

● Patent Policing: Scope and Litigation Costs

Maintaining the patent owner's rights can entail (a) patent renewal fees and (b) costs of litigation in case the patent is attacked. In many countries, such as Germany, Austria, France, Great Britain, the Netherlands, Japan and Switzerland, the patentee is required to pay periodic renewal fees to maintain its rights. Canada instituted the renewal fee system in 1990. The United States in 1982. Germany and Austria in particular have traditionally enforced schedules under which the renewal fees escalate sharply as time passes. In Germany during 1986, for example, renewal fees during the first ten years of a patent's life cumulated to a total of DM2,375. However, by the end of the 20th year, a patent holder would have paid a total of DM22,375 to keep its patent in force.⁷² A consequence of rising renewal fees is the weeding out of marginal patents - those whose value is less than the marginal cost of the fee.⁷³

The questions of patent coverage, validity and infringement are important because they largely determine a patent's value. Settling these matters when challenged by a competitor requires the patentee to incur transaction costs through the litigation process. The value of a patent, when litigation is necessary, is equal to the present value of revenues from its exploitation minus the costs of acquisition and policing against infringement. Minimizing these transaction costs benefits everyone except patent infringers and licensees.

The definition or description of the patented product is central to the resolution of a dispute over patent infringement. A product is defined by its constituent parts or characteristics. Readily measurable characteristics define the patented product with precision. A patent infraction by competitors of a well-defined patented product, brought before the courts, can be settled in a short time and at a low cost. Common or hard to measure characteristics leave room for competitors to dispute the scope or width of the patented product.

A patented product that is commercially successful and whose scope can be disputed attracts copy-cat competitors. The patentee can either take the patent violators to court or tolerate erosion of its profits. The patentee's decision will depend on net gain from moving to the courts. By going to court, the patentee incurs the time and legal costs, but can restore its profits over the remaining patent life of the product if it is successful. Imitators

⁷² Erich Kaufer, *The Economics of the Patent System*, New York: Harwood Academic Publishers, 1989.

⁷³ For these issues, see Ariel Pakes and Margaret Simpson, "Patent Renewal Data", *Brookings Papers, Microeconomics*, 1989: 331-410; and M. Schankerman, "Measurement of the Value of Patent Rights and Inventive Output Using Patent Renewal Data", *STI Review*, (8), OECD, April 1991: 101-122.