

# The challenge and path of constructing China's patent indirect infringement system

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## Abstract

According to the "comprehensive coverage principle", the patent infringement should meet all the technical characteristics of the patent right to be established, but in practice, there is a situation, that is, to provide a patent component or implementation method of a patent step and provide assistance, or intentionally instil others to commit a specific infringement. If the perpetrator does not carry out the act controlled by the exclusive right of intellectual property, but helps or ABETS others to carry out the act controlled by the exclusive right of intellectual property, how to regulate the above behavior, there is a solution strategy of introducing the indirect infringement system of intellectual property in theory. The legitimate basis for the existence of indirect infringement system of intellectual property rights is to prevent intellectual property rights from being overhead and deep pocket rules. Based on the existing judicial interpretation, this paper summarizes the specific problems faced by indirect patent infringement in China through statistical analysis of relevant cases in practice, analyzes the rationality and feasibility of the construction of this system from the perspectives of jurisprudence and law and economics, and compares the relevant provisions of foreign countries. This paper provides suggestions and references for establishing indirect infringement clauses in the Patent Law in the future from the aspects of clarifying the nature and legislative mode of indirect infringement, the specific components of determining infringement, the liability of infringement and the causes of exemption.

## Keywords

Patent right, Indirect infringement, Inducing infringement, Fault, Legal clause.

## 1. The present situation and existing problems of indirect patent infringement in China

The "comprehensive coverage principle" is widely used as the standard for determining patent infringement in the world, and China is no exception. However, when the infringer's behavior only points to some technical features, according to the principle of comprehensive coverage, such behavior cannot be regulated by the patent law, resulting in the risk of damage to the patented product, which is an indirect infringement of patent. Although there has been a lot of discussion in the academic circle, due to the absence of legislation, it has not been formally "corrected" in our country, which leads to frequent infringements in judicial practice, but the patentee is difficult to seek relief, and the courts at all levels have different judgment standards and too large a range of discretion. Whether and how to establish the indirect patent infringement system has been discussed in China for a long time, but the patent law has not stipulated it so far. It can be said that how to regulate the indirect patent infringement is undoubtedly a controversial and particularly thorny issue in the patent legislation of our country[1].

In 2016, the Interpretation of Several Issues on the Application of Law in the Trial of Patent Infringement Dispute Cases (II) was released, alleviating the dilemma of the lack of applicable

laws and regulations in practice, and providing a legal basis for the long-standing regulation of indirect patent infringement. However, as a judicial interpretation issued by the Supreme People's Court, its validity level is obviously lower than that of the law. If China's legal system is like a building, the legislation of the National People's Congress is undoubtedly the main part, while the legal interpretation is the internal decoration of the building. If the internal decoration is carried out when the main building is not yet formed, it is tantamount to returning from white to black. Nor is it conducive to the long-term development of patent law.

### **1.1. Present situation of judicial adjudication of indirect patent infringement in China**

As of June 1, 2023, using "indirect infringement" as the keyword, a total of 1,507 cases with "indirect infringement" and "intellectual property and competition disputes" as the cause of the judgment were found in the database of China Judgment Documents Network. After excluding the cases involving infringement of online platforms and other cases that are less related to the topic discussed in this paper, a total of 84 sample cases were obtained. In terms of the number of sample cases, it is not very sufficient. On the one hand, the premise of the court's judgment is whether the parties have filed relevant appeals. Due to the lack of clear provisions in the Patent Law, when litigants file lawsuits, they are likely to think that the probability of winning is not high for this reason, so they will not choose indirect infringement as the object of prosecution, but will choose the infringement act clearly stipulated in the Patent Law to compare with the situation of their own rights being damaged, and then choose the cause with greater probability of winning the lawsuit to file a lawsuit. In the sample of cases searched, there are also cases in which the court has explained the indirect infringement of patent, but the parties have not filed the indirect infringement of patent. On the other hand, because the database is not updated in a timely manner, the cases may not be comprehensive, or some cases that have involved indirect infringement of patents but have not appeared in the judgment document "indirect infringement" are not updated in a timely manner, so these cases cannot be included in the case sample database. Although there is a problem that the number of cases is not particularly sufficient and comprehensive, the statistical analysis of limited cases can still clearly show the problems existing in the practice of indirect patent infringement cases in China, that is, how to determine the ambiguity.

### **1.2. The specific dilemma of indirect patent infringement in our country**

#### **1.2.1. The basis for adjudicating indirect infringement of patent is not uniform and the level of effectiveness is low**

In practice, courts at all levels have different legal bases for adjudicating indirect patent infringement, which are mainly scattered in the Patent Law, the General Principles of Civil Law, the Tort Liability Law and the relevant provisions of Interpretation (II). According to the different cases, the provisions cited by courts in adjudicating indirect patent infringement are also different. It is precisely because of the various adjudication bases and inconsistent adjudication standards that it is easy to form the situation that courts at different levels of the same case have different judgments, and courts in different regions of the same case have different judgment results. It is not only easy to cause judicial miscarriages, repeated appeals bring unnecessary litigation burdens to the parties, but also occupy and waste the judicial resources of the court. Further, it may even affect the motivation of the patentee to continue to carry out scientific research and innovation, which will lead to the stagnation of the innovation ability of the whole society and the weak follow-up of scientific and technological development in the long run. From the perspective of the effectiveness of the relevant judgment basis, the laws with high effectiveness ignore the indirect infringement of patents, while the most targeted Interpretation (II) is inferior to the laws formally promulgated by the legislative

department, and judicial interpretation cannot replace the special legislation in the field of patent law, which is undoubtedly a problem that has to be faced in the current judicial trial.

### **1.2.2. The nature of indirect patent infringement is not clearly defined**

Throughout the field of patent law in China, there is no clear answer on how to define the indirect infringement of patent, whether the indirect infringement of patent is a form of joint infringement, or whether the indirect infringement must be determined on the premise of direct infringement. At present, no matter the legislation or academic theories in our country have reached a consensus, so in judicial practice, courts at all levels have not formed a uniform adjudication rule. In terms of legislation, Article 21 of the Interpretation (II) includes aiding and abetting infringement into the category of indirect infringement of patents, and takes the actual infringement of patent rights by others as a condition for regulating indirect infringement, and considers that only at this time is it worthy of punishment, which is also clearly reflected in the attitude of the relevant person in charge of the Supreme Court when answering reporters' questions. Therefore, although the promulgation of Interpretation (II) provides a judgment reference for the cases of indirect patent infringement in judicial practice in China to a certain extent, its essence is to refine the joint infringement of patents, still in the scope of joint infringement, and it is not clear whether the indirect infringement of patents is independent in nature, which is not conducive to the protection of patent rights.

### **1.2.3. The liability for indirect infringement of patent is not conclusive**

Article 62 of the Amendment to the Patent Law stipulates the joint liability of the perpetrator and the specific infringer. According to the Interpretation (2), the basis for determining liability points to Article 1,169 of the Civil Code, that is, both parties bear joint and several liability. On the one hand, as for the nature of joint liability, in the previous discussion, joint liability is mainly based on the lack of independence of indirect infringement, that is, indirect infringement is still regulated by the theory of joint infringement. When the direct infringer lacks the consciousness of patent infringement, or the perpetrator does not know whether the direct infringer has such consciousness, the two parties have no intention to contact each other and do not have joint fault. At this time, the application of joint and several liability obviously violates the basic principle of tort liability; On the other hand, when the direct infringer is difficult to sanction due to objective reasons such as wide distribution, or is not regarded as an infringement at all, in the proceedings, if it is necessary to pursue joint and several liability, the parties should be added. If the patentee does not bring a lawsuit against it, the court determines that both bear joint and several liability, which is inconsistent with the principle of not ignoring civil litigation. Therefore, joint and several liability at this time undoubtedly lost the applicable space. In judicial practice, in the case that the patentee only sued the indirect infringer and won, the court generally made a vague treatment of the nature of liability in the judgment, not stating whether it bears joint and several liability, but only stating that it needs to bear infringement liability. On the other hand, the Patent Law is not clear on how to bear the liability for infringement. The current Civil Code stipulates the way to bear civil liability. In practice, there is no uniform standard for how courts at all levels determine the bearing of liability, how to provide the best protection to the patentee and maintain the balance of interests of the parties, mainly relying on the inner judgment and discretion of the presiding judge, which also hides the hidden danger of inadequate relief for the protection of the patentee. Circumstances that may lead to an appeal by a party dissatisfied with the outcome of the relief.

## **2. Theoretical analysis of indirect patent infringement**

Since a legal system exists, it should fully protect the right holder and balance the interests of the right holder and other members of society. The patent system is the same, on the one hand, by granting the intellectual labor results created by the patent right, to protect the patentee to

enjoy the benefits of its creation results, on the other hand, when the infringing person infringes on the private right, Sanctions shall be imposed in the form prescribed by the legal system. At present, the direct infringement of patent in our country adopts the "comprehensive coverage principle" as the standard to judge whether infringement[2]. At the beginning, the phenomenon of patent infringement has been effectively restrained through the existence of the direct infringement system. However, with the development and progress of science and technology, more and more new infringements that circumvent the "comprehensive coverage principle" and infringe on the rights and interests of patentees have begun to appear. If legislation is not adopted to regulate them, the interests of patentees will obviously lose their due protection. By incorporating the acts that cannot be covered by the patent infringement system into the legal system, the patentees are fully protected. The indirect patent infringement system, as a remedy after the patent right is infringed, is a passive intervention and a remedy aimed at solving the problem after the patent right is infringed. As a supplement to the current patent infringement system, by providing relief to the patentee and imposing a burden on the infringing actor, the social relationship between the patentee and the infringing actor is adjusted for a second time, so as to strike a balance between the public knowing the use of advanced technology and the protection of the rights of the patentee .

### **2.1. Indirect patent infringement analysis of the jurisprudence**

The rule of law has been endowed with different values in different times, and people's requirements for the rule of law have gradually increased with the development and progress of society, and the patent infringement system should also respond and change accordingly. In today's society, it is obvious that only regulating direct infringement of patents can no longer achieve true fairness and justice between right holders and infringers. The existence of indirect infringement makes the validity of the transaction contract lose its guarantee, the occurrence of dishonesty in the transaction of the tortfeasor reduces the security of the transaction, the equal status of the subject is obviously affected, and the original mutually beneficial and win-win relationship between the two parties of the transaction is obviously tilted to the infringer. All the above phenomena are against the requirements of modern rule of law. The indirect patent infringement system can set up the legal obligation not to infringe the property rights and interests of the patentee, determine the more detailed code of conduct for all subjects in the patent field to engage in economic activities, enhance the subject's awareness of the rule of law, more effectively protect the patentee, and fully respect and safeguard its freedom to create and develop new products within the legal scope. It gives play to the subjective initiative created by the patentee, effectively allocates, utilizes and allocates limited resources, indirectly stimulates the progress of science and technology, further promotes the prosperity of the commodity economy, and provides a stable foundation for the modern rule of law[3].

### **2.2. Legal and economic analysis of indirect patent infringement**

From the benefit of the whole society, the construction of patent infringement system also improves the efficiency of social and economic operation and promotes economic development. By regulating indirect infringement of patents and increasing infringement costs, the infringing party cannot obtain benefits in the form of illegal, and must conduct normal transactions with the patentee, so that both parties are in a mutually beneficial and win-win state, and the market transaction activities in the entire patent field will be more frequent and vigorous, and the efficiency of market transactions will be improved. However, due to the deterrent of the indirect patent infringement system, potential infringers are aware of the imbalance between infringement cost and infringement income, and the legal burden they need to bear after infringement, so they will take the initiative to eliminate such indirect infringement and reduce the occurrence of patent disputes. Judicature, the burden of handling cases has undoubtedly been reduced. Due to the small number of specialized intellectual property courts in China, as

mentioned in Chapter 2 above, the trial of indirect patent infringement cases has become increasingly complex and time-consuming. If the number of indirect patent infringement cases originally classified as difficult cases is reduced, judges can also focus on other difficult cases. The overall efficiency of trials in the intellectual property field has also been improved.

### **3. Comparative analysis of extraterritorial legislation on indirect patent infringement**

Although China has not justified the indirect infringement system in patent law at present, the case law system represented by the United States or the continental law system represented by Germany and Japan has fully affirmed the necessity of the existence of the indirect infringement system of patent, and has clarified its specific composition in the form of case law or legal articles. By comparing and analyzing the evolution and development of the indirect patent infringement system in other countries, and finally establishing the more mature system results, we also hope to get the feasible way to improve the indirect patent infringement system in China.

#### **3.1. Merican patent indirect infringement system**

Indirect patent infringement is stipulated in Article 271 of the Patent Law of the United States. As for its nature, although the specific legal provisions are not explicit, it can be seen from relevant judicial precedents that whether the indirect infringement is established depends on whether the direct infringement has occurred, that is, the United States adopts the "subordination theory" as the judgment standard, but the patentee does not need to prove that the direct infringement has occurred. Paragraph (f) also provides that the export of a direct infringement that has not yet occurred constitutes an indirect infringement if it occurs within the United States and could constitute a patent infringement. At this time, no matter whether the direct infringement occurs or not, because it is difficult to investigate abroad, it is allowed to claim compensation from the domestic provider, so as to prevent the export and stifle the direct infringement[4]. Thus, the indirect infringement system in the United States has extraterritorial effect. From the perspective of the legislative model, Article 271 (b) and (f) paragraph 1 provide for inducement of infringement, and paragraphs (c) and (f) paragraph 2 provide for facilitation of infringement. For inducing infringement, the perpetrator knows subjectively and carries out the seduction act, it should bear the corresponding responsibility. For aiding infringement, objectively, the object of the act is required to have a substantial non-infringing use, which constitutes a substantial part of the invention, and subjectively, the actor needs to know that the goods provided will play a corresponding role in the direct infringer's infringement.

#### **3.2. German patent indirect infringement system**

Different from the parallel dual legislative mode of the United States, the German patent law provides both inducement and aid infringement, but it is a non-parallel dual mode. From the perspective of the text of the article and the entire legal system, the second paragraph of Article 10 of the German Patent Law aims to regulate the exceptions not covered by the previous paragraph. When the goods targeted by the act do not belong to the provisions of the first paragraph, the second paragraph should be applied to regulate, that is, if the product involved in infringement does not meet the technical elements that help the infringement due to its nature, Then, the legislative model of inducing infringement is applied as a backstop and supplement to regulate, thus forming a legislative model of helping infringement and inducing infringement. Combined with the initial practice of regulating indirect patent infringement in Germany, it can be seen that the infringement inducement clause here is actually consistent with the provisions of Article 830 of the German Civil Code. In terms of the nature of indirect

patent infringement, the "independent theory" is affirmed. Even if the direct act is an act that is not regarded as infringement under the patent law, including the personal act without commercial purpose, the experimental act, and the related act of preparing drugs according to the prescription, the act of providing a helper still constitutes an infringement. It can be seen that the establishment of its indirect patent infringement does not depend on the direct infringement.

### **3.3. Japanese patent indirect infringement system**

Compared with the United States and Germany, the indirect infringement system in Japan adopts a different legislative model. In fact, at the beginning of the legislation, the legislative department also considered adopting a dual legislation model following the example of the United States, but in the end, the legislative department finally believed that the induced infringement can still be dealt with by Article 719 of the Civil Law, and repeated provisions are not beneficial in the field of patents, so finally adopted a single provision to assist infringement. After two amendments to the Patent Law in 2002 and 2006, the object of objective behavior has been continuously improved more comprehensively. In view of the nature of indirect infringement, "independent theory" is also the mainstream view at present. Since the Japanese patent law does not clearly require the existence of direct infringement, some scholars also adopt other viewpoints, such as the "amendment theory" that it should be analyzed according to various objects of behavior, and independent theory should be adopted for specialized articles, while for non-specialized articles, because the articles have other uses, the perpetrator should be investigated first when the direct infringement has not occurred. The unnecessary duty of care is imposed on it, and it is more conducive to the balance between the patentee and the social interests[5].

## **4. Suggestions for constructing the system of indirect patent infringement in China**

The existence of the infringement system can objectively balance the interests of different subjects, and this is also true in the field of patents. The indirect patent infringement system can better protect the patent, effectively promote the progress of scientific and technological innovation, promote the development of the market economy, and guarantee the modernization of the rule of law in our country. To improve the indirect tort system in China, it should be rooted in the legislation and practical reality of our country, and learn from the mature judgment rules outside the region, so as to be effective.

### **4.1. Refined judicial interpretation and gradually advanced to the introduction of patent law**

Combined with the aforementioned current situation of judicial cases in China, indirect infringement disputes can no longer be properly resolved, and relevant legislation should be put on the agenda as soon as possible. Article 21 of the current Interpretation (II) is the most authoritative basis for adjudicating indirect infringement cases in judicial practice. However, from the perspective of its function, judicial interpretation is mainly refining existing legislation and does not have the function of legislation[6]. At present, China's legislation has not yet determined the indirect infringement system of patent, so it is obvious that judicial interpretation can exercise this function for others. From the perspective of effect, judicial interpretation belongs to the formal interpretation of the law and has judicial binding on the parties, but from the perspective of effect level, it still cannot be compared with the law. When the legislation is not yet perfect, the introduction of Interpretation (II) provides a basis for the judicial trial at this stage, but with the increase in the number of cases and the gradual increase in complexity, even the refined judicial interpretation cannot avoid the situation of

incompetence. In 2020, the latest revision of the Patent Law came to an end. In order to maintain the stability of the legislation, it is not realistic to revise it again in the short term. Therefore, it is necessary to properly revise the judicial interpretation first, and test its applicability in judicial practice. It will be elevated to the level of patent law to ensure that the indirect infringement system continues to play an effective role[7].

#### **4.2. Clarify the behavior nature and legislative mode of indirect patent infringement**

The theory of joint infringement in current legislation and judicature is no longer sufficient to regulate indirect infringement of patents. The root cause is that the two have different functional positioning. Although the former is obviously applicable to Chinese legislation, in fact, the intellectual property system depends on the legislative departments of each country to regulate the degree of protection according to their national conditions. Its purpose is how to protect intellectual property rights, with a certain target-oriented. Joint infringement, as a system of civil law, aims to solve the problem of infringement by the majority. It takes the orientation of meaning as the distinguishing standard to solve the indirect infringement of patent, ignoring the difference in application of the two, and failing to regulate the indirect infringement of patent when the direct infringement does not exist or is not regarded as infringement, which brings adverse effects to the protection of patent rights[8].

On the other hand, from the perspective of the world trend of the development of the indirect patent infringement system, countries with written law, such as Germany and Japan, have recognized the independence of indirect patent infringement to varying degrees, and confirmed in legislation or judicial precedents the judgment standard that does not take the establishment of direct infringement as the premise. Germany explicitly stipulates that as long as the indirect infringer performs the provided act, it constitutes infringement. Japan also takes the "independence theory" as the mainstream view, and has improved the "subordination theory" to produce the "amendment theory". Although the judicial practice in the United States affirming the need for direct infringement as a prerequisite, but different from China, the direct infringement stipulated in the United States does not require the actor to have the purpose of production and business, as long as the patent is implemented without consent, it can be seen that the scope of direct acts stipulated in the United States law is much larger than that of countries with written law. This also leads to the situation in China that the direct infringer is not regarded as a patent infringement because he does not have the purpose of making profit, and the behavior of consumers who purchase the assembly for personal use and infringe the interests of the patentee will be recognized as a direct infringement in the United States. When a large number of infringements, such as consumer infringement, occur, it is unrealistic to Sue all infringers[9]. Therefore, although the United States takes the establishment of direct infringement as the premise, due to the larger scope of direct infringement, in fact, the protection of the patentee in the face of indirect infringement is more comprehensive. From the point of view of the semantics of article 21 of Interpretation (2), it adopts the legislative model and the rules of determining the constituent elements of the American law, but it neglects the difference in the identification of the scope of direct infringement in the practice of the two countries, so it is far from the protection of patent rights in the American law.

#### **4.3. Clarify the elements of indirect patent infringement**

Only the auxiliary infringement into the patent indirect infringement system is more in line with China's national conditions, so this section is from how to improve its specific components of the analysis, to ensure that China's patent indirect infringement judgment system can play an efficient and accurate practical value.

### 4.3.1. Subjective

China's Patent Law stipulates that unauthorized implementation constitutes direct infringement. The subjective elements of indirect patent infringement generally require the perpetrator to be at fault. Since the object of indirect patent infringement is a component of patented technology, whether the infringement depends on how to use it, and it needs to be judged according to the subjective mentality of the perpetrator, whether it is China's current Interpretation (II) or the judgment of the court in the judgment. Or other countries' legislation and judicial practice, in addition to the specific content of the differences, almost all of the "knowing" as a necessary condition. Throughout the provisions of various countries, Japan adopts the principle of fault liability for goods that are indispensable to technology and do not belong to the wide circulation, that is, "non-specialized goods"; The principle of no-fault liability is adopted for the indirect infringement of "specialized articles". Germany requires that a product or device related to a substantial element of the patent constitutes an infringement as long as the perpetrator knows that the product will be used for infringement. At the same time, in terms of how to prove knowing, if it can be inferred from the surrounding circumstances that the product provided will be used for infringement, it can also indicate that the perpetrator is knowing. The United States also takes "knowing" as the premise of infringement, which requires the actor to know the existence of the patent right, and his own behavior will help the direct infringer to carry out the infringement. Combined with the reality of our country, on the one hand, the current public awareness of intellectual property protection is still not strong, and our country is still in the critical period of social transformation, the importance of scientific and technological innovation to drive economic development can be seen, we should increase the protection of patent rights, but at the same time, we should also consider the difficulty of specific judgment in judicial practice. If the practice of Japan is followed, the principle of no-fault liability is adopted for specialized articles that can only be used for patent enforcement, and the actor provides such products and shows that he has subjective bad faith. However, in practice, for the proof of special supplies, as long as it can provide a use that is not used for patented products, and this use must have realistic feasibility or commercial value, which also increases the burden of proof of the parties. The standard of "exclusively used" may be too strict and not conducive to the protection of patents. Therefore, compared with Japan, the provisions of German patent law are more suitable for us to learn from, that is, as long as the perpetrator knows or knows according to the surrounding situation that the product provided will be used for infringement, it can be determined that it has the intention of subjectively infringing. On the one hand, the knowledge here should include knowing the existence of the patent and the products provided by the direct infringer will be used to implement the relevant patent, focusing on the attitude of the perpetrator; On the other hand, since this mentality may be difficult to prove, the patentee has a higher difficulty in proving. If it is known that the product provided will be used for infringement according to the surrounding circumstances, it reflects that the doer is subjectively at fault.

### 4.3.2. Mode of conduct

In terms of the mode of indirect infringement of patents, different countries have different provisions. In addition to sales and promises of sales, the United States has stipulated extraterritorial effects, including import acts; Japan also provides for manufacturing and leasing for the purpose of production and management, and the scope is larger than that of the United States and Germany. The mode of indirect infringement of patent shall be consistent with the level of intellectual property protection and development in the country, that is, it shall be included in the scope of the types of patent infringement provided for in the current patent law. For manufacturing, use, import acts for the purpose of production and business, they can only be used by themselves or provided to others. If the perpetrator uses the patent himself to implement the patent, it constitutes a direct infringement of the patent; If the purpose is to

provide for others to use, because the patent has not been actually implemented before the provision, there is no risk of patent infringement at this time, the actor has the purpose of production and business, it is obviously impossible to provide the above products free of charge, so the specific provision of the act includes sales and promises to sell, at this time constitutes indirect infringement of the patent. It can be seen that manufacturing and import ultimately flow to supply behavior, which can be regulated by prescriptive sales and promising sales behavior.

#### 4.3.3. Object

At present, the indirect infringement of patent in our country has adopted the identification mode of "special articles" in legislation and judicial practice. From the perspective of the world, there are two main ways to distinguish the object of behavior, one is the United States and Japan do not limit the subjective mentality of pure objectivists indirect infringement, that is, specialized articles in addition to the implementation of patents, no other purposes, while non-specialized articles have other substantive non-infringing uses. Another division standard believes that between the two, there should also be a class of products, from the point of view of specificity, it is not required to be used only for the implementation of patents, but must be indispensable for the solution of patent technical problems have a close connection, and from the point of view of liquidity, does not include the normal or widely circulated products on the market. Germany and Japan's subjective and objective indirect infringement adopt this standard. If the object of indirect infringement is limited to "specialized articles", such products between specialized articles and general non-specialized articles do exist in practice, are not widely circulated in the market and have an inseparable relationship with the patent to play its unique role, and if the perpetrator proves that the product is used for purposes other than the patent right and is not specialized articles, Even if the patent right is damaged, it cannot be found that the actor constitutes indirect infringement. Therefore, in the determination of the object of conduct, the provisions of the German patent law are worthy of our reference, that is, they do not adopt the strict "specialized articles" standard as the limit, but take "related to the substantive elements of the patent" as the judgment standard. Combining with the current trial situation in our country, judging with special equipment elements has become a standard familiar to most judges, and has accumulated certain experience in how to judge special use. In order to better protect patent rights while taking into account judicial practice, on the basis of this judgment standard, The addition of a special criterion for determining the difference between a specialized article and a general non-specialized article in common use, that is, an article which, despite having other uses, is related to the substance of the patent, is essential to the problem addressed by the patented technology, is not normally available in commercial transactions, and does not circulate normally on the market. For such articles, because they are not widely circulated and have other uses, their existence will not affect the interests of the patentee before the creation of the patent right; After the patentee obtains the patent right, if the actor intentionally provides it to others to implement the patented technology, it will undoubtedly damage the patent right. Therefore, this kind of article is limited through such a definition to maintain the balance between the patentee and the social interests[10].

#### 4.4. Determine the way to assume responsibility and the reasons for blocking

Torts cause harm to others and must therefore be compensated. After determining that the tort has satisfied the relevant constituent elements, if there is no reason to prevent the establishment of liability, it should be considered that the tort has been established. In the indirect infringement of patent, if the actor has satisfied the subjective and objective conditions, if there is no obstruction, the actor must bear the corresponding responsibility.

1. When it is clear that the indirect infringement of patent does not need to be established on the premise of direct infringement, the liability for indirect infringement of patent should also

be independent. When the direct infringement has not occurred, or the direct perpetrator does not have a profit-making personal use and therefore does not constitute an infringement, the right holder can directly Sue the indirect infringer and bear the compensation liability independently. If the patentee files a lawsuit against both of them, it means that the direct actor has also committed the infringement, and the infringement liability can be divided, and the two parties shall bear the liability respectively. When the infringement liability is closely related and does not have the practical operation of splitting, it is still necessary to clarify the liability of each party according to the fault and internally clarify their respective shares, so as to better meet the claims of the patentee. Recoup the loss of the patentee.

In the way of liability, patent rights, as a kind of civil rights, should not go beyond the scope of civil liability, and can be applied according to the specific circumstances and combined with the claims of the patentee. If the direct infringement has not yet occurred, the perpetrator may be ordered to destroy the equipment for manufacturing the relevant product, etc., if it has already occurred, it may require the destruction of the manufactured product and the equipment for manufacturing the product. If the exploitation of the patent rights causes damage to the reputation of the patentee, it may be required to eliminate the adverse effects and restore its reputation. The specific application still depends on the courts at all levels in practice in the actual trial, according to the severity of the infringement, the amount of profit of the actor and the loss of the patentee, reasonable judgment.

2.The implied license defense is derived from the United States, that is, although the actor provides an infringing product, the source and destination of the product are those who have the right to exploit the patent, then the actor does not constitute infringement and aims to prevent excessive protection of the patent right. Only when the interests of the patentee are threatened, it is necessary to clarify whether the scope of trust interest of the specific object who obtains the relevant product from the actor is in conflict with the interests of the patentee, and then consider whether the indirect infringing actor can file a defense. As to whether the perpetrator can be allowed to use implied license as a defense, we can consider learning from the provisions of the United States, judging from the source and destination of the products provided by the perpetrator are legal. On the one hand, if the actor can prove that the source of the product is the patentee or other patent licensor, and does not prohibit the actor from providing the article to others, the actor should be considered to have obtained a patent license. On the other hand, if the actor only provides the relevant articles to a specific object, and the specific object belongs to the patent licensee and the prior right holder, in this case, if the specific object belongs to the licensee, it has already obtained the right to exploit the patent, the actor's provision of the act will not bring additional new risks to the patent right. Before the application of the patented technology is submitted, the market use space belonging to the prior right holder outside the control of the patentee has been formed, and it will not damage the interests of the patent right.

## 5. Conclusion

The degree of patent development represents the innovation ability of a country, which in turn affects the economic development and scientific and technological level of the whole country. The protection of patents is not only to protect the patentee's right to benefit from his research results, but also to promote and stimulate the patentee's enthusiasm for further development and innovation from the policy level, and encourage the whole society to devote itself to the development and application of scientific and technological achievements, which is the only way to establish a strong intellectual property power, but also an indispensable step for China to develop into an economic power. Indirect infringement of patent is a kind of infringement which is difficult to judge compared with direct infringement. If it is not regulated in time, it

will undoubtedly lead to the loss of patent property and hit the innovation enthusiasm of the patentee. At present, the current legislation in our country can not regulate the indirect infringement of patent effectively. Only by determining the criterion of this kind of behavior in time can we better resolve the disputes in practice and protect the interests of the patentee. Considering the specific conditions of our country and the policy goals of patent development and protection, how to construct the indirect patent infringement system needs the concerted efforts of the legislative departments, the judicial departments and the academic circles.

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