

## Patently complicated business

**Q. I have been reading about the “smartphone” patent wars between Apple and Samsung, and am now very worried because I recently learnt that someone has a patent covering the electronics product that I am about to launch here in Singapore and hope to sell around Asia.**

**What should I do? Where can SME owners like me seek help?**

**A:** First of all, don't panic.

Intellectual property rights (IPR) like patents are territorially limited rights. So you must find out in which countries they are registered – the correct term for patents is “granted”.

It is not unusual for patents (in particular) to be applied for and granted in North America and/or Europe only – because the more countries involved, the more expensive it gets.

If that is the case, you are free to launch your product in Singapore without worrying about being sued for patent infringement here. But remember to investigate the position for each country in which you are thinking of selling your product because there might be a patent there.

It's not the end of the world even if you find that there is a patent granted to someone else in a country in which you want to sell your product. Although they are on the Patents Reg-

ister, many patents should not be able to and would not be able to stand up to attack. Often, their owners know that, and are unlikely to go through with threats to sue.

Patent protection – the scope of which is set out in the clear and precise language of the patent's “claims” that are on the public register and, with the exception of pharmaceuticals only, lasts for a maximum of 20 years – is available only for products and processes that at the time of the application are novel and inventive when compared with earlier products and processes.

The tests for “novelty” and “inventiveness” (or “obviousness”) applied by the patent offices involve a comparison with all information previously available to the public, in the form of products, processes or documents, anywhere in the world.

Inevitably, the worldwide extent of this comparison means that patent offices, with limited resources, will often get it wrong and grant patents they should not grant.



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Likewise, they may require the applicant to narrow what he is claiming is novel, to avoid an earlier invention.

This is the reason why most legal actions for patent infringement involve the defendant arguing

not only that he does not infringe (his product falls outside the claims), but also that the patent should never have been granted in the first place – either

because it was not new, or was obvious when considering what there was before the application was made.

So, what does all this mean if you get a lawyer's letter warning that your product infringes a patent and you should stop selling it immediately?

The first thing to recognise is that this is a horribly complicated field of law and you need help from a specialist.

A good patent attorney or specialist lawyer will advise both whether your product or process falls within one or more of the patent's claims, and whether the patent is valid or if you

can attack it before the court (effectively on the basis that the patent office got it wrong and the court should correct that).

But they should also advise you that patent litigation is very expensive and attacking a patent that your adviser tells you is clearly invalid will cost a lot of money that might be better spent redesigning your product to avoid infringement.

So don't let the legal tail wag the commercial dog: you are in business to make money, not to fund the legal profession.

However unfair you may think it is, threats of IPR infringement – some are justified but many are not – are a normal part of doing business today. In many instances, the best course of action is to ask for a licence from the patent owner, and pay what is hopefully a small royalty per product. Or if legal action has been threatened or commenced, negotiate a settlement.

It's more sensible (and less expensive) to do that than to run the risk of losing in court, and end up paying not only damages and your own legal costs, but most of the successful party's costs too. You may even be able to buy the patent if it's no longer central to its owner's business.

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