims. Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action. However, the Government in the said litigation may claim *no reasonable availability* of Patented product to the general public on reasonable terms. The scope of §1498 was recently reconsidered, en banc, by the Federal Circuit in the context of carbon fiber panels which were partially manufactured abroad only to be imported and finished in the United States. The Federal Circuit reversed its prior holding and found that §1498 did apply to the importation of a product made by a patented process. In so holding, the court clarified that the correct interpretation of 1498(a) is that it creates a cause of action for direct infringement that is separate and different from 271(a), and that it could include conduct falling under 271(g).[12]

As per WIPO, almost 62 member states of the WIPO have Government use clauses in their respective patent laws with almost nil or no limitations to use of government power for patented inventions.[13]

Contract Theory of Patent Law

Increasing view of Patent Law tends towards the *Contract* theory that a patent is in fact a contract between the Government and the Patentee.[14] Presentation/Disclosure to the public of a novel, useful and non-obvious product/process is the consideration for the government granting exclusive rights to the claimed invention for a limited time. Use of Patent is a crucial element of the law concerning India. The Patentee is obligated in India to work the patent under the statutory mandate of Section 146 read with Rule 131 and is required to furnish the evidence of such use to be disclosed to the Controller General by way of Form-27. Failure of information relating to non-working may create a presumption of non-working making patentee liable for a punishable offence statutory penalty of up to ten lakh rupees. Therefore, India has in a way given statutory recognition to this contract theory.

Recent Indian Judgments on the Provisions

In the recent *Chemptura Corporation's*[15] case, as the Delhi High court ruled the use by the government of a patent owned by an individual cannot be termed as

[12] *Zoltek Corporation* v. *United States* 28 U.S.C. § 1498 (2016)

[13] Alain Gallochat , Exceptions and Limitations to Patent Rights: Compulsory Licenses And/Or Government Use , World Intellectual Property Organization (Nov. 07, 2014) , http://www.wipo.int/edocs/mdocs/scp/en/scp_21/scp_21_5_rev.pdf

[14] *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 489 (1974)

[15] Supra Footnote 14

*infringement*and must only be construed as a 'Government Use' exception. The interpretation of the Court with respect to the scope of 'Government Use' exemption under Section 47 is well-founded and appropriate. As pointed out by the Court, a literal reading of the section indicates that manufacture or use of a patented invention both "by and on behalf" of the Government is exempt from patent infringement. Therefore, restriction of the exemption to use by the Government department or its officers as done by the Bombay High Court in *Garware Wall Ropes case*[16]would not be in consonance with the language of the section.

The Hyderabad High Court in writ jurisdiction where courts usually do not proceed into questions of facts relating to patent infringement owing to the fact that such power of an original jurisdiction nature is conferred on the Civil Courts by the statute proceeded to delve into merits and hold that the State Government has rights to issue a tender even for a patented product under Section 47 as it may be *imported* or *made on behalf of the Government* as per the language of the provision. Therefore the government cannot be restrained from calling of a tender in relation to manufacture of a patented product.[17]

[16] Supra Footnote 12
[17]*Mohammed Ismail & Anr* v. *State of Telangana* WP No. 28498 of 2017

Conclusion

The government use of patents signifies an important *socialist* agenda in the functioning of the Indian Patent Regime. While many member states of the WIPO are in fact in support of the Government use clause in their patent regimes, the fact remains to be that India has been moving towards a protected patent regime where there is no adverse interpretation whatsoever in limiting the powers of the Government *over a patented invention*. While provisions pertaining to Compulsory Licensing have been rather meticulously interpreted and implemented and sparingly used, the *Government use* clause has been invoked much and courts have not attempted to interpret it narrowly so as to impose on the Government to show adequate cause for not having shown adequate cause to institute government use without obtaining specific authorization from the patent holder.

There are two fundamental aspects that the author seeks to purport in this particular case. Firstly, that the authorization of the patentee holds true and a long way in protecting the Patent Regime of India and making it more investor-friendly. The Government's power in using the patent must remain, however, protections and procedural safeguards must be laid down in order to attempt to verify the veracity of the claim of the Government. Secondly, the

compensation granted to the patentee must be on *commercial terms* if situation is not resembling that of an emergency or a urgency irrespective of whether such use of the government is *commercial* or *non-commercial* in nature.

The authors propose a procedural structure similar to that of France where there are two kinds of situations where a government may seek to use a patent

a) National Emergency or Circumstances of Extreme Urgency
b) Commercial/Non-Commercial Public Use

In the case of the former, the existing power of the Government must be retained intact to enable the Government to use the patent expeditiously. In case of the latter, the Government must be compelled to attempt to obtain a commercial license from the Patentee at reasonable commercial terms in order to fulfill its objective and must be subject to such obligations as a licensee may be. If such license is denied by the Patentee and if the Government deems fit that such circumstances exist where it is crucial for the Government to use the patent in light of public interest, it may use the provision to make use of the patented invention *by giving a prior notice of invocation of power under Section* 100. Such notice may be amenable to the jurisdiction of a court of law. Further, before use of such patent, the Government and the Patentee must amicably arrive at a conclusion in terms of monetary compensation. In case of a commercial use, there must be no doubt that the compensation or royalty must be on entire commercial terms. In case of a non-commercial use, the monetary sum may perhaps be lessened but at the mutual convenience and acceptance of the parties. This model is essential to pour life into the contractual relationship that a Patentee has with the Government.

The authors are of the opinion that a robust patent regime which seeks to *beneficially* protect the inventors of the crucial rights of their intellectual properties leads to a better economic growth, encourages innovation and scientific development. The Government must only look at balancing the rights of the patentee and general public in *terms of working of patents* and none more to its credit.