

Abrogating Sovereign Immunity in Patent Infringement Cases in India: Retreating Without Disgrace

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A broad overview of the present patent regime internationally, reveals that States have an untrammelled, unbridled privilege to derogate from any burden as may arise on infringement of patents held by its citizens, in the name of 'sovereign immunity'. This is in addition to a power conferred upon the State to acquire patents arbitrarily and the discretion to grant compulsory licenses to third parties. In the United States of America, this has aroused much debate ever since the judiciary maintained a stand in favour of the doctrine of sovereign immunity which has its roots in the British Common Law concept of 'the king can do no wrong'; a principle that is regarded anachronistic by many.

Even in India, the Indian Patent Act, 1970 has provisions which immunize the State from liability in cases of patent infringement and provide for arbitrary acquisition of patents; for reasons that need not necessarily fall within the ambit of medical emergencies or only for life-saving medicines or technologies, as many would wrongly tend to believe, but for any use by the government. Under the Act, the government can infringe or acquire a patent directly and openly without any liability. In the light of this, can Article 300A of the Indian Constitution (the right to property), interpreted in the light of the doctrine of reasonableness, be used as a remedy by patentees in case of infringement by the State through a writ petition under Article 226 of the constitution? After all, the jurisprudence of the liability of the State in India is indeed much more evolved and more oriented in favour of the rule of law than it is in the United States. This article examines and denounces the sheer incongruity between patent infringement liability for acts by a private individual and exemption for the same acts by the government and suggests some reforms in the present Indian patent law.

Keywords: Sovereign immunity, Eleventh Amendment, Florida Prepaid, right to property, Indian Patent Act

The doctrine of sovereign immunity has been enshrined under the British Common Law principle of *rex non potest peccare* (the king can do no wrong). In the contemporary era of democracy and human rights, this principle is believed to have largely lost its relevance. After all, constitutionalism in democratic countries is all about promoting the rule of law by having sufficient checks and balances, so as to ensure that even the State does not violate the rights of any individual citizen.

However, this doctrine continues to exist even in avant-garde jurisprudences like intellectual property. Even more surprisingly, it is still largely prevalent in a country like the United Kingdom, the economy of which is capitalist in nature and which happens to be the oldest existing democracy (though within the setup of a constitutional monarchy). Under Section 46(1) of the UK Patents Act of 1949, 'any Government department and any person authorized by a Government department may make, use and exercise

any patented invention for the services of the Crown'. This was further enunciated in *Pfizer Corp v Ministry of Health*, where the House of Lords held that the use of patented drugs for the benefit of in-and-out patients of National Health Service Hospitals was a use of the invention for the services of the Crown, and that importation of patented goods was a use of an invention which could be authorized by the Minister under Section 46.

Matthew Paik has articulated the rationale for patent protection as 'to encourage this kind of dedication, effort, and innovation, and to make these new innovations available to the public, the US patent system 'exchanges' information about an invention for the exclusive right to prevent others from making, selling, and using the invention.'¹ While he has referred to the US, what he has stated is universally true.

Long before intellectual property was a much discussed and debated subject, eminent thinkers like Hegel had delved into the concept of an invention being an extension of the inventor.² Also

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characterized as the 'personality theory' of property, Hegel's rationale suggested that the inventor has imbued the invention with his personality or will, making the process of creation an intensely individualistic one. Hegel postulated that property and ownership were important milestones in the journey towards self-development.²

Thus, an individual's right to his/her property, be it tangible or even intangible being infringed by the State without justifiable cause in the form of compelling reasons or even authorization of the State leading to infringement is indeed a matter of grave concern. While this article focuses on India, to understand this issue in a holistic fashion, the prevailing position in the United States would be analysed first followed by jurisprudence in India.

Position in the United States

Sovereign Immunity in the United States

The doctrine of sovereign immunity is of early origin in the US as can be seen from the landmark case of *Chisholm v Georgia*³ wherein the State of Georgia declined to appear in the United States Supreme Court on being sued by a resident of South Carolina. The ruling was however in favour of the plaintiff. This decision evoked large scale resentment from the States, and so, the Eleventh Amendment was proposed and ratified in 1795. The amendment stated that, 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State'. In other words, the amendment denied federal jurisdiction in cases between a citizen of a state and another state.

In an unprecedented move, the Supreme Court reasoned in *Hans v Louisiana*⁴ that a citizen was forbidden from even suing his own state as per the Eleventh Amendment, embodying 'a broader rule than what was explicitly provided for by the language of the Amendment'.¹

This in effect spawned a situation wherein a State could not be sued in federal courts for failing to live up to its obligations in rights enforcement even though a lawsuit would otherwise be justified. However, a progressive tilt came in the form of the Court's decision in *ex parte Young*.⁵ Here, an opening was provided in as much that a state official could be brought to book, though states still retained their immunity from legal proceedings.¹

Effectively, *ex parte Young* circumscribed *Hans* to 'a mere exercise in proper pleading strategy'.¹ This allowed the regular citizenry to partake in lawsuits against State officials for want of ability to take on the State directly. Following this, in *Edelman v Jordan*⁶, the Supreme Court held clearly that a State official could be sued only in his official capacity for prospective injunctive relief, and not damages. This narrowed down exception is what the state of the law in the US still pays allegiance to.

Sovereign Immunity with respect to US Patent Law

The said doctrine has found mention abundantly in patent infringement cases in the US, one such being *Chew v California*⁷ where the plaintiff held a patent for having invented a mechanism for testing automobile exhaust emissions.

Chew's allegation was that the State of California directly and indirectly infringed on her patent rights when the State started requiring third parties to 'test automobile engine exhaust emissions [with] a process' claimed in her patent. After having claimed for compensation which was rejected, she chose to take up a suit for patent infringement in the Federal Court. The State of California filed a motion for dismissal on the grounds of the Eleventh Amendment, which the District Court upheld.

In her opposition to the contentions put forth by the State of California, Chew argued, *inter alia*, that 'Congress had abrogated the states' immunity by provisions of the patent statute and by giving exclusive jurisdiction to federal courts to decide patent infringement claims.' The district court rejected this argument stating that abrogation of Eleventh Amendment immunity must be explicit, and that did not appear in the language of the patent statutes. The Federal Circuit affirmed, saying that the 'evidence of such congressional intent must be both unequivocal and textual'. As *Chew* shows, the law at the time was that even though states could obtain patents and enforce them, the states themselves could not be sued for infringing a patent held by a private party.

Sometimes, the patentee may have the opportunity to initiate state-level proceedings against an infringing state, as was the case in *Chew*. However, even this course of action was, and still is, not offered in all states. In most cases, even when remedies are provided by states, they are not exactly ideal. In other words, patentees could not sue states in federal courts, and so, they would have no option but to try to avail

of whatever state-level remedies offered by that particular state, if it offered any remedies at all.

However, even in states that do offer state-level remedies, there has been a serious dearth of such proceedings. Perturbed by the decisions in cases like *Chew*, the Congress passed the Patent and Plant Variety Protection Remedy Clarification Act (popularly known as the Patent Remedy Act), in 1992. Section 296(a) of the Act stated – ‘Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of a patent...’. Section 296(b) stated that remedies (including remedies both at law and in equity) are available ‘for the violation to the same extent as such remedies are available for such a violation in a suit against any private entity’ where such remedies were to include damages, interest, costs, and treble damages, attorney fees and the additional remedy for infringement of design patents, as against only injunctive reliefs as laid down by the Supreme Court earlier. Thus, the Act clarified, in no uncertain terms, that states could not use the Eleventh Amendment as a shield against allegations of patent infringement.

This Act, however, did not last long. It was struck down as unconstitutional in the landmark case of *Florida Prepaid Secondary Education Expense Board v College Savings Bank*⁸ popularly known as *Florida Prepaid*. In order to understand the case, two other landmark cases pertaining to the issue of state sovereign immunity, viz., *Seminole Tribe v Florida*⁹ and *City of Boerne v Flores*¹⁰, were examined. The ratio from these cases was that the Congress could not abrogate immunity under powers found in Article I (*Seminole Tribe*), but that it could, in the right situations, abrogate under Section 5 of the Fourteenth Amendment (*City of Boerne*). For the abrogation to be upheld by the courts, the legislation would have had to pass the ‘congruence and proportionality’ test laid out in *City of Boerne*, by virtue of which legislations by the Congress under the Fourteenth Amendment should only be as a remedy to a certain injury being caused as a result of the prevailing legal position, and not to substantively create new rights, impinging on the domain of the States.

Section 5 of the Fourteenth Amendment states that, ‘The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.’ In the context of *Florida Prepaid*, this has to be read with Section 1 which states, ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’

The *Florida Prepaid* case involved, *inter alia*, a business method patent held by College Savings Bank, a company based in New Jersey. In this case, Florida Prepaid, the accused infringer, argued that the ‘Patent Remedy Act was an unconstitutional attempt by Congress to use its Article I powers to abrogate state sovereign immunity.’ College Savings, in response, contended that ‘Congress had properly exercised its power pursuant to § 5 of the Fourteenth Amendment to enforce the guarantees of the Due Process Clause in § 1 of the Amendment.’ In *Florida Prepaid*, College Savings Bank alleged that the State of Florida had engaged in patent infringement and was seeking appropriate relief.

The main issue in *Florida Prepaid* was whether the abrogation of state sovereign immunity under the Patent Remedy Act was valid under the US constitution. If the abrogation was constitutionally valid, then the Patent Remedy Act would allow states to be sued in federal courts. If, however, the Congress had transgressed its authority in passing the Act, the law would be struck down, and the states would enjoy the immunity they had prior to the passage of the Act in 1992. The view that the Act was unconstitutional prevailed, with four out of nine judges dissenting.

A detailed discussion of the case is not warranted here, since the real debate was not as much about the desirability or relevance of sovereign immunity but about whether the centre was intruding into the turf of the States by robbing them of their immunity in the US federal structure.

Criticism of the Doctrine of Sovereign Immunity in the United States

The doctrine of sovereign immunity has been subject to tremendous criticism for decades in the US. In fact, most of the reactions to the *Florida Prepaid* judgment by observers, including legislators and academics, were

extremely critical, and many judges criticized it too.¹¹ The critics point out that the Eleventh Amendment was being misinterpreted to give the State more powers than intended by those who framed the amendment and that the doctrine of sovereign immunity is against the principle of a remedy for the violation of any right, which lies at the heart of the US constitution.

The incongruity caused by the doctrine has been well articulated by Peter Lattman, citing the example of the University of California:

In the lucrative world of patents, the University of California is a major player. It receives by far more patents from the US government than any school in the country. And by licensing out its intellectual property, the university has generated about \$500 million in revenue in the past five years. The school also aggressively uses the courts as a sword, and is unafraid to take on big companies. As a plaintiff alleging patent infringement, the school has settled a claim against Genentech Inc for \$200 million, secured a payment of \$185 million from Monsanto Co, and won a \$30 million settlement from Microsoft Corp. Yet, when it comes to getting sued for patent infringement, the university, as well as the state of California, are Teflon. A legal doctrine known as sovereign immunity protects states and state institutions from legal liability. Courts have held that participating in the federal patent system doesn't cost a state its immunity. The upshot - states can sue, but effectively can't be sued.¹²

Arguments advanced in favour of the doctrine also do not really hold water, as has been pointed out by the noted scholar Chemerinsky¹³. The arguments being advanced in favour of the doctrine include the view that it derives itself from the US constitution, that it has been a part of the British Common Law tradition, and that it checks the power of unelected bureaucrats and gives more power to elected legislators and gives them a more free hand in the budget process. Chemerinsky however, shows that the doctrine of sovereign immunity is antithetical to the US constitution. Traditions are subject to change and need not be frozen in a static mould. He also argues that giving more power to elected legislators is not desirable if it decreases their accountability to the people who elected them.

Position in India

Liability of the State

To examine the liability of the State in the Indian context, it would be appropriate to refer to Article 300(1) of the Constitution, which states that 'the Government of India may sue or be sued by the name of the Union and

the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.'

Thus, the liability of the Union of India is inextricably linked to that of the nature and extent of the liability of the Dominion of India before the enactment of the constitution, the liability of which was the same as that of the ruling British government in India, the liability of which was the same as that of the British East India Company which governed India till the passage of the Government of India Act, 1858, transferring power in the hands of a government in India directly subservient to the British Crown. In a landmark case, *P&O Steam Navigation Co v Secretary of State for India*¹⁴, Justice Peacock had observed that taking into account the functioning of the East India Company, the Government of India or that of any Province could not be held liable for those acts which purely fell within the bracket of sovereign functions i.e. those acts which were only legally permissible for the Government and not by private individuals, but the Government would definitely be held liable for wrongs committed while discharging non-sovereign functions. This principle has been applied by the Indian courts since then, and famine relief work¹⁵, providing health care facilities¹⁶, carrying firewood for campfire by the military¹⁷ or transporting food for the defence forces¹⁸ have been held to be non-sovereign functions, since private individuals can also engage in these, and the Government has been held to be liable to pay compensation for wrongs committed while engaging in these activities.

Thus, the ambit of the doctrine of sovereign immunity, understood as executive prerogative, is not as wide in India as compared to the UK and USA.

Right to Property as a Constitutional Right

The right to property was earlier a fundamental right under Articles 19(1)(f) and 31; but while it is no longer a fundamental right after the 44th Amendment, it is still a legal right available against the State under Article 300A, which states that '...no person shall be deprived of his property save by authority of law.'

Thus, one can avail of a constitutional remedy in case of a State interference with one's rights over his/her property by invoking the writ jurisdiction of the concerned High Court under Article 226 of the Constitution, except if the deprivation of property has been carried out by the authority of law.

Since intellectual property rights have been recognized in Indian law since colonial times i.e. even before the enactment of the Indian constitution, there is no reason why intellectual property should not be included within the ambit of the term 'property' as used in Article 300A. Since early times, the concept of an invention being an extension of the inventor's self has been recognized. In fact, the US Constitution explicitly mentions patents and copyrights as being property over which individuals have a right that the State ought to respect. Hence, there is no reason why such an interpretation would not apply in the Indian context.²⁷ Rights over intellectual property, despite its intangible nature, deserve to be regarded as sacrosanct and the State should not be allowed to infringe these rights of individuals or other independent juristic persons unreasonably.²⁰

The fact remains that enforcement of intellectual property rights in India has been very poor.²¹ In this context, the importance of intellectual property in the light of the *lex suprema* of the land, the Indian Constitution, which serves as a touchstone for all legislative and administrative decisions, needs to be highlighted.¹⁹ Intellectual property infringement must be perceived as no less than theft.

Provisions in Indian Patent Law giving the State Immunity

Indian patent law has several provisions dealing with the position of the State when it engages in infringement of violation of patent rights. Section 47 of the Indian Patent Act, 1970, states as a pre-condition to be granted patent rights, that 'any machine, apparatus or other article in respect of which the patent is granted or any article made by using a process in respect of which the patent is granted, may be imported or made by or on behalf of the government for the purpose merely of its own use' and that 'any process in respect of which the patent is granted may be used by or on behalf of the government for the purpose merely of its own use'. The ambit of 'use of the government' is left open-ended and there is no provision for any compensation to the patentee where such use is made.

This is not evidently consistent with the position that the Indian judiciary has adopted while

interpreting Article 300 of the constitution wherein the State has been held liable for legal wrongs committed by the government while discharging non-sovereign functions. This could be possibly because there are no clearly laid down rules as under what conditions it would be reasonable to use the patentee's invention without his/her consent or without giving him/her the royalty he/she desires. In the authors' opinion, Section 47 of the Indian Patent Act should make it explicitly clear that except in the case of an extreme medical or defence-related emergency (while inventions exclusively in the realm of defence are not patentable, there may be cases of some patented technology having possible defence applications), the use of the inventor's technology would not be made except on terms agreeable to him/her. If possible, a situation that would amount to such an emergency too should be defined, and if not, interpretation can be left to judicial discretion.

In fact, the conditions stated in Section 47, also go beyond what is mandated in the TRIPS Agreement, to which India is a signatory and to which the Indian Patent Act is meant to comply. As stated in Article 29, only the following conditions that may be imposed on someone applying for a patent for the grant of patent rights by governments of signatory countries:

1 Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2 Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

If the State could be held liable for military officers engaging in the tort of conversion by picking up firewood belonging to a private individual for the purpose of fuel for campfire by mistake¹⁷, why should the same logic not apply to intangible property as well? In fact, the above was a case of vicarious liability of the State, for the wrong was committed by its servants; but in Section 47, the legislation seemingly gives a *carte blanche* to the State to institutionally disregard the rights that a patentee ought to have over his/her invention, going against the jurisprudence of Article 300A of the Constitution,

which makes the right to property a legal right for every individual that cannot be violated arbitrarily even by the State. In addition, Chapter XVII (Sections 99 to 103) of the Indian Patent Act is relevant in which Sections 100 and 102 particularly deserve attention. However, before examining these sections, it may be noted that the importation or preparation of apparatus or articles or utilization of processes to make them, as discussed in Section 47, are not relevant in the context of Chapter XVII, as has been stated in Section 99(3). On the other hand, Section 99(1) makes it clear that the phrase ‘use of inventions for purpose of government’ as used in the chapter refers to use for the purposes of the Central Government, State Government or any Government undertaking.

In the case of *Garware-Wall Ropes Ltd v AI Chopra and Anr*²², the court contended that the words ‘merely of its own use’ as found under Section 47 would envisage only those situations where fulfilling the purposes of the government is given attention to. This could be made available to any department of the government, servants and agents in the lawful discharge of their duties, irrespective of the ultimate beneficiary. Such an extension would not however, be available to any other person like a contractor of railways. Section 99, on the other hand, entitles in no uncertain terms the use of the invention by the Central Government, State Government or a Government Undertaking in accordance with the terms and conditions as laid down in Chapter XVII.

Section 100 of the Patent Act authorizes the Government to use an invention for its purposes (the scope of which, is defined in Section 99), while Section 102 authorizes the Central Government to acquire patents for a ‘public purpose’. These sections also ought to be amended and the possibility of acquisition should only be with the consent of the patentee under normal circumstances. While the importance of ‘public interest’ is self-evident and it is convenient to romanticize the same beyond any point by its advocates, the inventor’s rights ought to be given utmost respect. Giving the State powers in an open-ended fashion such that they can be easily misused would be inappropriate. Such misuse by the State would not evoke protest by human rights groups, or much criticism by the media, but is an issue serious enough to warrant amendment of laws.

Indeed, Article 300 gives room to the legislatures to modify the scope of the right to property when it

mentions ‘save by authority of law’ and even Article 300A allows the State to deprive people of property by authority of law. Implementing the Patent Act, which happens to be a law, though not violative of Article 300A or even Article 300, should come with an element of reasonableness.

In a landmark English case, *Associated Provincial Picture Houses v Wednesbury Corporation*²³, certain grounds of reasonableness were laid down to evaluate an administrative decision which finds reflection in *Maneka Gandhi v Union of India*.²⁴ The judgment in the case *M/s Bee Jay Contractors v Hindustan Petroleum Corporation*²⁵, stated, ‘the courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.’

Likewise, in the case of *Indian Oil Corporation Ltd v Mahendra Prasad & Ors*²⁶, it was held that ‘fairness and reasonableness doctrine speaks that in all activities of the Government and its instrumentality should pass the test of such fairness and reasonableness principle... settling the law that unreasonable exercise of power vitiates Articles 14, 19 and 21 of the Constitution of India.’

Thus, if the Government gives no royalty to the patentee while using his/her technology or acquires it without any sound justification, that is arbitrary and unreasonable under normal circumstances, and can be struck down by the judiciary even if the same is being done invoking a legislative provision. Sections 100 and 102 of the Indian Patent Act provide room for this arbitrariness by not explicitly laying down any conditions as to when the State can infringe or even acquire patents and hence, requires amendment to avoid unnecessary lawsuits. However, in the context of Section 47, even the element of reasonableness arguably does not come into picture, since it is in the form of conditions which the patentee has consented to while being granted the patent, and which he/she presumably cannot challenge. Therefore, amending this provision becomes even more important. As stated earlier, concessions should be made only in case of extreme medical or defence-related emergencies and the sections should make that amply clear. This would also be in conformity with the TRIPS Agreement, which explicitly states under Article 31(b) that the use of technology over which someone has patent rights ‘may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on

reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.⁷

In the recent *Chemtura* case²⁷, involving an American company being granted a patent²⁸ may also be cited. The judgement was found in favour of the defendants settling that the infringing products in question were being manufactured on behalf of the Government and for the use of the Government itself. If one is to go by this interpretation, the Government and its instrumentalities are completely given a free hand and are above infringement proceedings. This would envisage a scenario in which the Government would not have to pay a single penny in royalty to any patentee. Such a state of affairs would indeed prove to be unfair to the patentees.

Possibility of a *Florida Prepaid Rerun* in India

It has already been established that the ambit of the doctrine of sovereign immunity, understood as executive prerogative, is not as wide in India as compared to the United States. It also must be noted that the centre-state relations in India are not like those in the United States, India not being a typical federation. In fact, some eminent jurists have even contended that the Indian Constitution is quasi-federal, more unitary than federal. The liability of the Union and States under the Indian Patent Act, the legislation governing patents in India, can be subjected to change easily by amendments in the said legislation by the central legislature, the Parliament. This is because the power to make laws relating to patents is expressly granted only to the Parliament and not the State legislatures under Article 246 of the Indian constitution because it finds a place in Subject 49 of the Union List in the Seventh Schedule. So, if the Indian Parliament, by way of amendments, abrogates the immunity of the executive at the central and state levels, there is no question of the states raising a judicial dispute, as was the case in *Florida Prepaid*.

Conclusion

Intellectual property, despite its intangible character, is as much a property as tangible property is, and an individual or any other juristic person's right over it ought to be regarded as sacrosanct. The State ought not to have unchecked powers capable of being misused to violate intellectual property rights.

In the Indian context, the doctrine of sovereign immunity is not as widely applicable as in the United States, nor are the centre-state relations in India so typically those of a federation as they are in the United States. Keeping this in view, amending the arbitrary provisions of the Indian Patent Act would only be consistent with the pattern of rights and State liability jurisprudence that has been followed in this country

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