

Israel

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A. INJUNCTIVE RELIEF IN ISRAELI LAW: AN OVERVIEW

1. *Injunction as Equitable Relief*

Israeli law, in general, is based on the principles of English common law, in which an injunction is perceived as a form of equitable, discretionary relief.¹ Historically, injunctive relief was granted based on discretionary criteria, including the irreparable injury rule (in the absence of an injunction, the plaintiff would be caused an irreparable injury, which could not be compensated for by monetary relief); the balance of hardships between the plaintiff and defendant (known also as the “balance of convenience”); and the clean hands rule (equitable relief is only granted if the plaintiff acted in a decent and moral manner, disclosing the relevant facts).² Another important criterion was the public interest.³

In many common law countries, including Israel, these equitable considerations have survived with respect to temporary injunctions, where they are known as the four-factor test,⁴ but they have become only a rhetoric with respect to final injunctions.⁵ Nevertheless, according to Israeli law, both temporary and permanent

¹ Worthington 2006, 13. For additional discussion of the English common law basis for injunctive relief, see Chapters 13 (United Kingdom), and 14 (United States).

² See Fischer 2006, 201–02. For the origins of the different considerations see Fiss & Rendleman 1984, 104–08; Bean 2004, 3.

³ *Id.*

⁴ Goren 2015, 862 (in Hebrew) (explaining that under Israeli law the main considerations for granting temporary remedies are the chances for success at the final proceedings, the balance of convenience and other equitable considerations).

⁵ Douglas Laycock conducted comprehensive research concerning the irreparable injury rule, which is a major equitable factor. His conclusion was that this factor became “dead” in US case law, in the sense that though it is used rhetorically, in fact it does not play a significant role, see Laycock 1991, 7 (concluding that “I do not argue merely that the irreparable injury rule *should* be abandoned; I argue that it *has been* abandoned in all but rhetoric”). Laycock further

injunctions, at least *de jure*, are subject to the courts' discretion. Under section 75 of the Courts Act 1984, any court, ruling in a civil law matter, is authorized to grant an injunction and any other remedy as it deems appropriate under the circumstances. The Civil Law Procedure Regulations (1984) anchors the Israeli version of the four-factors test with respect to temporary remedies: Under section 362 of the Regulations, in granting temporary remedies a court should take into consideration, inter alia, these factors: the injury to the plaintiff if the remedy were not to be granted as opposed to the injury to the defendant if the remedy were to be granted, as well as injury that may be caused to a possessor or third party; whether the application was submitted in good faith, if it is justified and appropriate to grant the remedy, and if the remedy is proportionate.⁶ The enforcement of injunction, as all other court orders, is based on the Court Contempt Ordinance, setting the authority to enforce obedience to court orders by fines and imprisonment.⁷

2. Property Rights and Tort Law Remedies

Injunctions in the field of intellectual property law raise complex questions regarding the relationship between the nature and scope of property rights and the protection over proprietary interests through tort law and other remedial means. In a nutshell, under Israeli law, property rights are set by laws such as land, chattels or intellectual property laws, but the protection of ownership and possession over assets is determined, inter alia, by tort law. For example, while land law defines ownership of land, the injury to land by trespass is a tort civil wrong. The tension between the proprietary nature of a right and its protection, inter alia, by tort civil wrongs is reflected in the realm of remedies, because the framework for the grant of remedies is set in tort law, which addresses uniformly all remedies, without differentiation

explained that since the historical separation between the two parallel courts was abolished and the court was authorized to grant equitable remedies as well as entitled monetary remedies, the discretionary nature of the injunctive relief was in fact diminished and became part of the plaintiff's entitlements. In other words, injunction became a "legal" and not an "equitable" remedy, see, *id.* at 7. This conclusion is relevant to Israeli reality as well, because since the establishment of the state of Israel in 1948 all courts are authorized to grant equitable remedies.

⁶ See Civil Law Procedure Regulations (1984), sect. 362. This section is shifted into section 109 of the new Civil-Law Procedure Regulations (2018) which entered into force in 2021. Under the new section, a temporary injunction may be granted on the basis of its necessity to the execution of the final court decision.

⁷ Court Contempt Ordinance (1929), art. 6. The enforcement of injunctions in patent cases by court contempt procedures is not rare, yet the claims are examined carefully. For example, already in 1965 the court ruled that the infringement of the injunction was not made by the defendant or his agents, but by a third party that the defendant was only indirectly linked to him, see, CC HMR. 8292/65 *Anshel Cohen v. Shlomo Ben-David* [1965]. In another case, concerning an injunction based on unjust enrichment, the Supreme Court ruled that because the validity of the injunction was not clear and it had already expired, the infringement should be considered within the calculation of the monetary remedy, see CA 2287/00 *Shoham Mechonot (Machines) and Mavletim (Dies) LTD v. Harar* [2005].

between civil wrongs aimed at protecting ownership and possession, such as trespass, and other civil wrongs, such as negligence. The question, therefore, is whether there are policy considerations supporting differentiation of remedies in cases involving property rights in contrast to other civil wrongs and, in addition, the question of what exactly is the meaning of the notion of “property right” in Israeli law.⁸ In a long series of decisions, the Israeli judiciary has consistently categorized various intellectual property rights as “property rights.”⁹ Therefore, the discourse over remedies in the intellectual property realm is inevitably driven into the comprehensive perceptions of the legal meaning of property rights and its consequences.¹⁰ More specifically, in land law, property rights are perceived under Israeli law as “robust,” which confers their owner an almost absolute prerogative to control the protected asset. For

⁸ For such discussion by Israeli Supreme Court see: LCA 6339/97 *Roker v. Solomon* 55(1) PD 199 [1999] – a case which is further discussed below, see footnotes 11–13 and the accompanying text. See also Lewinsohn-Zamir 2006, 19–25 (analyzing the *Roker v. Solomon* decision and supporting its final outcome from an economic perspective); Dagan 2009, 41, 47 (in Hebrew) (stressing the need to understand property rights as non-absolute, which are subject to social needs, and the necessity for the same approach with respect to copyright).

⁹ For example, with respect to intellectual property rights in general see: LCA 5768/94 *ASIR Import, Manufacture, and Distribution v. Accessories and Products Ltd* [1989] (handed down by a special panel of seven judges); With respect to patent right see: HCJ 5379/00 *Bristol-Myers Squibb Company v. The Minister of Health* [2001] (the Supreme Court acknowledged the patent right as a protected property right under the Israeli constitutional provisions); LCA 8127/15 *The Israeli Manufacturers Corporation v. Merck Sharp & Dohme Corp. f/k/a* [2016] (the Supreme Court acknowledged the patent extension term as creating a property right); With respect to copyright see: LCA 6141/02 *ACUM (Israeli Collecting Society) v. GLZ (IDF Broadcast)* [2003] (Justice Dorner acknowledged copyright as a property right protected under the constitutional provision for the protection of property rights).

¹⁰ This discourse is reflected both in court decisions and in scholarly writings. For example, see *ACUM (Israeli Collecting Society) v. GLZ (IDF Broadcast)* [2003], in which Justice Dorner explained that since copyright is a property right, its holders are entitled to prevent future infringements by way of injunction. The most prominent example for such discourse held by a court is in the case LCA 5768/94 *ASIR Import, Manufacture, and Distribution v. Accessories and Products Ltd* [1989], which is further discussed in Section C. In this case, the Supreme Court discussed the question of whether intellectual property rights are exclusive in the sense that protection over the subject matter could be enforced only through intellectual property laws. This question further led to a normative debate as to the meaning of the classification of a right as a “property right,” and whether the grant of injunction creates a *de facto* property right. Justice Cheshin held the view that injunction generates a property rights, since it would effectively be understood as an *in rem* remedy. In contrast, former Chief Justice Barak stressed that injunction may be granted on a non-property right basis, such as unjust enrichment cause of action, and therefore would have a limited *in personam* impact, that would not create a “new” intellectual property right. Following this ruling, in a subsequent decision, the Supreme Court held that in determining the appropriate remedy the court should consider the field in which the case is “located”: is it property, tort, or contract; and the remedy should be adjusted accordingly in order to maintain the legislative harmony, namely legal consistency, see: CA 2287/00 *Shoham Mechonot (Machines) and Mavletim (Dies) LTD v. Harar* [2005, para. 16]. For such discourse in the literature see, for example, Dagan 2009, 41, 47 (proposing to understand all property rights, including intellectual property rights, as non-absolute, which are subject to social interests, and therefore as not necessarily including an entitlement to injunction).

instance, in the landmark decision *Roker v. Solomon*,¹¹ the Supreme Court held that although remedies, in general, are always subject to the court's discretion, the injunctive force underlies the basic essence of a property right, and therefore as a matter of principle an owner of a property right should not be deprived of the injunctive prerogative. In this case, the question was whether a landowner in a condominium could insist on preventing a neighbor from using and occupying a section of a shared area on the premises, and whether such action could be characterized as an abusive misuse of a property right. The Supreme Court ruled that a landowner, having a property right, is usually entitled to injunctive relief, and the insistence on enforcing an entitled remedy could not be ruled as a lack of good faith or abusive misuse of a right.¹² Though property rights are not absolute, the Supreme Court concluded, injunctive remedies would rarely be deprived.¹³ In the following sections of this chapter, it will be demonstrated that this rigid perception of the scope of property rights has percolated into intellectual property case law.

Moreover, the perception of entitlement to injunctive relief, deriving from the classification of intellectual property rights as property rights, should be settled with another classification – that of intellectual property infringement claims as being part of the broad legal field of tort law.¹⁴ In other words, while intellectual property rights are classified as “property rights,” the legal framework for the grant of remedies when such rights are infringed is tort law. The challenge is significant considering section 74 to the Torts Ordinance (New Version),¹⁵ according to which the court should not grant an injunction in cases where the injury or damage to the plaintiff is small and could be evaluated monetarily and offset by compensation, and when granting the injunction would be abusive to the defendant. However, the court may grant monetary relief in lieu of the injunction. The question, therefore, is which of

¹¹ *Roker v. Solomon* [1999] (handed down by a special panel of seven judges).

¹² *Id.*

¹³ All seven judges deciding the case held that discretion in granting injunction, in principle, exists. They differed, however, as to its appropriate scope, and its application to the case at hand. Six of the seven judges held that the discretion to refuse injunction is narrow and is based on the general principle that every right and remedy, including the right of landowners, must be exercised in good faith, see *Roker v. Solomon*, [1999, pp. 238, 240, 241–42, 286, 287]. Justice England, in a dissenting opinion, expressed the view that an injunction should be granted according to a cost–benefit analysis, as is the case with all injunctions granted in tortious civil wrongs, and in the specific case at hand, monetary compensation to the landowners should suffice, see *Roker v. Solomon* [1999, pp. 221, 230–31]. See also Lewinsohn-Zamir 2006, 19–21 (explaining the differences between the various majority's opinions).

¹⁴ With respect to Copyright Law, see section 52 of the Copyright Act 2007, according to which infringement of copyright is a civil wrong and the provisions of the Torts Ordinance shall apply. With respect to Patent Law, see: CA 3400/03 *Ruhama Rubinstein and others v. Ein-Tal* (1983) Ltd [2005] (holding that patent infringement is akin to a tortious act and the purpose of compensation in case of tort wrongs and patent infringement cause of action is similar).

¹⁵ It should be noted that the Torts Ordinance (New Version) is based on the British torts law that was in force during the British Mandate until 1948, when the state of Israel was established. Namely, torts law in Israel is still based on the British law.

the two perceptions prevails in intellectual property actions – the rigid proprietary perception of an (almost) absolute entitlement to an injunction or rather the tort law perception of a balance of interests and a cost–benefit analysis regarding injunctions? In the following, Israeli courts’ approach to patent law actions are examined. It generally appears that the proprietary perception is governing; however, some mild exceptions will be presented.

B. INJUNCTIVE RELIEF IN ISRAELI PATENT LAW

1. *The Patents Act*

Under section 183(a) of the Patents Act – 1967 (the “Patents Act”),¹⁶ a plaintiff is “entitled to relief by way of an injunction and damages.” Namely, a permanent injunction is perceived as the major remedy that follows from the patent right, conferring exclusivity over prevention of use of the protected invention.¹⁷ However, as explained in the previous section, the granting of injunctive relief is subject to the court’s discretion, being an equitable remedy in essence. Therefore, the use of the term “entitled” may denote a presumption according to which the grant of injunction is the *default* remedy once infringement has been proven, and the court should express a solid reasoning why, upon the specific facts of the case, it is justified to deny the grant of the injunctive relief. In that sense, section 183(a) of the Patents Act does not present a *lex specialis* to the general rule, which acknowledges courts’ full discretion to grant or to refuse to grant equitable remedies.

The explanatory part of the Patents Act Bill, dated 1965, is rather laconic in the sections concerning remedies.¹⁸ The only explanation given is as follows: “Thus far, the only substantial law governing claims of patent infringement is British common law. It is proposed to set comprehensive rules with respect to jurisdiction, the power to file an infringement lawsuit, exceptions and defense claims, and remedies. All these are new sections.”¹⁹ There is not much we can learn from the Patents Act Bill, except that it is proposed to codify British common law rules and not necessarily deviate from them. The term “entitled” in section 183(a) of the Patents Act should not, therefore, be interpreted as overruling the general British common law tradition with respect to courts’ discretion in granting injunctive relief.

The common law legacy preceding the Patents Act was acknowledged anew by the early Israeli Supreme Court decision in the case of *American Cyanamid*

¹⁶ The patent system in Israel is governed by the Patents Act, 1967 and the Regulations thereunder, as amended from time to time.

¹⁷ The patent right is a “negative right” conferring exclusive preventive prerogative and not a positive right to use the invention, see Patents Act, sect. 49.

¹⁸ Patents Act Bill – 1965, H¹H 637, January 20, 1965, p. 98.

¹⁹ *Id.* at p. 123 (unofficial translation).

Company NY USA v. Lepetit SPT,²⁰ which discussed a patent owner's petition to amend the claims of an already registered patent. Justice H. Cohn, handing down the decision, ruled that the Israeli Supreme Court is free to adopt British common law rules as it deems fit. Furthermore, remedies are subject to courts' discretion, and could be denied on the basis of delay or unclean hands. Courts' "discretion" means weighing the conflicting interests at stake and presenting the reasons that justify the refusal to grant remedies that the court is authorized to grant.²¹

The question, therefore, is whether the Israeli judiciary applies its vested, inherent discretion in matters of injunction in patent cases, and if yes, how.

It should be noted that compulsory license schemes are set out in chapter 7 of the Patents Act and include a compulsory license for cases of misuse of a monopoly,²² and a compulsory license for dependent patent.²³ The terms for the grant of a compulsory license by the Patent Registrar are specified in detail. Chapter 7 was amended in 1999 in order to comply with the TRIPs requirement.²⁴ Compulsory licenses based on misuse of a monopoly are occasionally granted, but a compulsory license for a dependent patent has not been reported thus far, to the best of our knowledge.²⁵

2. Court Decisions

a. Supreme Court

According to Israeli law, patent cases are heard at the District Court (of the relevant jurisdiction) in the first instance, and therefore appeals upon the courts' decisions are directly filed at the Supreme Court, at the second instance. Under a judicial system in which the Supreme Court serves as the appellate instance, there is a relatively high volume of Supreme Court patent cases.²⁶ Most Supreme Court cases

²⁰ CA 245/60 *American Cyanamid Company NY USA v. Lepetit SPT* PD 16, 788[1962].

²¹ *Id.* at p. 803.

²² Patents Act, sect. 117–19.

²³ Patents Act, sect. 121.

²⁴ Act for the Amendment of Intellectual Property Rights (in Accordance to the TRIPs Agreement) 1999; Tur-Sinay 2017, 318–19 (in Hebrew).

²⁵ See Tur-Sinay 2017, 318 (in Hebrew).

²⁶ The survey was based on the Israeli database Nevo, which includes Israeli court decision of all instances, commencing in 1950, and it included all the decisions that were located as relevant in the database. As explained below in note 30, we have located seventy final decisions at the District Court level. On appeal, approximately forty-five Supreme Court final decision were located, yet it should be clarified that some of these final decisions are without reasoning (i.e. technical decision), and some relate to patent infringement only as a secondary issue to another major claim, such as ownership of a patent. These forty-five decisions do not include interim decisions and permitted appeals concerning Patent Registrar decisions, which occasionally were identified as appeals (twenty-eight located decisions). However, these forty-five decisions include permitted appeals on interim decisions which were turned into a final decision by a determination of the court. Therefore, the amount only reflects an approximation. Out of these

focus on routine patent litigation questions, including the initial qualification of patent registration, validity of the registered patent, interpretation of the patent claims, and inspection of the alleged infringing acts. In cases concluding that the patent was infringed, the Supreme Court approves the injunction order, whether preliminary or permanent, issued by the lower instance. There are no Supreme Court decisions discussing up-front the question whether it is proper, under the circumstances, to deny the grant of permanent injunctive relief, yet as will be presented in the following sections the traces of some hidden flexibilities may nevertheless be found. Moreover, the decisions are focused on the material questions of patent law; the injunctive remedial consequences, in contrast with the monetary remedial consequences, are left with no in-depth reasoning.²⁷ In other words, final injunctions are generally approved *de facto* by the Supreme Court on an automatic basis, albeit a few mild exceptions could be sketched. The Supreme Court functions as an appellate instance, therefore it can either uphold or reverse the determination of the District Court concerning the patent validity and infringement. However, the operative part of the decision concerning the injunction is viewed as if it is merely a technical matter, which does not merit a normative evaluation. District courts' decisions reflect the same view. In that sense, Supreme Court approach echoes in District Court approach, and vice versa.

Moreover, the characteristics of the parties involved in patent cases seem to be irrelevant: the parties in Israeli patent litigation are both multinational corporations, particularly pharmaceutical companies, and local corporations and individuals; however, we have not found evidence concerning a linkage between that factor and courts' discretion regarding injunctions. Furthermore, there is no special rule exempting the state. In fact, in one of the seminal decisions handed down by the Supreme Court – discussing a patented invention of combat pilot's helmet – a final injunction was issued against the state.²⁸

Nevertheless, there are a few slight exceptions, relating to specific situations. The most prominent decision by the Supreme Court, denying the grant of an injunctive relief, relates to the interim period, in which a patent application is still pending (i.e.

forty-five Supreme Court final decisions, in thirty-nine cases the appeal was rejected, and in sixteen cases the appeal was accepted in whole or in part.

²⁷ Sometimes a court bifurcates the issues of patent infringement liability and remedies, and it is in the court's discretion to determine on the matter. However, while the scope of the monetary relief was extensively discussed in a few Supreme Court decisions, there is no similar discussion regarding injunctions. See for example: CA 2634/09 *Rotenberg v. Algo Hashkaya LTD* [2011]; CA 3400/03 *Ruhama Rubinstein v. Ein-Tal* (1983) Ltd [2005]; CA 2972/95 *Joseph Wolf and CO. Ltd v. Be'eri Print Ltd* [1999]; CA 817/77 *Beecham Group Ltd v. Bristol-Myers Co.*, 33 (3) PD 757 [1979].

²⁸ CA 345/87 *Hughes Aircraft Company v. the State of Israel* [1990]. The injunction granted against the state does not differ in any term from injunction against a private entity. The Supreme Court articulated the injunction very briefly (non-official translation): "We order hereby the defendants to refrain from infringing the patent, by themselves or by the aid of others."

the “pendency period”). Under section 179 of the Patents Act, an action for infringement can be brought only *after* the patent has been granted. Once a patent is granted, the court may grant relief for pre-grant infringement. Namely, during the patent pendency period, no remedies may be granted, and only post-grant actions are possible, yet the compensation would be evaluated on a retroactive basis as well. In 2011, the Supreme Court handed down a seminal decision in the case of *Merck & Co. Inc. et al. v. Teva Pharmaceutical Industries Ltd et al.*,²⁹ ruling that section 179 represents an exhaustive rule, prohibiting the grant of injunctive relief (whether temporary or final) during the patent pendency period. Such a rule applies to other legal mechanisms as well, including the Unjust Enrichment Law, which cannot circumvent the Patents Act provisions. The Supreme Court’s reasoning was based on the complex balance of interests reflected by the Patents Act, which takes into consideration both the need to protect inventors’ incentives and the public interest in free markets. According to this ruling, the Patents Act equilibrium of interests is clear: The exclusive proprietary power of the patent right begins only after the grant of the patent. The intertwined relation of intellectual property law and unjust enrichment law in Israel will be further discussed in Section C.

Another mild exception, reflecting a not completely automatic approach to permanent injunctions, relates to orders for stay, which seek to temporarily suspend the execution of the lower court injunctive order until the decision in the appeal is made (i.e. “stay order”). In the case of *Neka Chemicals (1952) LTD and others v. Sano Industries Bruno LTD*,³⁰ the Supreme Court held that while the general rule is that there is no reason to grant a stay order with respect to ordinary injunctions granted by lower courts in patent cases – since otherwise the plaintiff’s injury may increase – there is a justification to suspend the delivery up (seizure) order of the infringing products in the case at stake. The reason for such an exception was that delivery up (seizure) orders may injure the defendant’s reputation, beyond the direct monetary injury in case the appeal is upheld, and it would be very hard to retroactively evaluate the reputational damages. In contrast, if the appeal is rejected, the plaintiff will be fully compensated for their loss. Therefore, a stay order was issued in part. This decision nevertheless reflects a reasoning that underlies temporary injunctions, weighing harm to the parties as part of the equitable discretion.

A third case, representing somewhat of a deviation from the automatic approach for granting injunctions, is the 1971 decision in the case of *Trisol LTD v. Moses Kobobi*.³¹ This decision concerns pre-Patents Act events that occurred in the 1950s and 1960s relating to an allegedly permitted use of a patented invention. Based on severe delay in filing the action, which was decided on the basis of laches, alleged misrepresentation of approval of use and alleged implied license, the Supreme

²⁹ LCA 6025/05 *Merck & Co. Inc. et al. v. Teva Pharmaceutical Industries Ltd et al.* [2011].

³⁰ CA 4705/05 *Neka Chemicals (1952) LTD v. Sano Industries Bruno LTD* [2005].

³¹ CA 689/69 *Trisol LTD v. Moses Kobobi* [1971].

Court ruled that there was no basis for granting an injunction, particularly since at the time the decision was handed down the patent had already expired. Though exceptional, this decision may signal the court's early approach of applying equitable considerations concerning delay with respect to permanent injunctions as well. Yet it could not be ignored that since the patent had already expired at the time of ruling, the court could not grant an injunctive relief. Moreover, the Supreme Court explicitly ruled that delay, in principle, does not deprive a patent owner from their right,³² but in cases where delay is accompanied by an implied equitable license which is based on the plaintiff's behavior, the patent infringement claim should be entirely rejected. As explained in Section A, with respect to temporary injunctions, Israeli law preserves the British common law legacy, according to which courts apply full discretion on the matter, based on the various traditional factors. Patent law decisions follow these lines.³³ Many Supreme Court decisions foster this legacy,³⁴ and moreover stress the general rule according to which the appellate instance would not overrule the factual basis underlying the lower court decision to grant or refuse to grant temporary injunction.³⁵

³² Supporting such conclusion with British references: *Van Der Lely (C.) NV v. Bamfords, Ltd* RPC (1964, p. 54).

³³ See, for example: LCA 920/05 *Hasin Ash Industries Ltd v. Konial Antonio (Israel) LTD* [2005].

³⁴ See, for example: CA 342/64 *American Cyanamid Company USA v. Hirshhorn-Gilerman Partnership* [1965] (holding that the principles for granting a temporary injunction in patent cases are no different from other cases. One of these principles is the "balance of convenience," referring to *Chattender v. Royle* (1887), 36 Ch. D. 425, 436. Moreover, it was explained that the appellate instance usually will not intervene with the lower court determination. Such intervention shall be conducted only if the lower instance was not led by these principles or applied these principles wrongly, referring to Blanco White, *Patents For Inventions* (3d ed.), 338. Finally, the court overruled the lower court refusal to grant the temporary injunction, since the balance of convenience was not considered properly); LCA 5248/90 *Reuven Antin v. Benjamin Frankel* [1991] (holding that the principles for granting temporary injunction in patent cases are no different from other cases, referring to *id.* CA 342/64 *American Cyanamid Company USA v. Hirshhorn-Gilerman Partnership* [1965], and approving the lower-instance determination with regard to the "balance of convenience" principle at stake); LCA 920/05 *Hasin Ash Industries Ltd v. Konial Antonio (Israel) LTD* [2005] (approving lower instance's decision not to grant temporary injunction on the basis of laches); LCA 11964/04 *Tzefi Profil Chen (1983) LTD v. Azulai* [2005] (holding that the appellate instance usually will not intervene with lower-instance decisions concerning temporary remedies. Patent cases are not an exception referring to CA 342/64 *American Cyanamid Company USA v. Hirshhorn-Gilerman Partnership*, and therefore approving the lower court decision); LCA 4788/08 *Cellopark Technologies LTD v. Mobidum LTD* [2008] (holding that the appellate instance usually will not intervene with lower-instance decisions concerning temporary remedies, considering its vast consideration of the matter and its ability to assess the relevant evidence directly. Patent cases are not an exception and in the case at hand there was no basis for deviation from the general rule of non-intervention).

³⁵ See, for example, *id.*: LCA 11964/04 *Tzefi Profil Chen (1983) LTD v. Azulai* [2005]; LCA 4788/08 *Cellopark Technologies LTD v. Mobidum LTD* [2008].

b. District Court

In almost all District Courts decisions, once a patent infringement is determined, a final injunction is granted upon request.³⁶ Namely, the lower courts' approach to final injunctions is predominantly an automatic one as well. The rare cases in which injunction was not granted although the court held that the patent was infringed do not reflect an exception to the automatic approach on the matter, but rather were based on a specific factual situation in which the grant of injunction was irrelevant. For example, in two cases, the court held that the patent was infringed, but nevertheless because at the time the decision was handed down the patent had already expired no injunction could be granted and the only remedy left for the plaintiff was a monetary one.³⁷ Other examples relate to cases in which injunction was not requested due to various factual circumstances.³⁸ In contrast, temporary

³⁶ The survey was based on the Israeli database Nevo, which includes Israeli court decision of all instances, commencing 1950, and it included all the decisions that were located as relevant in the database. We have differentiated between interim decisions (which may include very technical short decisions and reasoned decision with respect to grants of temporary remedies) and final decisions (which include final determination). Within this latter group of final decisions, we have differentiated between final decisions concerning patent infringement and other final decisions, discussing only the validity of an already granted patent; appeals on the Patent Registrar decisions; final decisions concerning various issues except from patent infringement (such as validity of a license, or conflicts relating to the ownership of inventions). The group of final decisions concerning patent infringement is the one that stands at the heart of this survey. We have reviewed seventy District Court final decisions, out of which in thirty-one decisions the court held that the patent at stake was valid and was infringed. In all these thirty-one cases, injunction was granted upon request. In the other thirty-eight decisions, it was held that there was no infringement and therefore no injunction was granted. The following is the result of the survey by year (the year division is set by the Nevo database):

1950–1989: seventeen District Court final decisions, out of which seven held patent infringement;

1989–2005: twenty-seven District Court final decisions, out of which fifteen held patent infringement;

2005–2013: eighteen District Court final decisions, out of which eight held patent infringement;

2013–2017: five District Court final decisions, out of which one held patent infringement;

2017–2019: three District Court final decisions, out of which none held patent infringement.

³⁷ See, CC 1512/93 *The Wellcome Foundation Limited v. Teva Pharmaceutical Industries* [1995] and CC 881/94 *Eli Lilly Company v. Teva Pharmaceutical Industries* [1998]. It should be further noted that at the time these decisions were handed down, time extension orders for expired patents were not yet acknowledged by the Israeli legislation and therefore the court concluded that it could not grant a post-expiration injunction. In a third case, handed down in September 2019, the District Court ruled that the time extension period of a patent had expired, and therefore injunction was no longer a relevant remedy, yet in this case the court also ruled that there was no infringement due to judicial estoppel, see CA 28676-05-13 *Pfizer Inc. v. Unifarm LTD* [2019] (under appeal).

³⁸ See, CC 121/06 *Kapoza v. Y. Cochav & Son Construction LTD* [2009] (injunction was not requested, apparently since the case concerned a single act – construction of a system – which was held as a patent infringement); CC 6160/08/07 *Rotenberg v. Algo Hashkaya LTD* [2009,

injunctions are subject to close inspection, and courts consider the traditional factors: the balance of convenience, the irreparable harm rule, and equitable considerations of clean hands and laches.³⁹

The specific phrasing of injunctive orders is usually included within the court's final decision, and there is no special form for such remedy. The common phrases used are very short, and there is no evidence for flexibilities in the texts. For example, the phrasing of one of the earliest injunctions granted in Israel, in 1952, was (non-official translation): "I order the two defendants and each one of them, to refrain from infringing patent Exhibit 1, directly or indirectly, whether by themselves, by their providers, agents and in general."⁴⁰ A later phrasing would typically include more specific prohibited acts, such as the following order granted in 2004 (non-official translation): "The defendants and any one in their behalf will refrain from any commercial act, including acquisition, production, advertising, distribution, marketing, sale, supply and/or offer of the product protected by Israeli patent number 88373, without the plaintiff's in-advance approval in writing."⁴¹ In some cases, the plaintiff is requested to submit separately a phrasing of the injunction for the approval of the court, and in such cases the final injunction is not open to the public.

c. Flexibilities within the Interpretation of Substantive Law

While the Israeli judiciary perceives final injunctions as an automatic outcome to the determination of patent infringement, it nevertheless applies profound discretion as to substantive patent questions involving interpretation of the Patents Act and of the patent claims. The courts have stressed in a long line of decisions that patent cases always entail the application of judicial discretion with respect to substantive issues, such as the qualification of the registered patent and the interpretation of the patent claims, in light of the balance of interests underlying patent law.⁴² In other words, in clear contrast to the question of granting injunctions, when determining substantive conclusions, Israeli courts demonstrate great flexibility.

Since there is such a significant difference between the judiciary's rigid approach to final injunctions and its broad, inherent discretion applied with respect to other

p. 48] (the court explains that injunction is the usual remedy in cases of patent infringement. In this case injunction was not requested since it concerned termination of a patent license and the plaintiff did not think that the defendant would cause any further harm).

³⁹ See, for example: CC 7438-11-11 *Kwalata Trading Limited v. Regensal Laboratories LTD* [2012]; CC 18514-12-13 *Magnetica Interactive LTD v. Ambrozia Superherb LTD* [2014] (temporary injunction was denied due to lack of full disclosure of relevant facts).

⁴⁰ CC 1003/51 *Park Davis and Company, Detroit, v. Abik Chemical Laboratories LTD* [1952].

⁴¹ CC 2168/00 *SDR Shiryun Yevu and Shivuk LTD v. F. B. Sochnuyot Shivuk LTD* [2004].

⁴² See, for example: CA 345/87 *Hughes Aircraft Company v. the State of Israel* [1990]; CA 407/89 *Tzuk Or Ltd v. Car Security Ltd* [1994]; CA 2626/11 *Hasin Ash Industries Ltd v. Konial Antonio (Israel) LTD* [2013].

legal questions arising in patent cases, we should ask whether there are *hidden* flexibilities concerning final injunctions as well.

A *possible* phenomenon, proposed here, could be that since the perception of patent cases is binary and a patent was either infringed (and therefore its owner is entitled to an injunction) or there was no patent infringement at all, then in the specific cases in which we could have expected a midway conclusion where despite the finding of patent infringement the granting of an injunction was not justified, the court nevertheless ruled that there was no patent infringement. Namely, the extreme binary way patent law is operated may lead, *de facto*, to the shifting of all the judicial flexibilities to the substantive part of the decision, discussing the infringement. Thus, the proposed hypothesis is that in “gray area” cases, to avoid the ill-consequences of final injunction affecting the public interest at large, the court may rule that there was no infringement at all.⁴³

A possible evidentiary basis which may, somewhat, support such a proposition is the finding of this project, which reviewed located final decisions of Israeli district courts (first-instance courts) discussing *inter partes* patent infringement lawsuits in the years 1950–2019.⁴⁴ Out of seventy courts’ final decisions, in thirty-one cases the lawsuit succeeded, namely the court ruled that the patent was valid and was infringed (in full or in part), and therefore injunction was granted upon request. This finding represents a ratio of 44 percent success in patent lawsuits reaching a court’s final decision, which should be understood as a non-accurate ratio, considering many unknown variables, such as the number of patent cases settled outside court (especially after interim proceedings), the number of patent cases resolved in arbitration and other alternative dispute resolutions methods, and other reasons for the cancelation of lawsuits.⁴⁵ Nevertheless, this finding is remarkable, considering the general average ratio of success in civil lawsuits reaching a final decision in

⁴³ By way of analogy, former Chief Justice Shamgar expressed a similar fear in a decision discussing the statutory damages scheme that was in force at that time in copyright law. This scheme included a minimum damages threshold, of a significant amount, that courts were compelled to grant. Chief Justice Shamgar expressed his view that this minimum sum did not reflect “light” copyright infringements, therefore courts would inevitably use their discretion and refrain from granting damages at all in such “light” cases. Hence, in his view, the legislature had to amend the statutory damages scheme to give greater flexibility to courts in a way that would allow adjustment of the damages granted to the relevant circumstances, see CA 592/88 *Shimon Sagy v. The late Abraham Ninyo Estate*, p. 271 [1992]. In other words, Chief Justice Shamgar’s view was that a rigid approach to remedies may lead to rejection of intellectual property infringement lawsuits in order to avoid the negative consequences of granting overcompensation. It should be further noted that the statutory damages scheme was indeed amended in the new Israeli Copyright Act enacted in 2007, and the minimum threshold for statutory damages was abolished, see Copyright Act 2007, sect. 56.

⁴⁴ See *supra* note 36.

⁴⁵ According to an Israeli research, an average of 18 percent of civil cases reaches a final reasoned court decision, see, Weinshall & Taraboulos 2017, 763 (in Hebrew).

Israeli courts, which is much higher.⁴⁶ How can such a gap be explained? One *possible* explanation is that courts are aware of the gap between the vast legal flexibilities with respect to questions of patent validity and infringement in contrast to the rigid approach with respect to injunctions. And, since the determination in patent cases has a profound impact on the public interest, although the conflict is between private parties, courts may be drawn to entirely reject lawsuits to avoid far-reaching negative consequences of an injunction that may harm the public interest. In other words, the nature of patent litigation, involving the public interest, in contrast to “ordinary” *inter partes* civil lawsuits, may generate a different approach.⁴⁷

A few Israeli cases could fit within such a proposition. A putative example is the case of *Tzchori and Sons Industries LTD and others v. “Regba” Communal Agricultural Village LTD*,⁴⁸ in which the court had to interpret section 50 of the Patents Act, according to which, if the invention is a process then the scope of the patent covers the “direct product” of the process as well. In this case, the invention concerned the process of cutting a surface (such as marble or stone) that allows for a sink to be installed into the surface in such a manner that the sink and the working surface create a flat platform. The invention related to the cutting process and (implicitly) to the installation of compatible sinks. The question was whether the compatible sink falls within section 50 of the Patents Act, as being a “direct product” of the patented process. The defendant imported and sold compatible sinks without the plaintiff’s approval, and therefore competed on the same market. The installation of the imported compatible sinks was done by various freelancers.

It should be noted that these kinds of situations are known in design law as the “must fit/must match” problem, in which the protected design right may give rise to claims of exclusivity over secondary market products (i.e. aftermarket products), such as printers and cartridges, or machines and technological devices and spare

⁴⁶ The Research Department of the Israeli court system conducted a statistical research concerning civil cases in first-instance courts in Israel and published the full data in 2014. The data includes a sample of 2,000 cases from various Magistrate and District Courts that were “closed files” between December 2008 and December 2011. The sample consists of 2 percent of the entire files at the respective period and, according to the statistical information reported by the Research Department, it reflects an accuracy of over 95 percent and error sampling of less than 6 percent, see Weinshall & Taraboulos 2014. Out of the 2,000 sampled cases, 815 cases have reached a final decision in court (the rest were withdrawn, technically closed, or transferred to arbitration and most were settled with the court’s approval). Out of the 815 cases that have reached a final decision in court, in 247 cases the lawsuit was rejected and in 568 cases the lawsuit was accepted in full or in part (401 cases in full and 167 cases in part). This statistical sample represent an average ratio of 70 percent success when a civil case reaches the stage of a court final decision. Clearly this is not an accurate ratio, but it may indicate a scale.

⁴⁷ This hypothesis could not be proven or rebutted, but other explanations for the drop of success in patent litigation would lack solid evidence as well.

⁴⁸ CA 7614/06 *Tzchori and Sons Industries LTD v. “Regba” Communal Agricultural Village LTD* [2000].

parts.⁴⁹ The “must fit/must match” problem, however, may be relevant in patents law as well, and has given rise to complex questions concerning the limits of intellectual property monopolist rights vis-à-vis free competition.⁵⁰ The District Court in *Tzhori* held that the compatible sink is a direct product of the patented process, since, at least in some periods, it could be installed into surfaces only if they were cut by the patented process. The District Court Judge explicitly explained that considering free competition, not all compatible sinks should fall within the monopoly’s scope, but rather only those that would possibly be installed by the patented process. Moreover, the court was aware of the fact that the installation of the compatible sinks was done by third parties – the freelance installers – and the defendant had no control over their acts. During the hearings the defendant had developed its own process for installation of compatible sinks, which was approved by the court as non-infringing. Therefore, a final injunction was ordered, referring only to sinks that were aimed to be installed by the patented process and not by other newly developed methods.⁵¹ On appeal, the Supreme Court reversed the decision, holding that the direct product of the cutting process was only the aperture (i.e. the opening) in the surface, while the compatible sink was a “later” product. The defendant imported and sold the compatible sinks, yet the customer was responsible for the installation of the sink they bought, and the installation was done by third parties for whose acts the defendant was not liable. The Supreme Court rejected the application of the joint tortfeasors doctrine in this case and ruled that the doctrine of contributory infringement was not yet adopted in Israeli patent law. Therefore, the Supreme Court clarified that even if the installation done by third parties was a patent infringement, considering a broad interpretation of the patent, the defendant could not be held liable for such infringing acts since was merely importing the sinks.⁵² It should be noted that one year later, in a different case, the Supreme Court

⁴⁹ In England there is a special exclusion, according to which such objects do not fall within the scope of the design right. Section 213(3)(b)(i) of the Copyright Design Patent Act (1988) is often referred to as the “must fit” exclusion and section 213(3)(b)(ii) as the “must-match” exclusion (“Design right does not subsist in – (a) . . . , (b) features of shape or configuration of an article which – (i) enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function, or (ii) are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part”).

⁵⁰ In the United States there is a significant movement calling for legislating special provisions that would protect consumers’ “right to repair,” and that would limit the control over spare parts and the aftermarket through patent rights, see Grinvald & Tur-Sinai 2019; Joshua D. Sarnoff, White Paper on Protecting the Consumer Patent Law Right to Repair and the Aftermarket for Exterior Motor Vehicle Repair Parts: The PARTS Act, S. 812, HR 1879, 115th Congress, November 2017.

⁵¹ CC 505/94 “*Regba*” *Communal Agricultural Village LTD v. Tzhori and Sons Industries LTD* [1986].

⁵² CA 7614/96 *Tzhori and Sons Industries LTD v. “Regba” Communal Agricultural Village LTD*, pp. 742–42, 745–47 [2000].

did adopt the doctrine of contributory infringement in patent law.⁵³ Moreover, the Supreme Court reasoning in the *Tzchori* case was that the Patents Act is subject to interpretation according to the law's initial purpose, and a balance of competing interests should exist: the need to set limits to the monopoly of the patent right which may limit the freedom of occupation and of competition, versus the proprietary interests of patent owners and the public interest in incentivizing the development of inventions.⁵⁴ Therefore, the Supreme Court concluded that the defendant did not infringe the patent, and consequently the injunction was revoked. Without discussing the issue of "direct products" and the proper rule for compatible parts, it is clear that the Supreme Court was concerned by the closure of the relevant market to competition, and thus it determined that there was no infringement at all. However, this was, potentially, an appropriate case in which even if the court had concluded that the patent was infringed – since the patent could have been interpreted as including the process of installation and the importation of compatible sinks could have been concluded as contributory – the court could have justified the denial of an injunction as being a far-reaching remedy under the circumstances, which would disproportionately close the market. Such result could have been justified particularly considering the defendant's contributory liability.

C. INJUNCTIVE RELIEF IN PATENT SUBJECT-MATTER CASES BASED ON UNJUST ENRICHMENT LAW

In 1979, the Unjust Enrichment Act was enacted in Israel, based on continental principles.⁵⁵ The Act establishes the grounds for monetary restitution; however, it was developed extensively in Israeli case law as a basis for a cause of action as well, particularly in intellectual property subject-matter cases which did not qualify for a fully fledged intellectual property right. Moreover, in a District Court decision of 1989, it was held that unjust enrichment may serve as grounds for granting final injunction, and not only for restitution. The Supreme Court further developed the principle of unjust enrichment as a vehicle for claims in situations in which products were copied, but there was no infringement of any other established intellectual property right.⁵⁶

In 1998, a seminal decision was handed down by the Supreme Court in the case of *ASIR*,⁵⁷ which concerned an industrial design that had not been registered and an

⁵³ CA1636/98 *Rav-Bariach LTD v. Beit Mischar Leavizarey Rechev (Car Accessories Store) Havshush LTD* [2001].

⁵⁴ CA 7614/96 *Tzchori and Sons Industries LTD v. "Regba" Communal Agricultural Village LTD* [2000, p. 741].

⁵⁵ Unjust Enrichment Act 1979.

⁵⁶ LCA 371/89 *Leibovitz v. A & Y. Eliyahu Ltd, et al.* [1990].

⁵⁷ LCA 5768/94 *ASIR Import, Manufacture, and Distribution v. Accessories and Products Ltd*, [1989].

invention for which no patent had been registered. The question was whether copying these unregistered products created grounds for a claim of unjust enrichment (which, as mentioned in Section C, entitles the plaintiff to both monetary restitution and injunctive relief). It should be noted that until the new Designs Act was enacted in 2017, there was no established, unregistered design right under Israeli law. The Supreme Court considered the principal question of whether intellectual property is regulated exclusively by the established intellectual property rights, such as patents and designs, or if it may be protected by other legal means. The majority ruled that unjust enrichment may serve as an independent cause of action in cases featuring an “additional element,” variously referred to as “unfair competition” or “unfairness.”⁵⁸

In the aftermath of the *ASIR* ruling, there have been further cases in which claims based on unjust enrichment were accepted, even though no design had been registered.⁵⁹ The injunctions in these cases were occasionally non-perpetual and limited to a certain period. The *ASIR* ruling did not discuss the time period of injunctions, but the Supreme Court referred to this issue in later decisions. For instance, a Supreme Court decision that followed one of the cases discussed in the *ASIR* holding, ruled that the monetary remedies should be limited in a way that would reflect *eight years* of protection over the non-registered design, and that this period already included the injunction that had been granted by the District Court for a limited time.⁶⁰ The Supreme Court explained that granting remedies in cases based on unjust enrichment is complex, since, on the one hand, there is no fully fledged (intellectual) property right and, on the other hand, the plaintiff's interest that their design would not be copied justifies protection.⁶¹ Therefore, various factors should be considered in tailoring the adequate remedy, including the behavior, intentions and good faith of the infringer, the investment in the design and the reason the design was not registered. The Supreme Court further emphasized that injunction is an equitable remedy which is subject to the court's discretion.⁶² In another case, the Supreme Court stressed that considering the proper balance of interests underlying intellectual property laws, between incentivizing

⁵⁸ *Id.*

⁵⁹ See for example: CC 16218/97 *Single Fashion Design 1994 Ltd v. Moses Ben Isaac Kuba* [not published] (injunction was granted against imitation of unregistered design for trousers); CA 3894/03 *Doitch v. Israflowers Ltd* [2004] (injunction against imitation of unregistered design for jewelry).

⁶⁰ CA 2287/00 *Shoham Mechonot (Machines) and Mavletim (Dies) LTD v. Harar* [2005]. The District Court granted an injunction which was effectively in force for three years, due to various interim decisions limiting the injunction during the hearings of the *ASIR* case. This Supreme Court decision, concerning remedies, was handed down ten years later. Therefore, the Supreme Court had to calculate the monetary relief retroactively, taking into consideration that during the term of eight years of protection the injunction was valid for only three years.

⁶¹ See *id.* at paras. 27–28.

⁶² See, CA 2287/00 *Shoham Mechonot (Machines) and Mavletim (Dies) LTD v. Harar* [2005] at paras. 27–28, 30–31.

creators and allowing free competition, there is no justification to grant perpetual injunction based on unjust enrichment, and the time period should not exceed the term of protection over a registered design. This conclusion was supported by the fact that no explanation was given for the non-registration of the design.⁶³ However, twenty years after the *ASIR* ruling's legacy was applied extensively in the area of design law, the new Designs Act enacted in 2017 foreclosed the possibility to use unjust enrichment as a cause of action in cases of design infringement, since an explicit provision states the exclusivity of the Designs Act over protection of both registered and non-registered designs.⁶⁴

In the area of patents, nevertheless, the courts are more cautious in their application of the *ASIR* ruling. For example, in a case where no patent had been registered for a medicine, the District Court dismissed a claim of copying based on unjust enrichment.⁶⁵ Moreover, as discussed above, the Supreme Court ruled that the Patents Act unequivocally determines that the use of invention cannot be prevented during the pendency period of a patent application, and that this rule cannot be circumvented on the grounds of unjust enrichment. In explaining its decision, the Supreme Court stated that the Patents Act has established a delicate balance of interests that should not be interfered with, and that in the current case the law should be viewed as exhaustive and exclusive.⁶⁶

D. ANALOGIES FROM CLOSE LEGAL AREAS: COPYRIGHT AND PLANT BREEDERS' RIGHT LAW

1. *Analogies from Copyright Law*

The most significant development concerning discretionary final injunctions in the field of intellectual property law concerns an explicit authorization in the new Israeli Copyright Act (enacted in 2007) not to grant injunctive relief. Section 53 of the Copyright Act 2007 provides that: "In an action for copyright infringement the claimant shall be entitled to injunctive relief, unless the court finds that there are reasons which justify not doing so."

⁶³ CA 3894/03 *Deutsch v. Israflowes Ltd* [2012]. In this case, the District Court had granted an injunction in 1996. The Supreme Court decision, rejecting the appeal in part, was handed down in 2012. The one and only claim that was accepted referred to the time period of the injunction. The term of design protection was at that time fifteen years, therefore the Supreme Court ruled that the injunction should not reflect a longer period of time. Considering the passage of time since the injunction was first granted by the District Court in 1996, the Supreme Court did not see reason to keep it valid. The injunction, therefore, was revoked.

⁶⁴ Designs Act 2017, sect. 2 provides that: "There shall be no right in a design except under the provisions of this Law." It was explicitly explained in The Designs Act Bill 2015 that this section is aimed at blocking the legal path created by the *ASIR* ruling.

⁶⁵ CC 2417/00 *Smithkline Beecham Plc v. Unifarm Ltd* [2006].

⁶⁶ See Patents Act Bill – 1965, H¹H 637, January 20, 1965, p. 129.

According to legislative history, the original Copyright Act Bill included only a general section according to which “infringement of copyright is a civil wrong and the provisions of the Torts Ordinance shall apply.”⁶⁷ This section is currently included under section 52 of the Copyright Act. The explanatory part of the bill clarified that without prejudice to the proprietary nature of the copyright, the general appropriate framework for remedies in case of infringement is tort law.⁶⁸ During parliamentary committee discussions, there was an outcry over this section and the possibility that it may hinder the nature of copyright as a property right. In particular, the fear was that such a section may give rise to claims based on section 74 of the Torts Ordinance anchoring the rule that injunctions are subject to various equitable considerations headed by the balance of convenience. As a compromise, the current section 53 was added, clarifying that entitlement to an injunction is the general default.⁶⁹ During the final vote in parliament, the committee chair explained that injunctive relief may be denied based on prevailing public interest, such as freedom-of-expression and freedom-of-occupation considerations.⁷⁰ These considerations, and other appropriate circumstances for denying injunctive relief, were reviewed in Israeli scholarly literature.⁷¹ Yet, after thirteen years, there is still very scant reference to section 53 of the Copyright Act by the judiciary; in fact, courts maintain the automatic approach to final injunctions in the copyright realm as well.⁷²

The few court decisions referring to section 53 of the Copyright Act reflect a very cautious and mild change of approach. For instance, the Supreme Court noted only in *obiter dictum* that where a photographic work of historical importance is concerned, the owner of the work may not be entitled to an injunction and may only receive damages for the infringement.⁷³ In some cases, lower courts were conflicted with the possibility of granting injunction. For example, in one case the District Court considered denying an injunctive relief due to the plaintiff’s failure to conduct themselves in good faith and their contributory fault; however, it eventually granted the injunction since the proprietary nature of the copyright should have prevailed in its view.⁷⁴ In another case, the District Court held that a *temporary* injunction against the broadcast of a television series should be denied since a *final*

⁶⁷ The Copyright Act Bill 2005, H¹H 196, July 20, 2005, sect. 55 at 1116.

⁶⁸ *Id.* at p. 1136.

⁶⁹ Minutes no. 353 Economic Committee meeting, Israeli Parliament (seventeenth Parliament, October 9, 2007), p. 23.

⁷⁰ Minutes no. M/196 Meeting 170 of the Israeli seventeenth Parliament. (November 19, 2007). According to Article 3 to the Israeli Basic Law – Freedom of Occupation [1994]: “Every Israel national or resident has the right to engage in any occupation, profession or trade”, see: www.knesset.gov.il/review/data/eng/law/kns13_basiclaw_occupation_eng.pdf.

⁷¹ See Fischman-Afori 2009, 529 (in Hebrew).

⁷² *Id.*

⁷³ CA 7774/09 *Weinberg v. Weishoff* [2012].

⁷⁴ CC 2545/07 *Miriam Bilu and others v. Holon municipality* [2012].

injunction would be rejected as well, as (except from the fact it was not requested) under the circumstances freedom of expression and the public's interest in access to the protected content prevails.⁷⁵ Following this later decision, a Magistrate's Court ruling explained the refusal to grant *temporary* injunction against the broadcast of a documentary film due to the high likelihood that the court would deny a final injunction in this case as well, since freedom of expression and the public's interest in access to the film at stake might prevail.⁷⁶ In other words, in these two latter cases, lower courts refused to grant temporary injunctions, as occasionally happens, yet the only change of approach lay in the reasons for such denial which referred to a potential justified denial of the final injunction in the future. Finally, recently, the District Court refused to grant an injunctive relief, stressing it was an unapplicable remedy under the specific circumstances, yet with no reference to section 53 and without elaborating on the matter.⁷⁷

2. Analogies from the Plant Breeders' Right Law

Another analogy is taken from a very close legal area – the protection of plant breeds. The Plant Breeders' Rights Act (1973) regulates the established, registered plant breeders' right in Israel. This intellectual property right is governed by legal principles akin to those underlying patent law. Moreover, the wording of section 65 of the Plants Breeders' Rights Act is the same as that of section 183 of the Patent Act, according to which in case of infringement the plaintiff is "entitled" to injunctive relief. Thus, when the courts concluded that a plant breeder's right was infringed, its owner was automatically entitled to injunctive relief.

However, in a single and rare Supreme Court decision, in the case of *Florist De Kwakel v. Baruch Hajaj*, handed down in 2013,⁷⁸ the scope and nature of the entitlement to injunctive relief in the Plant Breeder's Rights Act was discussed. The Supreme Court eventually granted a limited injunction, therefore most of the discussion is *obiter dictum*. However, since it reflects the first thorough analysis by the Supreme Court of the issue of discretionary permanent injunctions, it has a significant importance. Justice Hanan Meltzer, delivering the opinion of the court, opened by reviewing the adoption of the British common law tradition with respect to equitable remedies, headed by injunctive relief, into Israeli law, and that *de facto* this tradition is applied only with respect to interim injunctions. Nevertheless, Justice Meltzer emphasized that despite the decisive wordings of section 65 of the Plant Breeder's Rights Act and section 183 of the Patent Act, there is an *inherent*

⁷⁵ CC 57955-12-16 *DBS Satellite Services (1988) Ltd and others v. Noga Communication (1995) Ltd* [2018].

⁷⁶ CC 14106-06-19 *Doe v. Jonathan Ofek* [2019].

⁷⁷ CC 53689-10-17 *Bardugo v. D. Eithan & R. Lahav-Rig Architectures and Urban Planners Ltd* [2020].

⁷⁸ CA 10717/05 *Florist De Kwakel et al. v. Baruch Hajaj et al.* [2013].

vested discretion to the court in matters of injunctions. Such court's general discretionary power could be concluded from both section 75 of the Courts Act, according to which courts are authorized to grant such remedies as are proper under the circumstances, and from section 74 of the Torts Ordinance, according to which injunctive relief is subject to the balance-of-convenience principle. Furthermore, Justice Meltzer stressed that, according to the principle of interpreting various pieces of legislation in a harmonious way, section 53 of the new Copyright Act (clarifying that courts' discretion in granting final injunctions is vested) should be taken into consideration while interpreting the parallel sections on other intellectual property laws, being close legal subject matter. Justice Meltzer specified a few potential reasons for denying injunctive relief that are discussed in the literature,⁷⁹ including resolving severe market failures, promoting free competition, and striking a proper balance of interests aimed at promoting access to work. Justice Meltzer added that the court may deny injunctive relief in extreme and rare cases of *misuse of right* where the plaintiff's lack of good faith was apparent and abusive – or, alternatively, in *de minimis* cases. Nevertheless, under the specific circumstances, such exceptions did not arise – even though the initial use at stake was under license, a later cancelation of it and the insistence of the right owner on putting an end to the licensed use could not be perceived as abusive or misuse of right, nor as a *de minimis* infringement (inter alia, based on the *Roker v. Solomon* holding). The Supreme Court also rejected the claim of balance of convenience at stake, since it may hinder the proprietary nature of the intellectual property right.

The final ruling of the Supreme Court in the case of *Florist De Kwakel v. Baruch Hajaj* was that a final injunction should be granted only to a limited scope of acts that are a clear and direct infringement of the core of the plant breeder's right, in order not to hinder competition and the defendant's right to conduct his business freely (i.e. freedom of occupation).

It should be noted that there was no “follow-up” to the *Florist De Kwakel v. Baruch Hajaj* ruling, in the sense that no other court ruling took its legacy a step further.

E. CONCLUSIONS

Litigation concerning patent infringement is held between private parties, but its results have major impact on the public at large. The monopolistic nature of patents affects free competition, freedom of occupation and innovation, and it touches individuals' quality of life, especially when it comes to pharmaceuticals. Therefore, patent law needs to balance various competing interests: on the one hand, the public interest by granting patent rights to incentivize innovation and, on the other hand, the public interest by minimizing the negative consequences

⁷⁹ Referring to Fischman-Afori 2009 (in Hebrew).

stemming from the patent monopoly. Israeli patent law incorporates vast legal mechanisms that allow discretion in pursuit of the appropriate balance, from the initial stage of the patent registration to the final stage of patent enforcement by court. In all these stages, patent law uses legal measures that are subject to interpretation according to the underlying rationale of patent law. However, when it comes to the very last stage of the judicial process in court, the approach changes sharply – the Israeli judiciary grants final injunctions on an almost automatic basis, as if these were merely a technical matter. Therefore, equitable considerations and the public interest are not a major factor in granting final injunctions, in contrast to temporary injunctions which are still governed by equitable principles. This approach stems from the classification of patents as property rights. Property rights are perceived under Israeli law as “robust” rights that incorporate the injunctive power. While some mild exceptions to this approach have been reported, it nevertheless seems that the governing approach to final injunctions is rigid. A proposed hypothesis is that this rigid approach may lead courts to entirely reject patent infringement claims considering the negative consequences of an injunction. The Israeli patent system has much to gain from expanding the discretion of courts regarding final injunctions as well, since such discretion could serve as an additional, powerful legal means for balancing competing interests in an appropriate and wise manner. The rigid view of patent right as a property right may be relaxed by a complementary perception, according to which patent infringement claims are subject to the flexible equitable and tort law principles regarding injunctions.

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