# *Banana skins – When patent confrontations loom…*

Maintaining a competitive edge is important. On the one hand, there are those of us that are looking to stop others stealing the bread from our table. What can you do? On the other, there are those of us that are looking to increase market share, possibly by challenging existing patent rights that may be weak and arguably should not have been granted. Again, what can you do?

The field of patents is littered with banana skins and treading on any one of them could land you in very hot (and deep) water, because litigation-related mistakes can be financially costly and put your case at risk.

Set against this backdrop, in this article we look at common errors and practical steps that can be taken to minimise the prospects of trouble. We also take a brief look at the tactics that are used.

Without wanting to sound melodramatic, there are a huge number of different scenarios where things can go wrong – way beyond the scope of this short piece. However, one or two tips can help.

Unsurprisingly, the prospect of potential litigation is usually accompanied by a healthy dose of emotion, which is not usually helpful. It fuels aggression in many cases and as a result mistakes are made. Likewise, it can also engender panic, with equally undesirable consequences.

So, imagine a (realistic) scenario. You are at work one day, when a letter crosses your desk alleging patent infringement. What do you do? Ignore it and hope that it quietly goes away? Some have tried this and have got away with it. However, if it doesn't you have just lost time and made things worse for yourself.

The instinctive response of many people is to tell others in their organisation. With the ease and convenience of e-mail, a number of messages are fired off containing comments on the merits of the infringement allegations. Bad move. Something you write, whilst innocent and well intended, could be twisted and used against you. Instead, go speak to people.

The field of patents is very complex. The best thing you can do is to seek early advice. Ultimately, litigation should be avoided where and whenever possible. In order to wield some power in any negotiations, you will probably need the help of a professional advisor, such as a patent attorney, to arm you with bargaining chips.

One thing that can be done to help your patent attorney is to do some digging into the background of the invention associated with the patent in question. Was the concept known or was it very obvious at the time the original application was filed? If so, what proof can you get? In addition to this, your patent attorney would usually also recommend a patent and other literature search using a trained professional. Searching is an art form and a good searcher is worth their weight in gold. Hopefully, the search will reveal evidence that the patent being asserted against you is not novel or obvious, or both.

Presenting the results to the aggressor will hopefully make them realise that they have a weak case and that you know it. Then, hopefully they will either go away or you will be able to negotiate a low or no-cost "fig-leaf" licence, so-named as it covers their embarrassment!

One common trick used by an aggressor is to get a Solicitor to prepare all the court paperwork necessary for launching a lawsuit and sending it to the other side in order to intimidate. The paperwork is usually accompanied by a threat to lodge the papers with the courts if you do not stop your activities within a fairly short time frame. Sometimes this works as a strategy.

Of course, while the other side has shown its willingness to go to the expense of gathering ammunition and having the papers drawn up, this does not necessarily mean that they are actually willing to pull the trigger. It may simply be a bluff to scare you out of the market. If their case is not open and shut, they always run the risk of losing the litigation and even if they win, they will not recover all of their costs by any stretch of the imagination.

On the other side of the fence, you may be looking at a competitor who you believe has copied one of your ideas that is the subject of a granted patent. What do you do?

Do you fire off letters to them and others in their sales chain threatening hell and damnation if they don't back off? Not the best strategy, as you could end up with a counter-suit against you for unjustified threats. In fact, even the tamest of letters could be enough to give competitor ammunition for the counter-suit.

When drawing someone's attention to a patent, we cannot stress enough how important it is to speak with a professional advisor qualified in the subject; putting a competitor "on notice" is very subtle and if incorrectly done could backfire.

If you are really keen to start things yourself, a very plain letter simply drawing their attention to the patent and enclosing a copy of the document is all that should be sent at the outset. Nothing more.

The important things to bear in mind are that you should always stay calm, don't commit things - however innocently intended - to writing that could be twisted and used against you later. If you do want to try to stop someone who seems to be infringing your patent, don't threaten or allege anything. Above all, seek professional advice.

**If you would like to find out more about what can be done when threatened with an infringement law suit or when someone is possibly infringing your rights, Ross Kay can be reached at ross.kay@laudens.com or on 0207 830 9619.**

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