

Patent Drafting : Waste to Energy or Waste of Energy

On 9 July 2020, Aries Clean Energy LLC filed a patent infringement lawsuit against Eqtec PLC and its customer North Fork Community Power in the Eastern District of California asserting several US patents relating to the sustainable disposal of bio-materials and waste, particularly from industrial processes and its conversion to thermal and electrical energy for a range of uses.

Eqtec and North Fork reached agreement in January 2020 to install a biomass power plant with construction scheduled for 2021. Based on information from Eqtec's website describing its advanced gasification technology and reactor design, Aries has filed the lawsuit based on a suite of patents.

Eqtec and the other defendants have stated their intention to vigorously defend the action and have issued a public statement that claims the allegations of infringement are based on "infringement theories", (the allegedly infringing activity having yet to take place) which would "prove" the Aries patents as being invalid. Eqtec asserts that the gasification apparatus shown in the lawsuit was in fact sold and other virtually identical gasifiers were sold before the filing date of the patents, thereby making the patents invalid. Patents which claim inventions which have been made available to the public anywhere in the world before the earliest date of the patent are invalid.

This case raises important points about the development of a patent portfolio. It particularly highlights the need to integrate patent activities and strategy with business and technology strategies. With an awareness of the prior art and products/processes on the market at the time of drafting and the technology plans of the applicant, stronger more defensible patents may be secured. It is not enough however to simply have a valid patent. To justify the investment and to protect the underlying business, the patent portfolio also needs to be relevant to the commercial activity of the patent owner and would-be competitors.

But, patent applications are drafted many years before they are enforced risking a disconnection between the drafting process and shaping the assets and the enforcement process which is circumscribed by the shape of those assets. We therefore firmly believe in a "Cradle to Grave" approach in developing and utilizing a patent portfolio such that:

- patent applications are drafted with a full awareness of the complexities of litigation and enforcement;
- litigation is carried out with a clear understanding of the drafting process; and

- these activities are conducted in a strategic context through integration of technical, business and legal factors and experience.

Effective preparation of patent applications requires much more than protecting an invention. The likely nature of the infringement by a competitor, detectability, the supply chain, customer activities, the country/jurisdiction in which infringement occurs, the evidential requirements, procedural aspects, understanding the prior art and many other factors are all directly relevant as to whether the patent application will in fact turn out to be a commercially valuable patent asset in the years to come. There are therefore many pitfalls for the unwary in not adopting a "Cradle to Grave" approach:



In the Aries v Eqtec case, as the battle-lines are drawn, a key factor is that the allegation of infringement appears to be based on the same evidence as that which supports the allegation of invalidity. In arguing for an interpretation of their patents so as to encompass the Eqtec system, Aries risks having their patents read on to the prior sale of Eqtec (assuming these matters are themselves proved) and being held invalid. Eqtec in addition to claiming the patents are invalid, will need to decide whether to also argue that their system does not infringe the patents. In doing so, they may need to argue for a more limited interpretation of the patents which runs a risk of weakening the invalidity case. These pivotal issues, arising many years after the patents were drafted, are fundamentally shaped by and symbiotic with the drafting (and prosecution) of the patent applications.

Without a "Cradle to Grave" approach, the patent owner risks developing non-strategic or commercially weak patent portfolio with difficulties in enforcement. It remains to be seen whether Aries' patents provide effective protection for its waste-to-energy or whether they are a "waste of energy".

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