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PATENT INFRINGEMENT AND CRIMINAL LAW PATENT PROTECTION

ABSTRACT: The field of patents is the most important within industrial property, as it protects inventions and the position of inventors and patent holders. The interests of investors, scientists, researchers, and inventors must be somehow united in a legal system that benefits all these stakeholders, as the future of innovative creation depends on them. A patent is a right granted to the inventor and patent holder, providing certain benefits related to the invention they have patented. Thus, the patent system aims to reward the effort, knowledge, creativity, time, and money invested in creating new inventions, which leads to an expansion of knowledge in the field of industrial property, subsequently driving industrial progress. Since there are no rights without legal protection, the issue of legal certainty is linked to the development of the patent system. Various protection mechanisms are available to the inventor and patent holder through administrative procedures, as well as mechanisms to protect against infringements. What particularly interests us is which protection mechanism is most suitable in a specific situation, especially in the modern era.

Keywords: *Industrial Property, Patent, Patent law, Patent Protection, IT Law*.

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1. Introduction

It is not possible to absolutely determine the exact share of patent revenues in the economy of a country, nor the share of innovations in the country's GDP, but regardless of that, the fact is that economies tend to be based on newly created value. Patents primarily protect the invention, and secondary patents protect the inventor, and the patent holder, because of their invention. Industrial property, and especially patents, generate new value in two ways. The first is that the patent holder can independently produce goods and put them on the market in accordance with the protected patent, i.e., patent documentation. Another way is to give permission to others to do it, and in return collect a fee, which we call licensing or giving a license. Therefore, one patent for a business entity means not only direct income from the sale of the product, but also passive income from the licensee. It also means the value it creates without the effort to organize the production process or invest in any further work. Also, the possession of a patent for a business entity often means increased overall value of that business entity on the market, growth of shares of that business entity, creation of space for new employment. The advantages of having a patent are not exhausted by this enumeration, and some are also in the intangible sphere, for example the reputation of a business entity and recognition among consumers. We cannot measure how much money flow comes as a direct consequence of the above-mentioned.

Taking into account all above-mentioned advantages that a patent brings, it is quite clear that the real economic battlefield is in the field of innovation. Companies always try to be innovative in certain areas, to bring new improvements and new technologies, and in the end, all this is in the service of the progress of the whole society, and the progress of civilization. The path from an idea to a patent, which sets a business entity apart from the competition, is sometimes long for decades, and some business entities seriously prepare documents called "Intellectual Property Development Strategies", in which they plan the development of the innovation sector decades in advance. Such projects often involve whole teams, or even institutions.

Because of this indisputable weight of patents, but also because of the complexity and cost of a development procedure, it is of utmost importance to focus our attention on the creation and understanding of the patent law system, and especially the area of patent protection.

When it comes to patent protection and mechanisms suitable for specific situations, we will try to make a systematic approach and point out practical

knowledge. These are practical questions that lawyers and legal advisors in business law or IT law frequently encounter.

The scientific benefit of this kind of paper is certainly important, given that there are not enough sources on patent law and patent protection, and many topics are still unexplored by legal science in our country.

The social benefit of such a paper should derive from the scientific benefit, given that scientific activity must have its imprint in practice. The connection between knowledge and the solution of a specific problem should be established clearly in this paper. The new knowledge that we strive to achieve should be applicable, especially to the reader who is wondering how to protect his subjective rights to patent. This paper tends to give lawyers and patent holders new insights.

The methods employed in this paper are grounded in the nature of the legal topics being addressed. This means that the basic method is the analysis of legal acts and literature in the field of patent law. We supplement this with experiences from practice.

2. Patent protection

In accordance with the logic of the general legal principle that states: "There is no right without a legal means of protecting it", in this paper we focus on the legal mechanisms of protection of rights to patent. In this chapter we are talking about the forms of protection of inventors and patent holders in individual cases, which they can use to protect their individual rights regarding their patent.

But first we must define patent: "Not every invention can be protected by a patent. For this to be possible, the invention must be: 1. from any field of technology, 2. new and involve an inventive step, 3. industrially applicable, and 4. patentable" (Krivokapić, 2022, p. 215).

The Patent Legal Act (hereinafter: PLA), the Special Powers for Effective Protection of Intellectual Property Legal Act (hereinafter: SPEPIPLA, the General Administrative Procedure Legal Act (hereinafter: GAPLA), the Civil Procedure Legal Act (hereinafter: CPLA) apply to this area. Criminal Code (hereinafter: CC), the Criminal Procedure Legal Act (hereinafter: CPLA), and the Misdemeanors Legal Act (hereinafter: MLA) are important when we talk about criminal mechanisms of protection.

This is still a matter of the internal legal order of a country, although globalization in the era of the Fourth industrial revolution has internationalized threats to the legal system. "There have been only sporadic

attempts to regulate online crimes in the EU. The reason is simple: criminal matters are still mainly the responsibility of the member states" (Savin, 2020, p. 451).

The mechanisms of protection of individual rights regarding patents can be divided into three major areas:

1. Administrative protection.
2. Crime law protection.
3. Civil protection.

The protection of rights through administrative mechanisms includes all procedures that an individual or the state authorities themselves can initiate before the state administrative bodies, with the aim of protecting the individual right to patent. The patent owner is choosing a way he will protect his intellectual property for the future. In terms of patent application, this means a lot of paperwork and groundwork for patent protection.

Criminal protection includes all criminal proceedings (criminal, misdemeanor and proceedings for economic offenses) that can be applied, and it comes after a violation of individual patent rights.

Civil protection is another protection mechanism that takes place after a violation, or during it. This includes protection before courts of general jurisdiction, but also before commercial courts, when the dispute is between legal entities.

The legal rules that apply in the field of intellectual property protection, including patent law, are divided into two major areas:

1. General legal rules (criminal law, criminal procedural law, misdemeanor law, obligation law, property law, civil procedural law, administrative law, administrative procedural law);
2. Special legal rules, namely:
   - Broader – Intellectual property law;
   - Narrower – Patent law.

We will start with general legal rules, guided by the legal logic and doctrine that a law governing a specific subject matter (*lex specialis*) overrides a law governing only general matters (*lex generalis*). Thus, we will highlight the direct application of patent law and specifics in this area as the most important facts, and we will deal with general rules to the extent that we need to understand the area of patent law. We will be guided by the assumption that the educated reader knows general law.

And then there are modern tendencies (that are still not a part of legislative), especially the topic of AI generated patents. "Although among the hundreds of thousands of patented inventions in the field of artificial intelligence, only one case (keyword: DABUS) has arisen that raised the question of whether artificial intelligence can be considered an inventor as the original holder of patent protection rights, the public has sensationally embraced it as the central issue of patent law in the fourth industrial revolution" (Marković, 2024, p. 108).

3. Infrigements of right to patent

Monopoly position is generally prohibited, but it represents a justified tool in intellectual property law and the theorists of this area of law has not yet found better solutions to stimulate and continue to find relationships, research activities, investments, initiatives, and progress overall.

Patent law basically creates a monopoly in favor of the patent holder, so that he can exclude others from making, using, importing, and selling the patented innovation for a limited period of time. That is why the patent right is an absolute and exclusive right. Absoluteness means that it acts towards everyone. While exclusion gives the right to prohibit the use of the object of protection to anyone against whom the right applies. Everyone is prohibited from using the subject matter of the patent. By combining these two characteristics of patent law, we get a monopoly position for its owner, and that monopoly position is the biggest stimulus for technological development. This monopoly position guarantees it`s owner an enviable market position. Interest is the biggest stimulus for large business entities that invest money and time in research and development.

When trying to establish exclusion in patents, two concepts arise:

- Management of the patent – The extended interest of the patent holder to transfer the right to another and gain profit over time, limiting his involvement for the benefit of another person. The patent holder receives a fee in return. We call it licensing.
- Compulsory license – A license granted by a judicial authority, limiting the exclusion of the patent holder against his will.

"Intellectual property is an old concept. The Venetian Legal Act from 1474 is often referred to as the first systematic approach to protecting inventions by a form of patent, as it stipulated an exclusive right of an individual which limited the public interest for the first time. Sixteenth-century Tudor England

already had a patent system, and the Statute of Monopolies in 1624 was the first written law which provided for the grant of a monopoly for an invention for a limited period of time" (Idris, 2003, p. 13).

"A patent is a subjective intellectual property right that provides its holder with time-limited exclusivity in terms of the economic use of the patented invention" (Marković, 2018, p. 113).

Two questions arise: Against whom patent infringement actions could be aimed? Which actions constitute a violation?

An action for infringement of a subjective patent right may be initiated by:

- The patent holder.
- The person to whom he transferred the right to use the patent (usually through a license).

Infringement actions are all actions that prevent the holder of the patent right or the person to whom he has transferred the right to use this right unhindered. An act of infringement is always unlawful. And infringement actions can be legally opposed by the patent holder and the licensee, each to the extent of the rights they possess.

Actions of patent infringement are permanent in nature, they are not done by one single action, but are expressed in long-term frequent actions. We can analyze the language (verbs) used by the legislator. Actions of production and putting into circulation are given in the form of continuous verbs. The length of the infringement does not affect whether there is an infringement, but it potentially affects the severity of the infringement, i.e. the amount of damage caused to the holder of the patent right.

In the Patent Legal Act, the legislator defines infringement of patent rights by defining and enumerating the acts of infringement. The definition of infringement of patent rights is set out in Article 132, para. 1. in the following manner: "Any unauthorized undertaking of actions referred to in Art. 14 of this legal act." – This refers us to art. 14 of this legal act, that leads us to the explanation of the content of the patent right and the exhaustive list of actions that represent a violation: "The holder of a patent or small patent has the exclusive right to: use the protected invention in production, put on the market objects made according to the protected invention, dispose of the patent or small patent. In exercising his exclusive right to the economic exploitation of a protected invention, the holder of a patent or small patent has the right to prevent any third party who does not have his consent to: produce, offer, put into circulation or use a product made according to the protected invention or to import or store that product for the stated purposes, applies a process that

is protected by a patent, produces, offers, puts into circulation, uses, imports or stores for these purposes a product directly obtained by a process that is protected by a patent, offers and delivers products that constitute essential elements of the invention to unauthorized person for the use of that invention, if the offeror or supplier knows or should have known from the circumstances of the case that the product is intended for the application of someone else's invention (Patent Legal Act, article 14)."

The content of the patent and the content of the patent right are closely related to acts of infringement. From the content of the patent, we see what exactly the patent is protected for, while from the content of the patent right it can be concluded which rights the patent holder has. When we study those two terms, we will be able to come to a conclusion what will represent an action of infringement in a specific situation. Extent of owner's right is the potential violation of the right by a third party, who can only commit the violation by entering the content of the right without authorization (legal basis) to do so.

3"A patent, in general, grants the patent owner the exclusive right to control who makes, uses, sells, offers for sale and/or imports any product or process defined by the patent's claims. Patent claims are sets of sentences that define the invention being protected. To obtain a patent, claims must typically be for an invention that is new (novel), involves inventive step (is nonobvious) in view of the "prior art" and is industrially applicable (useful). Prior art is a technical term that generally refers to all the knowledge available to the public at the time of filing of the patent application" (WIPO Patent Drafting Manual, 2022, p. 12).

Types of patent infringements are:

- Direct – Direct infringement is an infringement of a person who directly places on the market a product that infringes a patent right;
- Indirect – Indirect infringement is patent infringement by the person who provides part of the product that infringes the patent right, and for the direct infringer who will later put the product directly on the market and thereby directly infringe the patent right.

"The existence of an immediate violation of rights has the following characteristics:

1. It was made without the permission of the right holder (the perpetrator is an unauthorized person);
2. The act of doing corresponds to the content of at least one exclusive authorization of the right holder;

3. It refers to an invention that is the subject of protection (necessary connection between the perpetrator, the act of execution and the object of infringement);
4. The violation was committed in the territory of validity of the right and during the duration of the right;
5. The enforcement action must not be covered by any limitation of protection (Raičević, 2009, p. 100)."

Acts of infringement can infringe a patent in whole or in a part (just certain patent claims). Considering that patents are more and more complex today, patent infringements can be based on the misuse of only a part of the patent. A patent consists of patent claims, and if we take as a patent formula for a patent with three patent claims, that formula would look like: A+B+C. Infringing the entire patent would mean abusing the entire formula. While a partial patent infringement would mean, for example, the use of one or two of the patent claims. The infringement of only patent claim A or A+B.

The social danger that comes from infringement of patent rights is twofold. It does not stop at the fact that there is no legal security for an individual and that his rights are violated, and his property is reduced, but it discourages that individual from further creation and investment in research and invention. It reinforces the idea of protection through informal channels of protection, i.e., through a trade secret, instead of a patent. This ultimately does not make knowledge publicly available to all of humanity. Because a patent is published publicly and after the expiration of 20 years it becomes a public good, so anyone can use it. In same time the nature of a trade secret is colored by its tends to remain undisclosed.

Understanding the acts that constitute a patent infringement brings us to a position from which we can evaluate specific situation in order to decide which legal mechanism is the best to use to protect individual patent rights.

4. Forms of patent protection

After dealing with acts of violation of subjective patent rights, in this part of the paper, we are interested in the mechanisms of patent law protection. The most important question now is: "What protection mechanisms are at our disposal when we notice a violation of patent rights?"

We have already stated in chapter 1 of this paper that these mechanisms can be classified into three different groups:

– Administrative protection of patents;

– Criminal law protection of patents;
– Civil protection of patents.

There are several stages that need to take place in order to effectively protect a patent right:

– Phase of detection of infringement acts;
– Phase of preventive action – removal of products from the market, prevention of further production, prevention of service provision, etc.;
– Phase of providing evidence for possible criminal or civil proceedings;
– Phase of criminal and civil proceedings.

At different stages of the process of patent law protection, different state authorities will be involved, different protection mechanisms will be employed.

4.1. Criminal law patent protection

Criminal law covers all criminal offenses in our system: criminal acts, misdemeanors and economic offenses. Legislation in Serbia prescribes one criminal offense and two misdemeanors.

Regarding criminal acts, the Criminal Code provides in Article 201, the act "Infringement of Inventive Right", which states:

– "Whoever without authorization produces, imports, exports, offers for marketing, puts into circulation, stores or uses in commercial circulation a product or process protected by a patent, shall be punished by a fine or imprisonment for up to three years.
– If, in part from paragraph 1 of this article, property benefit was obtained or damage was caused in an amount exceeding one million dinars, the perpetrator will be punished with imprisonment from one to eight years.
– Whoever publishes or otherwise makes available the essence of someone else's reported invention before this invention has been published in the manner established by law, shall be punished by a fine or imprisonment for up to two years.
– Whoever submits a patent application without authorization or does not specify or falsely specifies the inventor in the application, will be punished with imprisonment from six months to five years.
– Subjects from paragraph 1 and 2 will be confiscated and destroyed (Criminal Code, article 201)."

Analyzing the relevant article of the law, we see that this criminal offense incriminates a large number of acts of acts: production, import, export, offering for sale, sale, storage or use in commercial transactions, as well as publishing and making available someone else's invention, as well as unauthorized application submission. For each of these positions, we present the same result of the analysis regarding the basic concepts, so the subject is an indefinite person, considering the impersonal pronoun "Who", and the object of the criminal act is a product or process protected by a patent. As far as procedural issues are concerned, a shortened procedure is applied, the Basic Public Prosecutor's Office is competent, and the indictment is an indictment proposal. This criminal offense is prosecuted ex officio, and the jurisdiction is a single judge and the Basic Court. It is also necessary to point out that negligence and attempt are not punished for this criminal act (Pejčić, 2021, pp. 31–33).

The Patents Legal Act, in the section on penal provisions, provides for two offenses:

1. Article 170.:

"A legal entity that produces, imports and/or exports without authorization, offers it for sale, puts it on sale, stores or uses for commercial purposes a product or process protected by a patent or small patent shall be fined for a misdemeanor from 100,000 to 2,000,000 dinars, contrary to the provisions of this law.

For the following from paragraph 1 of this article, the entrepreneur will also be fined in the amount of 50,000 to 500,000 dinars.

For the actions referred to in paragraph 1 of this article, a physical person or a responsible person in a legal entity will be fined for a misdemeanor in the amount of 50,000 to 150,000 dinars." (Patents Legal Act, article 170).

1. Article 171.:

"A legal entity that engages in representation in the exercise of rights from Art. 5 of this law,

For the actions referred to in paragraph 1 of this article, a natural person or a responsible person in a legal entity shall be fined in the amount of 10,000 to 50,000 dinars." (Patents Legal Act, article 170).

Criminal proceedings can be initiated by other state bodies ex officio, by informing the competent prosecution office of violations of intellectual property, i.e. patent rights, which they have encountered in their work, or patent holders can do so through a private report.

The choice of which procedure to initiate should be made in such a way that the most serious criminal offense, that is, the criminal offense, is taken into account first. If the infringement of the patent right does not satisfy the existence of a criminal offense, then the misdemeanor law should be consulted. When making a choice, you should know that the *ne bis in idem* rule can lead to the fact that if misdemeanor proceedings are initiated first, this stops the possibility of initiating criminal proceedings in connection with the given violation, considering that the misdemeanor from Article 170 and the criminal offense cover similar or even same acts of infringement.

5. Conclusion

Patent law enable the holder of the rights to have a monopoly position on the content of this right. It is an absolute right, which applies to everyone. The content of the patent right includes the right to use in the production of the protected invention, placing on the market objects made according to the protected invention and disposal of the patent (granting a license, for example).

Any act by which an unauthorized person exercises patent authorization without the permission of the patent holder is an act of infringement of patent rights. Actions of violation of rights can be indirect and direct. Patent can also be partially infringed. Actions of violation of right are permanent by their nature.

Without the protection of rights, there are no rights. The protection of patent rights, the protection of the rights of inventors and patent holders, is a priority of the patent law system. There, the right of intellectual property rests on general legal areas. The existence of rights protection mechanisms is also a way to stimulate creativity, innovation, and progress of society while new aspects are emerging in the modern age with the hasty development of IT technologies. “Likewise, humans can misuse artificial intelligence. Humans can be benevolent or malevolent, technology cannot. But a more powerful tool can do more harm when misused” (Tul, 2024, p. 760).

Our legal system incorporetes several patent protection mechanisms that can be used independently or combined for more complete protection. We divide all protection mechanisms into three groups: administrative protection, criminal protection, and civil protection.

Criminal law primarily has the task of dealing with punishment, which has an indirect effect on prevention, due to the fear of punishment and on the resocialization of the perpetrator. It reduces the social danger of perpetrators

repeating the crime. Criminal law within the framework of patent law recognizes the criminal offense stated as "Infringement of invention rights", and two misdemeanors prescribed in the Patent Legal Act.

For any of the mechanisms to be used, it is necessary to ignite the initial spark. It is necessary to detect the acts of violation. Infringing actions can be discovered by a state authority within the scope of its work, or by a private person, most often a rights holder who is directly interested in monitoring the market and discovering if someone is abusing his patent.

The protection of patent rights is very complex and there are many mechanisms for the protection of patent rights. Considering the type of infringement, the acts of infringement, different forms of patent protection can be advised. Criminal law protection, however, addresses the most severe forms of patent law violations. Upon detection of violations, it will usually be possible to alert one of the administrative authorities and start the supervision procedure. After which, in the event of a violation of rights, that authority should exclude the goods from the market and thereby prevent further violations. After that, the rights holder has the option to alert the criminal law authorities, so that the violators are penalized and refrain from possible future patent violations. The ultimate interest of the right holder is to be economically compensated (civil law) for the damages caused to him. It rounds off the protection mechanisms with their purposes, and patent right holder have a chance to combine them at the right moments and in the right way.

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POVREDE PATENATA I KAZNENO-PRAVNA PATENTNA ZAŠTITA

APSTRAKT: Oblast patenata je najvažnija oblast u okviru industrijske svojine, jer ova oblast štiti pronalazaštvo i poziciju pronalazača i nosioca patenta. Interese investitora, naučnika, istraživača, pronalazača moramo na neki način ujediniti u pravnom sistemu koji pogoduje svim ovim subjektima, jer od njih zavisi budućnost inovativnog stvaralaštva.

Patent je pravo koje se garantuje pronalazaču i nosiocu patenta određene pogodnosti povodom pronalaska koji su patentirali. Dakle, patentni sistem ima za cilj da nagradi za uložen rad, znanje, kreativnost, vreme, novac koji dovode do stvaranja novih pronalazaka i time širenja obima znanja u oblasti industrijske svojine, koje će zatim usloviti industrijski napredak. Kako prava nema bez pravne zaštite pitanje pravne sigurnosti vezuje se za razvoj patentnog sistema. Pronalazaču i nosiocu patenta stavljaju se na raspolaganje različiti mehanizmi zaštite kroz upravni postupak, a zatim i mehanizmi zaštite u slučaju povrede istog. Ono što nas posebno interesuje jeste koji je mehanizam zaštite podoban u konkretnoj situaciji, a pogotovo u modernom dobu.

Ključne reči: *Industrijska svojina, patent, patentno pravao, zaštita patenata, IT pravo*.

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