

**ABSTRACT OF THE
Ph. D. THESIS**

ON

**COMMERCIAL EXPLOITATION OF
INTELLECTUAL PROPERTY IN PATENT RIGHTS:
INFRINGEMENT AND LEGAL REMEDIES-
A CASE STUDY OF INDIA**

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I – AREA OF RESEARCH:

‘Intellectual property in patent rights’, also referred as ‘patent property’ or ‘patent right’ or simply as patent signifies a property right of exclusionary nature in specific kind of intellectual object, that is, in inventive idea or, say, invention of non-mundane depiction satisfying the three substantive requirements of patentability of invention, enabling its holder to exclude others from using and exploiting such invention. This right is granted by the law, known as patent law (PL), to the right person in respect to the said invention known, thereby, as patented invention. As such the patent right constitutes a relationship between the patentee-the person whom the patent is granted or who has become the proprietor of the patent, and the invention patented in respect of the which the right so granted is exercised.

It is a truism in the patent world that the technological innovations, devoid of mundane depictions, yet of economic significance and technological development of a country, are protected by a specific kind of intellectual property rights, namely, the patent rights, from unfair misappropriation by the so called pirate and free riders, the infringers. However, the mere providence in the form of commercial exploitation of intellectual property in patent rights makes no sense in itself when it carries no remedy for their infringement. Taken as such, where there is a need for commercial exploitation of the patent right as, there always remains the probability possibility of its infringement making the scope of the remedies for such infringement an extremely important subject of the patent law. How the patent system of India caters to this aspect of patent rights has been made the subject of extensive research under the title **COMMERCIAL EXPLOITATION OF INTELLECTUAL PROPERTY IN PATENT RIGHTS: INFRINGEMENT AND LEGAL REMEDIES –A CASE STUDY OF INDIA.**

The work on the topic is, however, confined to doctrinaire study of India patent laws covering the aspects of the patent way of commercial exploitation of patent rights and their probable breaches or, say, infringement, as put in question before a court of law through patent infringement suit, with consequential remedies thereof provide therein.

II - RATIONALE OF THE PRESENT STUDY:

The reason for embarking on a problem under study is the fact that although in India very few patent infringement cases one could find to have gone to full trial resulting in any consequential permanent remedies provided under the law- most of them being resolved at the interlocutory stage, yet with the blowing and glowing entry of most sophisticated and advanced technologies I India with wider and wider ramifications of research and development (R & d) on all fronts, with local inventors being widely encouraged to

patent their inventions to preempt the aliens moves and efforts to so patent and with the nation entering into global market competing with the developed countries at the one hand and catering to the needs of the underdeveloped on the other, the India courts are bound to be approached with the flood of patent litigations arising out of patent infringement that by itself is a serious and important aspect. Hence, there arise a need to have a clear picture of the whole gamut of what is meant by commercial exploitation of patent rights and their infringements with the resulting remedies that the law provides to an aggrieved person in India.

III –HYPOTHESIS OF THE STUDY:

The need for the protection of patent right is derived from the perceived sense of belonging that constitutes a bond between the creator and the created. Breaking of this bond results in the collapse of his intellectual creativities and a virtual retardation of technology prosperity of a nation. This bond needs reflection and fortification. The patent right reflects and fortifies this bond. This right is conferred generally by a positive law, known as patent law (PL), of a given legal system, which naturally is required to make providence for its protection and remedies for its infringement.

Taken as a matter of grant that the India patent laws provide with the grant of a patent the possible hypothesis is: *where the Indian statutory patent provisions relating to infringement of commercial exploitation of patent rights, and the consequential remedies thereof are by themselves sufficient enough in protecting and reflecting the bond or relation between the inventor/patentee and the invention patented.*

IV –AIMS AND OBJECTIVES OF THE STUDY:

With the above said conceived hypothesis, the research has been carried out with the following aims and objectives:

1. To identify the legal definition of the notion patent right and see whether the Indian India patents act subscribes the same
2. To expound the concept of commercial exploitation of patent rights and the infringement thereof.
3. To critically analysis the working of the infringement constituent elements in the light of the existing laws dealing with such elements.
4. To find out the ways and theories of assessing any activity or device as amounting to patent infringement and their efficiency and adequacy in the context of India patent system.
5. To find out the possible defenses that the Indian patents system provides to counter the allegation of patent infringement.
6. To trace out the various remedies that could be available to the aggrieved patentee as a matter of his right or otherwise.
7. To expound on the possibility of criminal prosecution of the patent infringement in the body of the Indian patent legislation.

8. To analyze the judicial approach as regards the interpretation and construction of the patent provision and other enactments of concern having a bearing on the commercial exploitation of patent rights, their infringement and consequential remedies.
9. To find out the compatibility of the Indian patent system with that of the international standards of patent concern as regards the topic under research study.
10. To examine, analyze and evaluate the existing laws on the research topic and, if necessary, suggests suitable amendments, modification worth any consideration thereof.

V –METHODOLOGY ADOPTED:

It has been made clear above that the study is purely doctrinaire. For such doctrinaire study the statutory provisions as contained in the Indian patent legislations have been considered, analyzed, valuated and evaluated on the basis of judicial interpretations and meanings of those provisions and similar provisions contained in the patent legislations of others patent regimes, of national and international statutes. More over the opinions and philosophies and perceptions of the eminent writers, lawyers and jurists in that regard have not been left untouched with little consideration of any other civil or commercial laws save where the Indian patent legislative provision or provisions, if any, require their consideration for its own proper and balanced understanding. For this avowed purpose primary sources such as India patent act, 1970 as well as those of the previous patent legislations and subsequent patents (Amendments) acts, patent rules, and ordinances of concern and those of foreign statutes and international treaties have all been made the bases of present study. Not only this but the recommendations as contained in various Reports of parliamentary committees and non-parliamentary commissions, such as Ayyangar Committee Swan committee on patent drafting have also been surveyed and analyzed, the reported and un reported judgments of the Supreme Court of India and those of the High Courts of various States apart from the decisions of foreign Courts, for example, Common Law and Equity Courts of England and the courts of United States of concern have been well analyzed to get a better perception and understanding of the various provisions of the Indian patent legislations as regard the commercial exploitation of patent rights, its infringement and consequential remedies. Ample literatures contained in various books, magazines, journals and weeklies in the forms of articles, commentaries and views of India and foreign authors as available in various Law Institutions, Centers public and private libraries located in Delhi and elsewhere got collected and made of immense help in pursuing the present research study.

VI- SCHEME OF PRESENTATION:

With such wanton hypothesis, aims and object and the doctrinaire approach of study, the work has been preceded with the following eight Chapters.

CHAPTER –ONE:

INTELLECTUAL PROPERTY: PATENT RIGHTS

**CHAPTER –TWO:
DEFINITION AND COMMERCIAL EXPLOITATION OF PATENT RIGHTS**

**CHAPTER –THREE:
INFRINGEMENT OF PATENT RIGHTS: CONSTITUENT ELEMENTS**

**CHAPTER –FOUR:
PATENT INFRINGEMENT: DEFENCES ON THE PATENT REVOCATION
GROUNDS**

**CHAPTE –FIVE:
PATENT INFRINGEMENT: DEFENCES OFF THE PATENT REVOCATION
GROUNDS**

**CHAPTER –SIX:
PATENT INFRINGEMENT: PROCEDURAL REMEDIES**

**CHAPTER –SEVEN:
PATENT INFRINGEMENT: SUBSTANTIVE REMEDIES**

**CHAPTER –EIGHT:
CONCLUSION AND SUGGESTIONS**

The findings drawn from the research study on the topic ‘commercial Exploitation of Intellectual Property in Patent Rights: Infringement and Legal remedies –A case study of India’, reveals that the Indian patent legislations has a relatively short period, as compared to western countries, particularly England, of legislative protection to inventions that are novel, involve inventive step and capable of industrial application, dating back hardly to over one hundred and fifty years with the judiciary playing a vigorous supportive role. The tradition has been kept alive with the Indian patent Act, 1970; modernized in keeping with the global trends and updated to meet the complex contemporary needs and demands from time to time. The Act provides, *inter alia*, with the basic fundamentals as regards conferment of patent rights, their commercial exploitation, infringement and consequential remedies leaving the rest as a matter of detail interpretation and construction of those fundas at the hand of judiciary whenever uncounted with patent infringement litigation. These fundamentals are substantially full of merits satisfying to a greater extent the hypothetical question of protecting and reflecting the bond or relation between the inventor/patentee and the invention patented, yet a few of them have their own pros and cones, demerits and negative points that, it is felt, deserves the following suggestions:

1. In section 2 of the Principal Act, for clause (1) of sub-section (1), the following may be substituted, namely: -“new invention” means any invention which does not from part of the state of the art”.
2. In section 48 of the Principal Act, at the end of the said section the following, or other similar expression, may be inserted, namely: -“Explanation – for the

- purposes of this section other rights like exporting, sampling and warehousing or stockpiling etc, shall be given the similar meaning as the importing of the patented product or the product obtained directly by the patented process is given.”
3. In Section 53 of the Principal Act, at the end of sub-section (1) the following proviso may be inserted, namely: - “Provided that the specified period of time shall be extended on the progressive maintenance fee of the patent in question, or request in accordance to the rules and regulations made by the Central Government for such extension”.
 4. A suitable provision may be inserted in the Principal Act to the effect that the application of doctrine of equivalents, in cases either of mechanical or chemical actions, be made dependent upon the findings of the court as to whether the patentee be intended to stick strictly to the particular substance or, say, element by which he proposes to carry out his invention. If the finding is ‘yes’ the doctrine of equivalent must have no application and the alleged infringement be held no more infringement, if. ‘no’ , the doctrine must apply and the alleged infringement consequently be held an infringement in law.
 5. In Section 64 of the Principal Act, for clause (g) of sub-section (1), an explanation may be inserted to the effect that the term ‘useful’ mentioned therein ought not to be understood useful in the claimed sense.
 6. A suitable provision may be inserted in the Principal Act restricting the commercial exploitation of an invention by any person and not just by patentee only that is contrary to public order or morality or prejudicial to human, animal or plant life, health or environment’. Only such provision will make Sec.3 (b) provision a meaningful one.
 7. That Sec.3 (i) specified purposes i.e. “to render them free of disease or to increase their economic value or that of their products” might be scripted out from the statute book.
 8. That sub-sec. (3) of Sec.47 may suitable be amended inserting at its end the expression like: ‘provided that the acts done for such purposes are related only to the subject matter of the patented invention.’
 9. In Sec 140 of the Principal Act, in sub-section (4), for the words “Nothing in this section shall”, the words ‘Nothing shall’ may be substituted.
 10. That the sub-sec. (b) of Sec, 107A suitably amended to incorporate the importation of the ‘products obtained directly by the patented processes as well.
 11. a suitable provision may be inserted in a principal Act to the effect that Sec. 107A (b) permitted importation shall be to employ the imported products for obtaining marketing approval from the regulatory authority of the country and no commercial use be made of the resulting final products till the patent lapses.
 12. That Sec. 43(1) may be suitable modified to the effect that ‘patent shall be granted as expeditiously as possible to the person or person jointly, as identified in the patent-application.
 13. A suitable provision may be inserted in the Principal Act to the effect that a co-owner can sue for patent infringement only by making other co-owner to joint as plaintiff (if he consents) or as defendant (if he refuses to joint as plaintiff).

14. That sub-sec. (1) of Sec. 104A of the Act, 1970 may be suitably amended so that the court may have the power to direct reversal of burden of proof in all cases of infringement of patented process for obtaining a product and not only in the cases mentioned in clauses (a) and (b) of it.
15. That sub-sec. (1) of Sec 104A of the Act, 1970 may be suitably amended so that in the case of infringement in events mentioned in its clauses (a) and (b), the court shall be put under an obligation to reverse the burden of proof on the defendant.
16. That a 'perpetual injunction' in case of a patent infringement suit may be referred to either as 'patent-terminus perpetual injunction', or as 'final injunction'.
17. A suitable provision may be inserted in the principal Act or other appropriate Acts to the effect that by virtue of such a provision a defendant, to a patent infringement proceeding, as to any other proceedings, may after all be compelled to answer the question or comply with an Anton pillar order which would tend to expose him or her or spouse of either, to proceedings for a related offence or related penalty but not to criminal proceedings.
18. That the Indian Parliament may incorporate by amendment etc., in the relevant Act or Acts the provisions similar to that of the Sec. 72 of the English Supreme Court Act, 1981.
19. A suitable provision may be inserted in the principal Act to the effect that the nominal damages in case of 'no lost profits' to the patent holder for infringement of his patent must be no less than the 'reasonable royalty' which the right-holder could have realized by way of license patent
20. That the language of sub-sec, (2) of Sec. 108, may be remodeled on the pattern of Art.46 of the TRIPS Agreement, 1994 that contains the minimum object that the court's order, as regards the seizure, forfeiture or destruction of the infringing goods, must achieve.
21. A suitable provision may be inserted in the principal Act to the effect that any patent infringement committed willfully on commercial scale and in organized manner shall be subjected to criminal prosecution.