What are patents for?

This is a good question to ask oneself when confronted with an innovation that seems to deserve protection.

This question often crops up since small companies consider protection of intellectual property as an expense, which not only requires financial resources, but also ties up human resources, particularly in terms of time.

Business managers generally see patents as a fence preventing other companies from grazing on the green grass of their protected market. They also know that the durability of the fence depends upon the size of their company and their adversary's means.

These considerations are certainly correct, but restrictive, since patents exist for many other reasons, as will be seen in this article.

1. Think global

A good patent is a generalization of the particular case developed by the inventor. This generalization is a useful and necessary step that is taken in conjunction with the patent engineer who has a sound knowledge of the company's field of activity. The inventor or entrepreneur is focused on his solution, whereas the patent engineer has to extract an inventive concept of general application. The dialogue between the inventor and his patent engineer can lead to contemplation that optimises the invention by adding other embodiments.

Y-Parc - Parc scientifique & technologique
Rue Galilée 4
CH-1400 Yverdon-les-Bains
T +41 24 524 31 00
www.omnis-ip.ch

Riond-Bosson 3
CH-1110 Morges
T. +41 21 882 10 00
M. +41 78 410 17 12
info@omnis-ip.ch

This contemplation also enables the indispensable parts, on which protection is based, to be extricated from the ancillary parts. After this step, the inventor is clear as to what his strong points are in relation to the competition.

2. Knowing competitors' activities

Although filing a patent is not the only way to achieve this objective (document searches can be carried out), the procedure leading up to grant of a patent necessarily involves comparing the invention with the state of the art (except in some countries where there is a simple registration procedure).

Drafting the patent enables the innovative points of its technology to be identified and the search report will provide information as to the competitors' situation, their solutions and their weaknesses. This will allow the company to position itself, or pursue development in the most promising direction in terms of currently unoccupied positions.

3. Innovation showcase

A company that obtains patents is, by definition, a company ahead of its competitors. A patent is an asset and young entrepreneurs know this when they have to present a business plan to a financial backer. A frequently asked question is "How does your project differ from a competing project?"

If the entrepreneur can offer a patent application as an asset, this will play a positive part in the financing decision. By the very protection that it confers, the patent will enable the investment to become profitable safe from the competition and it offers some security to the financial backer, who thus has a better chance of seeing his investment bear fruit.

Moreover, it should not be forgotten that all large companies are equipped for monitoring the activities of competitors in their area. The fact of appearing in databases with pertinent inventions creates a good reputation for the patent application holder. When you come into business contact with one of these large companies, you will be greeted quite differently, since the capacity for innovation that your company has demonstrated will command respect.

4. Creation of an asset base

It should be recalled that patents form part of the company's assets. This fact is generally concealed since there is a very real difficulty in assessing their value. However, it is important for entrepreneurs to know how to negotiate their share of the company's initial capital when contributing this type of asset. It is common to see between 10 and 20% of capital made up by the contribution in kind of one or several patents (often actually patent applications at this stage).

The Swiss, innovation champions?

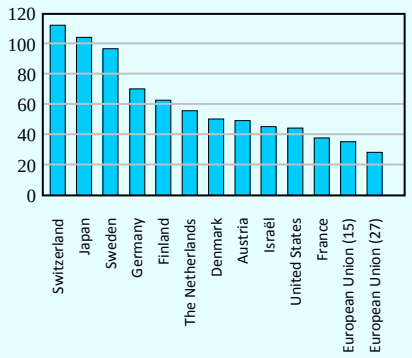
The Organisation for Economic Cooperation and Development or OECD defines a certain number of criteria for measuring the technological innovation capacity of a country. These include two that are of particular interest to us: the inventiveness coefficient and the technology balance of payments.

The **inventiveness coefficient** is defined by the number of patent applications filed by owners or inventors domiciled in Switzerland, per million inhabitants. The higher the coefficient, the greater the innovative activity.

The **technology balance of payments** is the difference between the amounts paid for the purchase of foreign technology and those received for the sale of Swiss technology. A positive balance indicates the capacity of Swiss companies to export their technology.

Number of patent families per million inhabitants

(Triadic families of patents, International comparison (OECD), 2009)



A patent family is defined as the set of patents filed in several countries to protect a single invention. The triadic patent families group the patent applications filed at the same time before the European Patent Office, the Japanese Patent Office and the US Patent and Trademark Office.

Source : OECD, Directorate for Science, Technology and Industry ©
OECD patent databases, July 2011
http://www.oecd.org/document/56/0,3746,en_2649_34451_40813225_1_1_1_1,00.html

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T +41 24 524 31 00
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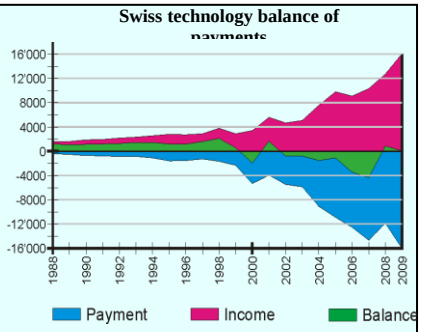
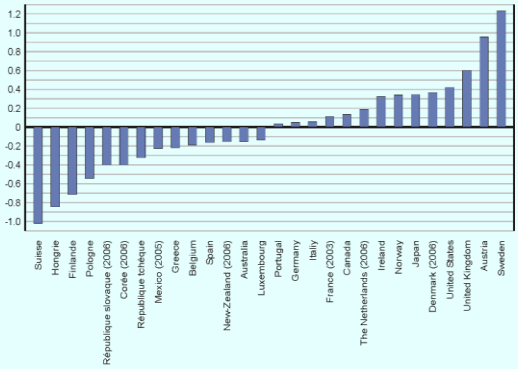
T. +41 21 882 10 00
M. +41 78 410 17 12
info@omnis-ip.ch

The graph opposite shows the technology balance of payments for Switzerland between 1988 and 2009. After having been systematically positive until 1999, the balance varied and became negative from 2002 to 2008. This shows that the offer for Swiss technologies is



The table below gives a comparison of the balance of payments

TECHNOLOGY BALANCE OF PAYMENTS
as a percentage of the GDP, 2009 or last available year



A table based on the 1997 data would have placed Switzerland at first position among the member States of OECD. Twelve years later, it appears at the last position. Despite a very high inventiveness coefficient, Switzerland is more and more dependant on foreign technologies. Having said this, Switzerland nevertheless maintains a good capacity for exporting its own technologies, the income from these activities having more than quadrupled between 2000 and

Sources: Federal Statistics Office
http://www.bfs.admin.ch/bfs/portal/fr/index/themen/15/09/key/ind2.indicator

This is particularly important when a company is being set up in which one of the partners provides a technological innovation and know-how and another partner provides the financing. In the absence of a proper evaluation of the intangible contribution in relation to the tangible contribution, the innovator is liable to find himself in a minority at the heart of his company, and all the more quickly if external funds arrive in the form of successive capital increases.

In the event of insolvency, with no exaggeration, patents can be considered the most sought after value by a potential buyer. In fact, assets such as offices, material and stocks are sold off for insignificant sums. Only patents remain since they protect not only the company's products, but also all other equivalent products.

This is important as the buyer very often wishes to integrate the technology into his product line rather than continuing with the original product.

5. Reinforcing links with commercial partners

After several years of good and loyal service selling your product on a given market, it is not unusual for your commercial partner to breach the contract, either in order

to get a similar product from a different source, or to manufacture the same product himself at a lower cost.

Of course contracts have a part to play in this type of relationship, but a contract has a given lifetime that rarely exceeds 2 to 3 years.

A patent acts as a safety net for the contract and secures the relationship by clearly showing its nature. For the record, the lifetime of a patent is twenty years. The patent protects the product and any attempt at autonomy will be penalised in accordance with intellectual property law.

In general, the legal risk taken by a partner in this type of situation will incline him to favour negotiation over breach. It should be noted, moreover, that he would have difficulty claiming ignorance of the patent in court.

The patent can also act as a medium of exchange. Indeed, with a good patent portfolio, it is possible to authorize a competitor to use an invention that has been protected, in exchange for the right to use technology patented by that competitor.

6. It can earn money!

With a few rare exceptions, no company is capable of managing worldwide marketing of its products, in all sectors of activity covered by its know-how.

In order to use this know-how carefully, it is possible to grant licences or assign rights, provided that the know-how is protected by a patent.

In a word, a licence is simply a lease which, generally in return for remuneration, gives the licensee the right to use the patented technology.

The licence can be territorial. In such case, if unable to exploit a patented innovation, for example in Asia or in the United States, one or several licensees could exploit it on their own account, while allowing the licensor to keep some control over his invention and to be rewarded for his innovation.

The licence can also be limited by sector of activity. The same generic innovation can be the subject of one licence for telephony and another licence for horology for example.

A licence thus constitutes a means of obtaining value from one's know-how without necessarily becoming involved in business diversification, which, as history regularly shows, has certain risks.

Assignment differs from a licence in that the owner of the patent changes. The patent is thus no longer leased as in the case of a licence, but sold.

In all cases, the « rules of play » should be clearly defined between the different parties linked by exploitation of the same invention.

7. Exclusivity of the patented technology

This paragraph is deliberately placed after the others. Exclusivity has to be made relative with regard to the business stakes and the size of the players. In this area, information plays an important part since no-one likes to be accused of infringement on the basis of a patent of whose existence he was unaware. The sooner the various participants are aware of the existence of your patent, the quicker they can integrate the cost of a licence in their business plan. Reactions will be very different if a claim is made for royalties on the last five years of production. The response will inevitably be "We are not infringers".

A small company will not have the technical and legal means of a large company for this little game and the battle will be unequal. This confrontation can end in a proposal to buy the small company, if the patent is worth it, in order to put an end to the dispute.

8. Conclusion

The purpose of this article is to raise awareness of the different reasons for starting a patent portfolio. It is however certain that, as with any operation, the cost/benefit ratio has to be weighed up. If the protected technology is not put into practice, the patent is of little interest. Indeed, unlike the United States, our country does not have companies whose sole purpose is to make a business out of licences, and which thus consist only of lawyers.

This approach can of course pay off in the mid term, but it requires significant means before the first results are harvested. As the last example to date, we can cite the British Technology Group which bought a patent in the mobile telephone area and is preparing to take legal action against SIM card manufacturers.

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