

FREEDOM TO OPERATE SEARCH

It is irrefutable that conducting a freedom to operate search, also known as “infringement search”, before commencing trading in Indonesia is a very important strategy to avoid the possibility of infringing patent rights in Indonesia. This type of search is essentially a risk assessment exercise, designed to manage the risks associated with exploiting technology that may infringe third party patents. This search is best conducted with a specific product in mind, and it is important to conduct it as early as possible in the product development and distribution process.

Patent infringement is the commission of a prohibited act with respect to a patented invention without permission from the patent holder. Permission may typically be granted in the form of a license. Patent infringement in Indonesia is regulated in Article 130 of the Indonesian Patent Law No. 14 of 2001 which stated that “*any person who deliberately and without rights infringes the rights of a Patent Holder by committing any of the acts as referred to in Article 16 shall be sentenced to imprisonment of at most 4 (four) years and/or a fine of at most Rp. 500,000,000.00 (five hundred million rupiahs)*”.

The definition of patent infringement in Indonesia typically includes *making, using, selling, importing, or renting the patented invention without permission from the patent holder* as referred to in Article 16 paragraph (1) of the Indonesian Patent Law No. 14 of 2001.

The scope of the patented invention or the extent of protection is defined in the claims of the granted patent. It is the terms of claims that inform the public of what is not allowed without the permission of the patent holder. Patents are territorial, and infringement is only possible in a country where a patent is in force. Therefore, if a patent is registered in Indonesia, only persons or legal entities domiciled in the country are prohibited from making, using, selling, importing, or renting the patented item. The scope of protection may vary from country to country, and each country may have different patentability requirements and procedures in examining the requirements. The above reasons make a patent in a specific country difficult to have the same level enforceability in another country.

Any parties which without the patent holder’s consent manufacture, make, use, sell, import or rent a patented technology during the term of the patent within the country issuing the patent are considered infringing the patent. The test for patent infringement in Indonesia requires that the infringing party's product, method or process falls within one or more of the claims of the patent. The test procedure employed involves “reading” a claim onto the technology of interest. If all of the claim's elements are found in the technology, the claim is said to “read on” the technology; if a single element from the claim is missing from the technology, the claim does not literally read on the technology and the technology does not infringe the patent with respect to that claim.

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