

through and established as a component of the high-level strategy, but not to be inflexible if unusual situations arise or the business environment changes.

Another high-level strategy is to decide to concentrate on ensuring you are not blocked by other people's IP rights (i.e. you have "freedom to operate") but not aim to build a significant IP portfolio of your own. Small, specialist chocolate makers commonly choose this approach, limiting their own IP to the trade marks which identify their business and perhaps their main products. People have been making chocolate confectionery for a long time, so the basic technologies are no longer covered by patents. Many companies do not try to obtain a competitive advantage by developing their own improved technology, they prefer to buy equipment and ingredients from suppliers, effectively using the same technology as many of their competitors. They may compete strongly in other areas such as quality, price or specialisation. There are different ways of protecting competitive advantage than just IP. Having a production or distribution system that others cannot easily replicate, or simply being fast may provide protection. For a company that constantly changes their products and engages consumers by always offering something new, filing IP for each new product may not make sense. By the time the rights are granted the company will be making something else.

With a strategy of not building your own IP, defensive publications can be used to prevent others from filing patents which block you (see Section 29.8). It is also advisable to keep systematic records of the products you sell and the recipes used to make them. These could be useful in proving "prior use", for example if a competitor later files a patent covering that product. Some companies choose not to file their own IP, but keep their inventions secret. As discussed in Section 29.7, there are risks associated with this strategy that need to be carefully considered.

High-level strategies are often combinations of the approaches described above. It may make sense to own IP in one strategic area of the business, but aim to use publicly available technologies in another. Once the strategy is defined, decisions such as whether to patent an invention, or whether to compromise on IP rights for the sake of concluding a contract, become clearer.

29.9.2 Innovation strategy and IP

There have been some successful innovations that were made more or less by chance, but generally companies need a strategy to maximise their chance of making profitable innovations. It is important not only to be aware of your own strengths but also to be aware of the strengths of your competitors, both in terms of technical strengths and patents. It is not normally wise to invest development effort in an area that your competitors already control through market position and patents. You might be better advised to look for an opportunity where you have the chance of building a sustainable competitive advantage using appropriate protection tools.

Patent landscaping is a technique used to analyse patenting opportunities and threats in a particular technology or business area. A set of relevant patents are identified by a patent search (see Section 29.2.5), then categorised, either by software or manually using experts, and plotted graphically to help analyse the situation. Software packages are available which analyse a mass of patent, business and literature data, extracting information automatically from the text and presenting analyses of the data graphically, for example grouping similar concepts together. Commercial database and search tools (see Section 29.2.5) often have analytical functions built in, such as the *ThemeScape*® mapping tool in *Thomson Innovation*® and there are also “stand-alone” analysis tools available such as INTELLIXIR. To analyse a group of patents you might choose to plot the assignees (owners) of the patents against different aspects of a technology to see where different companies are filing patents. Landscaping can also be used to study the technological evolution of a particular field, detect emerging technologies and perhaps identify a related technology you have overlooked.

Patent landscaping is a helpful tool, for example to check whether a proposed development direction makes sense or to get an overview of a competitor’s patent portfolio, but it does not make strategic choices for you. When planning where to direct R&D efforts to generate valuable IP, patent landscaping needs to be combined with an understanding of your technical and business capabilities and, most importantly, what your customers would want to buy. Just because there are no patents in an area does not mean it makes commercial sense to start R&D activities there.

It is important to realise that being patentable does not mean that something will make you money. A large proportion of filed patents are never commercialised. The Institute of Patentees and Inventors estimates that the success rate of getting patented ideas to the market is only 2% (IPI, 2014). As ideas move from paper concepts, through small-scale prototypes, to pilot plant trials and then to industrial trials there is a series of selections to find the most promising ideas, with only a small number of ideas moving on to the next stage. These selections can be made on the basis of business insight, consumer research, preliminary costings or even the personal taste of the managing director. At the early stages of development there is a high chance of failure, especially if it is a technology new to the whole industry. However, this is also the stage where you have the best chance of securing broad patent coverage. As the development continues and successfully passes the selection stages the uncertainty reduces and the probability of success increases. A company aiming to compete in the market for many years would expect to have a mixture of developments at different stages of maturity.

29.9.3 IP strategies for individual developments

For an individual idea or development you need to consider carefully what advantage it brings. This is the heart of what you want to protect and ideally you would like to protect every way of achieving this advantage and so gain the