

Section 3

“How It Works: Rights and Infringement”

Chapter 19

The Basics of Enforcement**Does patent protection guarantee that my innovation will be safe from infringement?**

Unfortunately no. Since it's not a crime to infringe a patent in the US, there is no government agency or prosecutor that will go after those dirty infringers. This is the sole responsibility of the patent owner. No one is going to help enforce the rights of the inventor or entity and the patent right therein.

This is why most patent holders hire a patent attorney to perform infringement analysis. They want to keep tabs on the marketplace and any possible infringement upon the claims of their patent right.

To begin this analysis, one of the first steps the patent attorney will do is a thorough examination and analysis of the claims. As I have repeated, the claims of the patent are its heart. This analysis will look at the claims of your patent and then carefully at the accused infringer's activities. Whether product or service, each or any of those commercially sold items that the alleged infringer is offering,

will be analyzed against the claims. If in fact the claims are being infringed upon, the patent attorney will issue notice letters or cease-and-desist letters regarding certain activities in the market place.

Having to file a lawsuit in federal court to stop an infringer is the worst case scenario and last resort. The first step to taking down an infringer is a notice or cease-and-desist letter. These letters describe in very specific detail what parts of the infringing body's activities are actionable. The more specific, the better. If the infringer sees that the patent holder has done their homework, that their attorney has been scrutinizing each of their activities and highlights precisely which claim and what language is being infringed on, more often than not the infringing party will comply and cease their activities. Usually responding with something like, "Oh, I'm sorry. I didn't realize it."

Next, they will likely either shut that part of their business down or to come to the negotiating table with the inventor and negotiate terms to license the rights. It can be a winning situation to settle for both parties. The inventor gets awarded for their invention, and to the infringer gets to continue being in business—assuming that they can afford to pay the royalties and the license fee **ALONG** with making a profit.

On the other hand and as I alluded to earlier however, the dispute may come down to a court case. This is rare, but infringers sometimes decide to deny their wrongdoing outright and say, "Oh no, I'm not infringing on that patent."

Dealing with these sorts of cases requires a lot more effort.

Although patent litigation is outside the scope of this book, it is very important to retain patent counsel in the event of any litigation.

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Infringement and Intent

It does not matter if a party intended to infringe or if they were altogether unaware that the patent existed. They are infringers both, just as liable under the civil rule: whoever without authority makes, uses, offers to sell, or sells any patented invention within the United States or imports it into the United States infringes the patent.

That's the law and it's pretty clear: there is no intent requirement.

Still, this is not to say that intent NEVER matters. For that reason, I'm going to dig into the law just a little bit more here.

There are more than just the direct infringers. There are what's called **contributory infringers**. Contributory infringement arises when a company, well, contributes toward the infringement. For instance, a widget that is being produced has a handle and a spinning top. The manufacturer makes the handle, but not the top. They only make a mold for the spinning top. It is the job of another manufacturer to make the top itself and then connect it to the handle.

The second manufacturer is a direct infringer. The first manufacturer is a contributory infringer. They haven't made the top per se, but they DID enable another entity to manufacture it. It's still infringement, just not in a clear, direct way. Therefore, in these cases, the courts have said that in order to be liable for infringement, the accused must have intended on it. In other words, the contributor must have had a certain amount of knowledge of the patent to be found liable.

In the case of the top mold manufacturer from the example, it could very well be that before they gave that mold and handle to the second manufacturer they knew that there was a patent on the part. It's almost at issue why wouldn't they just make the top. Were they were trying to be smart about it? Perhaps they were trying to avoid liability by simply making the mold for the top. That's exactly what this law was intended to prevent: those who exploit loopholes and skirt the law.

Another case in which intent is a factor in liability is known as willful infringement. A party is willfully infringing when they have been put on notice by the patent owner, yet have not stopped their infringing activities. Now, going back a chapter or two, when a patent attorney, on the inventor's behalf, gives a notice or provides a cease-and-desist letter that essentially says, "Hey, you infringer, you

should stop selling that widget because we have a patent on it,” and if that party reads that letter and says, “Whatever,” and sells anyway and doesn’t stop at all—they are willfully infringing.

This is important because, according to the law, if willfulness can be proved to the court, then the infringing party will also owe treble damages. No, not trouble, even though that word is also very fitting. Treble is the word. It can mean double or three times the amount of damages that would be awarded under a direct infringement. What’s more is that they also have to pay the attorney’s fees for the inventor.