

## **Concept of Patent Insurance: Part 2**

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### **Your View**

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**For Readers:** In the preceding newsletter a generous attempt was made to enlighten readers on the concept and types of patent insurance available at present. This write-up will throw some light on the existence of patent insurance globally.

### **1. Universal Approach towards Patent Insurance**

Practical difficulties in slow evolution of patent insurance globally are as under:

1. Low level of indemnity, perhaps 200,000 Euros in large countries where costs are highly variable.
2. Lack of awareness of insurance and low level of appreciation of patent utility.
3. Inadequate understanding of the limitation of a patent grant and the need to be able to litigate to enforce.
4. Poor experiences in the past with conflict between insured and insurer.
5. Bad press reports from professional bodies such as CIPA Restricted scope of policies.
6. Low indemnity.
7. Need for complex and expensive evaluation of risk for insurers.
8. Burdensome restrictions and exclusions.

### **2. Global obstacles in pursuance of insurance on patents.**

Conventionally the Patent Litigation insurance has not been so successful in most of the economies which was backed by few reasons leaving such imperative insurance in a predicament for e.g.:

- High level of premium (for example averaging 20-50,000 Euros annually).
- Lack of statutes and amendments required for implementation of patent insurance.
- Lack of sources for discovering actual infringement of patents and execution by government authorities.
- Poor definition of IP covered leading to disputes with insurers.

### **3. Enforcement insurance**

also known as: Intellectual Property (IP) Abatement Insurance

Intellectual Property (IP) Abatement Insurance, also called enforcement insurance, assists IP holders in enforcing their intellectual property rights against alleged infringers. The insurance provides funds and services to enable policy holders to more effectively negotiate, protect and enforce their IP rights.

In view of aforementioned reasons for slow evolution of patent insurance, there exist classes of entrepreneurs/proprietors who keep themselves away from applying for patents; as there exist a misconception amongst many that exorbitant costs are incurred for obtaining and protecting patents. On the contrary, the cost of applying and securing a patent is only a fraction of the cost of developing a new product. If the invention has financial viability and potential for commercial exploitation, then it makes sense to apply for a patent.

Soon after a patent is granted to an inventor, it becomes obvious for the patent holder to insure the patent so as to mitigate costs that may be incurred for pursuing infringement of the invention.

Furthermore, insuring a patent helps deter any kind of abuse as against the patent and provides a sense of security to the holder of patent. Patent insurance in short, is a tool in the hands of the insurer which may act as deterrent against the infringers who intend to infringe the legal rights of patent holder.

Enforcement insurance policy, however, in most cases, reimburses only 80 per cent of the legal costs incurred within the policy limit. Some companies such as LRM, Lloyds, and Homestead have a clause referred to as 'economic benefit' or 'presumed economic benefit', which includes the ability to recover money advanced to the insured by the insurance company. The 'economic benefit' clause has two ramifications:

- When the insured wins a monetary award or settlement against a patent litigation, it will have to reimburse the insurance company on a proportionate basis till the entire money advanced by it is recovered. The insurance company can also recover an additional 25 per cent of the litigation costs advanced to the insured, after recovery of the full amount advanced.
- The clause allows the insurance company to recover the 'presumed economic benefit' from the insured. Presumed economic benefit would include instances such as the insured obtaining an injunction order against the infringer and preventing further infringement, settlement of litigation by executing a licensing agreement, execution of a non-monetary commercial agreement between the insured and the infringer, as well as the infringer consenting to stop the infringement.

#### **4. Patent Insurance - Patent Protection in India.**

In India, no insurance company, either in the public or private sector, offers any type of patent insurance for patent-holders. Insurance Regulatory Development Authority of India acknowledges that no insurance company in India has even applied for a patent insurance product. This is because there is a perception that patent protection in India is not as stringent as it should be. This perception is faulty. Once a patent is granted in India, Courts will protect rights of patent holders. Hence, there is a vast scope for patent insurance in India.

#### **5. Effect of Patent Litigation insurance on technology.**

- More patents will be applied for by small companies, because they will feel more confident that they will be able to afford to make use of a patent.
- More patents will be actively asserted by the patentee approaching possible infringers.
- More investigations of technical situations relevant to technical matters of current interest and to the work of technical experts in industry relating to new and existing products and processes will be made.
- More small and medium sized companies will respond intelligently to allegations of infringement and need not merely adopt the supine attitude of giving into implied threats of infringement by abandoning their manufacture.
- More licenses will be negotiated with a clearer and more accurate picture of the scope of the rights licensed.
- Cross-licensing could also more accurately reflect the true strengths of the patents.
- Presumably more technical sophistication would be introduced into industry at all levels because those concerned will be more quickly, cheaply and better informed.
- As a result, technological progress will be aided.

## 6. Conclusion

Patent insurance is a boon in developed economies for IP holders. However, in the Indian market patent insurance is virtually non-existent. The scope is therefore immense. Hence to begin with, the Government of India may consider establishing a forum /panel of legal experts and engineers in conjunction with IRDA for the purpose of examining the potential of Patent insurance in India.

Note: Research methodology used for this newsletter is based on information available on the web.

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