

Concept of Patent Insurance: Part 1

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Introduction

A patent is an exclusive right granted by the Government to an inventor for an invention for a limited period of time, which maybe a product or a process that provides a new way of doing something or offers a new technical solution to a problem.

Patent Insurance is said to be an analogy drawn from general insurance of any commodity or article of which the owner has an immense interest in. It purports to safeguard the interest of the Inventor in the product/process patent and seeks to guarantee the inventor the cost of the litigation or the loss of the patent infringement. Patent insurance is a security given to the inventor which runs parallel to the rewards or price paid to the inventor for investing his efforts into inventing something.

What is patent insurance?

'Patent infringement insurance' virtually means indemnity guaranteed to the inventor of the patent by an insurance company for a premium. However, patent insurance technically means guaranteed indemnity as against:

- Defense expenses, including legal fees, declaratory statements, injunctions and appeals.
- Damages, including judgments and settlements, previous lost royalties and previous profits, interest and costs, as well as legal expenses assessed by the court.
- Liability for the company, its subsidiaries, employees, products and patents.
- New acquisitions, previous acts, arbitration and dispute resolution procedures.

Like any other insurance scheme there can be some exclusions in the insurance scheme of patent insurance such as:

- Willful infringement
- When infringement is already known or exists prior to the effective date of the policy
- Fines, penalties, judgments, double / triple / multiple infringement charges, exemplary fines or punishments, direct, indirect and / or consequential

damages.

Types of Patent Insurance

I. Patent Liability 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.

II. Patent Pursuance Insurance. 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.

Global walk of patent registration.

Pharmaceutical and IT companies are consolidating their operations and making overseas acquisitions and hence are aware of the risks. Patent claims have doubled in the past five years and it is now not uncommon to hear of patent awards which are above \$100 million. Indian companies are seeking patent insurance with an indemnity limit of around \$5-10 million.

Increase in the number of patents means increased threat of infringement. With the dawn of 21st century Intellectual Property (IP) has gained utmost importance and it may be held by a corporate body, group of individuals or even an individual. Invention in today's world is a scrupulous task, consuming massive amounts of time and effort. In such circumstances the award received by the inventor for his industrious job may not commensurate with time, money and efforts invested for such a creation, if the invention is encrusted with a threat of insecurity and infringement affecting literate meaning of invention.

Insurance schemes currently in practice globally.

There are various schemes employed throughout the world. A few of them are discussed below-

I. Scheme for both voluntary and compulsory operation.

This envisages block insurance where each patentee would pay an insurance fee for each of his patent applications filed in Europe.

1. The fee would be charged annually so long as the patent exists.
2. Cover would be automatic; there would be no risk assessment.
3. Infringement by third parties would be challenged using a sum of money provided by the insurers - upto a relatively low pre determined amount.
4. Should additional funding be required to further pursue the infringer, this would be made available after a report from a scrutiny committee formed for this purpose.
5. This scheme could be extended to cover the defence aspect which would cover allegations of infringement following the manufacture or sale of a product.
6. The scheme could also be extended to cover damages and/or financial loss

suffered.

II. Modification of an existing scheme.

Features

1. The EU patent litigation insurance would preferably be compulsory and would be in a very basic form for the pursuit of infringers, with extensions of cover available on a voluntary basis for additional premiums. Any compulsory insurance must be simple with basic flat premiums and these must coincide with payments for patent applications, for granted patents and renewal fees.
2. The patent litigation insurance would be a modification of the scheme presently used by the Patent Insurance Bureau and has been proposed by the bureau.

The policy covers:

1. The additional costs incurred in accelerating the insured patent application to grant when there is evidence of a potential infringement of the insured patent application.
2. A guarantee that if a potential infringement takes place during the patent application period, the insurer will issue a Patent Enforcement Insurance policy when the patent is granted.
3. Inclusion in the register kept by the Intellectual Property Policy Registry that publicizes those patent and patent applications that are protected by insurance.
4. There would be a very low premium paid at time of application with further higher annual premiums payable on grant and up to expiry of the patent.
5. Extensions could be designed to cover a defendant and also pay damages.

III. Patent litigation insurance for the pursuit of infringers.

Features

1. This type of insurance exists in various forms in Europe under policies underwritten by Lloyd's of London.
2. The patent insurance existing is part of a broad cover for IP including also trade marks and copyright but could be selected as a patent module and further restricted to cover pursuit only. The insurance company would pay legal fees in the event that patents are infringed by third parties. An annual fee would be paid. Risk assessment is usually requested by insurers to investigate validity and enforceability of the patent but this could probably be waived should the scheme be compulsory.
3. The scheme could be extended to include defence in the event that manufacture, use or sale of a product infringes the patent rights of a EU patent holder covered by the EU insurance scheme.
4. Cover could also be extended to include damage awards by a court.

IV. Patent litigation insurance for defence against allegations of infringement.

Features

1. This class of insurance is available in Europe from Lloyd's of London, Allianz

Gerling, AIG, and Evanston and is also widely available in the USA. The cost/premium payable for availing this insurance is provided in "Addendum No.1 to Final Report on Insurance against Patent Litigation Risks March 2003" by CJA Consultants Ltd., European Policy Advisers, Britain and Brussels.

2. Cover could be extended to include damage awards.

V. IP Sentinel - a two stage policy

IP Sentinel was developed by a syndicate of Lloyd's of London.

1. IP Sentinel consists of two insurance policies that provide a 2-step solution to the problem of infringement of a patent. Stage 1 is the evaluation of the claim and the patent by independent experts. Stage 2 will pay on behalf of the patent owner the legal cost of pursuing the infringer to obtain financial compensation.
2. The evaluation at stage 1 covers both legal and commercial aspects of the patent allowing the owner to make an informed judgment about pursuing the infringer. This coverage is paid by the insurer in return for the premium paid in advance by the owner of the patent.
3. IP Sentinel will pay legal costs for the action in the event that the evaluation is positive. Underwriters will offer this coverage in return for a share of the financial recovery. There is no up front premium charge for stage 2 coverage. If the action is not successful the patent owner will not be required to pay any costs incurred.

Note: This article is restricted for understanding the concept of Patent Insurance and should not be construed as an opinion. In the subsequent newsletter our readers will be edified on the existence and awareness of patent insurance globally.

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

- *By Rishikesh Bidkar (Associate)*

Editor-Trupti Daphtary

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