

PATENT INSURANCE: TEFLON COATING ON ARMOUR?

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Authors: M. Qaiser & P. Mohan Chandran

Thankfully, there is always some insurance protection available against all the dreadful calamities that can befall the human race: accident, fire, earthquake, floods, death, and now, patent infringement.

But wait! Patent insurance sounds like re-fried beans. A patent itself is a kind of insurance. A patent, by definition, is an exclusive right granted by the government to make, use or sell the patented products. In other words, no one other than the patent-holder can manufacture or market the patented products. This appears to be a sort of insurance. What then, is a patent insurance?

Patent insurance is a protection against infringement of patents and the costs associated with it. Patent insurance is of two types: Patent Liability Insurance and Patent Pursuance Insurance. Patent Liability Insurance is a defensive instrument, which helps the insured fight an infringement lawsuit filed by a rival company. It is also called 'Patent Infringement Defense Insurance'. In this case, the insurance company pays a part of the legal expenses incurred and/or the damages to be paid. Patent Pursuance Insurance on the other hand, is an offensive instrument, which aids the insured fight against a patent infringing company. This is also called the 'Patent Enforcement Insurance' or 'Offensive Patent Insurance'. In this case, the insurer pays a portion of the legal expenses incurred by the insured company.

Though it is neither well known, nor widely subscribed, patent insurance has been around for almost a decade on the international scene. With more and more firms entering the knowledge-based business and fighting hard to safeguard their interests and achieve their business objectives, insuring one's intellectual assets have now become an imperative and vital strategic business decision. Most companies, including well-established ones, may not want to use their stacked-up profits to fight any IP litigations that may arise during the course of their business. SMEs, that have comparatively weaker balance sheets, dread the idea of patent litigations. This, in turn, has an impact on their organic and inorganic growth, as well as on research and development, and hence on their revenues.

Effective management of intellectual property basically involves creating, maintaining, and safeguarding its patent portfolio, apart from strategic planning of risk management. This requires constant vigilance for any infringement by competitors. The company also needs to be cautious in its research and development work while expanding its portfolio, so that it does not infringe on others' patents. Filing or fighting a legal suit is an extremely expensive affair (with a median range of \$0.5 million to \$0.5 billion), as most of the firms involved in these legal battles have learnt. Sun Microsystems parted with US \$92 million in October 2004, in an out-of-court settlement, after Kodak filed a patent infringement lawsuit. More examples of penalties: Polaroid Vs Kodak – US\$873 million; Cordis Vs Boston Scientific – US\$271 million; 3M Vs Johnson & Johnson – US\$107. Bitter experiences. Expensive litigations. Moments of truth.

According to American Intellectual Property Law Association, the average cost of a patent litigation is \$0.5 million to \$5 million for each of the warring firms, depending on the amount of infringement in question. In some cases, the costs could also go as high as even \$500 million. For small and medium enterprises and firms entering a new business, it might be a question of life and death as a single infringement case might impair their entire portfolio of products and services. The invisible costs may include the stress on the employees involved and also loss of

many man-hours as they go about fighting an infringement or an allegation of infringement. The company's business and its image may also take a beating as customers and investors lose their confidence when a lawsuit is filed.

DEFENSIVE INSURANCE

“Whether or not a patent is truly infringed, it costs \$3 million dollars on average to defend a patent lawsuit,¹” says patent attorney Dan Ravicher, and that is only the attorney's fees and associated expenses, not the jury award. The damages can sometimes wipe out the assets side of the balance sheet. In today's business scenario, risk management is a key focus area, and Patent Liability insurance is the only effective protection available for a product portfolio. This insurance can be the best shield in the hands of all those companies – big, medium, small, or start-ups – that have to fight the infringement lawsuits. Though these insurance policies have been in the international market since 1995, it is only in the recent times that more and more companies are opting for them with an increase in the number of patent lawsuits being filed. The number of patent infringement lawsuits filed annually in the U.S. increased by a whopping 111 % between 1999 and 2000².

Most insurance companies offer policies that cover a part of the legal expenses as well as the damages awarded in infringement lawsuits.

The following issues are generally covered by a patent infringement insurance:

- Defence expenses, including legal attorney fee, declaratory statements, injunctions and appeals.
- Damages covered, including judgments and settlements; previous lost royalties and previous profits, interest and costs; attorney fees assessed by the court.
- The policy covers directors, officers, employees, company, its subsidiaries, all products, and all patents – utility, process, and design.
- Coverage of new acquisitions, previous acts, arbitration, and dispute resolution procedure.

ENFORCEMENT INSURANCE

Some companies do not apply for patents because of the misconception that there is huge cost and time involved in obtaining and protecting the patents. On the contrary, the cost of applying and securing a patent is only a fraction of the cost of developing the new product. If the invention has financial viability, then it makes good sense to apply for a patent. And once the patent is granted, insuring the patent would be the next logical step as it reduces the financial burden of fighting any legal suits. An insured patent also discourages probable infringement, as the infringing firms would fear the financial strength of the patent holder (due to the muscle power of the insurance company) in fighting any legal battle.

INSURANCE PREMIUMS

Premiums for patent insurance depend on the patent and/or the product being protected. They usually range between 2-5% of the insured amount. Damages of up to \$1 billion are covered

¹ “Linux Accused of 283 New Copyright Violations, CXOtoday Staff, www.itnation.com, Aug. 2, 2004,

² “Patent Infringement Lawsuits: By the Numbers” Patent Enforcement and Royalties Ltd., www.pearlltd.com, October 8, 2002.

under the insurance, while \$20-30 million are common. Insurance limits up to \$15 million coverage per patent are available. Deductibles start around \$50,000-\$100,000 and include a co-insurance percentage after the deductible. The co-payment can vary from 15% to 25%. Defense expenses such as legal fees, declaratory statements, injunctions, and appeals are usually covered by the policies. The insurance coverage premiums for a \$1 million patent starts at \$25,000. The factors that determine the premium rates are the past records of the firm, the care taken in patent research to prevent infringement and the firm's own research and development work.

However, before providing the insurance coverage, insurance companies carefully consider the following aspects of the insured company:

- Past attempts at handling and enforcing patents
- Licensing programmes
- Detailed patent claims of the insured's patented product
- Steps taken by the company to protect and monitor conflicting patents
- Existing and potential competitors in related markets
- Sales and market share of top five companies in the market
- The known patents and patent-holders in a particular field
- The availability of capital resources for marketing a competitive/patented product.

WHO SHOULD OBTAIN PATENT INSURANCE?

Every company which manufactures or markets new products must cover its risk by obtaining patent insurance. The key words here are "new products." If new technology, new design or new functionalities are available or embedded in the products that are manufactured or marketed by a company, it is recommended that the company must obtain patent insurance.

Also, several aspects of a business have inherent intellectual property material which may not even be known to the business. For instance, a business may have websites that need to be protected. Websites are publications, and as a publisher, the company may be liable to infringement claims.

If the new technology is patented by the company, they will benefit from the patent pursuance insurance or enforcement insurance. If the patents are not held by the company, it is possible that some other company holds the patents, and therefore the company must have the patent litigation insurance, to mitigate the risk of possible infringement suits against the company.

Patent insurance of both kinds (defense and offence) should be obtained by companies of all sizes – small, medium and large. Because, patents are size-neutral, and so is its insurance. In fact, the smaller companies must try to get more patents and more Enforcement Insurance to benefit from licensing to bigger companies. The bigger companies, on the other hand, must obtain Liability Insurance to protect against lawsuits brought against them by smaller companies. Of course, the bigger companies must also strive to have their own patents and the Enforcement Insurance on those patents. In short, if you have your own patents, you must have Patent Enforcement Insurance. If you don't have patents on your product line, you must have Patent Liability Insurance.

In addition to everything stated above, every company must perform infringement analysis to ensure that their products do not infringe on anyone's patents. On the other hand, they must also

establish market vigilance procedures to ensure that their competitors are not infringing on their patents.

EVERYBODY HATES INSURANCE!

A patent is the armour on the products. A patent insurance is the Teflon coating on the armour, which ensures that no infringement will stick. Having said that, it is also fair to mention that patent insurance is not the main highlight of a business plan. Of course, there is always the option to “do nothing.” It is the first course of (in)action; it is the path of least resistance; it is a procrastinator’s quick decision, and it is a no-premium but high-risk option. Yes, it is a simple decision to be without insurance. However, the people who do not obtain insurance, knowingly or unknowingly, still have, what is termed as ‘self-insurance.’ They are just not paying premiums. In a self-insurance scenario, you don’t pay premiums, but you might, one day, pay a heavy price.

And, if and when, that day comes, and an infringement occurs, against your patents, or against your products, and if it finds you without a Patent Liability Insurance or Patent Enforcement Insurance, and then, and there, you find the competitor to be aggressive and fierce, and you feel a sense of loss; and, for that day and hour, if you want to save this article, to be read and reviewed – yes, by all means, save it now; and, on that day, read it again; and then, surely you will read it in a different light.

END NOTES

1. “Linux Accused of 283 New Copyright Violations, CXOtoday Staff, www.itnation.com, August 2, 2004.
2. “Patent Infringement Lawsuits: By the Numbers” Patent Enforcement and Royalties Ltd., www.pearlltd.com, October 8, 2002.

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M. Qaiser

M. Qaiser is the Managing Director and Chief IPR Strategist in **iPrex Solutions**. Prior to this, M. Qaiser was associated with General Electric (USA) for twenty two years. Starting a venture during 1997 in Singapore, he brought iPrex Solutions to India in 2003. M. Qaiser has focused his efforts on the all-around development of iPrex Solutions, nurturing and developing relationships with corporations, and academic institutions, as well as planning and directing intellectual capital development, pursuing Knowledge Process Outsourcing and overseeing the organization's IPR-research activities. He is guided by his long-term vision of seeing iPrex as one of the leading Intellectual Property companies.

His vision is evident through the pro-active initiative he has taken in establishing an IPR Company & KPO in India to provide high-end quality in IP strategy, critical IP competitive edge & marketing advantage solutions.

M. Qaiser has degrees in Commerce, Science, Law, and Management. He also has certifications in Six Sigma (China), FMP (USA), FABD (Singapore), and many more. Over the last 25 years, he has worked in USA, UK, Middle East, Hong Kong and Singapore, and has gained significant knowledge and experience in Quality Programs, Marketing, Law, and Intellectual Property.

He has done extensive study focused on IPR strategy and impacts of Intellectual Property on business growth. He is frequently invited to speak in seminars and awareness programs conducted by Government bodies as well as Commerce Associations. He has also featured in television interviews.

He is currently responsible for the work efforts of the IPR Strategists, Patent Attorneys, Trademark Agents, IPR Research Lawyers and Business Development Strategists working in iPrex Solutions. He can be contacted at qaiser@iprexsolutions.com.

iPrex Solutions provides “*thought-to-finish*” solutions and services for Patents, Trademarks, Product Designs and Copyrights.

P. Mohan Chandran

P. Mohan Chandran is a 'Senior Research Associate' with **iPrex Solutions**, an Intellectual Property Rights (IPR) firm, based in Hyderabad, India, offering "*thought-to-finish*" IPR solutions and services.

His first stint was as a 'Research Associate' with ICFAI Center for Management Research (ICMR), an affiliate of the ICFAI University. During his association with ICMR, Mr. Chandran developed about 20 management case studies on diverse topics that were bought and read by leading international B-Schools across the world. One of his case studies titled "Wal-Mart's Supply Chain Management Practices" became an international best seller and was bought/read by more than 100 universities across the world including top B-schools/Universities such as Harvard, Stanford, Purdue, Michigan, INSEAD, London Business School, London School of Economics, IMD, Indian School of Business, Oxford, etc. About 6 of his case studies became international best sellers.

Mr. Chandran's second stint was with an NGO called Foundation for Democratic Reforms/"LOK SATTA" (meaning 'people's power'), India's largest democratic people's movement for political and governance reforms, where he worked as a Research Associate and Media Coordinator. Lok Satta is India's largest democratic people's movement for political and governance reforms. It enjoys the support of more than 20 million people in the state of Andhra Pradesh, which has a population of about 70 million. It is headed by Dr. Jayaprakash Narayan, a former civil servant (who stood 4th in All-India Civil Services Exam and later resigned his job after a 17-year stint as Civil Servant to start this organization). Lok Satta aims at eradicating corruption, implementing democratic reforms such as Proportional Representation, Direct election of the Heads of Indian states, introduction of intra-party democracy, and other such reformative goals. It has made significant progress since inception and is moving ahead at a robust pace, achieving its goals with clinical precision.

Mr. Chandran has a profound passion for English and writing. He is also an amateur poet and has penned more than 600 poems hitherto. He holds a Master's in Management as well as in English, and a PG Diploma in Journalism.

He also did freelance assignments as a *Copywriter* for an ad agency, and volunteers for social organizations.

He can be contacted at mohan@iprexsolutions.com or mohan.c.us@gmail.com.