

## Business Line

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### Deft drafting key to perfect patents

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*It is not enough for companies to get on to the patent bandwagon, what is needed is a skillfully drafted patent, taking into consideration both the technical and legal aspects.*

Even as Indian companies file more patents, their managements are often ignorant of a key factor to future success — the quality of the filings. Poorly-drafted patents are like bad assets — they leave open the possibilities of litigation and financial loss.

It is not enough just to get a patent. It must be a "well-drafted" one too, providing broad protection and prepared keeping in mind international case law and examination practices at various patent offices.

#### A peep into the future

Consider this hypothetical scenario: Year 2005: The CEO of India Research, Inc. at a press-meet says: "We now have a portfolio of 50 patents, and have protected our innovative technology. We were also granted a patent (number 9,999,999) in the US, which is for our new formulation. Our technology is revolutionary and we expect to achieve a market share of over 250 million in the next five years... ."

Year 2008: Patent number 9,999,999 is infringed and litigated in the US courts. A competitor, PatentSavvy Chemicals, in the US has managed to develop a formulation similar to that of India Research but is not considered to be infringing the patent. Why? Because the courts interpret the patent to have a narrow scope based on the claims and the examples used in the specification of Patent 9,999,999. Subsequently, PatentSavvy Chemicals launches a similar formulation in the US and erodes the market share of India Research.

This story could well become a reality for many Indian companies. In fact, Indian companies are not aware of the enormous financial losses and litigation risks looming ahead.

#### Price of ignorance

What are the consequences of not paying attention to the quality of what is being filed? Chiefly, companies will fail to capitalise on R&D; lose market share to competitors who can design around patents more easily; and face considerable financial loss, arising from increased spending on foreign prosecution and the costs associated with patent litigation.

Unfortunately, the shortcomings or strengths of a patent application are often revealed only when an infringement occurs and sets off a litigation. However, it is too late at this point, as it is not possible to broaden the scope of an invention during litigation.

Even if the court rules in favour of the defendant that the patent was not infringed, competitors are granted ample opportunity to design around the incumbent patent. Patents in India in many cases are drafted in-house or by law firms, with little understanding of the legal requirements at the global level.

### NASCENT PATENT REGIME

Patent drafting is thus a challenging and intricate process. Many companies are not aware of this or underestimate it. The patent law is at a nascent stage in India. As a result, there is an absence of good patent applications.

Another factor is that inventors or scientists are not aware of the patentable aspects of their invention, as they are concerned mainly with their research. They often ignore the intricacies of their work, which may result in the loss of valuable intellectual property. Only patent experts who understand the science and the case law are able to identify all the aspects of the invention and protect it adequately.

Patents are not standard agreements, and drafting one is a complex, specialised art. It demands understanding, both technical as well as all the legal determinants affecting the patent.

The technical requirements demand a clear understanding of the scope of the invention, the patentable aspects, the distinguishing features over previous work, and the language that will best describe the invention.

The legal requirements demand that the drafter be familiar with international patent law and the patent law specific to the countries where the company is seeking to protect its intellectual property.

A thorough understanding of how the various patent offices and courts interpret written language is also needed.

The use of one wrong word can narrow the interpretation of the patent scope than originally intended, which implies reduced protection of intellectual property and easier infringement by competitors.

Thousands or even millions of dollars could be lost. Poorly drafted patents destroy valuable intellectual property, and most companies discover this when it is too late.

### MEASURES FOR PROTECTION

What can companies do to protect themselves? They must first understand and realise the importance of quality patent applications. Well-drafted patent applications provide broad protection and deter competitors from designing-around the patents. Companies must commit to creating and developing a patent strategy for themselves.

They must invest in training their scientists as well as in-house counsels. They must create systems to capture all the intellectual property created and then they must protect them in the best way possible.

It is this level of commitment that will allow companies to attain high quality patents, construct strong patent portfolios and create a sustainable competitive edge in today's intellectual property-driven markets.

(The author, Founder and CEO of Innovar IP Consulting Group, advises companies on developing and executing patent strategies.)

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