Dear ABA-IPL Members;

Welcome to the May edition of the International Associates Action Group Newsletter. We are still looking for contributors so please get in touch with me at david@gearhartlaw.com. All articles are welcome, long or short. If interested in becoming an editor or just want to get involved in our Action group please do let myself or Matthias Berger know. See you next Month!

Yours,

David Postolski

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**Working Of Patents In The Indian Perspective - What Should ‘Work’?**

Of late, there has been a flurry of activity regarding India’s requirement for working of patents. In an order issued on January 10, 2018, the Delhi High Court, hearing arguments in a Public Interest Litigation (PIL) filed in 2015, directed the government to take expeditious steps for the enforcement of statutory provisions pertaining to the working of patented inventions and relook changes required in the statute, rules and prescribed forms.

But what is this provision and why is it such a big issue?

**The Genesis of India’s Working Requirement**

In many patent regimes across the world, a government’s ‘quid pro quo’ for a patentee’s right of exclusivity in his invention includes a requirement that the patentee will also “work the patent”, i.e., not just sit on the fruits-of-his-labour but commercialise the invention to the fullest extent. The intent behind this is to help the country by spurring growth in the domestic industry, generating employment and dissipating technological know-how.

Internationally, there was little consensus on the issue of patent working before the Paris Convention for the Protection of Industrial Property, 1883 was signed. Article 5 of the Paris Convention (as amended after the Hague Conference in 1925) prohibited forfeiture of a patent merely on the ground of non-working of a patent except for cases where grant of a compulsory license did not prove to be an adequate relief.

On the Indian front, being technologically underdeveloped as India was after independence, the government appointed a committee in 1957, headed by the legal stalwart Justice N. Rajagopala Ayyengar, to review India’s patent laws and to suggest changes commensurate with India’s new beginnings as an independent nation. The committee submitted its ‘Report On The Revision Of The Patents Law’ in 1959, which has become the bedrock of India’s ideological position on patent protection. Relevant to this report, the Ayyengar committee considered the vices of not commercialising inventions embodied in a patent in great detail, and finally recommended that India should retain compulsory licensing as well as “compulsory” working of a patent in its laws. As a penalty for continued non-working of a patent, the report advocated the sanction of revocation noting that “[i]f a country with the industrial progress of the U.K. is unwilling to drop the provision as to revocation for non-working in her law, the need for such provision in the circumstances of our country requires no elaborate argument”.

The Ayyengar committee’s ideology continued to prevail over decades of India’s technological growth and the most recent change to the Patent Act, 1970, (the “Act”) also embodies the working requirement. Although the term ‘working’ has not been defined in the Act, there is sufficient indication of its importance in our regime. For example, Section 83 (a) stipulates that “patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay”. Leaning towards “working” by way of manufacturing, Section 83 (b) clarifies that patents are “not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article”.

Procedurally, compliance with the working requirement is monitored through Section 146 of the Act, which requires patentees and licensees (whether exclusive or otherwise) to furnish annual statements – on Form 27 – elaborating the extent to which the patented invention has been worked on a commercial scale in India.

**The Consequences of Non-Working of a Patent**

The consequences of non-working of a patent are that (i) a compulsory license may be granted, and (ii) the patent may be revoked for continued non-working. Specifically, Section 84 (1)(c) provides a non-patent holder the right to seek a compulsory license on the ground that the patent has not been worked for 3 years since the date of grant of the patent. Thereafter, if a compulsory license is granted, then the patent in question may be revoked under Section 85, if the invention is not worked in India even after grant of a compulsory license.

In addition to the above, non-working of a patent may adversely affect chances of obtaining an interim injunction during an infringement proceeding. This result came to light in the case of Franz Xaver Huemer vs. New Yash Engineers, where the Delhi High Court addressed the issue of non-working and held that the plaintiff who had obtained a patent 12 years ago but had not worked the patent in India could not, in equity, seek a temporary injunction against the defendant.

Further, and relevant to the PIL currently being heard by the Delhi High Court, not reporting the working (or not working) of a patent also has its own consequence. Under Section 122 of the Act, failure or refusal to furnish information regarding working of an
invention could invite a penal action, which includes a fine of up to approximately US$ 20,000. Furnishing false information is also punishable with imprisonment up to 6 months, or a fine, or both.

**Does Importation Satisfy Working Of Patents?**

In 2012, the Controller General of the Indian Patent Office, while rendering a decision in the compulsory licensing matter of *Natco Pharma vs Bayer Corporation*, set the cat among the pigeons by adopting the view that “[t]he term ‘work the invention’ does not include imports as a [sic] compulsory license holder has to necessarily work the patented invention in India... “ The Controller General went on to state, “I am therefore convinced that ‘worked in the territory of India’ means ‘manufactured to a reasonable extent in India’.

The Intellectual Property Appellate Board (the “IPAB”), while hearing an appeal against the Controller General’s decision, disagreed. It recognised that there may be circumstances, such as low demand for the patented product, which may make setting up a factory in India impracticable. It held that working neither excludes ‘import’, nor is it synonymous with ‘import’. Rather, whether importation qualifies as working has to be determined on a case-to-case basis. In a subsequent writ petition filed in the same case, the Bombay High Court upheld this view of the IPAB. The Court noted that in Form 27 there is clear indication that ‘import’ is relevant for the purpose of working since the details of import are furnished under the head “worked”. It was also observed that onus was on the patentee to satisfy the authorities as to why the patented invention was not being manufactured in India keeping in view Section 83 of the Act.

In preliminary injunction matters before courts, the issue of importation was first addressed in detail in the matter of *F. Hoffmann-La Roche Ltd. & Anr. vs. Cipla Ltd.* (2009), where the Delhi High Court refused an interim injunction on the ground that the plaintiff was importing the patented product and not manufacturing the patented drug in India. The Court was of the view that “[i]n case interim injunction is granted in favour of the plaintiffs, the manufacturing and marketing network of the defendants so far as the drug is concerned would be dismantled. If due to any problem, the plaintiffs cannot make available the drug in required quantity in India, it obviously will be disastrous for patients. This consequence is foreseeable, therefore in my opinion, the Court should not pass any interim order which may possibly lead to such a situation.”

This view prevailed until 2015, when the landscape from the lens of a patentee became a little brighter because the Delhi High Court clarified that setting up of a manufacturing unit in India cannot be imposed as a condition precedent to patent protection. In its judgment passed in *Novartis AG & Anr. vs. Cipla Ltd*, the Delhi High Court unequivocally held that “the requirement of law is limited to working the patent in India so that the same is available to public at large. It is not essential that the patent must be worked by manufacturing the patented product in India... The Act does not mandate that no patent protection would be granted to a patentee unless local manufacture is undertaken”. As affirmation of this reasoning, in 2017, the Division Bench of the Delhi High Court confirmed that patents can be worked through imports, holding that “all that has to be seen is that the imports are of a sufficient quantity so as to meet demands for the product.”

**The Current State of Discontentment**

So, where is the discord? While several patentees decry that the working requirement is anti-patent, the PIL mentioned at the beginning of this article complains that the Patent Office is not fulfilling its duty as the gate keeper of the working requirement in India. Particularly, the PIL asserts that until now, the Patent Office has not initiated action against patentees who have not complied with the statement of working requirement mandated by the Act.
Statistics published in the annual report of the Office of the Controller General (Fig. (i) above) reflect that while compliance of filing a statement of working has increased considerably over the last five years, the percentage of patents being worked vis-à-vis the number of patents in force has remained static over the same period, as shown in Fig. (ii) below.

The PIL is sub-judice and hopefully, we will see some clarity emerge in the next few months, as the Patent Office (and the Court) decides the importance of the ideological requirement of working of patents in India, the procedural steps for compliance with the requirement and the consequences of non-compliance. To aid this process, the Patent Office has even issued a notification seeking comments from stakeholders on the issues that have been raised in the PIL. Whatever the outcome, it is almost certain that the finality will bring about far reaching changes with respect to the working requirement.

Practically, until further clarification issues, it will be prudent for patentees, especially in the pharmaceutical domain to meet the statement of working (Form 27) requirements by filing annual statements indicating the working of their inventions in India or alternatively, filing a statement that the patent is not worked – along with the reasons for non-working.

Ms. Ranjna Mehta-Dutt, Partner &
Mr. Debashish Banerjee, Managing Associate
New dynamics in Germany in dealing with grey market (luxury) goods?

Background

Some companies create valuable brands with great ambition and perseverance, brands that are surrounded by an aura of luxury or have an image of absolute coolness.

In times of constantly increasing competition, it is a remarkable achievement to be the owner of a brand that stands out from other brands. Once acquired, companies try to defend this prestige by all means. This is quite understandable, especially considering the fact that many customers are only willing to pay a considerable premium because of the brand's reputation.

One way to deteriorate or damage a brand's reputation is if the products are presented in a context that does not correspond to its actual image. This is why brand manufacturers want to prevent their products from being sold online as well as offline in supposedly inappropriate environments. Within the official and authorised distribution channels of the brand manufacturers, they naturally have the necessary influence to ensure an appropriate presentation of the goods.

However, it has been a major problem for brand manufacturers long before the times of the internet that original products are offered through grey market dealers outside the authorised distribution channels.

A categorical prohibition of such sales would be the solution which, however, is contrary to the principle of trade mark exhaustion that is enshrined in both, EU trade mark law and in the national trade mark law systems. Accordingly, the trade mark manufacturer cannot prohibit the use of its trade mark if the goods have previously been placed on the market in the European Economic Area (EEA) by the manufacturer itself or with its consent.

Under very restrictive conditions, the principle of exhaustion does not apply, namely where there are legitimate reasons for the proprietor of the trade mark to oppose the continued marketing of the goods covered by the trade mark. This is the case, for example, if the condition of the goods is changed or impaired after they have been placed on the market.

There are other situations in which the trade mark owner can oppose distribution. For example, damage to the trade mark's reputation may in principle constitute a legitimate reason for a trade mark owner to oppose the resale of the prestigious goods. The Higher Regional Court of Düsseldorf, Germany, has recently dealt with a case of reputational damage in its judgment of 6 April 2018 (20 U 113/17):

Düsseldorf court's decision

The Japanese luxury cosmetics manufacturer Kanebo, whose products are marketed under a strictly regulated selective distribution system, was able to stop the sale of grey market goods by a retail chain which was not part of this system. The court has prohibited the retail chain throughout the EU from offering Kanebo luxury cosmetics in its stores and online shop.
The court considered that there was an exception to the principle of trade mark rights exhaustion in this case. It held that since Kanebo’s luxury cosmetics were offered by the retail chain, reputational damage was caused. The sales environment, both online and offline, was not comparable to the luxurious environment in which the goods were offered by the manufacturer itself.

The court assessed the concrete circumstances in great detail and on a case-by-case basis. Among other things, it criticised the fact that the luxury articles were randomly located next to everyday and mass-produced products and also how they were offered, without any kind of prominent presentation of the goods. The possibility of financing also made them seem affordable for everyone and put them on the same level as the other items on offer, which significantly affected the prestige value of the goods.

Outlook for other branded goods

It is important to understand that the court did not under any circumstances establish a general prohibition regarding the sale of parallel imported products, but considered individually whether the distribution was unlawful in the specific sales set-up.

The question of how this decision will affect the development of future case law is an interesting one. So far, the clear emphasis of the decision is on so-called luxury goods. Recently, the European Court of Justice (CJEU), in its decision in Coty Germany GmbH v Parfümerie Akzente GmbH in December 2017, considered a restriction of free trade by restricting internet distribution via third-party platforms to be in conformity with antitrust law if this was necessary to safeguard the luxury image of goods from a selective distribution system. (See our blog here on this CJEU decision.)

But what makes goods luxury goods?

The CJEU says it is "not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury". This definition allows for many possible interpretations, particularly because the CJEU considers that the goods are also purchased because of their prestige character, not alone or above all because of it.

The Düsseldorf Court’s decision certainly offers potential for brand manufacturers of other very high-quality products, such as technical devices with a certain prestigious image, to test in court if the sale, both online and offline, of goods re-imported via the grey market can be successfully prohibited, if these goods were sold in an inferior sales environment.

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Trademark Applications for marks Registered and used Abroad

A non-Canadian trademark owner may file an application for a trademark and obtain a registration in Canada based on a trademark duly registered in the applicant's country of origin, if among other things, the mark applied for is not without distinctive character, having regard to all of the circumstances including the length of time during which it has been used in any country. However, the courts have found that the onus of proving that a trademark is not without distinctive character is a heavy one to discharge. To satisfy the onus, evidence that the mark has become known in Canada so as to distinguish the applicant's goods is required.

The outstanding amendments to the Act will change the above rules. First, the reference to "country of origin" will be removed from the Act and an application and claim to priority can be based on the filing of an application in any country of the Paris Convention other than Canada and is no longer restricted to the applicant's "home country". Second, the concept of "not without distinctive character" will be removed from the Act and an application based on registration and use abroad must satisfy all the requirements that apply to a domestic application.

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**Re-examination of a patent: An option for cost-effective post-grant challenge in Australia**

A granted Australian patent is afforded a presumption of validity. However, patent validity is not immovable, and the Patents Act 1990 (the Act) permits challenges to the validity of a patent throughout its term. One such mechanism is to request re-examination of a standard patent or an innovation patent.

A request for re-examination in regard to a granted patent may be filed by any party, with payment of an official fee and a statement of grounds and reasons. Moreover, the identity of the party initiating the challenge to the validity of the patent need not be cited in the request. For example, it is sufficient that the re-examination request be made in the name of an attorney acting on behalf of the third party.

Re-examination is an ex parte procedure, and as such, the requestor is not permitted to file submissions after the initial re-examination request or participate in any ensuing prosecution. This restriction underscores the importance of ensuring that the re-examination request is as fulsome as possible. It is noteworthy that there is no limit to the number of re-examination requests that can be filed in respect of a granted patent.

The grounds for re-examination are generous, and broadly follow the grounds that were available during initial examination. The date of initial examination is salient. For matters in which initial examination was requested on or after 15 April 2013, the grounds for re-examination are pursuant to the Raising the Bar Act 2013, which was implemented to, *inter alia*, align the requirements of a specification under s40 with that of the higher standards in Europe and the United States. For all matters with an initial request for examination date prior to 15 April 2013, the standard to be applied is pursuant to the arguably more lenient provisions in place pre-Raising the Bar Act 2013.

The available grounds for re-examination are as follows:

(i) whether the specification complies with s40(2) or s40(3);
(ii) pursuant to s18, whether the invention as claimed in any claim is
   (a) is not novel;
   (b) does not include an inventive or innovative step;
   (c) lacks usefulness; and/or
   (d) is not a manner of manufacture.
(iii) whether the invention contravenes s18(2) or s18(3). Under s18(2), a human being, and a biological process for their generation, is not patentable. For innovation patents, an additional ground is available in that plants and animals, and the biological process for their generation, are not patentable inventions pursuant to s18(3).

Prior use is available for consideration by the Examiner in relation to novelty and inventive/innovative step.

For matters that fall under pre-Raising the Bar Act provisions, re-examination under s40 is a consideration of (i) full description, including best method of performance; (ii) clarity and succinctness; and (iii) fair basis. The consideration of usefulness is one of whether the invention as claimed achieves the promised benefit.

Under the Raising the Bar Act, re-examination under s40 considers whether the complete specification discloses: (i) the invention in a manner which is clear enough and complete enough for the invention to be performed by a skilled addressee; (ii) the best method best method known to the applicant of performing the invention; and (iii) whether the claims must be clear and succinct and supported by matter disclosed in the specification. Under these provisions, usefulness is a question of whether the claimed invention achieves the use promised by the patentee in the specification, and has a specific, substantial and credible use.

Where a third-party requests re-examination, the Commissioner must re-examine the patent. Typically, although not exclusively, an Examiner other than the original Examiner is assigned the re-examination. Issuance of a re-examination report is under supervision of a senior examiner or a supervising examiner. The Patentee has a shortened period of two months to respond to an adverse report.
The Act does not prescribe when a third-party initiated re-examination process is defined as complete. However, this will not result in a rambling prosecution. The Australian Patent Office Manual of Practice and Procedure provides guidance in this regard:

Re-examination is intended as an efficient legislative means to dispose of invalid claims. It is inconsistent with this scheme to have protracted debates on the same issues over multiple re-examination reports.

Although re-examination is an *ex parte* procedure, it can be a useful and cost-effective tool to challenge a granted patent, and more particularly limit the scope of granted claims, particularly if new prior art has been identified post-grant or the pre-*Raising the Bar Act* provisions apply.

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German Federal Court of Justice ruling: Ad-blockers are allowed

Background

There has been a fundamental conflict between German media companies and providers of so-called advertising blockers used on the internet.

Media companies finance their editorial services, among other things, by receiving payments from other companies for the publication of their advertisements on their websites.

This was very common for a long time until the business model of advertising blockers developed. These prevent certain advertisements from being displayed on internet pages by using filter rules to identify and block server paths and file characteristics of advertising providers. The ad-blocking software most commonly used in Germany - Adblock Plus - can be downloaded for free. Website operators and advertising networks are able to register for a whitelist. Their advertisements that are classified as 'acceptable ads' will then not be blocked. According to the applicable criteria, acceptable ads are static advertisements that contain only text and no eye-catching images, that do not hide the actual website content and that are also marked as advertising.

Each website operator can participate in the whitelisting which is free of charge for small and medium-sized websites and blogs. Companies only have to pay for the activation of their advertising if they reach more than ten million additional advertising impressions per month via the whitelist.

Decision of the German Federal Court of Justice

In the proceedings brought by one of the largest publishing houses in Europe against the provider of Adblock Plus, the German Federal Court of Justice (Bundesgerichtshof) confirmed the legitimacy of ad-blocking software (judgment of 19 April 2018 - I ZR 154/16). It is the first decision of the highest German civil court in this area. The decision is in line with the judgments of the Higher Regional Courts of Hamburg and Munich and reverses the partial prohibition of Adblock Plus by the Higher Regional Court of Cologne. The Cologne court affirmed the fundamental legitimacy of ad-blockers but considered the business model of paid whitelisting to be inadmissible based on unfair competition law.

The judgment of the Federal Court of Justice is based on the following reasoning:

The offer of the advertising blocker does not represent a deliberate obstruction of competitors. Its provider primarily pursues its own economic interests and does not intend to drive media companies out of business. It even generates revenue by including advertisers in the whitelist for a fee. The business model therefore presupposes the functionality of any websites. From the necessary weighing of interests it follows that it is reasonable for media companies, also with regard to the fundamental right of freedom of the press, to counter the impairments resulting from the use of the blocking software by taking defensive measures, such as blocking access to the website for users of ad-blocker software.
There is also no general market obstruction. A general market obstruction happens if a competitive behaviour which, although not unfair per se, is in itself dubious and creates a serious risk of significantly restricting competition. According to the court, the distribution of the advertising blocker software makes the business activities of media companies and other website operators more difficult, but does not threaten their business model of providing free content to their users itself.

The court has also rejected the notion of an aggressive commercial practice in relation to the advertisers even if they are offered a paid activation of "acceptable" advertising. The court justified this by arguing that not concluding a whitelisting agreement only leads to the status quo of a full blockade of their advertising being maintained, which is legitimate. It does not cause any further disadvantages for the advertiser apart from a contract (i.e. the whitelisting agreement) that will not be concluded.

**Outlook**

Even after this decision of the Federal Court of Justice, the debate has not ended...

According to press reports, the publisher plans to lodge a constitutional complaint based on the violation of the freedom of press arguing that advertising blockers deliberately destroy the integrity of online media and their financing. In addition, the publisher sees this as an opportunity to take action against advertising lockers under copyright law because of a possible intervention in the programming code.

On the other hand, there are many voices who believe that traditional companies such as publishing houses should - in times of disruptive business models - face the new challenges rather than defending, what some argue to be, their outdated business models.

One thing is certain: the spread of advertising commonly perceived as being annoying and the associated increase in the use of ad-blockers together do not foster complimentary access to content on the internet. Even more than before, media companies may have to rely on paid content and pay-walls. As a consequence, there is a danger that not all parts of the population will have access to high-quality journalistic content.

Perhaps a possible solution will be found outside of German court rooms. The "Coalition for better Ads", founded just a while ago, is a consortium of major advertisers, agencies, publishers and tech providers. This coalition aims to decrease the rising rate of ad-blocker users. Among other things, it wants to achieve this goal by reducing advertising formats that some users may find annoying.

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International Action Group (IAG)

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