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A. INTELLECTUAL PROPERTY

(i) What is Intellectual Property?

Intellectual Property (IP) refers to creations resulting from an intellectual effort that are used in commerce. Such creations may include, but are not exclusive to, inventions. IP is protected in a variety of ways that depend to a large extent on the type of creation involved. For example, inventions are protected through patents; symbols and names used in commerce may be protected through both a trademark and copyright; and literary works including software and databases are protected by copyrights. IP is inherent to the work of many organisations. Successful businesses must generate, protect, deploy and manage their intellectual property in a way that maximises its value.

(ii) What are Intellectual Property rights?

<table>
<thead>
<tr>
<th>IP right</th>
<th>What does it protect?</th>
<th>Does it require registration?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patents</td>
<td>Inventions</td>
<td>Yes</td>
</tr>
<tr>
<td>Trademarks</td>
<td>Distinctive trade insignia</td>
<td>Yes (but rights can exist without registration)</td>
</tr>
<tr>
<td>Copyright</td>
<td>Expression of ideas (but not the ideas)</td>
<td>No (but you may need to register to sue for infringement)</td>
</tr>
<tr>
<td>Designs</td>
<td>Design Shape and configuration</td>
<td>Yes (but in some places Unregistered Design Rights are protected)</td>
</tr>
<tr>
<td>Trade Secrets / Confidential Information</td>
<td>Information that is confidential or secret</td>
<td>No</td>
</tr>
<tr>
<td>Database rights</td>
<td>Compilations / sui generis right</td>
<td>No</td>
</tr>
<tr>
<td>Circuit Layouts (chip topography)</td>
<td>Design layout of semiconductor circuits</td>
<td>Generally no</td>
</tr>
</tbody>
</table>

As patents are the most common form of IP protection sought in the context of research, we will focus on providing a broader understanding of this specific IP right in this primer.

(iii) Why is knowledge of Intellectual Property rights relevant to you?

A basic understanding of IP rights allows you to evaluate and manage IP-related issues and to make informed decisions about research, literary and other creations and the handling of any resulting IP.

Competence in IP rights will not only aid you with your work, but it may also be an important feature of your future career in any sector of the economy.

By understanding and handling IP correctly you can avoid errors that may cause difficulty protecting research and development work and ultimately commercialising it. It also means avoiding the inadvertent infringement of other people’s IP, which may lead to waste, loss and costly litigation.
(iv) The role of your organisation

Protecting, licensing and developing any IP that is created plays an important role in the financial sustainability of successful businesses. As such, many organisations will make available an extensive IP policy that outlines how employees should operate. The detail and breadth of such policies as well as the degree of enforcement may vary, but it is recommended that both employees and management are proactive in developing their knowledge of such policies.

(v) Who do I go to for help?

If you have any queries call your organisation’s legal team.

Some employers may require, as a best practice, that you fill and file an invention disclosure form or questionnaire with the appropriate person before publishing or publicly disclosing any technical development that may be patentable (see generic example attached).

(vi) Intellectual Property considerations on a daily basis

It is of utmost importance that you consider IP in your daily work and that you develop an eye for spotting IP issues.

The following behaviours should be observed and adhered to:

• Document and date your work properly.
• Be careful when using non proprietary materials (someone else’s work).
• Make sure the right contractual arrangements are in place if you are collaborating with others.
• Be publishing savvy — publication may result in a bar to patentability, so do not publicly post or exchange information with outsiders without first protecting your patentable material.
• If in doubt, ask!

(vii) Seeking protection and commercialisation elsewhere?

You (or more usually your employer) can theoretically apply for patent protection through your local IP registry even if your interest is abroad. Even though the development of IP is occurring locally, you (and your employer) may seek to protect your IP rights in other markets where the commercialisation of your IP may be more feasible and lucrative.

Furthermore, your country may provide access to international patent protection through its ratification of international treaties like the Paris Convention for the Protection of Industrial Property, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Patent Cooperation Treaty (PCT). Discuss with your Latham & Watkins contact the particular requirements for your jurisdiction.

B. I HAVE MADE AN INVENTION; WHAT DO I DO NOW?

Consulting your organisation’s IP policy should always be your first step when considering the protection of your invention since the policy will clarify who owns it. You should also consult your employment contract as to any disclosure obligations in respect of inventions.

Resist the urge to publish or disclose your invention through any type of medium (oral, written or otherwise), and seek your organisation’s assistance before deciding what commercial or patent protection is needed. Such disclosure would render your invention incapable of protection by patent and would render its commercialisation more difficult and less feasible.

Fill out a patent disclosure questionnaire (see generic example attached); if your employer has its own form, use it.
As protecting your invention is a relatively costly endeavour, you and your employer should consider whether or not your invention is commercially viable and whether there would be a market for it. If the market need is not obvious, undertaking a market appraisal before applying for a patent is recommended.

Since you have unique and detailed knowledge of your invention, your involvement as the inventor is vital during the protection stage of a patent application. Your involvement will include guiding the development of the patent description and claims. (See ‘What Does a Patent Look Like?’ at Section K for an example of descriptions and claims.) Involving IP experts to assist in the filing of your patent application will be necessary and you will be critical in providing adequate characterisation for the invention.

C. WHAT MAKES AN INVENTION PATENTABLE?

Although the law on patents differs between jurisdictions (See ‘How Do I Protect My Patent in Several Countries’ at Section G) there are some practically universal requirements for patents that were enshrined in the Paris Convention treaty and more recently TRIPS. They are:

(i) The subject matter must be patentable

Patents are available for most industrially applicable processes and devices. Certain things such as scientific discoveries, (e.g. merely identifying a new chemical) scientific theories, or mathematical methods cannot be patented. In some jurisdictions, business methods and computer software are also excluded from patentability.

(ii) The invention must be “new”

There is a harsh rule of absolute novelty. Even the US is moving towards a “first-to-file” regime with absolute novelty. Therefore, to be regarded as novel, an invention must not form part of the ‘state of the art’. This essentially means that the invention must not have been made available to the public, either by its use in public or by its disclosure (other than under confidential conditions) before the priority date of the patent. (See ‘Intellectual Property Jargon Busting’ at Section N for the meaning of priority date.) The inventor’s own non-confidential use or disclosure of his invention will prejudice his ability to register a patent.

(iii) The invention must contain an “inventive step”

The test for this is that the invention must not be obvious to a ‘person skilled in the art’. The “person” referred to is a ‘notional uninventive but skilled person’. “Obviousness” and “lack of inventive step” are common arguments used to prevent the patenting of trivially varied things that are already known.

A search of the relevant literature may assist you in finding out whether your invention is novel. Ask yourself if your invention follows plainly or logically from what has gone before; if so, your invention may not be sufficiently inventive to be patentable. Your colleagues may be a good resource for help on this aspect.

(iv) The patent must be clear and the language describing it unambiguous

Your role in characterising the invention accurately will assist in drafting a clearly worded patent. The patent must contain sufficient instructions and adequate clarity to enable the invention to be put into effect by a ‘person skilled in the art’. (See ‘Intellectual Property Jargon Busting’ at Section N for definition of insufficiency.)

D. WHO OWNS THE PATENT?

An independent inventor is automatically the owner of the invention and is consequently entitled to register and own the patent, but in the context of a business there are other considerations, and they will be dealt with by your employer’s legal team. Often, in the
absence of agreements to the contrary, your employer will own the patent. If you are a consultant, you may be an independent inventor, depending on your contract.

(i) Employees

Subject to what is otherwise expressly stated in your employment contract or what has been agreed with the employer, the right to apply for a patent over your invention is reserved for your employer. Certain protections are in place if there were no provisions in your contract regarding the matter of inventions or if the contract detracts from the basic protections granted to you as the inventor under the law.

(ii) Commissioned work

The common position is that, subject to the specific terms expressed in any contract underlying work that is commissioned, the ownership of an invention by an independent contractor (i.e. not an employee) will vest in the contractor.

(iii) Joint inventions

Two or more parties may be jointly entitled to apply for a patent; that may include several persons, a person and a corporation or a university.

E. WHAT RIGHTS DOES A PATENT GIVE THE PATENTEE?

The most important right a patent provides its owner (the ‘Patentee’) is the right to stop others exploiting the patent within the scope of the claims. This exclusive right to the patentee allows him/her/it to prevent others from using it. This does not constitute a positive right to carry out an invention but rather a right to prohibit others. However, special considerations should be made for compulsory licensing. (See ‘Other considerations’ at Section J for details on compulsory licensing)

A patentee can grant licenses (exclusive/non-exclusive) that would permit others to exploit the patent. Often this is how patentees derive commercial value from their invention. An agreement not to sue is another form of permission negotiated by a third party with the patentee.

A patentee may transfer some or all rights to the invention by assignment or the patentee may assign subject to some conditions or assign but retain some rights or subject to a grant-back of rights.

The patentee may seek enforcement action to prevent the infringement of the patent. In some jurisdictions an exclusive licensee may have rights to seek enforcement against patent infringement. (See ‘Intellectual Property Jargon Busting’ at Section N for definitions)

F. DURATION OF PATENT PROTECTION?

The usual length of a patent is 20 years. Limited extensions for pharmaceutical and agricultural uses are available in certain jurisdictions. Patents are territorial (see ‘How Do I Protect My Patent in Several Countries’ at Section G) but the Paris Convention created the ability to file a patent in jurisdictions other than the preliminary jurisdiction within the first 12 months of registration. In effect this adds 12 months (at most) to the patent life by granting protection in the new jurisdiction from the date of original filing in the initial jurisdiction.

The PCT expressly allows claiming priority from applications made elsewhere, which are not more than 12 months old.
G. HOW DO I PROTECT MY PATENT IN SEVERAL COUNTRIES?

Due to the territorial nature of patents, protection should be sought in such countries where the invention may be manufactured or marketed. However, it is important to weigh the costs of patenting in various countries against the anticipated revenue.

If it is deemed financially justifiable to protect your invention in several countries, you have a few options:

(i) File first locally (if it becomes available) or US or EPO and within one year under the PCT to secure multi-country protection.

(ii) File all countries where protection maybe sought at the same time. This is expensive and should be limited to one country and a pathfinder application.

H. WHERE DO I PATENT?

You should patent where you can get the best protection with consideration regarding population since the potential size of the market for goods or service protected by your patent is an important factor.

Typical A-list countries are US, EU (for an EP application you may wish to specify limited countries on grant e.g. GB, DE, FR, IT, NL, etc.), China and Japan.

B-list countries include Canada, Australia, Taiwan, Brazil, Korea and India.

C-list countries include Singapore, South Africa, Israel and Russia.

Take a 20-year view — where is the market for the product or service of the patent (including products made by the patented process)?

I. HOW MUCH DOES IT COST TO PATENT?

It will usually cost between US$7,000 and US$15,000 per country to get the patent granted. Some countries have expensive translation requirements and slow processing and can therefore be much more expensive.

J. ARE THERE ANY OTHER CONSIDERATIONS THAT MAY ARISE WHEN PATENTING AN INVENTION?

Translation requirements: Although filing a PCT application only requires a single language application for protection in multiple states, protection in single states or certain regions may require filings in the native language or both the native language and English. This may significantly add to the financial requirements of a patent filing. European patents maybe filed in English, and translations of full specifications are no longer required.

Renewals: For a patent to remain in force it must be renewed or maintained. Some countries have difficult renewal regimes, but most require annual fees. There are good outsourcing organisations who will deal with paying renewal or maintenance fees on time.

Compulsory Licensing: Patent statutes in most countries allows for the compulsory licensing of a patent on the basis of impeding the establishment and development of industrial or commercial activities in the relevant state and insufficient exploration after a certain number of years from grant. Such compulsory licensing provisions do not need to be considered when making a choice on patent filing jurisdictions, because they are rarely effective under modern conditions.

Cautionary Notices: In the absence of a local patent office, the publication of a 'cautionary notice' in a local paper may have legal value in patent infringement before the courts in some jurisdictions.
K. WHAT DOES A PATENT LOOK LIKE? (STRUCTURE OF A PATENT DOCUMENT)

When a patent is issued, the patent document consists of a number of parts:

(a) **The Title Page**: which includes certain details relating to the patent as well as the details of a patentee, the date of a patent and the details of the inventors.

(b) **The Abstract**: which sets out in one paragraph a technical description of the invention.

(c) **The Specification**: which sets out the problem to which the patent is directed, the nature of the invention and a description of the invention (often including a number of examples of how to put the invention into practice) and usually one or more drawings setting out in graphical form the nature of the invention.

(d) **The Claims**: which set out the scope of the exploitation monopoly that is to be granted to the patentee for the invention. It is often possible to use the claimed abstract matter in more than one field of use, in which case field of use licenses may be appropriate to those who wish to exploit the rights.

THE PATENT – COVER PAGE
**THE PATENT – DESCRIPTION (& DRAWINGS)**

Descriptions contain the ‘background’ to the invention, describing the need in the market i.e. why the invention is commercially viable.

The patent can contain drawings and so, dependent on the subject of the patent, descriptions are included (as detailed as possible).

**THE PATENT — CLAIMS**

Claims represent the most important part of the patent since they set out in detail the matter for which protection is sought. The claims limit the scope of the patent and must be within the scope of the specification.

Multiple claims can be made with regard to the same invention in order to make the patent as accurate and efficient as possible.

Dependent claims are narrower than the independent claims and describe the invention with more specificity. They are more likely to be valid than broader independent claims.
L. WHAT IS THE PROCEDURE FOR REGISTERING MY PATENT?

The procedure will differ depending on the territories in which the patent is sought (see ‘How do I protect my Patent in several countries’ at Section G) but the process has been known to take about 30 months in the US and about 30 to 40 months for a European Patent (although expedition requests may be made). The process is slightly different when accompanying the EPO with the USPTO.

OVERVIEW OF PROCEDURE & TIMESCALE

(i) Initial Application

The patent application process is complex, therefore it is highly recommended that the patent application is managed by a qualified patent attorney to ensure the procedure is correctly followed and the adequacy of the protection. The actual filing at the relevant patent office is preceded by the drafting of the patent specifications and claims (see ‘What does a patent look like?’ at Section K), a process that will require extensive input from you as the inventor.

(a) Examination of formalities: To determine whether your patent application should be granted, the relevant patent office first examines whether the relevant formalities for the grant of the patent have been complied with.

(b) Final Steps in the Initial application: During or at the end of the ‘breathing space’ (a period of up to one year after the application is filed in which no more steps need to be taken), the final steps in the application need to be undertaken. They include developing the claims and the abstract, paying the search fee and considering protection in other territories. It is sensible to consider applying for patents in other countries at this time.

(c) After the initial examination and re-filing, often as a PCT application, a patent application undergoes a substantive examination to determine whether relevant thresholds for patent grant have been met. This includes assessing whether the subject matter is patentable (see C.i), whether the invention is new (see C.ii) and whether it involves an inventive step over the prior art (see C.iii). The examiner also considers whether the invention is sufficiently described in the application to enable it to be put into effect by others (see C.iv).
(ii) Patent Office Response

An extensive documentary search for related publications is conducted and a search report is produced. Although it may be published late, the search report is published alongside the application 18 months after the priority date. Up to the moment of patent publication, the subject matter of the patent must remain confidential, but disclosure of its content may be made in a scientific paper etc.

(iii) Substantive examination

There is a period of six months following the publication of the search report in which the owner of the patent that is being sought must decide whether to proceed and if so, to request the substantive examination (for a fee). A PCT application at this stage further delays the application for 30 months after the initial application. The patentability is assessed and possible amendments are made at this stage to ensure the invention is defined clearly and appropriately; it is usually a narrowing process.

(iv) Result

A successful patent application is entered onto the patent register, a patent rejection may be appealed. In many countries, an application may take several years to proceed to grant. In some countries (e.g., EPO, and also the US) there are post grant opposition procedures.

M. OTHER RELEVANT IP RIGHTS

Although there are many types of IP rights that may manifest in your invention or creative product, the most common ones in the business setting are:

(i) Trade Secrets (Confidential Information)

A trade secret may encompass both technical trade secrets and commercial secrets or other information of value that is not available to the public. Trade secrets are most frequently applicable to commercial production processes and business secrets such as commercial strategies. Trade secrets are often encountered with the undertaking of commercial consultancies. Generally, provided that the owners of the trade secret take proper care to prevent the dissemination of the information, the law grants it protection over the trade secret. The general rule is that trade secrets developed by an employee are owned by the employer. The prevention of unlawful dissemination of a trade secret is by injunction in Court.

(ii) Copyright

A copyright protects the fixed expression or manifestation of ideas but not the fundamental ideas themselves. Copyright is commonly utilised to protect works of a creative nature. The main categories of works protectable by copyright are: literary works; dramatic works; musical works; artistic works; motion pictures; sound recordings; television and radio broadcasts; software; written work products, published editions and some elements of databases.

The protection of databases is particularly variable depending on where you are in the world. Copyright grants the owner exclusive rights to exercise control over copying and other forms of exploitation of the works for a limited period of time (generally up to 70 years after the author’s death). The copyright owner can license and assign the copyrighted work to others and can prevent the infringement of the copyright.

Generally the author of the work is the owner of the copyright in that work. However this can be modified by contract (your employment contract). Your creative work in the context of your employment will likely be owned by your employer, however you may retain your right to be identified as the author of the work.
Copyright arises automatically with the creation of the work and there is no requirement for registration for the subsistence of a copyright, however registration may be required for enforcement against third parties in certain jurisdictions (e.g., US).

(iii) Trademarks

As trademarks arise from trading or to protect trade, they will almost always be the property of the employer, unless agreed otherwise.

N. PATENT JARGON BUSTING

Assignment: transferring IP holder’s rights to someone else.

Claims: the parts of a patent that define the scope of protection.

Conception: the initial stage in an invention. It signifies the formation of the idea that is the basis of the patent application.

Enforcement: taking action to stop people infringing on your intellectual property rights. These actions may include suing or taking out an injunction.

Entitlement: the right to apply for a patent.


EPO: European Patent Office.

Exclusions from Infringement: National patent laws may exclude liability for infringement in certain limited circumstances. For example, acts done for experimental purposes and private and non-commercial acts are excepted from infringement under the laws of some jurisdictions, although the scope of such exceptions varies significantly between jurisdictions. Specific exemptions, often referred to as ‘Bolar’ exemptions, exist in many countries to allow generic pharmaceutical companies to test generic versions of medicines before the patent term has expired, so as to enable regulatory obligations to be satisfied in advance of launch.

Filing: the initial stage of the patent application process. It must comply with the formality requirements as well as any language and fee payment requirements.

Infringement: performing any of the rights exclusive to a patentee (or licensee) that are protected by a patent without the patentee’s permission.

Innocent Infringer: as patents are registered rights, anyone dealing in a product theoretically has the ability to conduct searches on the relevant national or supra-national register applicable to the countries in which they wish to do business. However, given the sheer number of patents granted in various industrial sectors, in practice it is unreasonable or impossible for a business to conduct exhaustive searches for every patent which may potentially be relevant to their product. In the US and Europe ignorance is not a defence to a claim for patent infringement, but in some jurisdictions an infringer may avoid paying damages where they can show that they were unaware of the existence of the patent(s) at the time the infringement was committed. Once notified of the patent, however, all subsequent acts of infringement will attract liability for damages.

Insufficiency: a reason for a patent being rejected or revoked, meaning your description of your invention doesn’t explain how it can be operated.

Inutility: one of the reasons for the rejection of patents in some jurisdictions. It essentially means that the invention is not operable or capable of being put into use.

International Preliminary Examination: an “International Preliminary Examining Authority (IPEA)”, at the request of an international applicant, carries out an additional patentability analysis, usually on an amended version of the international application.
International Publication: as part of the PCT application process and as soon as possible after the expiration of 18 months from the earliest filing date, the content of an international application is disclosed to the world.

International Search: an “International Searching Authority (ISA)” identifies the published documents which may have an influence on whether your invention is patentable and establishes an opinion on your invention’s potential patentability.

IP rights: the umbrella term for how IP is legally protected, including trademarks, copyright, design right and patents.

Licence: when an IP owner gives someone else permission, commonly in writing, to use their IP.

Paris Convention: Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised on several occasions since then. The primary goal of the convention was the creation of a union whereby a person domiciled in a signatory state shall, as regards the protection of industrial property, enjoy in all the other countries of the convention union the advantages that each of their respective laws grant to nationals of that convention country. The convention also created special rules on priority for the different rights (for details on convention priority for patents see Section F).

Patent Annuities: annual maintenance fees or renewal fees paid to some jurisdictions to maintain a granted patent in force. In some areas, annuities are also paid for pending applications.

PCT (Patent Cooperation Treaty): an international treaty, administered by the World Intellectual Property Organisation (WIPO), between more than 125 Paris Convention countries. The PCT makes it possible to seek patent protection in a large number of countries through a single filing.

Priority: how long a patent applicant has after filing a patent in one country to file an equivalent application (with the same filing date) in another.

Prior Art: all material in the public domain before the priority date of a patent.

Priority Date: the date at which the novelty and inventiveness of an invention will be assessed for the purposes of patentability.


WIPO (World Intellectual Property Organisation): a specialised agency of the United Nations dedicated to developing a balanced and accessible international intellectual property (IP) system.

END NOTES

1 For further exceptions see TRIPS Article 27(2) and (3).
<table>
<thead>
<tr>
<th>Confidential Questionnaire</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Name of applicant.</strong></td>
</tr>
<tr>
<td><strong>Address of applicant.</strong></td>
</tr>
<tr>
<td>Relevant business of applicant or type of academic institution.</td>
</tr>
<tr>
<td>Field of business or study (1-3 lines).</td>
</tr>
<tr>
<td>Please provide the names and addresses of all of the inventors.</td>
</tr>
<tr>
<td>What is the nature of your invention? Describe in 1-2 paragraphs including the product or process to which it related.</td>
</tr>
<tr>
<td>What products or processes can the invention be used with?</td>
</tr>
<tr>
<td>Describe in 1-2 paragraphs, what competing technology exists, to your knowledge.</td>
</tr>
<tr>
<td>Please confirm there has been no disclosure to any member of the public of your invention.</td>
</tr>
<tr>
<td>Describe how you made the invention in 1-2 paragraphs.</td>
</tr>
<tr>
<td>Is the invention intended to be used with an existing product or process?</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>If the invention came out of a general research program, describe that program in 1-2 paragraphs.</td>
</tr>
<tr>
<td>If you were to license any patent resulting from the invention, what kind of company do you think might be interested in a license?</td>
</tr>
<tr>
<td>Do you think you could base a new stand-alone business based on this invention (assuming funding), and if so, what would that business do or make?</td>
</tr>
</tbody>
</table>
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