

How Inventors are protected

What exactly amounts to patent infringement? Does it require that the infringing article should look identical to a patented invention?

Does an infringement occur when there are merely slight modifications or cosmetic changes done to the patented invention?

Patent infringement in its narrow sense would amount to textual infringement, that is, the infringing article or process embodies every integer of every claim according to the strict language of the claim.

However the courts have become more reliant on substantial infringement where an infringer will not escape the consequences of infringement if he makes immaterial variations.

The question will be whether the infringing article is substantially the same as the apparatus said to have been infringed.

This “Pith and marrow doctrine” developed out of the need to protect inventors from substantial infringement as opposed to mere textual infringement.

It would be most unfair if an infringer could get away with merely adding an attachment to an invention merely for decorative purpose only!

In one of the most celebrated cases known as the *Catnic Component* case, the defendants, that is, the infringers relied on the fact that their steel lintels (a lintel is a piece of wood or stone forming the top of the frame of the window) did not infringe the patented steel lintels because the rear support member of the structure was not precisely vertical (as claimed in the patent) but inclined at a slight angle (6° to the vertical).

As illustrated (right), the mere shifting of a rear support member from a vertical position to position 6° from the vertical did not enable the infringers to get away with patent infringement!

The question in such a trial would be whether the infringing article was substantially the same as the article said to have been infringed.

A substantial infringement would be where the infringing article takes each and every one of the essential integers of the claim.

The novel features that were essential would constitute the so-called “pith and marrow” of the claim.

The question of “essential” would be determined by a person with practical knowledge and experience of kind of work in which the invention was intended to be used.

Evidence as to the meaning of words or phrase appearing in the description was admissible and will not rely solely based on the construction of the claims alone.

In deciding whether there was infringement the courts have become increasingly reliant on giving the patent specification document a purposive construction rather than a purely literal one.

As a result mere colorable evasions of the strict language of the claims will not avoid infringement.

There have been no decided cases in Malaysia that we can rely upon where there has been substantial infringement as opposed to mere textual infringement.

We can however expect the Malaysian courts to rely upon UK case law in deciding cases of infringement which have increasingly turned to the “pith and marrow” doctrine when establishing infringement and which tend to favour the purposive approach in the construction of claims rather than leaning on the literal meanings of the words contained in the claims.

It has been popular practice for industrialists to go around the world in search of new products and to come back home to manufacture the same product with slight modifications.

Some even go the extent of patenting these copied products!

These so-called inventions are in danger of being declared invalid for reasons of not being novel.

Imitation can be the most expensive form of flattery not only to the original inventors who may lose millions because of lost sales but also to the infringers who may face huge lawsuits!

Ultimately it would indeed be easier for inventors to come up with their ideas.

Who knows? It may be even better than anything else around so get those thinking caps on and start inventing!