INTELLECTUAL PROPERTY

The rights stuff

An increase in the number of patents being filed in the energy sector suggests a growing focus on intellectual property (IP) issues by operators, reports *Mark Prinsley*, IP Partner at Mayer Brown.

Intellectual property (IP) rights give their owners exclusivity in a product or area of technology. This exclusivity can be licensed to third parties and it can also be used to restrain the activities of competitors. According to the Thomson Reuters Derwent World Patents Index, three times as many patent applications were filed in the oil, gas and energy sector in 2012 compared with 2002. Baker Hughes, Halliburton and Schlumberger between them secured more than 1,200 patents in 2012 (986 in 2013), which is double the number they secured 10 years earlier. The increase in the number of patents being filed in the sector suggests an increase in focus on IP issues by operators.

There are likely to be macro-economic reasons why the patent system and the protection it offers appear to have become more relevant to the industry. It certainly seems to contrast with the approach taken by some of the pioneers of fracking technology in the 1990s and early 2000s. Their approach, which may have been dictated to some extent by features of the US patent system at the time, was to buy up land with mineral rights and then to publicise the potential of shale gas technology to increase the value of the land and mineral rights. This approach, in a way, was rather like a computer hardware manufacturer giving away software to sell its hardware.

Two types of IP rights in particular are likely to be of significance in the oil, gas and energy sector – patents and trade secrets.

Patents

The patent system has a number of attractions for oil, gas and energy innovators. In broad terms, a patent protects new and innovative ideas capable of commercial application. There are well established systems for searching pre-existing inventions and for granting patents in countries around the world. The priority for an application can generally be based on an application made in a single country. Different patent systems have different rules as to the scope of invention capable of protection. The disadvantages are that it can be relatively expensive to obtain patent protection in a large number of countries. Also, the 'trade off' in the patent system is that the patent owner exchanges exclusivity in the invention for a period of time for disclosure of the technology to the public. This may not always serve the innovator's best interests, especially in an industry where innovations may be used in countries where it may be difficult to obtain or enforce patent rights. Also, the nature of some activities in the oil, gas and energy industry are such that it may be extremely difficult to establish whether or not a competitor is, in fact, using technology which infringes a patent.

Where a patent infringement action is successful, the financial compensation can be significant. In 2012, WesternGeco, a subsidiary of Schlumberger, was awarded damages of more than $100mn for patent infringement by Geophysical Corporation arising out of the use of Geophysical Corporation's DigiFin product which captured underwater images to determine the likelihood of oil and gas exploration opportunities.

Technology licensing will take place at many levels in the oil, gas and energy sector. Small, highly innovative single product companies will be attractive to larger companies. Also, larger companies such as the oil majors, licence their technology to other operators to generate revenue. The existence of patents to support a technology which is being licensed is likely to make it easier to demand substantial royalties and the increase in patent filings may indicate increased patent licensing activity in the industry.

Clearly, litigation between commercial competitors such as the action between WesternGeco and Geophysical Corporation referred to above will take place from time to time. Also, as in other industries, it seems likely that non-practising entities – or 'patent trolls' – who acquire patents for the sole purposes of extracting licensing fees from entities using technology which they regard as infringing their patent rights will grow. Oil, gas and energy companies have already been joined as defendants to litigation involving technologies used across a number of business sectors and have had to develop strategies for dealing with patent trolls. As troll litigation expands in the sector, oil, gas and energy operators will have to look more closely at options for challenging the patent rights owned by patent trolls and to limit exposure to speculative patent litigation.

Trade secrets

Some types of technology may be incapable of protection through the patent system but might still give a valuable commercial advantage which it is possible to protect as a trade secret. Examples of this type of technology include

seismic data or geophysical information used to identify locations suitable for development. Unlike the patent system, the law relating to protectable trade secrets is not harmonised around the world. There is a proposal to create a harmonised trade secrets law throughout the EU, but even that proposal is at a relatively early stage and there are subtle differences in the extent of protection given to trade secrets in different countries.

The fundamental feature of all trade secrets law, however, is that the data or innovative material to be protected must be treated by the developer of the material themselves as confidential. This means care needs to be taken to ensure that personnel having access to the material are made aware of the confidential status attaching to it. Care must also be taken to ensure that the material is not disclosed to third parties in circumstances where there is any lack of clarity as to the confidential status of the material.

Where the 'trade secret' falls into the public domain any protectable rights the owner had fall away. Operators should develop policies and procedures which protect their trade secrets from inadvertent disclosure. These policies and procedures will include confidentiality undertakings or non-disclosure agreements to govern all external disclosures, terms for employment contracts which impose clear and fair confidentiality obligations on personnel having access to trade secrets and policies to prevent misuse of third-party trade secrets disclosed to the operator.

The extent of the protection given to material regarded as a trade secret will be open to interpretation by the courts of the particular jurisdiction in which disclosure is made or threatened. One of the factors to be balanced against claims that material is confidential and must therefore be protected as a trade secret will be the extent to which the law in a particular jurisdiction entitles an individual to use the skill and knowledge acquired during a period of development with one company in successor activities with other employers.

The courts in Texas have protected seismic data as trade secrets balancing factors such as the extent to which the data was known to others, the measures taken to guard the secrecy of the information and the value of the information/cost of developing it. As discussed above, these are key indicators that the approach that the innovator/owner of confidential information must take to ensure it remains a trade secret.

An additional consideration is the risk that regulators may compel the disclosure of the confidential information. In some western states in the US, for example, there are laws requiring public disclosure of the chemical make-up of fluids energy companies inject into the ground to release oil and gas. There have been exemptions to those laws for 'trade secrets'. Inevitably, there has been litigation about how widely this trade secrets exemption should be interpreted. In the UK, similar information held by public bodies will be susceptible to disclosure through the freedom of information legislation which also has an exemption for commercially sensitive information.

Even though there are uncertainties around the scope of trade secret protection in any given situation, it is an established form of protection in many countries and operators should be aware of the requirements for protection of trade secrets. The principal risk to loss of protection is the action of the operator themselves, ie failure to keep the trade secret in fact secret.