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Balancing Patent Rights - Towards Patent 'Fair Use'

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Patent rights are very necessary and important to promote innovation across various fields. However, one who owns patent rights has the right to restrain others from using their patented work without permission but this can limit the access to the technology. Growing interest has been shown in creating a concept of patent "fair use" that might offer specific exceptions to patent infringement for socially beneficial uses to balance these competing interests. This research paper deals with the importance of balancing patent rights and the doctrine of Fair Use explicitly. In copyright law, where the concept of fair use initially developed, certain limited uses of copyrighted materials—such as those for criticism, commentary, news reporting, teaching, scholarship, or research—are permitted without the owner's consent. Similar to this, in the context of patents, fair use might offer a small exception to patent infringement for actions that advance innovation, competition, or the general good. A few case laws about the aforementioned themes are also highlighted in the study. This research paper supports Professor O'Rourke's broad argument that a fair use doctrine is necessary in patent law. Additionally, this paper suggests that the fair use doctrine for patents should be technology-specific rather than industry-specific, which is in direct opposition to Professor O'Rourke's recommendation for the application of fair use in patent law. Fair use should only be applied to fields and technologies that raise network effect issues.

Keywords: *patent law, fair use, copyright, Balance, Intellectual Property Rights, Maureen O'Rourke.*

INTRODUCTION

Intellectual Property is a very distinct kind of property created by the intelligence of the man in the field of arts, literature, music, trade, science, etc. For “patent holders patent rights protect

inventions that are costly to create and easily expensive to protect once they are realized into the world”¹. Since IP is a fresh intellectual creation, it is intangible in character and is distinct from the physical assets such as land, a house, gold, and a car, that we are well known with. The rights to intellectual property are rights granted to the inventor/creator by the legislation. The creator/inventor receives these rights in return for disclosing the invention/creation process in the public domain. The specific rights to use, sell, distribute, offer for sale, and restrict others from exploiting the invention without his previous consent are granted to the creator. The aforementioned rights are associated with intellectual innovation and not the physical item in which the creation may be embodied. Intellectual property rights are broadly classified into two categories that are, Copyright and related rights and Industrial property Rights. Copyrights and related rights refer to legal protections for artistic and literary works, including publications, buildings, music, wood and stone carvings, photographs, paintings, sculptures, films, and computer-based software and databases. Patents, trademarks, commercial services, industrial designs, and geographical indications are all examples of industrial property rights. The system that fosters invention by granting exclusivity – patent law – stands in the way of goodwill and growth in production.

In the early agreements like the Paris Convention, the Berne Convention, and the Madrid Agreement the word "Balance" wasn't used to describe intellectual property rights. The phrase came into use specifically after the TRIPS Agreement. Article 7 of the Trips agreement defines balance as "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, in a manner conducive to a balance of rights and obligations."² Through this article, the term balance came into wide use regarding IPR. In the modern time of increasing inventions and innovations, it has become quite essential to balance the use of patents for the benefit of both users and inventors. Whether the infringement can adversely affect the patent holder's market

¹ Gideon Parcho Movskoa & Alex Stein, 'Intellectual Property Defenses' (2013) 113 Columbia Law Review <https://scholarship.law.upenn.edu/faculty_scholarship/452/> accessed 26 April 2023

² TRIPS Agreement 1994, art 7

is one of the significant questions that arise in the fair use of patents. So, for making this more applied “the doctrine of fair use” can play a major role.

THE NEED FOR BALANCE IN PATENT

As the TRIPS Agreement and its enforcement have been the subject of dispute resolution proceedings since the agreement's adoption up until 2009³. Out of these disagreements, three are still in the consultation stage, thirteen were resolved through a mutually acceptable solution, six were the subject of panel reports, and three were the subject of reports from the appellate authority. Only one appellate body report and three-panel report out of the six-panel reports specifically used the word ‘balance’ about IP law. The enforcement of IP rights must support a balance of rights and obligations of the right holders, the same is stated visibly in Article 7⁴ of the TRIPS Agreement. Here, the law aims to strike a balance between an inventor's rights and his duties toward the nation or to humanity as a whole. In other words, it is necessary to achieve a balance between the right holders’ interests and the wider public good. The Patent Protection of Pharmaceutical Products, Canada countered that the TRIPS Agreement's definition of ‘balance’ included a balance between the agreement's creation of intellectual property rights and other socioeconomic policies, not just between rights and obligations. The US had argued in the context of Article 70 (9)⁵ of the TRIPS Agreement that the grant of ‘exclusive marketing rights’ protects the core balance of the TRIPS Agreement concerning pharmaceutical and agricultural chemical product patents. This argument was summarised by the appellate body report of India titled Patent Protection for Pharmaceutical and Agricultural Chemical Products. However, the appellate authority did not specifically address balancing issues in its response to this submission.

According to Kozinski in *White v Samsung Electronics America Inc*⁶, intellectual property law is full of careful balances between what is put aside for the owner and what is left in the public domain for the rest of us. Patents have a relatively short lifespan, while copyrights have a longer

³ World Trade Organization, mod 9

⁴ TRIPS Agreement 1994, art 7

⁵ TRIPS Agreement 1994, art 70(9)

⁶ *White v Samsung Electronics America Inc* [1992] 989 F 2d 1512

but still constrained lifespan, the fair use doctrine, the prohibition on copyrighting facts, television broadcasts, musical compositions, the nominative use doctrine in trademark law, the right to make sound-alike recordings, and federal law pre-empting overbroad state intellectual property laws. Each of these limits an intellectual property owner’s right. All permitted the use of third-party works by the general audience. However, they are all essential to preserving the freedom that allows for the flourishing of creative creativity. By policies and statements of WTO the TRIPS agreement has the motive of attaining a balance between the inventor's benefit and public good by providing certain incentives and exceptions. Attaining balance is quite necessary, especially in the case of public health and accessibility to drugs. This matter was highlighted by the Supreme Court of India during the time of Covid by a *Suo Motu Writ* petition; *In Re: distribution of Essential Supplies and Services during the pandemic*. In this case, the Honourable Court had highlighted the portions from the Doha Declaration, WTO, and TRIPS in the need of making exceptions in the matter of public Health. The court also expressed the role and importance of compulsory license in such a situation and by analyzing this we can say that compulsory licensing plays an important role in balancing the patent rights for the benefit of the economy. As public health and the economy go hand in hand?

ECONOMY AND BALANCING PATENT RIGHTS

Balancing the patent right is of utmost importance for the developing and the least developed countries, especially in terms of drugs as the cost of invention of such drugs can severely hamper the economy of such countries. So, exceptions for stringent patent rules are quite necessary to overcome such situations. If we look at the Patent Act of India, we can see some exceptions and provisions such as compulsory license, government use license, and Bolar Exemption which are used by the government to balance the patent rights. In the case of *Bayer Corporation vs Natco Pharma Ltd*,⁷ the Honourable Court upheld the decision of the controller general to grant a compulsory license to Natco, an Indian company to make a medicine (Nexavar) that could cure kidney and liver cancer. The medicine was originally patented by Bayer, a German company, but the price and availability of the medicine were of great concern. Natco stated that they can

⁷ *Bayer Corporation v Natco Pharma Ltd* [2012] SCC IPAB 149

make the same medicine at a much more reasonable price, as this was a matter of public concern the compulsory licensing was granted. This can be seen as a situation where the patent right was balanced in terms of public health.

The rights granted to the IP holder and the exceptions to those rights must be balanced to achieve a balance between the rights and obligations of the patent holder, between the rights of the patent holder and the public interest, or between the cost and incentives of production and the availability of drugs to the general public. To use the creation without being accused of violating the creator's IPR, it is crucial to have both the rights of the creator and a "fair use" exception for the general public.

THE DOCTRINE OF "FAIR USE" IN PATENT

The doctrine of fair use is a legal mechanism used to encourage the freedom of expression by allowing the unauthorized use of works that are copyright-protected under certain conditions. Section 107⁸ of the Copyrights Act, 1976 establishes the legal foundation for deciding what constitutes a "fair use" and lists specific uses that may fall within this category, including criticism, comment, news reporting, teaching, scholarship, and research. This can be observed in the case of *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v Rameshwari Photocopy Services & Ors.*⁹ In the said case the professors of Delhi University prepared a course pack from books from different publishers and left it at the Rameshwari Photocopy Center for the students to take copies. The publishers filed a suit against the photocopy center for infringing their copyright. Here they highlighted that the photocopy center was not gaining any monetary benefit other than the normal photocopy charge and the course pack was left by the professors for education purposes the court also stated each student and teacher cannot buy photocopiers so they can get the material photocopied. The Honourable Court also mentioned that the students were not their targeted market so they were not facing any loss either. So, this will come under fair use, and by selling the photocopies of the course pack Rameshwari photocopy center is not doing any infringement to the copyright of the publisher. Copyright's fair use

⁸ Copyrights Act 1976, s 107

⁹ *The Chancellor, Masters & Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services & Ors* (2016) 235 DLT 409 (DB)

doctrine is used to promote progress in several ways. Although copyright can act to restrict free speech, the Framers intended that it operate to the contrary¹⁰. Unlike copyright, patent law has traditionally been centered on mechanical technologies.

MARKET FLOW AND FAIR USE

Fair use works to discourage and lessen market failings, which is maybe more significant, at least from the perspectives of economics and progress. From an economic standpoint, copyright assumes that the market will function in a way that furthers social goals. When a socially acceptable transfer is unlikely to occur, a market failure occurs, necessitating the legalization of non-consensual transfer. Entry restrictions and the use of intellectual property rights to restrict information flow are two examples of market failure. These kinds of market failures may result from copyright. Where such let-downs occur, copyright functions to prevent advancement and not encourage the advancements. In these circumstances, the market failure can be solved by the doctrine of ‘fair use’.

Patent law, in contrast to copyright law, has typically focused on mechanical technologies. These scientific and technological sectors have typically not been vulnerable to worries about market failure. Non-mechanical domains, however, have grown in significance in intellectual property law since the 1950s. Among these non-mechanical industries are software and business procedures. These new fields are vulnerable to specific market failure concerns, unlike the majority of historically patentable fields. No such doctrines such as the fair use doctrine of copyright do not exist in patent law, despite the growing worries about emerging technology sectors.

Copyrights and patents both contribute to economic expansion and share somewhat the same goal of granting the creator a temporary monopoly over their work. Without any exceptions on fair use, patents give the author the sole right to use, sell, or license his creation whatever he pleases, with no chance for anybody else to utilize it in any other way. Therefore, it is essential to add the idea of fair use to patents.

¹⁰ *Harper & Row Publishers Inc v Nation Enters* [1985] 471 U S 539

HOW CAN THE USE OF FAIR USE IN PATENTS BE JUSTIFIABLE?

Patents and copyrights are increasingly overlapping. The requirement for the fair use concept for patents is discussed in the fourth of four distinct structural concerns sections' comments on the comparability between copyrights and patents. Along with structural problems, there are market and regulatory changes that emphasize the necessity of fair use of patents.

Structural Issues: According to intellectual property law, every state has the right to support useful arts in terms of copyright laws and to support science in terms of patent laws. Scholars, however, contend that these two rights should not be viewed as competing with one another but rather as complementary to one another. In this scenario, there is a likelihood that there will be more subject matter overlap between the two regimes, necessitating the application of the fair use concept to patent laws just as it does to copyright laws. The goal of both copyrights and patents is to safeguard the original work and promote subsequent innovation. This goal is achieved by giving the creator a set of rights and protections that prevent others from using their work without permission, or protection against infringement. The goal of both systems is to strike a balance between the authors' rights and the creations they have developed. The idea of fair use accomplishes this under copyrights, and it stands to reason that it would also be advantageous under patents.

When compared to copyrights, patent laws are applied more strictly. This indicates that to obtain a patent, more stringent criteria must be met than to obtain a copyright. Therefore, it is simpler to violate a patent through a slight likeness than it is to violate a copyright. It happens frequently when a product fails to find success on the market because patents prevent others from pursuing and changing the unsuccessful product's patent without a license. This results in significant losses and needless delays, demonstrating the need for a fair use notion in patents.

Finally, the two regimes' reach is constrained in various ways. While the patent law restricts the use of the patented product, the copyrights law establishes the extent of use once the work has been created. Through the establishment of fair use, copyrights are made easily adaptable to changes and cutting-edge applications of the protected subject matter. The addition of fair use for patents makes patent laws flexible to the current situation.

Market and Legal Shifts: The requirement for the fair use notion is supported by two different types of developments: market and legal shifts. One of these doctrines is a connection to market failures. Equivalence refers to the usage of one product in place of another when their functions are similar, which constitutes an infringement. For instance, the development of the nail, screw, and binding tape. Despite being used in various locations, these goods all have the same purpose, which is to join two or more objects together. As the doctrine of equivalence can be used to expand the reach of patents, finding equivalency in technological sectors becomes challenging and there is a higher risk of market failure. A rise in the legal shift regarding patents is occurring along with the market movement. Many court rulings support patents and expand patent rights to innovations. There is a chance of market failure given the rise in patentable subject topics. When comparing this to copyright law, it is obvious that the fair use idea is required to control patents.

TEST FOR FAIR USE

Prof. Maureen O'Rourke has put up a complete solution to the issue of patents lacking a fair use principle. She proposed a five-factor test for determining a patent's fair use:

- (i) The nature of the advance represented by the infringement;
- (ii) The purpose of the infringing use;
- (iii) The nature and strength of the market failure preventing the conclusion of a license;
- (iv) The effect of the use on the patentee's incentives and general social welfare; and
- (v) The nature of the patented work.¹¹

The first factor, the innovation's nature, establishes the fair use exception based on how distinct it is from the original invention. The likelihood of the fair use doctrine being used increases with the size of the discrepancy. The second criterion, the purpose of the infringing use, considers whether the use is being done for a direct commercial purpose, an indirect commercial purpose, or a non-commercial purpose. The fair use doctrine is likely to be advantageous for non-commercial or less significant commercial purposes. The third condition that prevents the

¹¹ Maureen A O'Rourke, 'Toward a Doctrine of Fair Use in Patent Law' (2000) 100(5) Columbia Law Review <<https://www.jstor.org/stable/1123488>> accessed 27 April 2023

conclusion of a license is the type, severity, and form of market failure. Impact on the patentee's market: The fourth factor emphasizes the significance of the infringement's effect on the patentee's market. Such infringement can be viewed as fair use if the innovation is transformative, does not affect the incentives received by the patentee, or does not affect the patentee's position in the market. The nature of the patented work is a factor comparable to the first criterion, but it also stipulates that the patented innovation must not be very groundbreaking. It is more likely that a pioneer invention won't receive any fair use advantages.

SHOULD PATENT "FAIR USE" BE TECHNOLOGY SPECIFIC?

Now this idea may be a bit contradicting to that of Professor Maureen O'Rourke. A viable patent fair use theory will correct the market failures present in network industries since fair use is intended to lessen the negative effects of market failure brought on by the exercise of intellectual property rights. A fair use doctrine in patents would solve the same issues as the fair use doctrine in copyright, specifically, it would act to lessen the market failures, if it were restricted to network industries this indeed helps to ensure that the exception does not apply to traditional patent areas, which traditionally have been open to innovation without a fair use doctrine, thanks to this restriction to network industries. Limiting the application of fair usage to those sectors that show network effects, in this situation the first element of Professor O'Rourke's suggestion is irrelevant. Professor O'Rourke recognizes that because entry into a market with network effects needs conformance with the network standard, any development is practically going to be quite gradual; in these markets, this element has the least impact. When the first O'Rourke component is eliminated, a four-factor industry-specific test is produced. In network marketplaces, where compatibility inevitably restrains innovation, the infringing advance aspect has no impact, as Professor O'Rourke acknowledged in her initial proposal¹². By using this recognition to restrict fair use to network markets and removing the first component of the O'Rourke test, many questions and confusion can be avoided.

¹² *Ibid*

CONCLUSION

By looking at the above-mentioned situations, it is to be concluded that the "fair use" theory is more important than ever in the rapidly developing technological world of today. With the aid of fair use, patent law can be made more adaptable to modern circumstances, but it still retains a rigid character and is challenging to change. However, because fair use is a subjective term, it can be used differently depending on the situation, which makes it more useful.

Even when the law does not explicitly vary between different industries, it is nonetheless evident that patent law is enforced differently in each one. The fair use doctrine should be able to distinguish across industries if other areas of patent law can. It is crucial to make this difference because it guarantees that patent fair use will foster innovation in network marketplaces while preventing additional legal issues in fields already well-served by patent law. Much of the complexity in Professor O'Rourke's five-part test can be avoided by first demonstrating that a patent is sensitive to network effects, and then looking at the four other elements.

Many worries about network sectors could be eliminated by a patent fair use theory that is industry-specific. The challenges of a generally applied fair use theory can be avoided by restricting fair use to those network industries. Last but not least, a patent fair use concept can help forward the development of Copyright regulations.