

# Introduction to intellectual property law commercial essay

[Law](#)



\n[[toc title="Table of Contents"](#)]\n

\n \t

1. [Table of contents Page](#) \n \t
2. [INTRODUCTION TO INTELLECTUAL PROPERTY](#) \n \t
3. [2. 0BACKGROUND OF PATENTS ACT](#) \n \t
4. [THE MALAYSIAN PATENT SYSTEM](#) \n \t
5. [4. 0ETHICAL ISSUES AND CRITISM ON PATENTS ACTS](#) \n \t
6. [5. 0CASE STUDY OF VIOLATION OF PATENT ACT](#) \n \t
7. [6. 0 CONCLUSION](#) \n

\n[/[toc](#)]\n \nINDIVIDUAL ASSIGNMENT II: INFRINGEMENT OF INTELLECTUAL PROPERTY LAW – PATENT ACT AND ETHICPREPARED FOR: DR. ALIAS BIN AZHARPREPARED BY: TENGKU BAHARUDDIN BIN TENGKU NORDINSTUDENT NO: 810308DATE OF SUBMISSION: 14 APRIL 2013

## **Table of contents Page**

1. 0 INTRODUCTION TO INTELLECTUAL PROPERTY21. 1 Patent Act 19832. 0 BACKGROUND OF PATENT ACT42. 1 Patents Act in Malaysia3. 0 THE MALAYSIAN PATENT SYSTEM64. 0 ETHICAL ISSUES ON PATENTS ACTS105. 0 CASE STUDY OF VIOLATION OF PATENT ACT126. 0CONCLUSION 16REFERENCE17

## **INTRODUCTION TO INTELLECTUAL PROPERTY**

Intellectual property (IP) is the work product of the human mind. Novels, paintings, computer programs, songs, and inventions are all examples. IP differs from other kinds of property (land, buildings, stocks, consumer goods) in several key ways. While often expensive and time consuming to generate,

<https://assignbuster.com/introduction-to-intellectual-property-law-commercial-essay/>

intellectual property can be quickly and easily copied. Unlike tangible items whose use has physical limitations, only one person can drive a car at a time; a pie can be divided into only so many slices, the number of persons who can use any one item of intellectual property is boundless. A painting hung in a museum or reproduced in art books or on the Internet can be viewed by many; a poem or song can be endlessly repeated and enjoyed; the same software program can run on computers throughout the world. The legal framework that protects intellectual property has evolved over the years, as lawmakers have sought to promote commercial progress and enrich culture by rewarding inventors and creative people for their efforts. Malaysia is member of the World Intellectual Property Organization (WIPO) and the Paris and Berne Convention which govern these intellectual property rights. Malaysia is also a signatory to the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and signed under the auspicious of the World Trade Organization (WTO). Malaysia provides adequate protection to both local and foreign investors. The ACT is implemented in compliance with the TRIPS agreement to provide a guarantee to investor in Malaysia's electronics industry and to ensure the growth of technology in the country. Malaysia's intellectual property laws are in conformance with International Standards and have been reviewed by the TRIPS Council periodically. Intellectual Property scenario more focusing on patenting trend in Malaysia, which includes the patenting process that being practiced by the Intellectual Property Corporation of Malaysia (MyIPO). In industry property includes inventions (patent) trade mark, industry designs and geographic indications. Copyright includes literary and artistic works

such as novels, poems, films, musical works, and artistic works such as drawing, paintings, photographs, sculptures and architectural designs. Rights related to copyright includes those performing artists in their performances, procedures of phonograms in recording and those of broadcasters radio and television programs. Intellectual property in Malaysia can be divided into three (3) categories which are: Patenting A patent is an exclusive right granted for an innovation, which is a product or a process that provides new technical solution to a problem. A patent is a document issued by the government office which describe the invention and creates a legal situation which the patented invention can normally be exploited (made, used, sold, and imported) with the authorization of the patentee. Trademark Trade Mark protection is governed by the Trade Marks Act 1976 and the Trade Marks Regulations 1997. The Act provides protection for registered other than its proprietor or authorized users may use illegally. The period of protection is 10 years renewable for a period of every 10 years thereafter. A mark includes words, logos, pictures, names, letters, numbers or a combination of these. Trademarks are used as a marketing tool to enable customers recognizing the products clearly and the proprietor has a right to deal or assign as well as to license its use. Industrial Designs Industrial Design protection in Malaysia is governed by the Industrial Designs Act 1996 and Industrial Designs Regulation 1999. The Act provides the rights of registered Industrial Designs as a personal property which allows by the law. The design features must be applied to an article by any industrial process or means of which the features in the finish article appeal to eye. Registered industrial designs are protected for period of 5 years which may be extended for

another 2-5 years term, providing a total protection period of 15 years. Of the three areas, patents are the most common. Although they are difficult to obtain, they hold the strongest protection. Patents are grants from the government giving exclusive rights to "make, use, and sell a product for 20 years." Their attributes include providing strong protection, and total exclusivity. Their downsides include long expensive, technical processes, and inventors must make all the details of their product known to the public. One must apply to the Federal government for a patent. Patent Act 1983 Patent Act 1983, Section 36(1) and Patents Regulation 1986 provide adequate protection in field of industrial property for local and foreign investors. The right conferred by a patent is the right to exclude others from using the invention in various ways. A patent is an exclusive right granted for an invention which provides a new way of doing something to offers a new technical solution. It also give the owner of the patent/utility the exclusives right to stop others from manufacturing, using and/or selling the owner's invention in Malaysia without the owner's consent or permission. The Patent Act 1983 provides the owner of the followings: Exclusive rights to exploit the patented invention Assign or transmit the patent To concludes license contracts The patent Act 1983 provides patent protection for 20 years from the date of register/filing subject to yearly renewal. The sole proprietor of the patent has the right to assign, right to exploit the patent invention, transmit the patent and license the use of patent. Section 60(1) of the Patent Act provides that where there is infringement, court can award damages an account of profits and/or injunction, or any other legal remedy.

## **2. 0BACKGROUND OF PATENTS ACT**

The history of patents and patent laws is generally considered to have started in Italy with a Venetian Statute of 1474 which was issued by the Republic of Venice. They issued a decree by which new and inventive devices, once they had been put into practice, had to be communicated to the Republic in order to obtain legal protection against potential infringers. The period of protection was 10 years. Patents, however, existed before the Statute of 1474. In England grants in the form of " letters patent" were issued by the sovereign to inventors who petitioned and were approved: a grant of 1331 to John Kempe and his Company is the earliest authenticated instance of a royal grant made with the avowed purpose of instructing the English in a new industry. The first Italian patent was actually awarded by the Republic of Florence in 1421, and there is evidence suggesting that something like patents was used among some ancient Greek cities. In 500 BC, in the Greek city of Sybaris (located in what is now southern Italy), " encouragement was held out to all who should discover any new refinement in luxury, the profits arising from which were secured to the inventor by patent for the space of a year." In October 1845, Massachusetts Circuit Court ruling in the patent case Davoll et al. v. Brown., in which Justice Charles L. Woodbury wrote that " only in this way can we protect intellectual property, the labors of the mind, productions and interests are as much a man's own as the wheat he cultivates, or the flocks he rears." Similarly, Section 1 of the French Law 1791, stated, " all new discoveries are the property of the author to assure the inventor the property and temporary enjoyment of his discovery, there shall be delivered to him a patent for five, ten or fifteen

years." These exclusive rights allow owners of intellectual property to benefit from the property they have created, providing a financial incentive for the creation and investment in intellectual property, and, in case of patents, pay associated research and development costs. Economists estimate that two-thirds of the value of large businesses in the United States can be traced to intangible assets where IP-intensive industries are estimated to generate 72% more per employee than non-IP-intensive industries.

## 2. Patents Act in Malaysia

The Patents Act 1983 and the Patents Regulations 1986 govern patent protection in Malaysia. An applicant may file a patent application directly if he is domicile or resident in Malaysia. A foreign application can only be filed through a registered patent agent in Malaysia acting on behalf of the applicant. Similar to legislations in other countries, an invention is patentable if it is new, involves an inventive step and is industrially applicable. In accordance with Trade Related Aspects of Intellectual Property Rights (TRIPS), the Patents Act stipulates a protection period of 20 years from the date of filing of an application. Under the Act, the utility innovation certificate provides for an initial duration of ten years protection from the date of filing of the application and renewable for further two consecutive terms of five years each subject to use. The owner of a patent has the right to exploit the patented invention, to assign or transmit the patent, and to conclude a licensed contract. Under the scope of compulsory license, TRIPS allows for importation of patented products that are already in the other countries' market (parallel import). The Government can prohibit commercial exploitation of patents for reasons of public order or morality. The Act was amended to include provision for Patent Cooperation Treaty (PCT) and to

allow importation under the scope of compulsory license. Malaysia has acceded to the PCT and effective from 16 August 2006, the PCT International Application can be made at the Intellectual Property Corporation of Malaysia (MyIPO).

## **THE MALAYSIAN PATENT SYSTEM**

Prior to October 1, 1986, protection of patents in Malaysia was effected under the following:(a)The Registration of United Kingdom patents Ordinance 1951;(b)The Patents Ordinance of Sarawak;(c)The Registration of United Kingdom Patents Ordinance of Sabah; and(d)The Patents (Right of Government) Act, 1967. These Ordinances/Acts was repealed with the coming into force of the Patents Act 1983, the Patents (Amendment) Act 1986 and the Patent Regulations 1986 as amended by the Patents (Amendment) Regulations 1997. This Act gives protection to inventions which may relate to a product or a process. Patentability InventionsAn invention is patentable if it fulfill with three basic requirements:-Novelty, (i. e. newness)Involves an inventive step, & (i. e. would not have been obvious to a person having ordinary skill in the art); &Industrial applicable (i. e. it can be made or used in any kind of industry including agriculture). Non-Patentability InventionsSection 13(1) of the Malaysian Patent Act also provides exclusion from patentability certain inventions. They are:- discoveries, scientific theories and mathematical methods; plant or animal varieties or essentially biological processes for the production of plants or animals, other than man-made living microorganisms, micro-biological process and the products of such micro-organism processes; schemes, rules or methods for doing business, performing purely mental acts or playing



games; methods for the treatment of the human or animal body by surgery or therapy, and diagnostic methods practiced on the human or animal body:

What are the rights of a patent owner? The right conferred by a patent is the right to exclude others from using the invention in various ways. Section 36(1) of the Patent Act 1983 provides that the owner of a patent shall have the:- Exclusive rights to exploit the patented invention, Assign or transmit the patent, and To conclude license contracts

Exploitation of a patented invention means: making, importing, offering for sale, selling or using the products; stocking such product for the purpose of offering for sale, selling or using; in respect of a patent which is a process: (i) using the process; (ii) doing any of the acts referred to the above

Patent Application and its procedures

The process of obtaining a patent starts with the writing of the specification which describes and precisely defines the invention. A first patent application is normally filed in the country in which the invention is made. Under sections 23A and 30A of the Patent Act 1983, the government retains the right to prohibit the publication of details of an invention, whether here or abroad for reasons of national interest or security. This provision is normally limited in its application to inventions relating to the defense industry.

However, it should be aware that patent applications relating to local inventions must not be filed overseas simultaneously with filing at the Malaysian Patent Registration office, or without any filing in Malaysia, unless prior written authority is obtained from the Registrar in Malaysia. The patent application has three basic elements: application form; specification; and filing fee. These three elements must all be filed together in order to secure a filing date for the application. After filing, an application is

subjected to three different types of examination, in the following order:

- examination as to whether the requirements for a filing date are met;
- preliminary examination as to be completeness of the documents and their suitability for reproduction later on when the patent is published;
- and substantive examination as to whether the application relates to a patentable invention and discloses it in adequate detail and clarity. The formal examinations (i) and (ii) are performed automatically, whereas the substantive examination (iii) is made only upon specific request and payment of a further official fee, within a certain time limit, (i. e. 2 years from the filing date of the application). The complicated and strict legal requirements for preliminary and substantive searches and examinations before grant of a patent require a lapse of time of three to five years before such grant.

Grant When the Registrar is satisfied that the application complies with the requirements of the Act, he shall grant the patent.

Duration of Patent The period for patent protection is 20 years from the date of filing [Amend. Act 2000], subject to yearly renewal. The proprietor of the patent has the right to assign or to license the use of a patent. There are certain limited circumstances, which are consistent with international norms, where compulsory licensing, subject to payment of royalties, are issued. It should be noted that obtaining a commercially valuable patent or certificate can be a complicated process.

Infringement Any person who contravenes the rights of the owner of a patent is, subject to various provisions, liable to proceedings for infringement of a patent brought by the patentee or licensee in the court. Section 60(1) of the Patents Act provides that where there is infringement, the court can award damages, an account of profits and/or an

injunction, or any other legal remedy. OffencesThe following are offences under Part XIII the Act and all are punishable by a fine not exceeding RM15,000 and/or imprisonment for up to two years: 1)making a false entry in the Register, or making a writing purporting to be a copy of a Register entry or producing such a false writing in evidence (section 63); 2)falsely claiming that any product or process disposed of for value is patented or falsely representing that any article disposed of for value is subject to a patent application, provided that where a patent or patent application has existed, sufficient time has expired since the patent or application ceased to exist that it is unreasonable to be still marketing a product bearing an indication of the patent or application (section 64 and 65); 3)Falsely representing an official connection with the Patent Registration Office (section 66); and4)Carrying on business, practicing, acting, etc as a patent agent without being registered under the Act (section 66A). It is also an offence under section 80(1)(c) and (2) to fail, without lawful excuse to produce any documents requested by the Registrar. In this case, the penalty on conviction is a fine not exceeding RM2,000 and/or up to six months in jail. The importance of supplying any document asked for by the Registrar should always be remembered when a client is reluctant to disclose requested information about search and examination results in corresponding foreign patent applications. EnforcementThe Minister has the power to authorise any public officer to exercise certain powers including the power of arrest and the power of search with seizures etc, with a warrant and to examine witness in regard to offences under the Act. InvalidationSection 56(1) & (2) of the Patents Act provides for any aggrieved person to institute Court proceedings

against the Owner for invalidation of the patent on the following grounds:

(a) That the invention was not a patentable invention within the meaning of the Act; (b) That the descriptions or claim does not comply with the requirement of the Regulations; (c) That any drawings which are necessary for the understanding of the claimed invention have not been furnished; (d) That the right to the patent does not belong to the person to whom the patent was granted, or (e) Incomplete or incorrect information has been deliberately provided by the applicant or his patent agent in relation to a request for full substantive examination. Utility Innovation Apart from protection for patents, the Patent Act also grants protection to utility innovations. A utility innovation is intended to provide intellectual property rights for those incremental and lower level inventions that would not be sufficiently inventive to qualify for patent protection. It does not required to meet the test for inventive step, as with a patent, but only need to be " new" in Malaysia. You can include only one claim in your application for utility innovation, as opposed to an unlimited number of claims in a patent application. The duration of a certificate for a utility innovation shall be 10 years from the filing date of the application [Amend. Act 2000] . It can be extended for 2 further periods of 5 years.

#### **4. 0 ETHICAL ISSUES AND CRITISM ON PATENTS ACTS**

Recently, an increasing number of patent lawsuits have been initiated by entities who do not manufacture products themselves - including universities, individual inventors, failed businesses, and speculators who purchase patents from others. These patent holders wait until another brings

a product to market and then jumps from under the bridge to demand a toll. Patents Acts could sometime be seen as harming health, preventing progress, and benefiting concentrated interests to the detriment of the masses. Patent acts also have been criticized for promoting monopoly in the computer software industry and business methods patents. Patent monopolies are believed to drive innovation but they actually impede the pace of science and innovation, the current patent system in which anyone who writes a successful software programme is sued for alleged patent infringement, highlights the current system's failure to encourage innovation. There is also criticism because strict intellectual acts can inhibit the flow of innovations to poor nations such as the internet, mobile phone, vaccines, and high-yielding grains. Many intellectual property rights, such as patent laws, arguably go too far in protecting those who produce innovations at the expense of those who use them. Some have raised ethical objections specifically with respect to pharmaceutical patents and the high prices for medication that they enable their proprietors to charge, which poor people in the developed world, and developing world, cannot afford. Critics also question the rationale that exclusive patent rights and the resulting high prices are required for pharmaceutical companies to recoup the large investments needed for research and development. Other critics claim that patents reward and abet misplaced pharmaceutical R&D priorities, which they describe as being directed to creating incremental improved treatments for diseases prevalent in wealthy countries and away from diseases that cause devastation in the developing world. Some libertarian critics of intellectual property have argued that allowing property rights in ideas and

information creates artificial scarcity and infringes on the right to own tangible property. Imagine that we're living in the time where men still lived in caves, a bright man decided to build a log cabin near his crop and others start to think that it is a good idea. According to IP advocates, that bright man has the right to prevent others from building houses on their own land, with their own logs, or charge a fee if they do build houses. Other criticism concerns the tendency of the protections of intellectual property to expand, both in duration and in scope. The trend has been toward longer protection term and the inventors have sought to bring more items under the protection. Academicians are now arguing on the Intellectual Monopoly Privileges (IMP) aimed at creating an international policy as framework for governments to balance the intellectual property law.

## **5. 0CASE STUDY OF VIOLATION OF PATENT ACT**

5. 1Austal Ships Sales Pty Ltd v Stena Rederi Aktiebolag [2008] FCAFC 121 (3 July 2008)In a recent decision, the Full Federal Court presided over the next instalment in the long running dispute between Stena and Austal Ships regarding multi-hulled vessels. The decision was an important one in regards to the Court's approach to issues relating to Section 40 of the Patents Act 1990 ' the Act' and is one of a number of current high profile cases decided in favour of the patentee. At first instance, the respondent ' Stena' alleged that a group of ship building companies, collectively known as ' Austal', had infringed their Australian Patent No. 648624 (' the patent'), entitled ' A Hull Structure for Multi-Hull Ships'. Austal, by cross application, sought revocation of the patent on the grounds of lack of novelty, obviousness and/or failure to comply with the requirements of Section 40 of the Patents Act 1990 ' the

<https://assignbuster.com/introduction-to-intellectual-property-law-commercial-essay/>

Act' that the claims be clear. Tamberlin J held at first instance that one of Austal's vessels infringed Stena's patent while rejecting Austal's cross-claim for revocation. On appeal, Austal sought to overturn this decision, maintaining the objection to the patent for lack of clarity as well as the decision on infringement. The case in general turned on the construction of the claims, and, in particular, whether the claims were clear. It was argued by Austal that the terms 'substantial portion' and 'narrow waisted' of claim 1 could not be resolved by a skilled addressee so as to provide a commonsense assessment or understanding of the claims. Having regard to the nature of the invention that the claims of the patent sought to define, and taken expert evidence from both parties into account, the Full Federal Court concluded that the claims were clear. The Court placed emphasis on the proposition that the clarity of a patent involves a matter of degree and for that reason any distinction that is precise must be an arbitrary restriction on the inherent variability of the feature, with reference to precedent case law. The appeal against the infringement finding was also dismissed. Based on an understanding of a person skilled in the art, the Court held that Austal's hull in question did not fall within the scope of claim 1 of the patent. Claim 1 required that the width of the hull continually decrease in the forward direction, whereas the width of Austal's hull increased slightly over its initial length when moving in a forward direction. Interestingly, however, the Court found that the Austal hull did fall within the scope of claim 7 (dependent on claim 1) that had the further limitation that the width of the hull is substantially constant in the sternward quarter of the vessel. Despite the dependence on claim 1, the Court found that: For the purposes of claim 7...,

notwithstanding the increase in width by 147mm, the sternward quarter of the Austal 94 was substantially constant. Based on evidence of expert witnesses from both sides, the Court determined that claim 7 was a 'true alternative' to claim 1. The Court further noted that: There is no requirement of patent law that subsequent claims narrow the scope of earlier claims, even though, as a matter of practice, this is often the case. The outcome of this case reinforces that the degree of precision outlined in the patent claims is in keeping with the understanding of a person skilled in the art.

5. 2 Case study: Hammar Maskin AB v Steelbro New Zealand Ltd

In this case the question was whether the defendant, Steelbro, had infringed a patent directed to a stabiliser for a side-lifting container trailer. The claims of that patent required, in part, that the stabiliser mechanism incorporate a support sleeve and an extension part which was said to be "moveably arranged in a bearing in the first support part ie the support sleeve". After hearing from experts for both parties, the judge in the High Court held that the description could only be read as referring to an additional element which performs the function of a bearing and, as Steelbro's stabiliser did not have that additional component, it could not infringe the claims. Hammar appealed, arguing that the word "bearing" in claim 1 was intended to convey the concept of a "state of bearing" rather than a discrete physical component. Hammar relied, in part, on the fact that, despite the word "bearing" appearing in claim 1, there was no reference in the specification to a "bearing" in the form of a discrete physical component in either the description of the prior art or the detailed description of the invention. In response, Steelbro argued that, as the meaning of the claim was clear on its face (ie, there was no ambiguity)



no reference could be made to the body of the specification. The Court of Appeal rejected that submission, stating that the claims must be interpreted in the overall context and by reference to the object and description in the body of the specification. Thus, while the Court of Appeal agreed that the phrase "in a bearing" in isolation from its context might more naturally denote a separate physical component, interpreted in the context of the specification as a whole that phrase could only refer to "bearing" in a functional sense. The Court of Appeal did not believe that that interpretation would modify the monopoly the inventor had marked out in the claim.

## **6.0 CONCLUSION**

Patents play a crucial role in the economy. The economic principles underlying the patent system have not always been well understood, especially in the courts. In part, the difficulty lies in two circumstances: first, that innovation is essentially the creation of information, which has different economic characteristics from goods, and second that the patent system, while effectively dealing with this primary problem of the special nature of innovation, nonetheless creates secondary economic problems. And in part the esoteric nature of patent law has obscured the way in which patent law doctrines deal with these secondary problems. Because patent law is so crucial to the economic system and because patent doctrines play such an important role in shaping how patent law promotes innovation while minimizing problems associated with the power to exclude, the economic role of patent law deserves greater attention from the courts. At a time when public focus on technology and the role of government in promoting it has never been higher, it would serve neither the patent system nor public policy

toward technology to obscure the role of the patent system in a thicket of technical patent law rules.