PATENTANWÄLTE
SCHUSTER, MÜLLER & PARTNER

PATENTS

Patents are technical protective rights, i.e. the protection request must be based on a technical background. In §1 (1) of the Patent Act it is set out that patents can only be granted for inventions.

However, as there is no definitive, generally applicable definition for the term “invention”, §1 (2) Patent Act explicitly excludes from patent protection non-technical innovations, such as discoveries, scientific theories, mathematical methods, aesthetic creations, plans, rules and methods for intellectual activities, games, business activities including processes which exclusively contain instructions for the human intellect.

§1 (1) Patent Act also rules that the invention must meet the statutorily required protection prerequisites of novelty, inventive step and commercial usability in order to acquire a sustainable technical protective right.

Here, an invention is considered as new if it does not form part of the prior art. Information about the prior art is obtained through searches, for example through preliminary or overview searches carried out in a patent information centre in which the inventor can himself compare the published documents with his invention. The inventor can also search by himself in internet databases, e.g. in the database DEPATISnet provided by the German Patent and Trademark Office (DPMA), However, depending on experience in the field of searching it can, on a case by case basis, be better to commission a specialist with the search. Such a search can also be used for checking that a subject matter is free of third-party protective rights through which own mistaken investment can be avoided. In addition to the published documents, journal articles, presentations, exhibitions, demonstration events, tests or use in public, for example, can have an effect on the protectability of the invention that is prejudicial as to novelty. It should be noted that the prior art that is prejudicial as to novelty can also be brought about the inventor himself. Therefore, even if some inventors or the

applicant might find it difficult, an idea should be kept to oneself until the date of application if possible.

In addition to the novelty requirement, the invention must be distinguished from the prior art by an inventive step. A prerequisite for this qualitative requirement is that the invention must not be evident in an obvious manner from the prior art to a person skilled in the relevant technical field.

The third protection prerequisite requires that the invention can be commercially used, i.e. it must be able to be produced or used in some kind of commercial field (including agriculture). Non-commercial applications include, for example, therapeutic, surgical or cosmetic processes carried out on the living human or animal body.

For applying for a patent an application fee is payable and an application form has to be completed (electronically or in paper form) to which an application text is added. The application text must be formulated particularly carefully as through it the invention should be disclosed so comprehensibly and extensively that a person skilled in the art can implement it. The application text consists of an abstract, a description of the prior art and of the invention and one or more patent claims. The invention can be explained in more detail by means of a drawing and one or more examples of embodiment. Above all, however, the correct wording of the claims is very important as it is through them that the protective scope and thereby also the value of the invention are primarily determined. In order to not to make any fundamental errors here which would allow a competitor to circumvent the protective right, the collaboration of a patent agent is advised.

In most cases it is sensible to also submit at the same time as the patent application the examination request which has to be submitted within seven years of the application anyway. In this way the applicant receives an official vote on protectability within the priority year and on the basis of the determined prior art and the examiner's vote can make a substantiated decision on make foreign applications.

If no examination is requested it is recommended that at least an official search is requested. Through the official search the applicant receives a search report on the

identified German and foreign documents which sets out the view of the DMPA in relation to assessing the protectability of his invention in the form or a categorisation of the documents opposing his invention.

The effect of a patent on third parties is based on the sole authorisation of the patent proprietor to use the subject matter. Every commercially active third party is therefore forbidden from producing the product, offering it for sale, marketing, using it or for said purposes, either importing it into the country in which the law is applicable, or owning it. Processes (manufacturing, working, usage methods) may also not be used or offered for sale by unauthorised parties in the areas of validity of the law. It is also prohibited to offer for sale, market or use objects, or to import them or own them if these have been produced using a protected process.

The validity of a patent, calculated from the date of application, is a maximum of 20 years. In Germany, to maintain patent applications and patents, as of the start of the third year annual fees must be paid which progressively rise as the duration increases.

As stated above, to initiate the patent granting procedure the applicant must submit an examination request within seven years of the patent application. Only then does the DPMA examine whether and to what extent the above protection prerequisites have been fulfilled.

The official fees must be paid within the deadlines set out by the DMPA as otherwise the patent application is considered as withdrawn or the patent expires.

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