

29.10 Enforcement

It is up to the owner of intellectual property to enforce their rights. Rights are enforced through the courts, or in some countries the relevant Intellectual Property Office. However, you may be able to resolve your dispute without taking any legal action, and this is generally cheaper. If you suspect someone is using your protected intellectual property rights without permission (infringing) you should take professional advice immediately. Do not contact the other person before seeking advice as your communication could be construed as an unjustified threat and might be illegal. Similarly if you are threatened with legal action you also need to take professional advice. Such contacts are not always bad news – it is possible that you might be able to reach a profitable commercial arrangement with the other party.

It is advisable to monitor the marketplace by checking the press, trade publications and the web for companies using your intellectual property without authorisation, as well as monitoring products being offered for sale. In the case of trade marks, you should also make sure no one tries to protect an identical or similar trade mark to yours. This may be done by setting up alerts on trade mark databases, or by employing a professional trade mark watching service. If you discover a competitor has applied to register, or has registered, a mark that is similar or identical to your own, you can oppose or cancel the trade mark registration.

Border control officers have the power to take action against goods suspected of infringing certain intellectual property rights. If you believe that imported goods are infringing your IP rights, you can request that the border control authorities detain the goods. You must file an application for action and provide a description of the goods that is accurate enough to enable the goods to be intercepted. You must also be able to show that you hold the IP rights that you think are being infringed. Although border control officers can detain suspicious items on their own initiative, the probability that they will find infringing items substantially increases if the rights holder files an application for customs action.

In order to take legal action you need to have rights. Some IP rights can be obtained more quickly than others, so if you suspect that a competitor is likely to copy your product in a certain country this may influence your strategy. Trade mark registration is faster than getting a patent granted for example, and may be more straightforward to enforce at customs. In countries where Utility Models rights are available for your invention (see Table 29.1) these provide a potential basis for an infringement action more quickly than waiting for a full patent to be granted. Patents may give some provisional protection as soon as they are published, the details vary from country to country. It could therefore be advisable to request early publication and fulfil any other requirements necessary to obtain this provisional protection. Generally, any damages obtainable once the patent is

granted will be calculated back to the date the patent was published. In all these situations, professional advice is required.

Insurance is available for all kinds of intellectual property rights to provide for the costs of litigation. For example, there are insurance policies which would cover you in the event that you needed to enforce your patent by launching an infringement action. Such policies are generally more suited to small companies who would otherwise not have the financial strength to enforce their rights.

29.11 How to find help

In some countries it may be technically possible to represent yourself or your employer without professional help, but IP law is complicated and a small mistake could leave you with no protection for your potentially valuable idea. Unless you are very sure of your competence it is advisable to seek legal or other professional advice, as the cost of not using a qualified professional could easily exceed their fees. Larger chocolate manufacturing companies may have in-house lawyers and intellectual property specialists, but smaller organisations will need to find external help. The UK Intellectual Property Office publishes a booklet to help choose the right IP adviser (UKIPO, 2011b). Make sure the person you employ is appropriately qualified, for example a qualified legal professional, patent attorney or trade mark attorney. Qualifications differ between countries, but a quick web search should indicate the appropriate qualifications for representing clients. In the copyright and related areas, lawyers and/or one of the trade associations may be helpful. As in any profession, qualifications set the basic standard, but abilities and experience in a particular area may vary. It can be useful to seek recommendations from contacts in the industry before choosing a representative.

When working with a patent attorney to draft a patent you should try and provide them with as much relevant material as possible. If the information you provide is well organised, the patent attorney can then easily select what they need to draft the application. Points to consider include a description of the problem which the invention solves; full details of the invention including examples, things that are essential for it to work, and any experimental data and drawings, as well as relevant background information and any earlier publications you are aware of. It is also advisable to explain the commercial relevance of the invention and how it will be used. This helps the patent attorney draft appropriate patent claims to protect your business. The patent attorney will usually send you a draft to comment on. If you do not understand what the patent attorney has written, then ask – it may be wrong. Similarly, if an important aspect you hoped to cover is not mentioned in the draft, then say so. The patent attorney probably knows less about the technical area than you, and by working together you can improve the quality of the application and the chances of being able to enforce the patent.