

EIP

Competitor Monitoring

Whatever stage you are at in the drug discovery and development process, obtaining IP protection is the best way to protect your investment, both monetary and time. However, another hugely important aspect to a well-founded IP strategy is monitoring competitor IP. This allows you to track new patent filings in your area of interest, both from known competitors and also new entrants to the field which could pose a threat to your freedom to operate.

There are several benefits to obtaining information on patent filings within your specialist area. For example, the filings can be analysed in terms of chosen jurisdictions, giving you an idea of what geographical areas are important in your specific market. It is important to choose jurisdictions wisely; there is a balance between wanting to maximise the patent protection coverage whilst being mindful of the associated costs. The decision is time sensitive and so looking at trends from competitors can help you make an informed decision.

Furthermore, patent filing information can be analysed to determine gaps in innovation within a technological domain. Identifying potential gaps within the patent landscape can offer an exclusive advantage over competitors.

As well as keeping a record of existing live patents, it can also be useful to track the status of patents. Competitor monitoring can provide early insight into which patents are about to lapse, such as instances where an annual renewal fee has not been paid or where a patent is reaching the end of its 20 year term. This may provide unexpected opportunities and increased flexibility in the development of a new compound/formulation.

Most potential investors or acquirers will complete due diligence and identify third party rights that are relevant to your space. Being aware of relevant third party rights yourself, and having answers prepared for the challenging questions that might follow, should allow you to defend your IP position and, with luck, attract a higher valuation.

Competitor monitoring should be an ongoing project as the competitor IP landscape will constantly evolve. We can generate a competitor monitoring strategy that suits your current needs, and can implement the monitoring strategy using a custom patent landscaping tool, which will identify newly-published relevant documents and flag these for review.

There are various aspects to competitor IP which should be considered and we can advise on strategies to best deal with these.

FTO Analysis

Freedom to Operate (FTO) is a type of analysis which is used to determine whether you are free to commercially exploit your compound/formulation without infringing another party's IP right. Carrying out an FTO analysis is often a necessity when it comes to securing funding and future investment.

Knowing when to carry out an FTO analysis can be challenging. Complete it too early in the drug development stage and it may be too broad to provide any useful insight. Conversely, too late and significant resources may have been devoted to a product that cannot launch.

Many companies will do more than one FTO review during drug development, with the scale of the review increasing with time. This can build into a detailed and accurate view of the FTO landscape, which allows investors and partners see the path to commercialisation and ROI.

Third Party Observations

Third Party Observations (TPOs) are a useful tool which enable you to file objections on the patentability of a pending patent application which may pose a threat. Whilst it is important to strengthen your own patent protection, it is also crucial to identify vulnerable points in competitors' patent applications and attempt to steer their protection away from your products. TPOs are generally a relatively cheap way to try and improve your FTO position, although they do have some downsides in practice.

Oppositions and Litigation

Post-grant proceedings are available before most major patent offices in which it is possible to attack a recently granted patent. There is often a strict deadline for filing an opposition, so monitoring competitor patent cases is key to make sure you can utilise these processes if needed. Our team has significant experience in this area and can help strategise in such a situation.

Meanwhile, patents are enforced and/or can be attacked in court proceedings. Litigation is typically costly and time-consuming and many start-up or scale-up companies will seek to avoid this option. However, through competitor monitoring, the potential for future litigation can be evaluated and steps can be taken early on to put yourself in the best possible position. The EIP Veriphy team includes experienced court litigators who can advise on best practices.

Licences

Identifying when you need to licence IP from a third party is also important. Proactively approaching a third-party rights-holder to seek a licence will generally result in more favourable licence terms than if a product is launched and the rights holder notifies you of potential infringement. In the latter scenario, licence negotiations are typically more adversarial!

Licence negotiations can be complex and we have a team of experienced commercial IP lawyers who can help. Having your own, strong patent portfolio can be a useful bargaining chip in such conversations.