

Introduction on Intellectual Property to Engineers and Technologists
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Lecture – 14
Patent Infringement

So last class we discussed about patent prosecution like Popi grant prosecution, Post grant prosecution. Just like say walking of patent, patent of addition (Refer Time: 00:41) so all those things about the post grant prosecutions of patent.

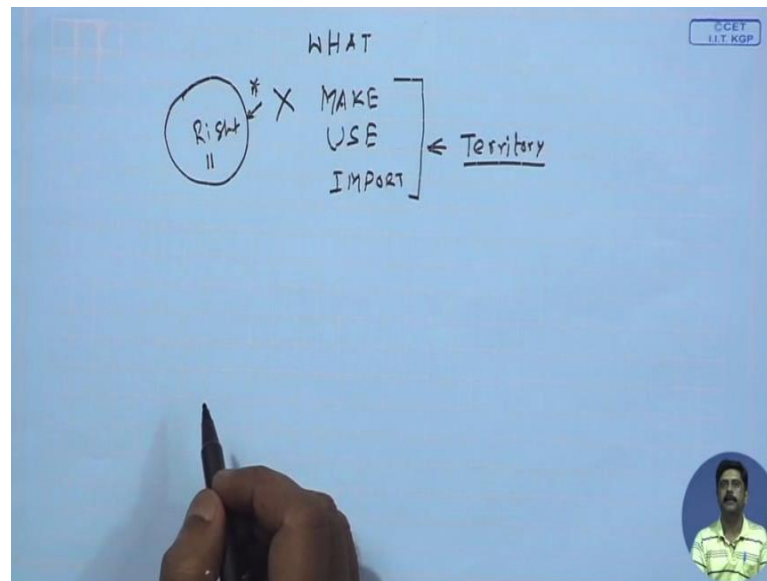
So now, I suggested when I was discussing the say content of any form of IP they are 3 elements, just like creation of rights, transaction or transfer of right and enforcement of rights. So, how can you enforce your rights, if you have a rights, if you do not avail to enforce your rights then there is no value of your rights. So, enforcement of rights is coming by virtue of let us say we come consider the patent infringement.

So, before starting that the word infringement, some I call infringement is some infringer is called doctor, kidnaper just English dictionary meaning if you follows.

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- In respect of **product patent**, the patentee has the **exclusive** right to prevent the third parties from:
 - **Making** that product
 - **Using** that product
 - **Offering for sale** that product
 - **Selling** (actual) that product
 - **Importing for the purpose of Making** that product
 - **Importing for the purpose of Using** that product
 - **Importing for the purpose of Offering for sale** that product
 - **Importing for the purpose of Selling** that product

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So, before that if you have to ask the infringement is, let us use of balance of rights, violation of rights, let us say considered violation of rights. So, violation of you I will again little bit more precise way violation of your statutory rights. Statutory rights means the by virtue of law, some rights you acquired; now the violation of that rights is called Infringement. Then before that you should know about or you should aware about what rights you have, that rights is within that by boundary somebody is here, so he is not in infringer, somebody here he is the infringer. So, you should know what is the domain of your rights, so in that patent act, the territorially the right when I already referred bitten right has been crusted or drafted in a negative right format, patentee can excludes others to use his patented product or the process product or the product using that process.

So, let us see what way the patent law has given the right to the patentee. So what way section 48 of the patent act in the Indian contest we are telling that telling that in respect of product patent the patentee has the exclusive right to prevent the third parties; third party means let say may be they want to considers third party means that a unauthorized users that let us say if licensee can be considered authorized user and then who is not licensee, may be considered third party.

Again government have some sorts of privilege, so government some cases government can acquire the right of the patent. So, considering that they are mentioning the third party; third party means unauthorized user, so who is not a licensee; so they kept the provision of first licensee.


So in respect to product patent, the patentee means the patentee I already referred whose name reflected in the register as the owner of the patent, exclusive right to prevent the third party making that product, using that product, offering for sell that product, selling that product, importing the purpose for making that product, importing for purpose of using that product, importing for purpose of offer for sale that product, importing for the purpose of selling that product.

So, if you are somebody patentee has a product invention and let us say he has an invention called active pharmaceutical invention or active pharmaceutical ingredient, he has an invention for let us say a chemical or he has an invention for a drug or he has an invention for let us say a product also can be devised or medical diagnostics kits. So, he may say that third party, so exclusive right to prevent he can prevent third for making that product so he can prevent any third party to produce that API, produce that what the patentee who was the diagnoses kit making that product, using that product means they are also using means he can; third party cannot use that product they are also later on I will say that commercial use. The extension has been provided for research purpose use somebody used for research purposes may be will not be liable for infringement offering advertise that thing, offering for sale advertise that product in a website e-commerce people let us say they are offering for sale on let us say if a e-commerce site there are putting that API in their website.

So they are offering for sell that product, selling that product e-commerce has selling the product. Let us say flipkart, they are offering for selling that product, selling that product without permission of the patent, importing the product or making that product or importing for research purpose may not be liable importing for making that product, importing for using that product commercial using of the product, importing for that you know for that importing purpose of the selling that product all will be prevented without authorization of the patent owners.

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- In respect of **process patent**, the patentee has the **exclusive** right to prevent the third parties from:
 - The act of **using** that process
 - The act of **using the product** obtained directly by that process
 - The act of **offering for sale the product** obtained directly by that process
 - The act of **selling the product** obtained directly by that process
 - The act of **importing for the purpose of using the product** obtained directly by that process
 - The act of **importing for the purpose of offering for sale the product** obtained directly by that process
- The act of **importing for the purpose of selling the product** obtained directly by that process




Similarity for the process, in respect of process the patentee has the exclusive right to prevent the third party from act of using that product process, what way that process can be used for benefit of the product or for the making of the product. Act of using that product obtained directly by that process. So that appear for that product set of API is using that process, so he will be prevented to use that API also to that API which is ultimately produced by that process, so understood the process is for say intangible.

So, the process is tan tantalized in the form of a product, so how will you process part tangiblized in the products. So, we are telling the we cannot use that product, that product is made by using that process act of offering for sell that product, we can act on that product, which have produced or used by that process act of selling similarly importing that product. See that using that process for the product other part there are tangilabalized the reference to the product just like a product right with a reference to product have been provided.

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INFRINGEMENT

- ✓ **DIRECT INFRINGEMENT**
- ✓ **IN-DIRECT INFRINGEMENT**
- ✓ **WILL-FULL INFRINGEMENT**
- ✓ **UN-WILLING INFRINGEMENT**
- ❖ **LITERAL INFRINGEMENT**
- ❖ **INFRINGEMENT BY MEANS OF DOE OR PURPOSIVE CONSTRUCTION OF CLAIM**



So, now you got an idea about the say the rights of the patent, what is the scope and ambit of the right; rights, means again I am repeating rights means he can prevent other to make or use input. So, like this if we let say prevent others to make, use, input where in the territory where he has the right in the territory. Let us say territory means let us say India prevent other to make use import the product or in respect of process or that use of the process or use of the product made by that process. You got the rights now you got the idea of the infringement means somebody violate the rights of the patentee who is then, he will be treated as an infringer.

So now, the make use import may happen different way direct, indirect, knowingly unknowingly. So based on that now say literally or scientifically they have defined the infringement in different ways just like say direct infringement, so means you are directly infringing means you are directly making the product that is covered by means of some patent. Again example let us say drug for cancer, let us say; what is drug now what is as drug patent in India and they are maintaining that patent means they have valid right in India. Now another company, company A has started a manufacture unit of that product, so they will be treated as a; direct infringers. Why? They are directly producing that patented drug without authorization of the patentee. Other thing direct infringer or the direct, then the process will treat as a direct infringement.

Now, indirect infringement, how, let us say this situation may arise the product of the novelties for making that product what is happening, they require some sorts of ingredient, they require some sorts of equipment, they require some sorts of devices. So may be they are not directly say producing that product, but they are indirectly helping the direct infringer to produce that product. In that situation they may be liable, depending upon the situation to situation they may be liable for indirect infringement, so they are I can link their contribution with reference to that infringement action, so indirectly they are also getting benefited from the direct infringement action of the infringement.

So, I can put them on the boat of direct, indirect infringers. So, sometime we call inducement, inducing infringement or inducement or inducing infringement is coming within the per view of indirect infringement, selling of ingredient, selling of equipment, used for direct infringement, you are putting them as the direct indirect infringement. Similarly they have willful infringement, unwilling infringement. Somebody knowingly that these are may now what is a valid patent a company has started the manufacturing unit; so intention is willful intention.

So, willful willingly they are infringing so they are treated within the purview of some cases, some jurisdiction in the purview of criminal law. So, they are willingly infringing they know that there is a patent till they are infringing, so that is will full infringement all about put their ignorant about a patent, you know it about the infringement, what is infringement kinds of situation, so they are telling the unwilling infringes. So that now these are the basics part with reference to the infringement, the defined types of infringement.

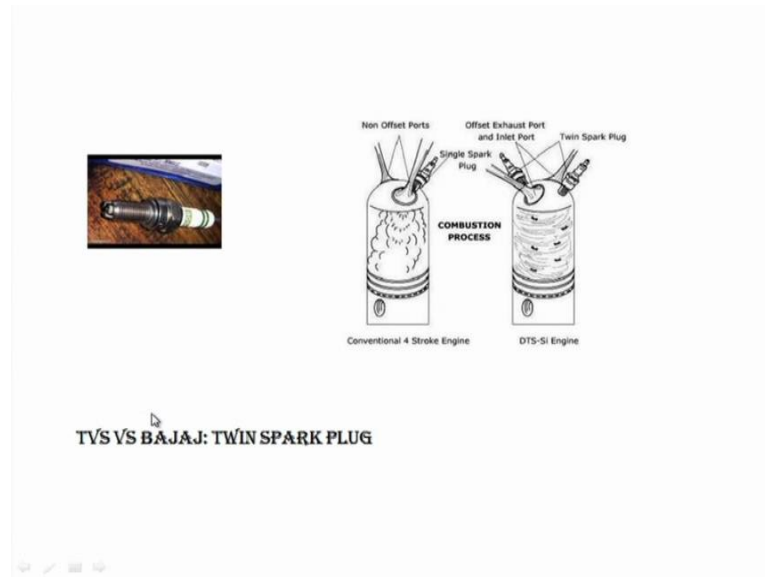
So, why I am telling all these kinds situation, so how you may be suggest like when you are working in a organization, when you are just like say may be purchasing some product or different things. So, how you may come within the purview of any of those set or subset that to make you aware of the situation I am stating all those types of infringement also. Now with reference to the patent and may be with reference to the co operate later on, but for a patent specifically we consider infringement may happen by means of literal infringement or infringement means of doctrine of equivalents or

purposive construction of claim. I referred already purposive construction of claim in respect of patent doctrine of equivalents also I have explained just like say something substantially doing same function, just like say just say which is joining means you are mentioning the, joining means may be joining can be done by bolt nut or welding brazing soldering if you are in somebody patent on so brazing, somebody replacing that brazing by soldering and performing the same function then not able to give some efficacy in respect to functionality then he can be come within the purview of doctrine of equivalents. So, let us say somebody patent and joining means and joining means, he referred specifically for brazing joint. Now somebody have created a soldering joint and also replacing that just replacing that brazing joint, what that brazing joint and soldering joint is performing substantially the same function there is whatever way the brazing joint was used, same cases the soldering joint also used.

So, then that second case even the he has any created a soldering depend new process. Even in that situation also, he may be the liable for infringement under the doctrine of equivalents. Equivalency will be just substantially same function based on substantially for equivalency; substantially same function. In Indian context sometime we call purposive construction, the same purpose if we same purpose just like equivalency, we are telling same purpose at infringer, product and the patentee's product is performing the same purpose. Now the equivalency then may be also treated in the form of purposive construction of the claim within the purview the purposive construction of (Refer Time: 15:37) and based on the prior claiming part, he will be liable under the patent infringement.

So, what are different way the patent infringement can happen, let us say literal infringement or infringement by means of purposive construction or in US context we call it DOE means equivalency or purposefully those purpose of the infringer product or purpose of the patentee product is equivalence or substantially similar. So it is wider ambit although there is a very difficult to situation may arises to prove this kinds of situation, although it is easier to prove literally infringement I will come regarding those things.

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Let us say very interesting situation you know that TVS vs. Bajaj. We were fighting with reference to the Twin Spark Plug. Twin Spark Plug; I have given that drawing for that spark plug deferentially. So, that they are also let us say Twin Spark Plug TVS was is Bajaj, TVS was claiming that they were the inventors for spark plug in that Bajaj was claiming that Bajaj was created a spark plug. So, then whether that both spark plug having that on the grounds of the equivalency purpose if (Refer Time: 17:00) whether the fulfilling the same purpose, whether the design and the components of the Spark Plug of the TVS and Bajaj are similar not, whether it will come up by virtue of literal infringement or virtue of purposing construction and doctrine of equivalence. So, it was the issue before the court to address that infringement within purview of literal and or purpose if construction of DOE there is of situation.

So, that say that is the spark plug then you have to distinguish; differentiate the patent claims of the TVS then you have to (Refer Time:17:49) distinguish the Bajaj spark plug from the TVS spark plug component wise we have to distinguish as you are technologist or engineers or you have to nice way then, if you want the analyze the infringement there equivalently lawyers and will relay on you people, then you have to put the two component side by side, then each component sub divided into different units, whatever the smallest unit, you will able to create for a particular component, when I discussed

about the flue gas conditioning system you remember, divides into different components then you analyzed the similarity between the two spark plug.

So, this is the scientific way of realizing the infringement as you are technologist again I am repeating you should become thorough about the technology means the product then what are the different components remains in the product, what are the product remains in the Bajaj product and TVS product just like a single spark plug and twins spark plug differentiated to spark twins spark.

Advantage of twins spark you understood the twins spark and somebody another spark plug company also can generate, but their thing if it is same or equivalence to that other companies thing, there lies the infringement.

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Various mode Infringements

- ❖ **Inducing and Procuring Infringement:** Inducing and procuring infringement amounts to infringement
- ❖ **Sale of Ingredient:** Selling non-patented articles to persons for the purpose of infringing a patent is not an infringement.

Case Law

In Townsend v Howarth: Use of chemical for purpose of preseving vloth from mildew.....

In Innes V Short and Beal: Use of Zinc powder to prevent corrosion in steam boiler

- ❖ **Part of combination:** The manufacture or sale of parts of a combination patent is not an infringement of that patent although such parts are meant for the purpose of making the combination provided that the parts themselves are not the subject-matter of patents

Case Law:

In Dunlop Pneumatic tyre v david Mosely: "Improvements in tyres or rims for cycle and other vechile and for improvement in rubl



It is clear, you are clear about the TVS Bajaj part, so now I will analyzed; if this is just like various modes of infringement inducing and procuring infringement just like sale of ingredient, part of combination. Then say sale of parts of patented machines somebody selling a part of the patented machines.

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❖ **Sale of Parts of Patented Machine:** If a person sells the patented machine in parts which are so manufactured as to be adapted to be put together, he sells in substance the whole of the patented machine.

Case law:

In united Telephone Co. v dale: If component put together even by a school boy...

But if what is complained of is merely the sale of some or other of the parts, not separately claimed, of one or other of the patented articles, it cannot constitute an infringement of the patents

❖ **Claim for method of working a machine:** where a claim is for machine or apparatus to be worked in a particular manner described in the specification, the sale of the machine or apparatus is not an infringement unless it could not be work except the claimed manner



So, the different case laws are there then just like say if a sale of the some of the other parts not separately claimed, if one of other of the patented cannot become just like a different case laws, you may get a different views based on the different facts of the cases where a claim is to for a machine and a apparatus to be worked in a particular manner described in the specification the sale of the machine unless it is not an infringement would not be work except the claimed manner.

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❖ **Claim for Machine operating automatically:** Where the claim is for a machine which operates automatically and defendant machine satisfy all the condition required under the the specification, and contains mechanism capable of operating automatically...


❖ **Repairing Patented article:** Where there is an infringement in the guise of repairing the patented articles two test may be applied: (i) In the alleged repair has the workman so employed the patent and infringed it, (ii) Is it substantially, in common parlance, honestly, a new article, or is it an old article repaired

Case law:

The principle is quite clear although its application is sometimes difficult, you may prolong the life of a licensed article, but you must not make a new one under the cover of repair

❖ **Infringement-License to repair as defense to infringement-right to repair**

❖ **Repair amount to making Patented article**



There will be may lead to the infringement different situation, you know machine operating automatically; repairing there you have to remember. Repairing on the pretended article here the some exceptional also provided when you want to refresh on some component, an use of process patented by some patentee for repairing purpose then also may lead to the infringement, but say if foreign vessels reached in India and for repairing let us say aircraft reached in India. Now aircraft you have to repair and for repairing of that aircraft, you have to use somebody's patentee, you may not be liable for infringement.

So just like say so different types of case laws are they are reference to repairing regarding some cases may lead to the making of the patent article, so that lead to the infringement, so that over getting the idea that what are the different way direct or indirect infringement may happen as to sometime that just like say exception of the provided with reference to the different way that is these are exceptions sometime call it is to some cases that disclosure to a government to send an embodiment of an invention to a government authority for approval for use just like a you call clinical trial related issues or others.

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Contd..


- ❖ **Rule as to experiments:** Use of the patented article for the purpose merely of experiment or research is not an infringement

Case law:

In *Frearson v Loe*: If a man makes thing merely by way of bonafide experiment, not with the intention of selling...

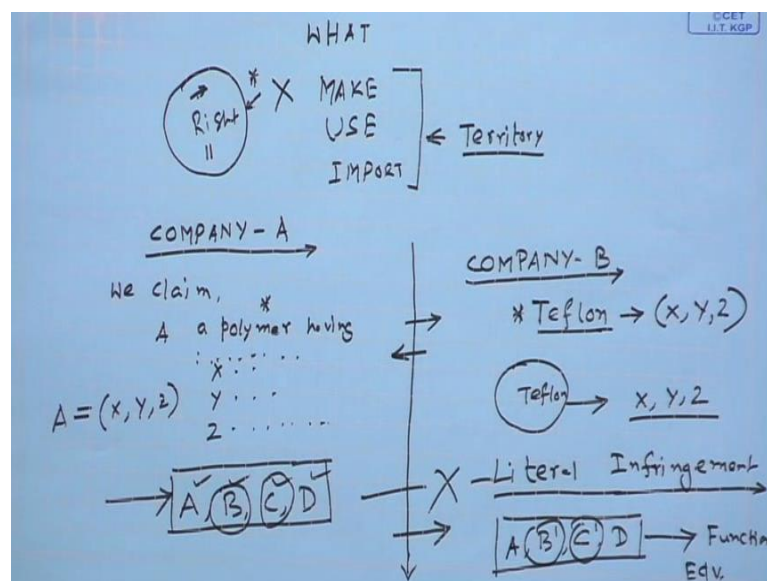
Monasnto v Stauffer.....

- ❖ **Disclosure to a government:** To send an embodiment of an invention to a government authority for approval was a use of the invention, and use for commercial advantage. This is infringement.
- ❖ **Use to instruct Pupil:**
- ❖ **Sale of a article made by Patented Process:** Where the patent is not for article manufactured, but for the mode by which the article described is brought into existence...



So, that construction uses for to extract people to expand the purpose use those are the different situations are they are also. So, then another part you can mention here just like how you can consider literally infringement and how you can consider say non literally infringement.

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Let us say company A, has product or say a patent, he claim to the, we claim. So, the patent claim, suggested we claim that is we claim, let us say it is a yes, we claim let us say a polymer. So, then subsequently you referred polymer having a polymer having the let us say properties different property A; let us say a X, Y, Z different property he claimed.

So, in this case what are the different components is there let us say polymer A and within that sub set, let us say a within that sub set (Refer Time: 23:01) X, Y and Z. So, now if company B, is also producing let us say polymer, now he is not than improve polymer. Company B let us say producing let us say polymer A let say Teflon A, so a within that one Teflon having the property that is already claimed by company A, XYZ. Let us say now as a technical students; you can now consider that polymer and Teflon. The Teflon is a polymer yes or no, so definitely you are considering Teflon is also a polymer.

So now, literal means let us say what are components of the components of company A and what the components of company B. If you just consider that Teflon is also a polymer is a let us say polymer within that subset Teflon is there. So, you are falling with in the area of the right of the patentee Teflon, so now Teflon is all the attributes let us say X, Y, Z. So, you may consider now that whatever the product claimed by company A and what are product you are using or making, that is coming within the ambit of the company is product patent and almost let us say all the features of the company A's product is remains in your product.

So, this thing we may consider as a literal infringement clear if literal means just like say you are literally replacing. So all attributes of the company A's product patent is remains with the company B's product manufacture or let us say even patent manufactures or sale or import, if companies B import this product, make this product, use this product all will come within the purview of rights of the company A, so these are called literal infringement. Now the situation may I already referred the joining means or let us say other equivalency or purpose if to this spark plug situation, may arises may be all the components of company A; A, B, C, D these are the components are present in company a s product and definitely patent claim of the company a having the features A, B, C, D.

Now, company B's product having the features let us say A, B bar, C bar, D and let us say they are functionally equivalent. So, A literally B is not; here B is converted to B bar, C has converted into C bar, so this is not literally infringement, no literally infringement, but because of equivalency function, so they may come within the purview infringement on the DOE and purposive construction. Even all the elements of the components patented by the patentee does not present in this cases because of equivalency or purposive situation that may also be liable under the patent infringement.

So, now you understood if you have got a job of let us say infringement analyst. So, how will you analyze the infringement, I will suggest, distinguish the patentee is product from the infringer product, how will you distinguish just first sub divided patentee product or process into small units, whatever possible way you can divide that units, then compare.

Whether A here means by virtue of Teflon and polymers or a is here A or B is here B bar, C bar, D bar then the equivalency in their functionality you compare, then you will able to proper way analyze the patentee infringement. Let us wind up now patent infringement means somebody using the say violating the statutory right of the patentee with reference to the product or process, what are different way he can violate; violate by virtue of, let us say literally lower, he can violate or nonliteral lower is also he can violate, he can violate the rights of the patentee just like say ABCD or equivalency by virtue of that, he is infringing the rights of the patentee.

So and exception have been provided for the research purposes or may research purposes, research exceptions have been somebody using the patented process or patented product or research purposes; he may not be liable for infringement, (Refer Time: 29:32) exception have been provided call research exception in the patent act. It use of patent act product of or patented process for research purpose have been treated as not infringement.

So, now this is the overall idea or overall things behind the patentee and the act as several procedures or you should further remember where to file the suit for infringement, there are district court to try that suit, will be the appropriate jurisdiction for filing the suit then what are the remedies provided, injunction and damages is

provided in the Indian patent act for the infringement, other jurisdiction criminal remedies also provided. So, just like what is infringement; what way infringement proceed, so you have to file suit in the district court then it will be further proceed and you should know that also then say what are the I must say by infringement what are things, what are remedies will be provided to me; you may get injunction either in form temporary or permanent will get damages and damages those are different way you can get the remedies, so let us stop here.

Thank You.