

Weaponising IP

Ahmad Saleh - Partner, Head of Patents & Designs (R&D and Innovations) - Intellectual Property
ah.saleh@tamimi.com - Dubai International Financial Centre

The COVID-19 global pandemic has not only affected the safety and security of people around the globe, but has undoubtedly made a substantial economic impact worldwide. The characteristics of the virus and the measures taken to limit its transmission led to a slow-down in general economic activity across a number of industries including hospitality, leisure and airlines. However, for some sectors the slow-down has offered an unexpected opportunity to develop, grow and expand fledgling businesses that, on any other given day, might struggle to compete with the established, successful giants in their respective fields.

COVID-19: Digital change and disruption

Indeed, COVID-19 has provoked, and is likely to continue to provoke, a very strong wave of change and disruption. Among the companies likely to benefit from this wave are digital innovation-driven enterprises. Such companies are already actively pivoting at the core of the 4th industrial revolution, and are optimally positioned to take advantage of the potential opportunities presented by COVID-19 which is effectively acting as a catalyst for their business operations. Against this background, we anticipate the emergence of two types of companies: Type A; and Type B. Where a large proportion of Type A companies will be market established companies profiting from the new digital market needs to expand their operations, many Type B companies will be outsiders and entrepreneurs and start-ups coming with disruptive innovations leading to business disruption in various industries. Disruption is a business concept and occurs when a “disruptive innovation” once introduced leads to the creation of a new market by overtaking an existing one displacing related established market leading businesses, services and products.

Type A Companies

This type of company generally provides a service or product that complements established companies. We note that they generally focus on the provision of required ICT support to established businesses across various industries. They form part of the supply chain and will support those businesses in overcoming existing challenges by means of digitalisation and virtualisation. This may include developing online platforms, remote access systems, mobile applications, cybersecurity systems, business and supply chain management systems, and so on. At the core of Type A companies are software developers and other ICT related businesses. Type A companies are likely to see unprecedented growth in their operations because businesses have and will increasingly turn towards digitalisation and the integration of new, innovative digital technologies into their operations and supply chains in order to avoid continue their business operations during this type of crisis.

Innovative technology consistently creates value from a business perspective, from a legal perspective however, ensuring the underlying IP is appropriately protected is imperative and should, be sought where possible. The appropriate IP protection not only further secures investments made in the technology but also restricts others from exploiting it without official authorisation. Failure to do so can lead to disastrous business and financial consequences including bankruptcy. It is important to understand which form of IP protection is the most effective and appropriate in any one case.

Copyright or Patent?

Whilst software is protectable under 'copyright', it is recommended that this type of protection be supported by other types of legal protection. Copyright protection will protect a computer code in itself however, it falls short of protecting the technical concept or process underlying the software code. This is important where the value of software revolves around a new innovative 'technical solution' to a 'technical problem' (a new 'technical concept' or 'technical process'). In order to protect a new technical concept, one must look to patent protection. It is worth bearing in mind that patent protection may prove to be more difficult to obtain as patent laws normally require the application of a high threshold of novelty, inventiveness and practical application for the innovation to be eligible.

The 'work around'

Fortunately, some countries have developed a more simplified type of patent sometimes referred to as a 'utility model' or 'petty patent'. This type of patent sets a lower threshold in order to guarantee protection and has the added bonus of being comparatively simple, cheap and more efficient to obtain. China is at the forefront of adopting less stringent standards when it comes to applying for patent protection. The Chinese experience has resulted in the grant of millions of dollars' worth of utility models every year. This type of protection is also available in the UAE and some other countries in the MENA region. Consideration of protection under a patent or utility model would require a thorough consideration by a patent attorney from both a technical and legal perspective. When applying for patents for innovations, it is advisable to avoid descriptions relating to 'software' or 'business related method' as the patent laws of most countries prohibit protection in such instances.

Type B Companies

This type of enterprise could be considered a 'threat' to established companies as they focus on finding ways of developing new technologies that completely disrupt the 'traditional' way of doing business. These innovation-driven companies can either be completely new start-ups or existing companies currently serving secondary markets which may benefit from the current health crisis.

At the time of writing, we are currently in a very fertile period for 'potential disrupters' to take on these large established companies (which lack the necessary business agility required to survive) by surprise, leaving them incapable of reacting quickly enough to disruptive attacks. In order to gain a foothold in their preferred market(s), disruptors will continue to push and challenge the status quo until they impose new markets service them, and eventually displace existing market-leading companies and their related business operations.

In fact, due to the COVID-19 outbreak, the vulnerable financial and competitive positions of a large number of established companies and the increasing market need for new innovative substitutes to respond to the changing consumers' needs and behaviour makes the current time ideal for innovation-driven companies to launch their disruption attacks. There is no doubt that the technological advancements in the digital arena, from computing power to Big Data and 5G connectivity will be important enabling factors. This will likely lead to business disruption in a number of industries.

Netflix, Amazon and Uber are very good examples of companies which started small, targeted secondary markets and moved upstream to take over the main markets and disrupt the then established companies. Disruption in these cases was without doubt enabled partially by the underlying innovative platforms

developed by these companies. However, this, in and of itself, was not enough to disrupt established markets. Additional favourable external factors existed at that time including: (a) technological advancements in the digital space (i.e. the proliferation of smart phones, higher connectivity, computing and video streaming capabilities at lower costs); and (b) the users' appetite for a change of behaviour and readiness to adopt new ways of doing things, both of which proved decisive in the support, deployment and use of these platforms by global users on a wide scale.

Without any doubt, disruption is highly demanding, difficult to achieve, and requires tremendous internal preparation and business skills including a formalised vision and market assessment, innovative technology supporting the vision, and targeted disruption strategy. While some companies will make it through, many others will try and fail. Patents can be used as an important weapon to enhance the odds.

Importance of Patents

This type of "disruptive innovation" generally leads to the development of new, innovative and revolutionary technologies, products, business processes and services. IP protection, mainly patents, should be sought by these emerging companies whenever possible. Subject to their approval, a patent can be employed in a variety of ways to help both secure ownership, expand or maintain market share and prevent external exploitation.

A patent can offer secure a business' market share and act as a barrier against competition seeking to enter the market. Patent protection is one of the most powerful weapons (and in most cases the only weapon) that innovation-driven emerging companies can use to fight large, established companies which have the money, influence and resources, all of which emerging companies are generally deprived. Patents can also be used to leverage the position of an emerging company during business negotiations for a potential joint venture with an emerging company or a cross-licence agreement. It can be used as a tool to sue a competitor for infringement in case of a breach on the one hand, and on the other profit from a potential settlement or court award. Equally, it can also be used to protect against a potential attack.

Patents in practice

Smartflash vs Apple (2015) is a good example in which a small US company (Smartflash) won an award exceeding USD 500 million in damages against Apple for the infringement of its patents related to iTunes. Apple's business suppliers also offer a good example on how patents can be monetised and used as complementary products to an existing company. In fact, Apple's suppliers, including Qualcomm, Texas Instruments and many other smaller companies, have thousands of patent licenses as part of their products supplied to Apple which is considered to have one of the most sophisticated and efficient supply chain management systems in the world involving thousands of underlying patent licenses.

Patents and Market Leaders

Of course, just as patents are available to emerging companies, they are also available to established companies that are generally active in the arena of patent protection. Established companies also use these tools to expand their global footprint and put their competition under pressure within the confines of the laws in question. Patents provide a very powerful tool to established companies as they can act as a barrier preventing new entrants into (established) markets as well as defend against disruption by restricting, or slowing down, any potential attempted disruptive attack from taking over their main business stream.

Consider Huawei, this Chinese giant will have the chance to grow and spread at an unprecedented pace against the backdrop of the COVID-19 pandemic. It would not be surprising if Huawei achieves the pinnacles of the world's corporate superpowers because it has the capacity to use the IP rights' weapon as both as a tool to exert influence and protect its IP (it already has over fifty thousand patents in the field of 5G and IoT). From another perspective, experienced American companies such as Qualcomm and, are also prepared with tens of thousands of patents in readiness for any future patent competition.

With all the power conveyed through patents and the high business stakes they involve, it is crucial that private business interests acknowledge and comply with national security and public health interests particularly in the current climate where human lives are at stake. A recent example involved the US patent troll Labrador Diagnostics LLC which used a portfolio of old patents to sue BioFire, a US company that makes and distributes COVID-19 tests. Fortunately, Labrador Diagnostics later agreed to provide royalty free licenses for COVID-19 testing. The law also provides legal mechanisms for such situations.

Conclusion - a powerful tool for emerging and established companies

The wave of digital change and disruption provoked by the COVID-19 outbreak will certainly lead to an increasingly competitive market which may, in turn, lead to a complete change of business dynamics and demographics. Patent war strategies are among the most frequent and crucial important business wars, all of which start the moment patent protection of important business assets (in particular innovation) is sought. The magic of patents is that they can provide a very powerful weapon for emerging companies and established giant companies alike. They offer emerging companies the ability to leverage their positions against the business interests of larger companies that may have a more established and dominant business presence than them. On the other hand, they provide existing companies with the means to act as market barriers and defend against market penetration by future competition, as well as slowing down possible disruption attacks. Patent protection should be considered very early on in the process and treated as a priority by businesses that rely on a business strategy based on technological innovation or distinctiveness with a view to achieving success. Securing patents as part of a company's portfolio is in the interest of both business owners and investors alike.