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The abuse in the use of the exclusive right of the patent in the Algerian legislation

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Abstract:

The exclusive right of the inventor results in the right to protect his industrial exploitation of the patent without competition during the legal protection. Nevertheless, the right to own the patent is not absolute because it is a system that takes into consideration the interest of the inventor without harm to the public interest and the right of the society to take advantage of the new inventions. In return for the legal protection, a commitment emerges on the inventor to produce his inventions inside the protecting state; otherwise he would risk the compulsory license or the forfeiture.

Keywords: *Inventor; exclusive right; commitment to exploitation, compulsory license; forfeiture.*

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Introduction:

New discoveries are subject to legal protection that enables their owners to monopolize their use before the rest of the people. This is known as the exclusive right to the patent which means that the inventor alone has the right to take advantage of his invention in an absolute manner compared to the others all along the protection period(1) . The Legislator figured out the importance of the legal protection for the inventor(2) and the effects it has in promoting their innovative potentials. In addition, the protection guarantees industrializing the inventions and the utilization of the society of the achievements made(3) .

The exclusive right of the patent holder results in the right to protect his industrial exploitation of the patent without competition all long the legal protection. Nobody should violate this right; in case this happens, the offender is sued for imitation that is sanctioned with jail from 06 months to 02 years and with a monetary fine between 2500000 and 1000000 Algerian Dinars, or with one of the two(4) . In all cases, the invention must be industrially exploitable to get the patent. As soon as the patent is issued, the inventor becomes the

owner of the invention with the full right to monopolize his invention in the way he sees suitable to his interest without harm to the social interest. However, this right is not absolute because the Legislator linked it to the necessity of exploiting the patent. Hence, the problematic we attempt to answer is:

The inventor's right on his invention is an ownership in the limits of law, not an absolute one. Thus, what are the legal limits of the right of the inventor's ownership of his patent? The study shall use the analytical method and rely on the comparative jurisprudence and justice due to the similarity between the articles. We shall answer the problematic according to the following outline:

- The 1st chapter: the legal nature of the commitment to use the patent.
- The 2nd chapter: the legal effect of violating this commitment.

Chapter I: the legal nature of the commitment to use the patent:

The commitment to exploit the patent by the inventor and anyone to whom the right is transferred is related to the society's interest because each invention, regardless its nature, aims at achieving the interest of the inventor and the interest of the society. If the exploitation is the right of the inventor to guarantee his interest, it is on the other hand a commitment(5) . The question here is what is the legal basis for all this? And what are the types of exploitation?

3- The basis and conditions of the commitment to exploit the patent:

Jurisprudence disagreed(6) about the basis of the commitment to exploit the patent. Some jurisprudents base on the economic nature, some base on the social nature, while the majority base on the legal side as detailed in the upcoming lines.

First: the legal basis of the commitment to the exploitation of the patent:

The invention, regardless its nature, can achieve the interest of the inventor and that of the society. The commitment to exploitation is just a tool to create balance between the two interests because the owner of the right can monopolize the exploitation of his invention. The commitment disallows any other part to exploit the patent without license; otherwise the part shall be sued for imitation(7) .

If the exploitation of the patent has the concept of the right for its owner, it is at the same time a commitment that leads to legal outputs

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if the commitment is violated. Hence, the legal protection of the patent has no importance if the invention is not exploited on behalf of the society(8) .

The jurisprudence disagreed about the legal basis of this commitment because some made it economic, some others made it legal, while some others related it to the society's requirements due to the inventor's relation with the society(9) . We believe that the legal basis of this commitment is the theory of abuse in the use of the civil rights(10) .

The exclusive right generates a main effect that is disallowing the non-holder of the patent from exploitation. The inventor commits himself to start exploiting the patent in return for the legal protection. In case he neither exploits it nor allows the other, he is considered abusing in the use of the prohibition right. This does not only harm the other, but the society as a whole(11) .

Second: the conditions needed for the achievement of the exploitation:

The Legislator did not identify a meaning for the exploitation that binds to the patent holder. Rather, the Legislator just imposed exploitation on the patentee. The disrespect of this commitment results in the compulsory licensing. According to the jurisprudence, the conclusion here is the necessity of the real application of the invention in the state where the inventor gets the patent(12) . The patent holder must respect a set of conditions for the valid use of exploitation. The conditions can be summed up mentioning:

a. Industrializing the invention: this means exploiting the patent industrially through production because importing or buying it to be resold is not enough; rather, the production of the invention must take place in the state whereby it is in force because monopolizing the exploitation that is not accompanied by production does not meet the social function of the industrial patent rights inside the state that grants the exclusive right(13) .

b. The exploitation must be enough and serious: this means that the production must cover the needs of the national market as provided by the legal texts that regulate the compulsory licenses mainly Article 38 of Ordinance 03-07 that provides that the compulsory license is not exclusive and aims at supplying the national market.

It is possible to claim the compulsory licenses when the exploitation is not enough and does not satisfy the needs of the national market.

4- <u>The types of exploitation</u>:

The exploitation of the patent may be by its owner. Besides, it can be by the rest after the approval of the inventor.

First: the exploitation of the patent holder:

This is among the most important types of exploitation. It is when the inventor manages to provide the material tools to industrialize his invention and transform it from an idea into a reality that generates profits for him and allows him to attract the labor force and develop the economy because it is not important to grant patent to the inventor to protect his invention if it is not exploited(14) .

Furthermore, the exploitation of the intention by the inventor is the return the society waits for after granting him the right to exploit it during the legal period estimated at 20 years starting from the application date(15) . In return, a right is established for the society to exploit this invention through the compulsory licenses if the inventor violates the commitment(16) .

Second: the contractual license of exploitation:

If the patent holder cannot exploit it due to the absence of the funding, he may meet

his commitment in the following cases:

a. The participation by the patent as a share in the oundation of a company:

Back to the general provisions of the commercial companies, the patent can be provided as a share in the capital of the company. In this line, it can be provided for ownership or utilization (17) . If it is provided for ownership, this means that the patent moves to the company. Hence, the provisions of sales are applied on it save what is related to the price. Moreover, the company becomes the real owner of the patent with a commitment to exploitation. In return, the patent holder gets the quality of partner and bears the outcomes of the project(18) .

On the other hand, the patent can be provided for utilization for a specific period. In this case, the patent holder keeps the ownership and the company gets the right to utilize it during the period agreed upon. For the jurisprudence, this is like a rent that takes place through the

license contract because it grants the company the right to utilization in return of granting the quality of partner for the inventor(19) .

Nevertheless, in this frame, the difficulties related to the estimation of the value of the patent provided for ownership or utilization differ. This requires the intervention of the shares representative as an external body for control and supervision to estimate the shares provided either during foundation or for increasing the capital of the company to protect the interest of the company from the abusive estimation of the shares and to have a real estimation of the shares due to the limited liability of the partners(20) .

b. The contractual license to exploit the patent:

The patent holder may waive his ownership of the patent and license other parts to exploit his invention(21) for a specific period of time for a return. On this basis, the licenser keeps the ownership of the patent and just waives the right to the real use and exploitation. In this context, he gets back the rights when the period agreed upon in the license is due. The comparative justice considers the contractual licensing as a rent contract(22) ; it is acceptable to consider this legal adaptation. Nevertheless, if the period of the license is not specified, the contract is valid for the period of the validity of the patent subject to contract(23) ; i.e, for a period of 20 years, and the patent becomes a public property after this period.

A part of the jurisdiction considered that the license is a contract that binds the patent holder to grant the right to use the patent, or some parts of it, to the licensee in return of paying a sum of money(24) . This pushes us to raise the following question: do the contract and license have the same concept? From Ordinance 03-07 on the patent, we find that the Legislator added the contractual nature to the license to distinguish it from the compulsory license. Therefore, the license is issued by the owner or the competent authority. If it is the result of an agreement, it is called contractual. On the other hand, it is compulsory when the patent holder does not exploit the invention.

b.1- The license to exploit the patent between the consensual and the formal:

The formality in the contractual license is just evidence if a disagreement takes place. Thus, it differs than formality for the establishment and results in a null and void behavior. However,

paragraph 02 of Article 36 provides that the writing is compulsory but did not clarify whether it is for evidence or establishment.

Nevertheless, it is likely that the contractual license for exploitation has a big importance because the legal positions of the owner and the licensee shall be determined and because the law provides that this contract shall be part of the formalist contracts, not the consensual. This means that the contract must be evidenced with writing and be signed by the contract parts. Besides, it must be registered at the Algerian national institute for the industrial patent in return for organizational fees(25) . Back to Article 36 of Ordinance 03-07 on the patent, the Legislator provided for two types of formality:

- A formality for the validity of the behavior that manifests in the necessity of writing despite that the Legislator used the term condition not element. Besides, the Legislator does not consider the contract as void if this element is not met. As for the compulsory formality, there is no text that provides for it(26) .
- The license restriction in the patents record for the validity of the disposition facing the others.

The license to exploit the patent, either to an ordinary or moral person or as a share in the foundation of a company for utilization, is subject to the general provisions of the rent in the civil law with the application of the rule of the particular benefits the public(27) . The licensee must exploit the patent; otherwise the contract is void(28) .

b.2- Types of licenses:

The contractual licenses can be divided according to the authority of the licensee(29) into two types:

–**The absolute license:** the owner shall not grant licenses of the same patent, but can exploit the patent in person.

–**The simple license:** the patent holder can grant license of exploitation to many people. This type is very common and achieves a common benefit for the holder and the benefiters in various states.

In addition to what has been said, the license must guarantee the prerogatives granted to the licensee either granting the invention, industrializing it, trading it, or using it for production in order to protect the owner and the benefiter at the same time. Back to Article 37-2 of Ordinance 03-07 that is an application of the theory of the void contract, it clearly provides that the provisions of the contract related to the license, not the license per se, are void if their use might

cause harm to the competition in the national market. All the conditions that hinder the exploitation are void, and the effect does not reach the license contract(30) .

b.3- The legal positions of the two parts of the contractual licenses:

The rights and commitments of the patent owner are:

- The right to monopoly of the industrial exploitation of the patent because he is the owner and because he did not waive it.
- The right to royalties which is the financial return from the utilization of the patent. It may be a lump-sum amount determined when granting the license.
- Commitment to deliver: the patent owner must deliver the full patent with its appendices to the licensee and enable him to get detailed illustrations and drawings of the invention and all the documents that show how to exploit it. In this context, we have to ask if the patent owner is obliged to enable the license of the courtesy, decorum, and improvements in the absence of an agreement. The courtesy and decorum are not important elements of the patent. Thus, the owner is not obliged to deliver them to the licensee. However, from another side, we find that the patent owner had better transfer the courtesy and decorum to the licensee because they are related to the utilization of the patent. As for the improvements, it is necessary to distinguish the previous and the later. If the 1st does not raise any issue because it is a part of the full exploitation of the patent, the problem lies within the 2nd. According to the jurisdiction, the owner is obliged to provide all the improvements that allow the exploitation of the patent; otherwise, he would break the general principles of the law that oblige the renter to reduce and maintain the rented item(31) .
- The guarantee commitment: the owner guarantees to the licensee the utilization of the patent. On this basis, he shall not make any personal, material, or legal offense, or by the others(32) . In addition, the owner commits to guarantee the hidden defects that hinder the exploitation of the patent by the licensee; i.e. the invention must be exploitable. Nevertheless, this does not imply the owner's responsibility for the commercial value of the product or the profits in case of marketing(33) . As for the commitment to pay the taxes on the patent, they are assigned to the patent owner unless there is another agreement(34) .

As for the commitments of the licensee, they can be summed up mentioning:

- Commitment to pay a financial return agreed upon as a return for the exploitation of the patent. It can be determined in a global or periodical way, or with a share of the profits. On the other hand, if the licensee does not pay the costs, the license is void because it violates the contractual commitment.
- The licensee must keep secrecy because he must not transfer the technology to the others. Hence, he must exploit the patent in person and its related improvements. Moreover, he must not make implicit license contracts unless there is an agreement that allows this(35) .

Chapter II: the sanction of violating the exploitation commitment:

As previously mentioned, the commitment to exploit the patent is the real industrialization of the invention inside the state. The Legislator did not explicitly provide for the compulsory exploitation in a specific Article. Rather, we infer this from the content of Article 38 of Ordinance 03-07 on the compulsory license which explicitly provides in the 3rd paragraph that it is not possible to grant compulsory licenses unless the benefit is achieved. This Article shows that the Legislator considered the non exploitation, or the insufficient exploitation, a cause for the compulsory licenses. Thus, if the patent owner does not exploit it, or does in an unsufficient manner, it is possible to grant the non contractual compulsory licenses. In this context, importing from another state where the patent owner started industrializing the invention is not considered as a real exploitation(36) because the industrialization must take place inside the state that grants the patent(37) .

Thus, the condition of the committment to exploitation refers to the sufficient exploitation to satisfy the needs of the national market. The seriousness and efficiency of the exploitation must be estimated in the light of the needs of the society in the state of the patent(38) . In this context, part of the jurisprudence considered that the committment to exploitation under question is the committment that has an importance that leaves no space for fraud or formal exploitation(39) . On the other hand, part of the jurisprudence(40) saw that the committment to exploit the patent is a fatal result of the legal protection of the inventor who

commits to exploiting the patent industrially on behalf of the society in a sufficient way regarding the quality and the quantity. Otherwise, the compulsory licenses shall be granted to the others. Besides, the committment to the exploitation is related to the patent per se, not to its owner. If its ownership is not proven, it moves with the committment to exploitation such as the case of not providing the patent as a share in the foundation of a company ; where the committment to exploitation moves to the company. Violating the commitment to exploit the patent results in the compulsory licensing or the forfeiture.

1- <u>The compulsory license for not exploiting the patent</u>:

Allowing the rest to exploit the patent without the approval of its holder is a violation of the exclusive right as a private interest of the inventor. The Legislator issued a restriction because the compulsory license as a sanction is established only when the patent owner does not meet his commitment to exploit. In this case, the compulsory license takes place to protect the public interest(41) . This means that the right to the patent is a system that takes into consideration the public interest without harm to the private interest of the inventor(42) .

Therefore, we can define the compulsory license as the sanction taken by the state for the abuse of the patent holder in using his exclusive right. Or, it is the license issued by the competent authority to exploit the invention after the patent holder fails to get a contractual license with fair conditions(43) . The Legislator organized this by Article 38 of Ordinance 03-07. He allowed the interested parts to apply for a compulsory license from the Algerian National Institute of the Industrial Property for the non exploitation or the weak exploitation. This must meet a set of conditions to protect the public interest. Any part at any time can apply for this. In this context, the Legislator should have been more exact in determining the competent authority that receives application. It is probable that the National Institute of the Industrial Property(44) is the concerned one. This is a criticized point because the task must be assigned to the judicial branch mainly that the Legislator explicitly provided for the existence of competent commercial courts in charge of the disputes over the copy rights. In the same vein, the text should have at least provided that the decision to grant the compulsory license can be appealed at the competent court(45) .

To get a compulsory license, the following conditions must be met:

a. The patent application must exceed 04 years or the date of issuing the patent must exceed 03 years. The competent authority applies the maximal deadline(46) because it is the most valid for the interest of the inventor. The Legislator did not focus on the case of the suspension of the activity because he neither provided for the possibility or impossibility of granting the compulsory license nor showed its deadline(47) . It would be better to add the statement "starting from the date of the activity suspension" to cover the cases where the invention is not fully exploited or is insufficient.

b. The applicant for the compulsory license must prove he delivered an application to the patent holder and did not get a contractual license with fair conditions(48) . This embodies the concept of the abuse in the exclusive right by the inventor(49) . Nevertheless, the evidence must be by the applicant of the compulsory license not the patent holder. The rationality of the conditions offered by the applicant to the patent holder and their suitability to the importance of the invention, regarding the costs and economic efficiency(50) , are subject to estimation. The latter is part of the authority of the judge; therefore, it must be assigned to him as previously mentioned(51) .

c.The unexploitation must be proved to be for no reason. Hence, if the patent holder proves that he is making serious preparations to exploit the patent such as building factories, making supply contracts of the raw materials, importing the necessary machines etc, he will be acquitted from the charge of unexploiting the patent. Nevertheless, the seriousness of the justification must be taken into consideration in all cases.

d. The applicant must provide the guarantees that prove his ability to exploit the patent(52) and supply the national market. The compulsory licenses are not exclusive and, thus, the patent holder may exploit them. Moreover, the compulsory licenses may be the subject of contractual licenses or other compulsory licenses(53) .

The compulsory licenses are granted for a suitable compensation regarding their economic value(54) . In this line, the duration and conditions must be specified. The effect takes place since the date of delivery(55) . The identification of the economic value of the patent raises many problematic related to the nature of the funds or in determining the criteria followed in the process of determining the

value; whether it is the economic criteria that is based on the expected price, the marketing value in the field of the techniques, or the profits it shall make(56) .

Since the Legislator did not identify the part that can receive appeals, it is likely that the patent holder may, in all cases, appeal about the compulsory license at the level of the competent judicial authority, namely the commercial courts, which provide a primary rule that can be appealed in the judicial councils(57) . Back to Article 48 of Ordinance 03-07, it explicitly provided that the compulsory licenses are not exclusive and, thus, more than one compulsory license can be granted.

In the end, we must point out that the compulsory licenses granted to the others do not aim at harming the patent holder as much as they aim at benefitting the society from the patent(58) that had not been exploited by the inventor. The compulsory licenses for not exploiting differ than the compulsory licenses for correlation that emerge in the case of having two inventions for two different people when we cannot exploit the former invention before the later and vice versa(59) . Article 47 of Ordinance 03-07 specified the conditions of this license namely the correlation and necessity. Moreover, the compulsory licenses are granted to the two parts.

2. <u>The forfeiture as a result of the non exploitation</u>:

It is the most dangerous case the inventor may face because he loses the legal protection and the ownership of the patent. The Legislator regulated this in Article 55 of Ordinance 03-07 on the patent saying that if two years pass from granting the compulsory license and there is still non exploitation, or an unsufficient one, due to causes related to the patent owner, the competent justice may, based on the demand of the competent minister after consulting the minister of the industrial property, rule the forfeiture.

This text hows that the violation of the commitment to exploitation, for the inventor or the compulsory licensed, leads to a legal sanction as it is a compulsory license for the first and a forfeiture for the second. The forfeiture results in the end of the exclusive right, and the transfer of the invention to the public ownership. Thus, anyone can exploit the patent without any condition, restriction, financial return, or legal protection. We must point that the forfeiture as a sanction has two types. The forfeiture for not exploiting the patent and the

forfeiture when not paying the fees. The first is subject to the discretion of the comptent judicial part. The forfeiture conditions are:

a. The unexploitation of the invention leads to the forfeiture while the weak exploitation may lead to the compulsory license. Therefore, the continuous non exploitation of the patent by the inventor and the compulsory licensed may be a cause for the forfeiture if the other conditions are met.

b. The forfeiture should be preceded by a compulsory license. Moreover, two years must pass without exploitation. This means that the forfeiture is the result of the unexploitation by the inventor or even the one who got a compulsory license.

c.There is no forfeiture without a rule by the competent judicial branch based on an order from the competent minister and after consulting the minister of the industrial property. It is likely that the competent part is the established commercial courts.

From what was said, we find that the Legislator escalated the sanction resulting from non exploiting the patent in the granting state. Th first is the compulsory license followed by the forfeiture to the public property.

Conclusion:

From Ordinance 03-07 on the patent protects the exclusive right for the patent owner during the patent period estimated with 20 years starting from the application date(60) . Each exploitation without the consent of the patent owner results in penal and civil liabilities(61) . Nevertheless, the right of th patent owner is not absolute as it is linked to his commitment to exploiting the patent himself or through the contractual licenses. Otherwise, he bears the sanction that manifests in the compulsory license or the forfeiture.

From this study, our findings show that:

1.It is necessary to enshrine the right to the information through digitalizing the sector so that any investor can know the patents subject to forfeiture by the force of law or a rule and the patents that are exploited. Moreover, proving the unexploitation must be made by the competent body not the applicant.

2.It is necessary to review Article 38 of Ordinance 03-07 and reduce the deadline of the compulsory license to two years of the patent date because four years kill the economic value of the patent. Moreover, it

is necessary to provide for the compulsory license in case of exploitation suspension.

3.It is necessary to review Article 55 of Ordinance 03-07 that assigned the competent minister to be the forfeiture plaintiff in case of non exploitation. It is better to use the expression "anyone with interest after consulting the competent body" i.e., the Algerian National Institute of the Industrial Property, mainly that the Legislator identified the forfeiture conditions.

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