

## **Can the National Government Infringe a Patent?**

The national governments grant the patents rights. Does it mean that government is immune to the reach of the patent right particularly infringement? In the emergency like the one due to COVID 19 pandemic threat, Indian government may require the import of new inventions patented or otherwise relating to ***any medicine or drug, medical equipment or other equipment or quarantine suits on corona virus prevention and cure to*** effectively deal with the public health situation. The Indian Government is in a better position to deal such a situation. Section 47 and section 99 to 101 of the patent Act ,1970 give effective statutory exemption to empower the government to make, use, vend, or even import any medicine or drug, medical equipment or other equipment for use or distribution in public health centres owned by the government or notified by the government for that purpose. The patentee right are subjected to these conditional exemptions as trade-off for the grant of a patent. Thus, the patentee is not entitle to file infringement suit against government if the government use is limited to the situations referred in Section 47 and in case he venture to do so, the immunity of the government to such action would come into play to keep the public health related supplies undisturbed.

### **Conditions of patent grant**

The rights of the patents are not unlimited. Indian patent law particularly limit the reach of the patent right to certain conditions as stated under section 47 reproduced below:

*"47. **Grant of patents to be subject to certain conditions.**—The grant of a patent under this Act shall be subject to the condition that—*

*(1) any machine, apparatus or other article in respect of which the patent is granted or any article made by using a process in respect of which the patent is granted, may be imported or made by or on behalf of the Government for the purpose merely of its own use;*

*(2) any process in respect of which the patent is granted may be used by or on behalf of the Government for the purpose merely of its own use;*

*(3) .....; and*

*(4) in the case of a patent in respect of any medicine or drug, the medicine or drug may be imported by the Government for the purpose merely of its own use or for distribution in any dispensary, hospital or other medical institution maintained by or on behalf of the Government or any other dispensary, hospital or other medical institution which the Central Government may, having regard to the public service that such dispensary, hospital or medical institution renders, specify in this behalf by notification in the Official Gazette.*

This clearly means that patent rights are granted on a conditional basis and the act of the government under the provisions and conditions of section 47 would not amount to infringement so long as the patented invention is imported or made by or on the behalf of the government merely for its own use.

### **The Purpose of the government defined**

The use of the invention for the purpose of the government is a normal sovereign right of any national government. In India the use of invention for the purpose of government, includes its making, using, exercising, or vending by Central Government, a state Government, or a government undertaking. The patent law is not unduly unfair to the patentee/inventor as the purpose for which the invention or a patent could be used is clearly specified in section 99 of the Patent Act 1970.

*99. Meaning of use of invention for purposes of Government.—(1) For the purposes of this Chapter, an invention is said to be used for the purposes of Government if it is made, used, exercised or vended for the purposes of the Central Government, a State Government or a Government undertaking.*

This use of patent /invention under section 99 to 101 for the government purpose is under normal situation. Nevertheless, the power to **import, make or use of any machine, apparatus or other article or of any such using of any process or of any such importation, using or distribution of any medicine or drug**, or distribution of patented invention or its use for the purpose of the Government as covered under section 47 is not subjected to the conditions of section 99 to 101 as can be seen from section 99.(3) viz.

*(3) Nothing contained in this Chapter shall apply in respect of any such importation, making or using of any machine, apparatus or other article or of any such*

*using of any process or of any such importation, using or distribution of any medicine or drug, as may be made by virtue of one or more of the conditions specified in section 47.*

That means conditions and other provisions relating to such use of the invention for purpose of government as covered under section 99 to 101 are only relating to those inventions/patent, which could be used for the purpose of government in general in situations not covered by section 47. This clearly means that patent rights are grant on conditional basis. The government reserve the acts stipulated under section 47 for mere use of government in respect of any patent.

### **Can Government be sued for infringement?**

Rights of the patentee are governed by section 48 of the patents act, which clearly states patentee has "*the exclusive right to prevent third parties, who do not have his consent*". By implication, it means the patentee can prevent any other person who do not have his consent. Section 2 (s) define 'person' to include Government. Consequentially, the patentee can sue the Government for infringement of his right like any third party. However, question before the courts would be, can Government infringe a patent? The answer to this is would be negative when the alleged of use of the patented invention by the Indian Government would be squarely within the statutory exemptions stipulated under section 47. Another issue, which may crop up in this context. Will the government-induced use of the patented invention by other parties' amount to infringement.

### **Government Induced Infringement US Position**

The issue of infringement by Government was raised by the patentee in *Astornet Technologies, Inc. v. BAE Systems, Inc. , 802 F.3d 1271 (Fed.Cir.2015)*. Astornet's Complaint alleged that BAE had induced the Transportation Security Administration ("TSA") to infringe on Astornet's patented technology through BAE's bids and subsequent contracts with the TSA. Astornet the sole exclusive licensee of US 7,649,844, Michael Haddad sole inventor. In 2009, TSA solicited bids to build a new security-related system (Credential Authentication Technology (CAT) – Boarding Pass Scanning System (BPSS)). Astornet submitted a bid but was

unsuccessful. However, BAE, NCR Government Systems, LLC ("NCR"), and MorphoTrust USA, LLC ("MorphoTrust") were awarded trial CAT/BPSS contracts. Astornet was supplying such systems until 2011. On January 27, 2014, Astornet filed a Complaint against BAE, NCR, and MorphoTrust in the Court based on indirect patent infringement.

### **Manifestly unreasonable in assessment of infringement!**

Curiously, in the US Case referred above the court observed that *"When a patentee is manifestly unreasonable in assessing infringement, while continuing to assert infringement in court, an inference is proper of bad faith, whether grounded in or denominated wrongful intent, recklessness, or gross negligence."*

Coming down heavily on the conduct of Astornet's the court even order to award attorneys fee while observing that.

"Astornet's continued pursuit of baseless claims that had no chance of success, combined with its inability to provide a good-faith basis excusing this conduct, demonstrate that this case is "exceptional" and that awarding attorneys' fees is appropriate."

The court further quipped "Quite simply, Astornet and Mason "went all in" and, "[I]ike the unwise gambler,... did so at [their] peril."

This case clearly demonstrate that incessant actions of the patentee taking action for induced infringement against the third party authorised by the government may result into payment of the attorney's fee, which in this case was quite heavy.

### **Indian position on induced infringement**

Section 47 clearly permit such use on the behalf of the Government for the purpose of the government. Therefore, the possibility of any government indeed infringement is ruled out in India. Clearly, section 47 precludes any action for indirect infringement against any contractor working on behalf of the government premised upon the intended use of the patented invention for the mere use of the government. Similarly, use off invention for the purpose of the government under section 100 and right of the third to use the invention for the purpose of government under 101 is also deemed to be exempted from the infringement actions of the patentee. However, this

use is not royalty free except in cases "*(2) Where an invention has, before the priority date of the relevant claim of the complete specification, **been duly recorded in a document, or tested or tried, by or on behalf of the Government or a Government undertaking, otherwise than in consequence of the communication of the invention directly or indirectly by the patentee or by a person from whom he derives title, any use of the invention by the Central Government or any person authorised in writing by it for the purposes of Government may be made free of any royalty or other remuneration to the patentee.***"

In all other cases in case of any such use of any patent, the patentee **shall be paid not more than adequate remuneration in the circumstances of each case, taking into account the economic value of the use of the patent.** It may be noted that cap of four percent on royalty and other remunerations in respect of food and drugs patents has been removed by amendments in 2002. With such provisions in place, the only triable action of the patentee that would be possible is Reference to High Court of disputes as to use for purposes of Government. The dispute should be in relation to the terms for the use of an invention for the purposes of Government or the right of any person to receive any part of a payment made in pursuance of sub-section (3) of that section 100.

*"Provided that in case of any such use of any patent, the patentee shall be paid not more than adequate remuneration in the circumstances of each case, taking into account the economic value of the use of the patent."*

The use for the purpose of Government is not royalty free and the patentee is likely to be compensated with payment of adequate remunerations based on the economic value of the use of the patent. The provisions of these sections for the purpose of government is not limited to claims that are filed against the Indian Government or its government agencies but also apply to the government authorised third parties as well.

## **Conclusion**

Although a patentee can sue the Indian government for unlicensed use of its invention but the only remedy is for a payment of reasonable royalty and

remunerations. That too only by way the reference to High Court under section 103 in case of dispute on the terms of use and quantum of royalty. Thus, Indian government or the person authorised by Indian government would be deemed non-infringer of any patented invention used for the purpose of the government. Curiously, these provisions are similar to US law. Undoubtedly, in the amidst the ongoing corona pandemic government is free to use the corona kit /medicine related inventions for the purpose of the government if the government choose to do so to meet the exigencies of public health situations. The statutory meaning of the purpose of government is to stimulate persons authorised by the government to furnish what was needed by the government, without fear of becoming liable themselves for infringements to inventors or the owners or assignees of patents.

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