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PATENT PENDING: Euan Taylor

How to kick the tires

Buying a patent or a patent portfolio? Do your homework first. Here are some quick pointers on what to look for.

What do the claims say? The claims, the numbered paragraphs that may be at the end of the document, are what define the scope of the exclusive right that the patent confers on its owner. To infringe the patent, a party need only satisfy all the limitations of any one of the claims or come close enough to doing so that they are caught by a legal doctrine that can expand the meaning of the claims to catch close equivalents of what is described.

The independent claims (those that do not refer back to other claims) are the broadest, and it is often expedient to limit an initial analysis to the few independent claims. If a device or process is not caught by the independent claims, then it will not be caught by the narrower dependent claims.

Are there other relevant patents that could be an obstacle to work the invention? Owning a patent does not give you the right to work the invention, only to stop others using it. A patentee working his own valid and issued patent may nonetheless infringe on an equally valid third-party patent. It is advisable to do some searching to identify other patents in the same area in order to assess "freedom to operate" in the territory.

How old are any filings? Patents will generally expire 20 years from their filing date; make sure how much life you are going to get out of a patent or application before you buy it.

Is what you are buying an issued patent? If it is only a pending application, then take a look for any corresponding U.S. or other applications. See what prior art has been cited against them and how the prosecution is going. The results in Canada may follow a similar pattern. While an issued patent has an initial presumption of validity, claims are often struck down in litigation. You may wish to have prior art searches conducted and a legal opinion prepared on the validity and scope of the filing before you agree to buy it.

Have all the necessary fees been paid on good time and all necessary filings made? In patent practice, there are many deadlines: deadlines for filing applications, paying fees, filing documents, etc. If a deadline is missed, then rights may be lost.

Are you buying international rights? Although it is possible to file an international patent application (a so called PCT application), there is no such thing as an "international patent." Patent rights are jurisdictional and have to be pursued separately in each jurisdiction of interest. If foreign jurisdictions such as Europe or the U.S. are important to you, make sure that filings have been made there or are still possible, and that those jurisdictions are included in what you buy.

Are the filings subject to any litigation or oppositions here or abroad? If someone is already in court trying to invalidate or oppose the filing, you may want to know more about the state of those proceedings. On the other hand, if the filing has already survived a legal challenge, there is more reason to be confident that it will stand up in future litigation.

Who is the registered owner? The patent databases will identify the applicant. Make sure it is the same name as the party purporting to sell, and ask to see the chain of title. There should be an uninterrupted chain of assignments transferring rights from the inventors, through any intermediate parties, to the current vendor. Those assignments should all be registered with the relevant patent offices.

Some information can be quickly checked using online databases. The EPO (European Patent Office), USPTO (US Patent and Trademark Office), WIPO (World Intellectual Property Organisation) and CIPO (Canadian Intellectual Property Office) all maintain databases that can be easily located in a Google search and are relatively easy to use. Doing some research on your own initially can save a lot of wasted energy and give you a much better idea of what you may be buying. But this is a very specialized field, and substantive research is not readily amenable to do-it-yourself efforts.

Before you commit to forking out money, you should turn to qualified counsel to ensure that your own preliminary conclusions are correct.

If you are selling patents, it is advisable to go through some of this research yourself. This way you can see what any potential purchaser is going to find and can be ready to answer any immediately foreseeable questions.

While there is much you can initially do yourself, ultimately this is a very specialized area of law. You are strongly advised to seek qualified professional assistance regarding any transaction you may be contemplating. •

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Business in Vancouver (www.biv.com) has been publishing in-depth local business news, analysis and commentary since 1989. The newspaper also produces a weekly ranked list of the biggest companies and players in a wide range of B.C. industries and commercial sectors, monthly features and industry-focused sections that arm its subscribers with a complete package of local business intelligence each week.

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