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Nordic PDU – a Nordic Patent Defence Union



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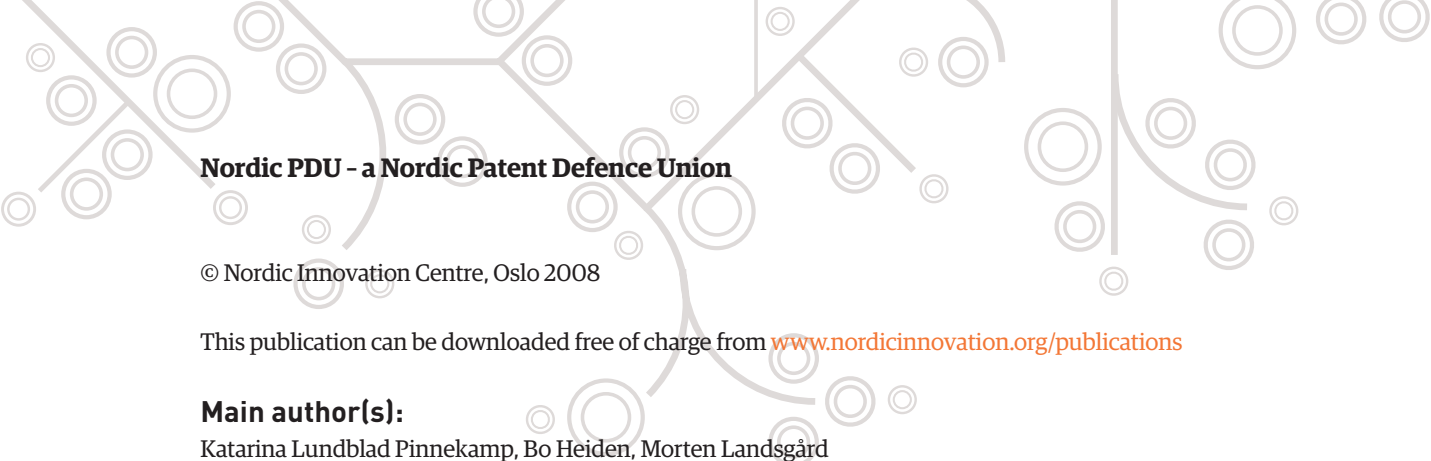
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Nordic PDU - a Nordic Patent Defence Union

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Executive summary

Project 05050 Nordic PDU – a Nordic Patent Defence Union, assigned by Nordic Innovation Centre (NICE) has as objective to define a proposal for a Patent Defence Union in the Nordic countries. The model shall specifically address the needs of small and medium size enterprises, SMEs.

The global market presents increasing challenges to the patent litigation. In Europe, each country has its own laws, court systems, processing regulations, languages, etc., while in the US, patent litigation may be extremely risky due to the high court proceeding costs and the high damages awarded to the winner of the case. In addition, as of yet, Nordic SMEs rarely have experience of the patent litigation process in the emerging economies in Asia.

Thus, patent litigation may present companies with lengthy proceedings of uncertain outcome and cost, as well as heavy involvement of internal personnel, suggesting a particular prohibitive burden for smaller companies. Litigation could therefore be argued to give a benefit to large companies, which possess the necessary resources that smaller companies often lack.

Small firms often lack the IP awareness and strategic IP capabilities to adequately protect their technology. This may give the small firms a disadvantage in cooperation with other parties and may also negatively affect the valuation of the companies.

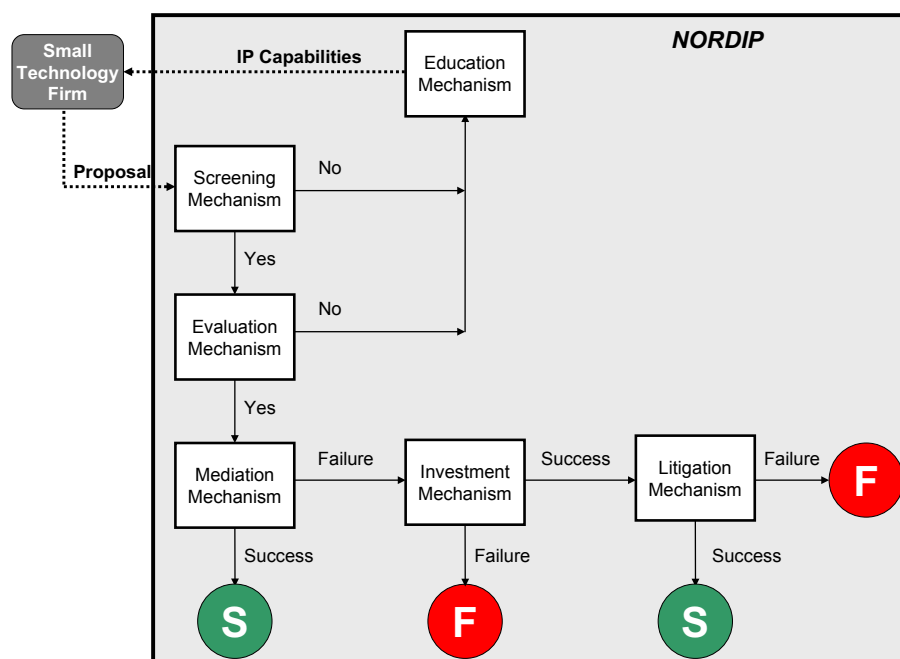
The model proposed in this study has taken the above described problem areas into consideration.

The NORDIP Model proposal

The Model has two main actors; the NORDIP (NORDic IP) organisation and the small company. In order to assist the small company in the main areas of IP strategy development and dispute resolution, six basic processes are devised:

1. Screening
2. Evaluation
3. Mediation
4. Investment
5. Litigation
6. Education

The Model is described in the diagram below:



- Small technology firms will submit confidential proposals at a small fee to NORDIP to be discussed and *Screened* against a number of main criteria to determine if the case is appropriate for evaluation by the NORDIP Council.
 - » Proposals that fail to have merit from either an IP or business perspective can be rejected at either the Screening or Evaluation stage.
- *Evaluations* will be conducted by a council of experienced executives and professionals on a low-cost basis.

- *Educational* support is offered to applicants of rejected proposals in addition to their written refusal.
- Those cases determined to have merit will be developed for direct negotiation or professional *mediation*.
- If mediation fails and the case is believed to be strong, a contingency *litigation* process is enabled.
- *Investment* funds are procured in order to retain top litigation experts. The hope is that the threat of the contingency process will aid in the creation of a mediated business settlement in most cases that reach this stage.

Feed-back

The Model was presented at two major IP conferences, CIP Forum, Gothenburg and PATSOFT, Oslo, and the feed-back from small company representatives were overall positive to the prospect of being able to find competent help in handling difficult IP situations.

The response from larger companies was often limited to commenting upon whether intimidation of smaller companies is a factual issue or is more a perception by others.

Public bodies were in general positive to the proposed Model. The awareness that IP issues are a setback for small companies is high and the preparedness to initiate improvement programs seems to be high as well.

Conclusions

The Education part of the Model could form a separate part addressing a wider circle of companies than the companies involved in IP disputes. Funding of the Education part is proposed to be a mixture of public money and participant fees, but it will probably be necessary to have a start up phase with predominantly public funding.

There is a large interest in dedicated education in IP strategy matter. This educational part of the Model is rather straightforward and could be initiated without resolving the more complex dispute resolution part of the Model.

The funding of the dispute resolution part of the Model is proposed to be primarily by private investments. However, also for this part the start up phase will depend on public

support to build up the institutions necessary for running the Model. The possibility of having private investments to finance the litigation process seems to be limited.

The prospect for finding competent advisors for the various process steps is good. The business community is positive to participate in development of new technology and helping Nordic companies to grow. The number of “young” pensioners is estimated to grow and it is likely that a number of experienced persons will be happy to contribute to the Model.

Organisation of the Model is a crucial factor. There has to be a body (publicly sponsored) responsible for developing the Model and for running it. It will take dedication and skills to set up the Model and develop it into a practical scheme that can run efficiently and cost-effectively.

Public funding will be necessary for starting to build up the Model and also for running the Model. The reliance of public funding makes the project uncertain.

A successful Nordic Model will have a good chance of developing into an international model for IP education and dispute resolution.

Background

Small and Medium Enterprises (SMEs) generate two-thirds of private sector employment in most economies¹. In the Nordic countries, SMEs employ nearly 60% of the private sector workforce, and generate about 50% of the total national turn-over².

Many Nordic SMEs are active in technology sectors and use large resources on developing new products and services. Also, the role of the universities has gradually shifted from transforming scientific studies into commercially exploitable technical results. As knowledge is more and more crucial for having a competitive advantage, the need for better understanding of Intellectual Property (IP)³ is high-lighted.

The number of patent applications is increasing rapidly; the global marketplace has in the last ten years seen almost a doubling of patent filings.

A shift of focus from the Western world to Asia is also taking place and companies all over the world today are faced with the need to protect their IP.

In a study published in 2007³, containing interviews with 405 European managers concerning the importance of IP, 53% of the managers expected IP to be critical or very important to their business model in the next two years. This is comparable to the 35% who viewed the question of IP as critical or important presently.

IP management is a challenge for many SMEs, with limited knowledge of what IP is, how it works, and a lack of understanding regarding the relevance of IP to business strategy and competitiveness.

In general, SMEs find the patent system too expensive and complex to use⁴, whereas large corporations usually have particular departments and personnel assigned specifically to IP issues, as well as the financial resources to utilize them.

i The terms IP and IPR are normally both used as a representation of enforceable rights. In this report we use IP as an expression for all enforceable rights, as defined in Strategic dimensions of Intellectual Property Rights in the context of Science and Technology Policy, ETAN working paper, 1999; "legally enforceable rights over inventions or other creative works ... They confer a right to exclude others from their use."

It is widely recognized that patent litigation is extremely costly and also very complicated. Some examples of litigation cases and cost in Finland are presented below.

If a SME has to consider litigation to assert its rights or to defend itself, it is, even prior to the litigation process, in a subdued/ disadvantaged position. This is, of course, further accentuated if the opposition is a larger company with both the experience and resources to effectively handle IP disputes.

In Europe, the EU has failed to create a union-wide patent protection and enforcement system. As a result, European SMEs are accustomed to a patent system that is limited, ineffective, and very expensive, even when the company is satisfied with protection only in its home market (the EU). This is, to a certain extent, particularly troublesome for Nordic SMEs, as development of products and services for the limited Nordic market is not an option. Consequently, Nordic SMEs in many cases do not encounter IP issues until they enter the US market. Moreover, IT-related companies may even be reluctant to consider patent filings from a conception that IT cannot, or should not, be patented. The pros and cons of patenting software is a separate question from this study, but the reality facing SMEs in the IT industry is that the large actors such as Microsoft file thousands of patent applications yearly.

Awareness of IP issues is generally higher in countries outside Europe, especially in the US, but also in advancing industrialised exporting nations like Japan, South Korea, and China. The US and Japan have extremely competitive markets, where companies successfully employ IP to maintain the desired level of competition even at an early stage of development, while South Korea is the most inventive country in the world (as measured by the number of patented inventions per capita). Furthermore, the Chinese government has launched several campaigns to inform the Chinese industry regarding IP, aiming at that a majority of future Chinese patents shall be owned by Chinese companies.

Addressing the problems of utilising the IP system experienced by Nordic and European SMEs, three fundamental challenges are identified;

- Knowledge about the IP system is limited, both among technical and business trained employees and managers
- SMEs do not allocate resources for handling IP issues on an ongoing basis
- The IP system is expensive and requires professional knowledge; and SMEs feel they are at a disadvantage in any discussion with third parties involving IP and therefore decide not to engage in IP at all

Five higher and executive education institutions in the Nordic region offer comprehensive IP Management programs (dedicated Master, pool of PhD students⁵). There are also individual master level IP modules offered at most major universities, and certain institutions offer executive education dedicated to IP management. However, evidently, this is not enough.

A study conducted in the Nordic region has investigated the use of IP among service companies⁶. Almost half of the companies stated that they did not know their level of IP competence, and 60% were uncertain of whether or not they needed protection of their services.

The study also showed that only 6% used IP as a source of information about markets and competitors, and 6% used it as inspiration to develop new services and products. Moreover, only 6% of the companies stated that they had a written IP strategy. A conclusive remark of the report was that the low percentages probably were results of a lack of knowledge/ understanding of the IP system coupled with little tradition of utilizing IP in the service sectors.

In comparing SMEs with larger businesses, the lack of IP competence becomes visible. An exhaustive Norwegian study⁷ showed that SMEs in Norway "... withdrew patent applications at twice the rate of large enterprises (32% versus 17%), but had a significantly lower chance of having a patent application granted (approximately 50% versus 65%). Similar rates have been found in Australia. These results illustrate the seemingly different "understanding of the IP system and access to skilled IP attorneys."

Many SMEs are also sceptical to the return they may get from IP registrations. A study in the year 2000 for the Danish Patent and Trademark Office⁸ indicated that of the companies that held one or more patents, about 75% had not patented additional products, either because it was too expensive, or because the predicted returns were too low. The report also indicated that of the companies that had no patents at all, 33 refrained due to reasons similar to the aforementioned.

One explanation for the perception that the returns are too low concerns the ability to defend a patent. In a European study⁹, about 55% of participants mentioned the "fear of heavy costs to defend patents" as "significant" or "big" deterrents to their investment in inventions.

The large costs of asserting or defending an IP put the SMEs in a weak position¹⁰. The resources needed to enforce IP can be dramatic, especially for companies that are entering new geographical markets or are operating in a number of geographically dispersed markets. One million € can be used as a rule of thumb for litigation in many countries.

Another heavy cost is the high demand on the small company human resources during a litigation, what Kingston terms as the “high cost of distraction from innovative work”⁹. Collecting documents, building up arguments, support a Discovery process are very demanding for a lean organisation dedicated to get a product on the market.

Entering a new market may increase the risk of becoming involved in litigation, when already established actors want to protect their market shares. Larger companies often file patent applications in order to secure the right to market their own products, as well as to have assets for trading or retaliation power, if threatened with litigation¹¹.

According to Blind¹¹, the fear of litigation costs not only affects the number of patents from SMEs, but also has an effect on the scope of the patent. A wide patent application may be in line with the company’s strategy, but it also makes the patent more visible for competitors. The SMEs therefore choose either to refrain from applying for patents or apply for a narrow scope in order to avoid clashes. Many companies are prepared to abandon a market if they are challenged by IP. In the extreme case the innovative technology will never be commercialised.

The issues discussed above affect the whole economy. As an illustration, a study by the Danish Patent Office found that “reducing the case cost of a lawsuit to 7,000 € would increase the patent portfolio value of Danes in Europe by 10%”¹².

This report explores mechanisms to mitigate the negative apprehensions SMEs and start-ups experience with IP ownership and litigation.

THE LITIGATION COSTS OF PATENT DISPUTES IN FINLAND - AN EXAMPLE

The District Court of Helsinki has sole jurisdiction in all patent matters in Finland. According to information released by the District Court, there were in the period 1998-2003, 103 patent litigation cases. This shows that there are about 10-20 cases per year, where about half the cases are settled during the process.

The IPR University Centre made a survey concerning the cost of patent disputes in 2000. According to the survey, there was great variation in the costs: from about 10,000 € to 150,000 €. The costs were lowest when the disputes concerned “old” or “traditional” technology, and increased as the technology in question was more complicated. Thus, disputes concerning pharmaceutical patents were the most expensive, reaching over 300,000 €.

According to Finnish legislation, the losing party is obliged to cover the litigation costs of the winning party. However, in many patent cases there is a significant difference between the claim and the award by the court. The average claim is approximately 100,000 €, while the average award by the court is approximately 59,000 €.

Proposed dispute resolution models

During the last years a number of ideas have been published on national and international level. This section outlines the major models proposed for improving the position of a company in an IP conflict situation.

Patent Litigation Insurance; a proposal of DKPTO

A patent litigation insurance scheme has been promoted by the Danish Patent and Trademark Office (DKPTO), involving the European Union to support an investigation of its feasibility.

Conclusions were reported in the June 2006 CJA (CJA consultants Ltd) report¹³.

The Concept of Patent Litigation Insurance (PLI)

PLI would enable small and medium-sized entities (SMEs) to enter a litigation process, as their costs would be covered by the insurance. As a result, the SMEs would have (some) financial support to fight large actors in litigation, as the PLI would be adjusting the initial economic imbalance and thus lessening the degree of possible intimidation by larger actors. The PLI is proposed to not only include cost coverage for litigation and threats of litigation, but also negotiations in the business arena, in order to prevent larger actors from taking advantage of unequal financial situations.

PLI cost estimate

According to the CJA report the costs would amount to around 300-600 € per patent and year; an estimation based on the assumption that the insurance is a compulsory rather than a voluntary, scheme. The study concluded that it would be impossible to design an insurance plan if not all patents were included in the scheme. The study also stated that *"costs are considered to be negligible, in order for the system to work"*.

Discussion

The CJA conclusion that “costs are considered to be negligible, in order for the system to work”, raises the question of whether or not small companies would consider these costs as negligible. A comparison of company expenditure on patents to the amount added on to the overall costs by the patent litigation fee can provide a realistic estimation as to the degree of cost negligibility. Therefore, assuming the patent application costs around 3,000-5,000 € to draft, official fees at 1,500 € for a first filing (including an international search), filing a European application adds approximately 6,000 € in fees and attorney costs, and the grant and validation adds 2,000-4,000 € per chosen country. These costs for obtaining a patent in European countries are normally spread out over a period of 5 to 7 years, with renewal fees per country in the range of at 100-2,000 €, increasing every year the patent is maintained. If the patent litigation insurance fee is added to these costs, the insurance fee is relatively small in comparison to the overall cost of obtaining the patent. However, in relation to the annual fee, it can be significant.

A patent litigation insurance system that covers litigation would allow companies a more equal standing in defending their rights, which may be sufficient encouragement for SMEs to take the risk of committing to R&D projects and patent applications.

However, there are challenges to a compulsory insurance; parties may take greater risks and frivolous litigation may increase. The cost of litigation may also increase if it is known that the other party has limited means and may thereby be forced to make a settlement regardless of the terms. Also, compulsory schemes behave like taxes, a disadvantage to European companies, which already have a comparable disadvantage concerning tax expenditures and costs for covering their (European) market with patent translation and maintenance fees. Furthermore, a functional insurance scheme requires a considerable amount of administration, which probably can only be organized by commercial insurance companies.

There are commercial insurance companies offering litigation insurance to companies, but the premiums are usually very high.

The Patent Defence union (PDU) proposal

The concept of a Patent Defence Union (PDU) was proposed by Kingston in the study “*Enforcing Small Firms’ Patent Rights*”⁹. An objective of the PDU is to prevent large actors from unrightfully acquiring technology from small companies, by use of intimidation.

One element of the PDU is that the members would agree to technical arbitration of any dispute with another member. If a member is involved in a dispute with a non-member, the PDU would offer a strong back-up protection function, including experts and

possibly financial backing for the member, in order to, at least, put the disputing parties on an equal level and dissuade any attempts at intimidation from the larger party.

By the union, the members of the PDU would have the ability to collectively stand up against large actors. The work in the PDU might not solely involve defence of infringed patents. The PDU may also be involved in lobbying activities pinpointing procedures that are discriminating small companies.

The establishment of a PDU may force a change in attitude to intimidation. Also, if actors within the union are strong, able, innovative, and respected companies, large companies risk losing potential business partners if the rules of the PDU are not respected.

A system with compulsory arbitration will of course not be gladly accepted by all parties.

Many companies have arbitration clauses in their contracts, but may still be reluctant to embrace compulsory arbitration in disputes with other companies.

Decisions of arbitration are normally not possible to appeal and the decision is therefore the final decision on the conflict in question. Another effect of arbitration is that the decisions are confidential and therefore offer little guidance to other parties.

Another question concerning arbitration of IP disputes is whether a negative decision on the validity of a patent should have as a consequence that the patent is revoked.

Major differences between PLI and PDU

Considering PLI and PDU in regards to the aspect of freedom to act, there are some fundamental differences between the two systems. The patentee in the PLI system may decide if he/she wishes to enter into litigation based on an assessment, taking the insurance coverage into consideration.

In the situation where a member of the PDU is infringed by a non-member, the organization rather than the individual company assesses whether or not it is worth proceeding with the case, taking into consideration the chances of winning the case, the amount of positive publicity for the PDU, if the case would be a deterrent for larger companies to intimidate SMEs, etc. The PDU would provide up to 100% of the costs of the process, so the member would be committed to sharing the reward of the success. The member company would also be expected to fully respect the decision of the PDU, irrespective of its decision to accept or reject the case in a dispute.

Another Kingston proposal

Kingston has also proposed in the EU study “Enforcing Small Firms’ Patent Rights”^{viii} to introduce an extended priority period for the patent application. Kingston claims that with an extended priority period, the SMEs would have an opportunity to evaluate the value of their inventions before proceeding with patent applications.

The proposal has many merits, but since the priority period is regulated by the Paris Convention, to which there are more than 150 parties, introducing a fundamental change must be seen as a great undertaking.

Intellectual rights protection insurance

Some national initiatives have been developed to make insurance schemes for small companies more affordable. Two examples, Sweden and Denmark are presented as an illustration.

Sweden

The intellectual rights protection insurance (rättsskyddsförsäkring) was developed through a collaboration of Swedish Inventors’ Association (Svenska Uppfinnareföreningen), Factor, Nordeuropa Försäkring, and Lloyds, and aims at offering financial relief to patent proprietors seated in the European Union (EU) and/or the European Economic Area (EEA) in the case of intellectual property conflict with another party. The patent proprietors would thus have the economic means of fully defending his/her intellectual rights to the product in question. For a yearly maintenance fee between 800 and 1,700 €, the insurance covers court costs, including the fee for legal representation, up to a cost of 210,000 €. The lower bound of 800 € would secure protection in the Nordic area, defined by the insurance scheme as including Norway, Sweden, Finland, Denmark, and Iceland.

However, the insurance may only be utilized by members of the Swedish Inventors’ Association. Also, the insurance is only valid if both parties are seated in the EU and/or EEC; therefore, it is not valid for European companies or individuals in patent conflict in the US or Asia. Also, the company or individual patentee must have possessed a valid insurance for a time period of at least two years prior to the time of the conflict; if not, then crucial events concerning the development of the conflict must fall within the time period covered by the insurance.

Denmark

In December 2007, the PatentEnforcerTM (www.patent-enforcer.eu) was launched in Denmark, offering patent insurance specifically to Danish SMEs. The insurance is offered by Dahlberg Assurance a/s and SAMIAN Underwriting agencies. All Danish

companies with less than 3,350,000 € in revenues can apply, while companies with revenues exceeding this limit will get individual offers. In addition, the low-cost insurance scheme is limited to 10 patent families, but individual offers are also available. The insurance covers legal expenses concerning prevention of sale and use of the products or processes related to the insured patents or patent families, liability issues as well as defending validity cases. Regional coverage is available in four different regions; Denmark, countries within the EPO, world wide excluding US and Canada and world wide. The covered costs for each case or in total (i.e. during one year) is limited to three optional bounds; approximately 130,000 €, 335,000 € and 670,000 €, and the insured must cover own share of at least 10% (variations related to country where the dispute takes place and chosen lawyers and patent engineers do apply).

The yearly insurance premium is calculated individually in each case, and is a result of the regional and bounds coverage. The insurance is only valid for a year, and covers only violation cases during this period. The insurance is valid for granted patents, and it is also possible to apply for insurance for applications.

European Patent Litigation Agreement (EPLA)

The European Patent Litigation Agreement (EPLA) is a proposed patent law agreement aimed at creating an “optional protocol to the European Patent Convention (EPC), which would commit its signatory states to an integrated judicial system, including uniform rules of procedure and a common appeal court”. If the agreement enters into force, this would create a new international organization with roughly the same competences as the United States Court of Appeals for the Federal Circuit (CAFC).

The European Patent Judiciary (EPJ) was set up by the EPC Contracting States committed to find an integrated judicial system. The main proposal is that a European Patent Court should have jurisdiction to deal with infringement and revocation measures regarding European patents. The European Patent Court would also act as a facultative advisory council, and would, upon request, give non-binding opinions on European or harmonized national patent law to national courts handling disputes in related matters.

The European Patent Court would have the power to revoke a European patent and its decision would be valid for all countries.

At the moment, there is, however, no clear indication of how a European Patent Court could be set up.

Patent Office extended services

The UK Patent Office

The UK Patent Office provides a service of expert opinions on validity and patent infringement issues. Anyone is entitled to the advice of the patent office on a specific granted patent matter, provided that the patent is a UK or European patent designated to the UK. An opinion will be issued approximately three months after the request is made. The fee for filing a request is 270 €, and must be paid at the time of filing. It is possible to withdraw a request at any time, and the involved parties would be notified by the Patent Office regarding the withdrawal. This advice is not confidential and may be published on the UK Patent Office website. Another requirement is that the requested patent matter must be new and may not have been previously processed. Otherwise, the Patent Office may decline to give its opinion. The activities of the Patent Office shall be considered as an alternative to the legal proceedings in court, and are meant to clarify the issues at hand.

The Swedish Patent Office (PRV)

PRV offers the service of extended novelty searches through PRV InterPat. The service is directed towards actors that require a thorough novelty check concerning their inventions, and the service is conducted in a similar procedure to a regular patent examination search. This enables the applicant a greater understanding regarding the prior art thanks to a more complete insight into the situation. The report is presented in either Swedish or English and shall, if there is no other agreement, be delivered within 13 working days. The service has a fixed price, approximately 1,000 €, excluding taxes. However, there is no guarantee that the patent (if issued) will not later be invalidated in a court. It is also important not to confuse the search service with the regular search reports that PRV issues for the applications on file.

One oddity with the Swedish offer is that the entity performing these services is closely connected to the administrative entity that grants patents.

Discussion

The different models for resolving patent disputes discussed are subjected to both advantages and disadvantages. PLI is a scheme where an insurance company stands for the costs of at least a part of the litigation process. The main disadvantage with this concept is the expense; it is probable that only companies that are aware that they have severe problems decide to have insurance, in case of voluntary scheme. According to the CJA study, the insurance must be compulsory, in order for the costs to be reasonable, i.e. companies cannot independently decide whether they accept the insurance. However, the insurance costs in a compulsory scheme cannot actually be seen as negligible when

in relation to the total costs paid by the patentee. But, since litigation is so expensive, it seems unavoidable that an insurance system must take out fees that are comparable to the annual fees of keeping the patent. Small companies are sensitive to costs, but it is difficult to know how price sensitive the keeping up of their patent portfolio is and if a doubling of the annual fees would discourage small companies from applying for and keeping their patents.

A PDU may not only prevent infringing activities, but also create opportunities of lobbying activities against pressure from larger companies on SMEs, in order to gain respect from larger companies. It could also contribute to the creation of a corporate environment where intimidation would be considered as unethical behaviour, which in turn may have a negative effect on the reputation of the companies involved. The PDU could have the power to allow the market to create new rules and regulations, rather than relying on financial support in a dispute.

Other proposals are based on the existing concepts and extend the services offered or adjust the legal frame work on an international framework.

NORDIP Model

The NORDIP Model developed within the framework of this study has the mission to

Stimulate innovation for the benefit of society through enhanced respect and improved knowledge and strategic use of the patent institution by both large and small firms.

The vision of the NORDIP Model is to

Create a non-profit, action-based research institution that can both investigate the imbalance of power between large and small firms regarding patent enforcement and rectify this problem

by providing:

- Increased respect for patents through high quality, low cost support for small firms in wilful patent infringement cases involving large corporations.
- A subsidized high-level education function to improve IP strategy capabilities in small technology firms.

The main hypotheses for NORDIP are:

1. Large firms exert a real or perceived imbalance of power over small firms in relation to patent enforcement, causing small firms to under-invest in R&D and patenting, resulting in a reduction of innovation in society.
2. Small firms lack the IP awareness and strategic IP capabilities to adequately compete against large firms in the knowledge-based economy.

Kingston supports the first hypothesis that small technology firms will under-invest in R&D and stop patenting due to a lack of enforcement possibilities. While extensive patenting may be affected, it is implausible that small firms will stop patenting as they

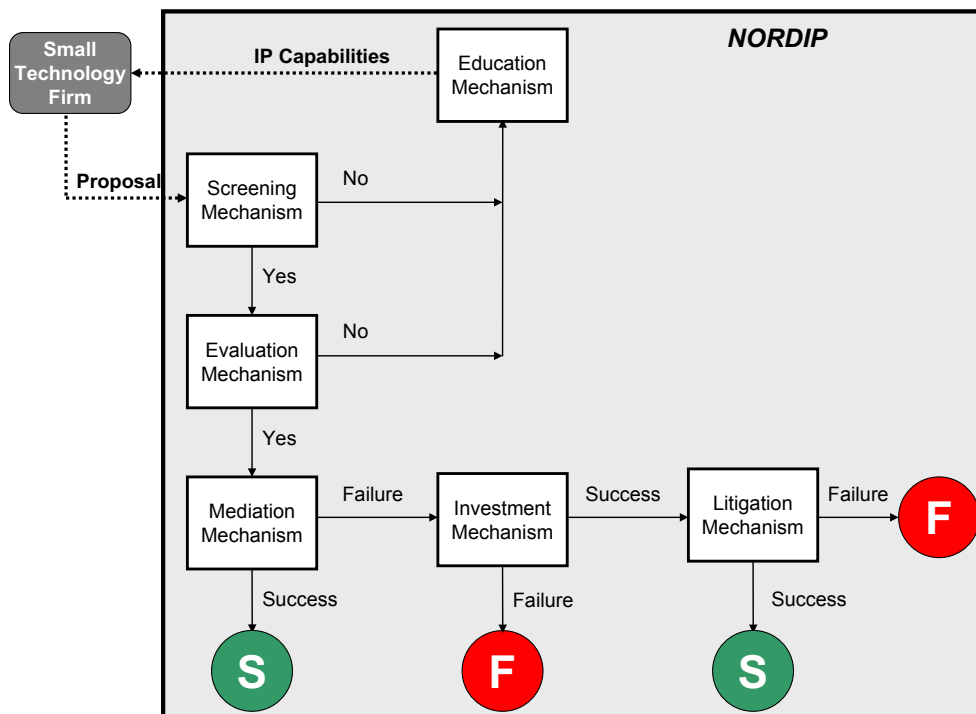
need patents in most cases to receive VC funding. There also seems to be an underlying assumption that claims of patent infringement by small firms against large actors are always valid. However, it is possibly more plausible to believe that SME often lack the general understanding of the actual strength of patents and the need to combine this with other control mechanisms and business strategies, which most likely means that they have put themselves in a poor position relative to their competition.

If hypothesis 1 is correct, one solution would be to enable small firms with the expertise and financing to use the existing legal system as a means to balance the market power exerted by large corporations.

If hypothesis 2 is correct, one solution would be to facilitate the education of small technology firms to create their own IP-based business capabilities or at least become knowledgeable consumers of consultant-based expertise.

NORDIP – a Patent Education and Contingency Model

A Patent Education and Contingency Model, such as the proposed NORDIP, will test both hypotheses, as well as to provide assistance to small technology firms, small in terms of infringement support and education. Below is a diagram of the entire model.



Organization

The model works between two organizational actors:

1. Small technology firms

Proposals can be submitted by small technology firms or individual inventors looking to engage in commercial activity. Holding companies and companies that only license out technology are generally omitted from the process.

2. NORDIP

NORDIP can be arranged as a virtual organization as many of the different processes (described below) are not limited geographically. For instance, the screening and evaluation of proposals can be done remotely. Mediation and Education activities require a physical location, but as travel within the Nordic region is rather short, a few locations could serve the entire region. Partnerships with industry organizations, investors, litigation firms, and business and IP professionals can be managed virtually under the NORDIP brand and supervision.

Process

NORDIP consists of the following six processes:

1. Screening
2. Evaluation
3. Mediation
4. Investment
5. Litigation
6. Education

Small technology firms will submit confidential proposals at a small fee to NORDIP to be reviewed by low-cost or pro-bono actors against a number of main criteria to determine if the case is appropriate for evaluation by the NORDIP Council. Proposals that fail to have merit from either an IP or business perspective can be rejected at either the *Screening* or *Evaluation* stage. Applicants of rejected proposals have the option to receive educational support in addition to their written refusal.

Evaluations will be conducted by a council of experienced executives and professionals on a low-cost or pro-bono basis. Those cases determined to have merit will be developed for direct negotiation or professional *mediation*. If mediation fails and the case is believed to be strong, a contingency *litigation* process is enabled where *investment* funds are procured and top litigation experts are retained. The hope is that the threat of the contingency process will facilitate a mediated business settlement in most cases that reach this stage.

Screening

The Screening mechanism is a process by which proposals are received from small technology firms and judged based on the following criteria:

- The proposal is submitted by a small technology firm (or an individual inventor)
- The firm lacks the resources for patent enforcement itself
- The case of patent infringement is well-documented, including a legal and business argument and an assessment of financial damages
- Documentation of previous actions taken to solve the issue, including evidence that the large actor is unwilling to enter into mediation or search for a business solution (i.e. a real case of bullying)

The Screening mechanism could be carried-out by a number of actors approved by the NORDIP organization such as the following:

- IP consultancy firms
- Patent bureaus
- Law firms
- IP graduate students (e.g. ICM Master students) under supervision of experienced faculty or consultants

Evaluation

Proposals that fulfil the screening criteria should be reviewed by a council of experienced business and IP executives and professionals working on a low-cost or pro-bono basis assisted by persons from the Screening Mechanism. The process will consist of the following:

- A formal due diligence of the IP in question
- An analysis of the business situation from both the small and large firm perspectives
- Development of a business and negotiation strategy

The goal of the Evaluation Council is to build a compelling business case that creates a win-win scenario, preventing unnecessary litigation. The case can then be solved through direct negotiation or through mediation either conducted together with a

member of the Council or by another authorized Mediation actor.

The Evaluation Council could consist of senior IP or business executives and professionals either currently working in industry or retired.

Mediation

Mediation services are widely available through different existing agencies. NORDIP could also provide Mediation support where the Evaluation Council could be used as mediators if required.

The objective of mediation is that the parties in question reach a mutually acceptable agreement with the aid of an impartial third-party, the mediator. Mediation encourages focus on the future, with emphasis on rebuilding relationships, rather than an apportion blame for past events, which is a sharp contrast to legal proceedings where unfriendliness often still exists between parties once the case is closed. The structure and commonsense approach of mediation also allows the parties to reflect on their own behaviour in order to find reasonable solutions.

Moreover, mediation is generally more cost-effective and less time consuming than court proceedings, and is a flexible process that can be used to settle various types of disputes. In addition, it is an excellent preventative tool, effectively preventing problems from escalating and for situations to deteriorate further.

Where mediation has been used, it enjoys remarkable high rates of success, due to its non-binding nature. Even if a settlement is not reached, the parties in mediation know more about the conflict than they did prior to mediation. The parties are also in control of the process and can decide in which direction the mediation procedure shall head. Each party has an individual right to terminate the mediation procedure.

An important factor to consider is the value of good-will. If large actors continuously proceed with intimidating activities, they face the risk of negative public relations. When a small patentee attempts to enforce his/her patent rights against a larger actor, the small patentee usually has an advantage in terms of the sympathy of the court. The negativity of the press that may ensue from such disputes is almost given. The consequences stemming from such press include for example devaluations of stock, undesired questioning from shareholders, and often a series of increasingly uncomfortable board of director meetings.

Customers and those in an outside relationship with the parties in the dispute would also react if it became known that certain companies would act unethically. This would generally have a negative effect on both costumers and potential business partners. In a time where trademark strategies, brand building, and core values are becoming

increasingly important, intimidation activities may have some very adverse effects indeed.

Therefore, large companies gain from entering into mediation if in dispute with either a SME or another large company.

Investment

In order to pursue litigation when mediation does not succeed, funding must first be secured. For US litigations, one alternative is to hire contingency fee lawyers, who self-finance the litigation process for a percentage of the reward at trial or settlement. In Europe, where this is not possible, external investors must be employed to raise the funds necessary to pay the legal fees. Thus an investor-based litigation approach is an indirect contingency model compared to that employed directly by US law firms. Litigation investment funding can be raised primarily from the following actors:

- Private individuals (e.g. angel investors)
- Venture capitalists
- Investment funds (e.g. private equity)
- Contingency law firms (in the US)
- Public innovation support agencies

Partnerships with potential investors can be developed later as required by the in-flow of accepted proposals. However, the better this function is developed the greater the respect for the entire organization from a brand perspective.

Litigation

Litigation is a very uncertain process, where the skill of the litigator can be more important than the facts of the case. Thus, if the role of NORDIP is to help build respect for patents in society, it is important that cases that reach this stage are won. Based on this societal mission, it is the hope that leading law firms will join as partners and participate in litigation when necessary. The fact that litigation fees are fully financed should ensure this.

Education

The Education mechanism is probably the most important component to the model.

If hypothesis 2 is correct, then most proposals will fail in the due diligence of the business or IP criteria. In these cases, educational support will be given to improve the

IP-based business capabilities of the small technology firm. The support can take on the following forms:

- General IP and business education
- Specific feedback workshops

Implementation

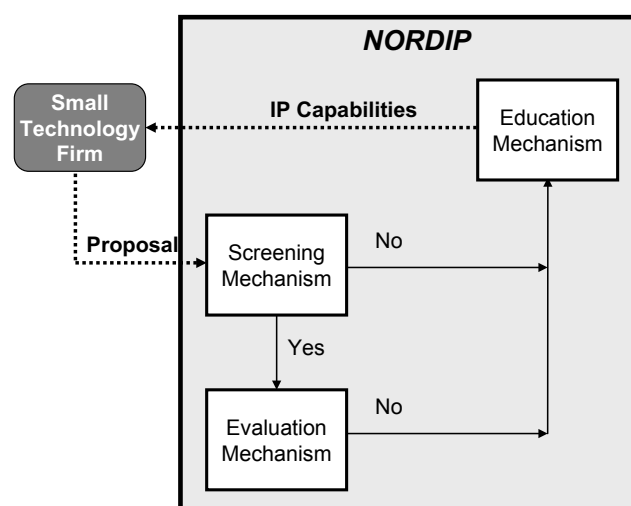
NORDIP, as both a research and action-based organization, can be created in two stages:

1. Hypothesis testing phase

By developing the Screening, Evaluation, and Education mechanisms, NORDIP can investigate the following:

- » whether large firms exert unfair power over small firms in patent infringement situations
- » whether small firms simply lack sophistication in their IP strategies
- » whether there is no perceived problem by small firms

A one to two year period can be used to test the hypothesis through the application, screening, evaluation, and education process shown below:



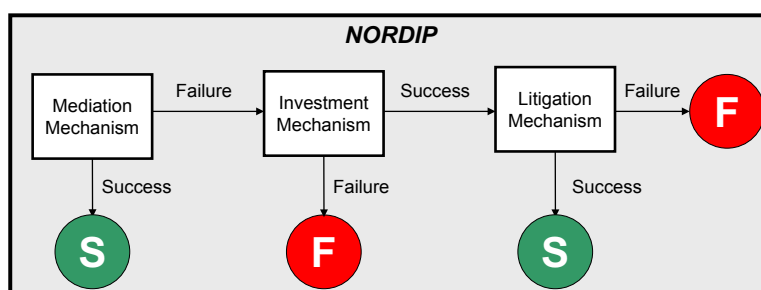
If hypothesis 2 is correct, the challenge facing small technology firms can be addressed through better awareness, education, and support services.

2. Contingency litigation phase

Given that small technology firms are compelled to patent to receive financing, if

hypothesis 1 is correct, we should see a large number of proposals with legitimate cases of infringement by large corporations. To test hypothesis 1 further, a research project to investigate small technology firm behaviour at a detailed level should be created in parallel.

A flood of legitimate infringement cases would require that the mediation and contingency mechanisms are operating properly. However, these organizational capabilities can be built on an ad hoc basis as required from the results of the hypothesis testing phase.



Funding

As the vision of NORDIP is to provide a service to society, it is anticipated that much of the services can be provided at low cost. Funding requirements would apply to start-up and moderate running costs.

Following start-up and administrative costs should be arranged through public bodies or NGOs:

- Website development
- Partner development
- Organizational development
- Marketing of the service to small technology firms

Following moderate running costs should be arranged through professional membership organisations (such as industrial confederations) and support by public education and innovation organisations, in addition to fees paid by the candidate, and include:

- Financial compensation for the screening advisor(s)

- Financial compensation for the IP education advisor(s)
- Financial compensation for the evaluation advisor(s)

Cost for the applicant

The small technology firm will have to participate to the costs of such support, generally less than the market costs.

- Fees for the screening process
- Fees for education module
- Fees for evaluation

For mediation, we believe the applicant shall pay market price. However, those may be important, and we are considering a mediation model with a mediator time-based invoicing model, instead of the current mixed model of fee + a percentage of the amount of the mediated matter.

Feedback

CIP Forum, Gothenburg

A first draft of the project model was presented in a 3.5 hours workshop at CIP Forum 2007 in Gothenburg, May 27th-23rd, with the topic *IPR Enforcement Strategies for SMEs*.

Katarina Lundblad Pinnekamp, AdviceIPR GmbH, was the chairperson, and speakers included Ashkan Pouya and Saeid Esmaeilzadeh from Diamorph AB, Alexander Bjørnå from Biotec Pharmacon ASA and Axel Moulin from Leogriff AS.

The workshop presentations given at the CIP Forum are in the Appendix.

The speakers presented their personal experiences with the patent system from a SMEs' point of view. They confirmed that the fear of litigation often is greater than the litigation process itself, and even questioned the perceived attractiveness of the US market. The fear of costly litigation has the consequence of driving many companies away from the US and towards new, emerging markets. The speakers also recommended that SMEs entering the US market have close contact with contingency lawyers in order to ensure better support, should a litigation case emerge. A potential litigation case demands large amounts of financial resources, especially in the discovery process, which takes approximately three quarters of the total litigation costs. In addition, the use of internal resources (IP-managers, the R&D department, management, etc.) may be extremely painful for SMEs.

However, the speakers would not advice against patent applications; on the contrary, patents may be highly valuable. Patents are not merely valuable for simple protection, but they may have important purposes in business, acting as "door openers" and sales arguments towards partners, customers, and financial supporters. Also, the speakers' experience is that larger companies take SMEs more seriously if they have patents pending or granted. Thus, they would recommend filing for a patent early in the process, and proceed to discussing the product with customers as soon as possible. An early and close dialogue between company and customers ensures better understanding of

customer needs, resulting in the development of a better product.

Axel Moulin from Leogriff presented the first draft of the NORDIP model. The main issues raised in this presentation were:

- What is a NORDIP case approval worth to you?
- Would you be part of the NORDIP Advisory Board?
- Are we distorting competition?
- Room for NORDIP in the Nordic landscape?

The presentation led to an interesting discussion where the model structure, eligibility of cases, financial issues and different alternatives were the main subjects. Below is a summary of the participants' comments.

The model

This looks like an excellent model for the SMEs, but might not be that interesting for the larger companies. Comments and thoughts from large actors should be considered; is this a relevant issue for the large companies, or is the model or union not that threatening at all?

The overall motive should be to find a way to make selling and mediating knowledge easy. One should force the different parties to behave ethically, and motivate collaboration. This is done in the US, where patents coming from the universities are actually treated differently than patents from SMEs and the like.

One could possibly position NORDIP in the same group, where the larger companies are motivated to behave ethically towards the SMEs. It could also be working as a “balancing tool”, ensuring that the legal system is working as it should.

One questioned the motives for using NORDIP; one could think that the SMEs just could go to mediation without involving NORDIP at all. For instance, it was pointed out that UKPTO already today are offering mediation services, and could thus be used as an alternative tool in order to achieve the desired goals.

After all, mediation is only one tool to settle disputes. In order to build an interesting model, additional value added to the SMEs should be considered. An example of additional value added could be to participate in finding other collaboration partners for the SMEs. This could actually be supported by the NORDIP advisory board network, offering both industrial contact and knowledge according to a participant.

Eligibility of cases

One of the most discussed issues was the selection criteria to be used for accepting cases into the model. Should we select the cases that are most probable to hold in court, the ones that are willing to pay a yearly fee, or some other criteria?

There would in fact be two cases presented to the NORDIP structure; offensive and defensive ones. Offensive cases are used when something is expected to be gained from an infringement case, or it might just be a part of the overall defensive strategy. Defensive cases are cases that could threaten the very existence of the SME, and should thus be the main priority for the NORDIP organisation when selecting the cases to be supported.

However, if the selection criteria only consider the cases that would hold in court, this could lead to select the wrong cases; not necessarily the cases such a model should support. A fear that was pointed out is that if the selection criteria are not good enough, this could develop into a valuable tool for patent trolling, which is not in the common interest of neither large companies nor SMEs.

Financials

Regarding the financial issues, one way of creating a fund is to start with a few first cases and get a share of the final cut, e.g. a 5% cut after the closing of a deal. This could be a good way of building up a financial instrument that could finance other cases afterwards. There is nothing wrong with earning some money on this, according to some participants. It was mentioned that the governments in some way could be forced to support these issues, but there could be some limitations regarding the competition law that should be investigated further. It was also argued that external money and finance must be considered further, and one should look at a possible split between public and private funding.

Alternatives

Some alternatives to the presented NORDIP model were also discussed.

A participant briefly explained an agreement between the Swedish inventor union and Svensk Innovation from 2007, agreeing on forming some kind of patent insurance (this insurance product is described above). In addition, we were also informed of the start up of a PATLIB in Norway. The PATLIB organization is funded by the local patent offices, and supported by the EPO, and could be interesting to investigate further. The PATLIB organization is already active in the Nordic countries and the rest of Europe. The organization is especially well-established in Finland. In Sweden and Denmark the services are handled by the national patent offices. No additional information on the PATLIB establishment in Norway could be found.

Patsoft, Oslo

The model was also presented at the Patsoft conference in Oslo, 4th-5th of June 2007, first as part of the overall program and later discussed in pub debate.

The presentation given at the conference can be found in the Appendix.

Questions from the audience concerned the validity of the assumption that large companies actually threaten the SMEs. A common understanding was that the large companies would fear for their reputation if they were intimidating the smaller companies. In addition, several of the larger companies actually rely on the SMEs when it comes to innovation, and they are thus enforced to build up a good reputation and relationship with SMEs.

When it comes to the SMEs' patenting process, they should be aware of the risks before patenting. How does the model support the phase preceding the decision to apply for patents? The audience also had the view that, if the model could end up as a plain insurance for the SMEs, the additional contributions would not be appreciated. The difference between this model and an insurance alternative should be better presented.

Norges Forskningsråd

Meeting with Odd M. Reitevold and Vebjørn Walderhaug, both from the Division for Innovation

There was a great interest in discussing, whether the SMEs had the required knowledge to implement a valuable IP strategy, or if they needed more education and support. The understanding of Norges Forskningsråd was that the "IP knowledge gap" is very much a reality both in the Norwegian industry and within Norwegian public organisations (e.g. the universities). A program targeting IP awareness and knowledge distribution would be very welcome. One of the issues emphasised was that the competence must rise to a level where the SMEs can understand that it is wise to consult experts on the IP matter and not necessarily treat all matters themselves. As a consequence, they saw the need of also building competence within the consulting business and that it should be easy to find competent IP consultants.

Two issues of special importance were good consultants/advisors and SME awareness on IP. Mr. Walderhaug questioned whether the threat from large actors is a real threat or if it is a perceived threat.

Another aspect emphasised by Norges Forskningsråd was that IP now has become

an important component in cooperation agreements (especially in relation to EU and national projects including both public institutions, e.g. universities, and privately held companies). The fact that IP issues now must be discussed already at the application phase of the projects brings the need of awareness and knowledge higher up on the agenda.

A stepwise implementation of the model, working with both the education part and the dispute resolution part in parallel was proposed. It is important, however, that the model is clearly structured (formalised), and that it had a good acceptance in business or public organisations. Norges Forskningsråd were not negative to take part themselves in the foundation of the educational/awareness raising part. They also saw the need for support from public institutions, and NICE was identified as a valuable player in ensuring the organisation legitimacy during establishment. Other interesting parties that could support such a union (or initiative) are the Nordic industrial organisations (e.g. NHO etc.). Ensuring support from four or five of the Nordic organisations would underline both legitimacy and credibility.

Regarding the illustration of the model; they very much appreciated that funding of a possible litigation case was presented as a single point (investment mechanism). This is an important (and difficult) task in itself, and therefore important to have as a separate activity. It is also useful in communicating the challenges related to funding of cases.

They saw a lot of opportunities when it comes to funding the project. The Norwegian ministry of trade and industry has recently launched a plan of initiatives for increasing the knowledge of IP on a national level. This gives guidance for the public support organisations (like Norges Forskningsråd and Innovation Norway), and programs targeting IP issues are to be expected. Implementing the NORDIP model through such a program could be interesting (and feasible).

The two main points that should be argued when implementing the model is that this is (i) an awareness and knowledge increasing program, (ii) the amount of public support (directly to companies) should not exceed 50% to be in line with EU regulations.

Norsk Biotekforum

Meeting with Thor Amlie, Director of Norsk Biotekforum.

The background of the project and the proposed model was presented, and the immediate feed-back was, that this could be very interesting. If the initiative were to succeed, however, it would be dependent on heavy engagement from the persons setting it up. The success of such an initiative is solely dependent on personal engagement and

drive from the “entrepreneurs”!

Amlie noted that it will be important to reach the SMEs at an early stage, they themselves will not be aware of the problems until they have entered the market. And, in that case it might be too late to help them. He also commented on the importance of building up competence for IP services in Norway, where a small and captive market and much translations activity has not been very challenging to the Norwegian patent bureaus. Hence, increase of the competence within IP at the national level, both within the industries and specifically in IP companies (patent bureaus, consultants, layers etc.), would be a valuable contribution.

One of Amlie's emphasised notes was that this also should act as a meeting point, where companies could learn from other's mistakes. He uses their own IP meetings as an example; they try to invite companies that have been engaged in conflicts and let them describe their experiences. NORDIP could also use the same practice; invite experienced people to talk about own experience. This could be done together with general IP and business education and workshops (as proposed also by CIP).

Regarding foundation of the model, he thought that it was essential that the model would be cross-national. Each Nordic country is not large enough for this kind of dedicated organisation. He thought that the EU IPR Helpdesk could be an interesting collaboration partner in the introduction phase, and that valuable participants for the screening/evaluation committees could be found in organisations like NIP.

Public organisations (Norges Forskningsråd and Innovation Norway) were discussed as more realistic funding partners, together with EU-funding, than financing from Industry organisations.

Feasibility discussion of the NORDIP Model

The proposed NORDIP model, herein called the “Model”, includes six process mechanisms: “Screening”, “Evaluation”, “Mediation”, “Investment”, “Litigation” and “Education”. In this chapter, the mechanisms and the basis for forming a NORDIP organisation are discussed, and the feasibility of the various parts of the Model is evaluated.

Basic assumptions (hypothesis)

One basic assumption underlying the proposed NORDIP model is that there is an imbalance in power between large and small firms regarding patent enforcement. As a consequence, small firms may not recover full value for their technological achievements in dealings with larger firms. This assumption cannot be scientifically validated, but it is nevertheless experienced by many small firms, although some smaller firms also would disagree with such harsh statement.

The other assumption concerns small firms’ lack of knowledge of the IP system. This seems to correlate with the views of many representatives of small firms. Although this assumption is less controversial, its effects on the behaviour of small firms may have broader implications than the first assumption.

This study has not made any research into the validity of the assumptions. Rather, the study has been undertaken on the basis that the assumptions are general enough to motivate the effort of finding a model solution to the problems involved.

Small technology firms

The definition of “small technology firms” is not quantifying any requirements, such as the number of employees or turn-over, but the company or individual inventor is

obliged to presently be, or looking to be engaging in commercial activities.

Many companies involved with research and development take long time to mature; it seems to be the nature of technical development that it is unpredictable and time consuming. This means that small start-ups can be active for a long time before they have a product on the market and before they meet competition. Many of these companies need to attract VC or to find collaboration parties that may sponsor the development. Consequently, although the company has no market position, they need an IP strategy in order to manage their further development. It could, for example, be very expensive to delay patent filings until after the company has received VC funding. A patent may cost 5,000-10,000 € to file, but the patent application may give the company a better valuation and thus a cheaper deal with VC (receiving more money for less ownership divesture). This may also be relevant for companies involved in development cooperation or doing assignment R&D for other companies. If these companies have not clearly defined their own technical contributions before entering into a deal with other companies (large as well as small), they may end up with a smaller share of the results or less compensation for their work.

The definition attempts to exclude certain categories/ types of companies in order to try to avoid misuse of the model. Patent trolls normally do not have marketing and commercial activities around the products or services enabled by the technology in their patent portfolios.

It appears important to the success of the model that the companies supported by it are pursuing sound commercial goals, while creating value through their own ideas and technical capabilities. Thus, the model shall not be able to be used as a subsidized means of raising questionable disputes with other companies (even if the other company is large) or to diminish the responsibility of the management or directors of the supported companies.

Screening

The Screening mechanism will be the first instance the prospective company will meet. This is proposed as a virtual organisation where a number of actors linked to the NORDIP organisation, e.g. on a pro-bono or low-cost basis, can be involved. As with any organisation, NORDIP will be dependent on having project management that is capable of selecting the right team for the screening process, as well as ensuring that objectives, time tables, financial plans, etc., are met. A common problem with contacts between specialised experts and entrepreneurs and inventors is the communication. It is probable that the NORDIP project leader will have to be engaged in securing proper understanding between the parties involved.

The screening will involve both investigation of the company involved and fact finding around the issues of the dispute. Even if the company has turned to NORDIP, it may be reluctant to display correct information (the information could have a bearing on the valuation of the company). Therefore, it is of greatest importance that NORDIP and all of its “sub-suppliers” have strict confidentiality obligations; if the companies are sceptical of NORDIP, the Model is of little use.

Evaluation

The Evaluation mechanism will consist of a review of the situation by a council of experienced business and IP executives, also engaged on a pro-bono or low-cost basis. The persons involved in the Screening may assist in the Evaluation.

The Evaluation will take both business and legal aspects into consideration and will help in developing a strategy for solving the issue at hand.

One crucial element for successful Evaluation is to have competent council members. The Evaluation mechanism will yield a plan of action, which shall be attractive to the company in question. However, it cannot encumber all the possible judicial or business details. The NORDIP project manager will probably have a more administrative (but also very important) role during this stage.

Mediation

Mediation is an established procedure and mediation services are available through many existing agencies. At this stage, the NORDIP model is limited to proposing that existing agencies can be used or mediation could be arranged within the model. In the latter case, the Evaluation council members could serve as mediators.

Mediation depends on acceptance from all parties involved and mediation is usually quite expensive. Normally, mediation is also non-binding and the parties may pursue their claims in litigation after mediation.

The main purpose of proposing mediation in the Model is that there is a strong belief that in many cases involving disputes between small and larger companies, both parties benefit from acting reasonable rather than to fight - a dispute between two large parties on the market usually involves an element of taking market shares and thereby the reasons for fighting are greater. Our conclusion is that mediation will have an important role in dissolving controversies.

One large obstacle for mediation is the cost. If NORDIP shall make its Evaluation council available for mediation, the point would be to make this alternative less expensive than a traditional mediation. A larger company may also hesitate to seek the counsel of the NORDIP Evaluation council, since NORDIP would appear to favour the small company. However, the large company may accept the NORDIP mediation provided that it is relatively cheap and, since it is non-binding, it may be beneficial to attempt to reach a solution through this channel. If the mediator can make the parties see a feasible solution with win-win qualities, the problem could be solved.

Investment

If litigation shall be pursued, funding is necessary, since most small companies do not have the resources to litigate by themselves. The funding can be private or a mixture between private and public money. One goal of the Model is that funding should be an investment and that the parties contributing to the fund shall be able to recover dividends. This is a very ambitious goal and it is not likely that the fund will be able to pay out dividends during a start up phase and doubtful whether they can do so within a five year period.

One mechanism by which the funds would be able to recover money spent for litigation is a contingency model. The Model will then step in between the company and the lawyer and pay all lawyers' fees, but charge the company on a contingency basis. The Model will need further development to go through various alternatives of how this could be done. Should, for example, the fund accept shares in the company as compensation, could contingency fees be paid out during a number of years in order to avoid too much strain on the company? Is it possible at all to attract public money with such a model? There are a number of issues to be solved in the Investment Mechanism before it could be considered as a running operation.

There may likely be legal obstacles for public institutions to support litigation between private companies and therefore a private solution must be found.

The private solution could be based, at least to start with, on a "charity" basis. Large companies and law firms could make a contribution, either in money or in services delivered, especially if they feel they contribute to a Model which helps small inventive companies to prosper and grow. They could also see the contribution as an "insurance" against unsolicited attacks by small companies (note that the small company is not always right and an important result of the earlier stages in the model is to educate the small company). However, a possible risk is that a contribution of this nature may be viewed by media as amends for "a bad conscience". It may therefore be advantageous for the contributors to remain anonymous.

Education

A very important aspect of the Model is the Education mechanism. According to the Model, Education will be offered primarily to companies that are denied access to Mediation or Litigation services. It may show that there is a wider demand for Education and that this part of the Model could be developed into a separate service offered to a wider circle of small companies that has not been filtered through the Screening.

Also, Education will depend on financing of the scheme, but it is probably easier to attract public funding for the education of small companies as compared to financing litigation.

General courses in the Education can be offered and have attendances from different companies. Other, more company specific education can be tailored and address topics of special interest.

It is possible that the Education will also attract companies not involved in any disputes and that Education could develop into an independent service.

Implementation

The Implementation phase is proposed to proceed in two stages. In the first stage, the Screening, Evaluation and Education mechanisms should be developed and results from working with the mechanisms shall be gathered and evaluated against the hypothesis that large firms exert unfair power over small firms and that small firms have low IP awareness. This process would take one to two years to complete and would serve as a basis for determining further expansion of the Mediation and Litigation mechanisms.

Also, in order to strengthen the initial mechanisms, an organisation is needed. It is necessary that the sufficient funding is available for developing the program, as well as administration capabilities. The activities can be started on a rather small scale and even be geographically limited in order to facilitate the nucleation of the program.

Another critical factor for starting the program, apart from the question of financing, is the demand from the small companies. That is a reason for proposing to launch the project with a limited geographical spread as a first step. However, a plan for expanding the model into the whole Nordic region might be worked out in parallel.

Organisation

Organisation is critical for implementation and will consist of two parts. One part must be responsible for setting up funding and administration. Another part can be responsible for developing and performing the actual services.

Many of the services offered in the Model are already available on the market. Patent law firms, law firms, IP consultants and management consultants offer various IP strategy and conflict handling services. Many small companies also use these services and are content therewith. It is important that a publically funded model is not set up to compete with already functioning institutions on the market. The Model should complement the existing services, and should, at least for performance services, ensure close involvement of actors from the market place.

Universities and Patent Offices are important actors in a country's IP system and can provide excellent resources to complement the implementation of the Model. The administrative body has to ensure that these resources are used and that a good geographical spread is achieved when the Model is implemented on a larger scale.

Advisors

NORDIP may only be as good as the advisors it selects for delivering screening, education, evaluation and dispute resolution services. Selection of these advisors, training with regard to the NORDIP approach and objectives, quality control and certification, compensation, will be key issues for developing a well performing organisation of consultants.

Our assumption is that many of these consultants will be available at costs lower than the market rate, thanks to a combination of factors such as a non negligible fraction of retired or well-off senior professionals, the status for the consulting company or the individual that serving NORDIP may bring in terms of competence recognition and/or charity provision. Another attraction for advisors that NORDIP should consider developing is the privileged networking among NORDIP advisors. And if advisors leave the NORDIP service, they should still be included in an Alumni society.

Legal aspects

Legal aspects will to a large extent be coupled to financing. Is it, for example, possible to use public funding for financing litigation of a party? There is a high likelihood that this is not possible and therefore that part of the Model should rely on a different funding

scheme.

The funding can be a mixture of national public funding, EU and private funding. That means that different national laws and EU regulations have to be considered. In order for the fund to be managed properly, tax considerations should also be made.

Other legal aspects concern the transparency of information. How much information has to be publicly available if a certain percentage of public money has been used?

The legal aspects raise a number of questions that may take considerable effort to investigate. The start up program should however be relatively simple and not go beyond well-know practice for use of public funding. This enables the Organisation to gain experience and enable the delegation of assigning more time for constructing the more complex parts of the Model.

Financial aspects

The funding of the project is crucial. Public funding can be available through a number of different actors. In this study we have not investigated which public actors would be most suitable for setting up the initial funding.

The funding aspects of Mediation and Litigation have to be further developed. There are some interesting thoughts presented in the study concerning private financing of the dispute resolution parts of the Model, but this has to be developed in more detail and tested separately from the other parts of the Model.

It seems clear from the feed-back given from public institutions, employers' organisations and small companies that the Education part (coupled with the Screening and Evaluation) is in demand and considered to be important. We deem that in order to set up the structure and make the first test rounds, public financing is crucial. But, in order for the Model to avoid dependency on public money, it is important to stress that fees will be required from the participants. In steady-state operation, the Screening, Evaluation and Education parts should be self-financed.

The expansion of the model

In commenting upon the possibility for the Model to expand into other regions, we will primarily consider an organic expansion. If the Model is running, it will affect companies that are active in multiple countries. Small companies are usually, from a very early stage, active in many countries. As a result services are likely to be requested

to incorporate, a company, a research team, a business angel etc from different countries within a very short time of operation. This will to some extent force the Organisation to find foreign cooperation parties and the Model will dissipate out and slowly start to be established also in other countries.

Another mode of expansion would involve setting up the Model as a role model and present it for various actors in other countries and the EU, and try to establish cooperation parties within the bureaucratic system. This will probably result in that some countries, including some EU bodies, set up their own tasks of developing similar models. This can also be very effective for the development of IP awareness for small companies in Europe, but is not primarily a task of the Model developed within this study.

We believe that a successfully operated Model will expand.

Success criteria

Certain aspects necessary to a successful construction and implementation of the Model were not presented directly in the previous section(s). These are listed below, but in no particular order of importance.

- **NORDIP organisation and project management**
 - » Organisation and management are crucial. The project of developing the Model needs to be the primary task of a dedicated organisation. The execution of the Model cannot be made without management and project leaders.
- **Selection of companies**
 - » The demand is critical for the development of the Model. Sound, ambitious companies with good development prospects should be choosing the Model.
- **Trust**
 - » The Model is dealing with confidential information at the core of a company's technical and financial development. Trust will be a very important element for successful dealing with the clients.
- **Financing**
 - » Without initial financing nothing will happen.
 - » The investment financing by private actors into funds have to be developed further. The Model has room for developing financing solutions which go beyond what is currently seen in the market. This is strength, but also a huge challenge.
- **Costs**
 - » Cost control is an important part of every economic activity. In this case where a financing mix of public funding, participants' fees and private investments are concerned, it will be an important task both to manage the books and minimise the costs. Many of the firms working on behalf of the Model in the various mechanisms are accustomed to charging very high fees. The Model wants to

give excellent service, so there is no general objection to paying out high fees for highly qualified council participants, but it is very important that the Model does not develop into a feeding line for patent law firms or other consultants. This is a task that is interrelated to the organisation and project management.

- **Value addition**

- » The companies using the services of the Model shall find that the Model has given them an opportunity they could not easily have found otherwise.
- » The overall objectives of the Model are to assist in solving problems and to deliver education to small companies. The successful completion of these tasks should be considered useful by the public institutions supporting the Model.
- » The Model depends on the involvement of senior persons with experience in business and IP. Even where fees are offered, there will always be an element of engagement that goes beyond monetary benefits. It is, therefore, important that a day's work for the Model is perceived by the engaged council members as a step in the development of new successful companies and thus beneficial for the Nordic society.

Appendix 1: Presentation at CIP Forum 2007



Intellectual Property Managers and Developers

NORDIP Enabling the Nordic knowledge economy

CIP Forum 2007
2007-05-20

Axel Moulin

A project supported by:  **norden**
Nordic Innovation Centre

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Leogriff, IPR managers and developers

- IPR valuation and Due Diligence
- IPR strategy
- IPR in projects
- IPR portfolio management
- IPR management practice audit
- IPR policies
- IPR Litigation and Opposition Support
- Patent landscape analysis
- Trademark landscape analysis
- Source code screening
- IPR infringement analysis
- IPR management software
- IPR Drafting and filing

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Some of our regular clients

- Corporate
 - Tandberg ASA – videoconferencing systems
 - Roxar Flow Measurements – oil and gas
 - Tomra – recycling automats
 - Norsk Tipping – state lotteries
 - Laerdal Medical – first aid and training products and services
- Governmental and R&D institutes
 - Patentstyret – Nordic Patent Institute
 - Institutt for Energiteknikk – energy research
 - Forsvarets Forskningsinstitutt – Norwegian Defence Research Establishment
 - NTNU TTO – university in Trondheim, tech transfer office
- Incubators
 - Campus Kjeller: defence, oil industry, shipping
 - Kongsberg Innovation: defence
- SMEs – Upstarts
 - Skanix (PC security)
 - Oceansaver (Shipping technology)
 - enCap (secure transactions)
 - scandinavian mobile technology (phone name)

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Leogriff people



Haakon Thoe Lin, Founder, Managing Partner
M.Sc. Teleinformatics, NTNU (Trondheim, Norway)
MBA, BI Norwegian School of Management (Oslo, Norway)
Industrial experience: Telecom, e-learning, media
Focus: IPR management for IT, telecom and media – innovation processes
Haakon is Norwegian, speaks English fluently, and has working knowledge of Swedish, Danish and German.



Axel Moulin, Founder, Partner
M.Sc. Geodesy-Geophysics, ENSG (France)
MBA, BI Norwegian School of Management (Oslo, Norway)
Industrial experience: Oil/Gas exploration, process, IT services
Focus: IPR management for O&G, process, energy and environment – contracts
Axel is French and speaks English and Norwegian fluently, has working knowledge of Italian and German.



Katarina Lundblad Pinnkamp, Partner
M.Sc. Material Sciences, Stockholm (Sweden)
European Patent Attorney
Industrial experience: Industrial R&D, Multinational Group Patent Counsel, IPR advisor to numerous businesses, board of VC company
Focus: IPR management, strategy and implementation, IP analysis
Katarina is Swedish, living in Zürich, Switzerland, speaks English fluently, and has working knowledge of Norwegian, Danish, French and German.



Morten Landstad, Innovation Advisor, Partner
M.Sc. Industrial Engineering (materials), IT & Telecom, NTNU (Trondheim, Norway)
Industrial experience: Business Development, Defence
Focus: IPR for start-ups, IPR in Business plans
Morten is Norwegian, speaks English fluently, and has working knowledge of Swedish and Danish.

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Research projects

- Nordic IPR management best practice study among Biotech and ICT SMEs, supported by Nordic Innovation Centre, concluded Feb 2005 (partner: CIP)
- DRM standard for e-learning project, concluded June 2006, supported by Abelia, concluded Feb 2005 (partner: 180grader)
- NORDIP project, supported by Nordic Innovation Centre, started December 2006 (partner CIP, IPR University centre, DKPTO, Abelia, AdviceIPR)

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The NORDIP challenge



Help SMEs manage their IPR wisely, and specifically help them signal their patents as

- valuable and
- enforceable assets.



This will improve credibility and tradability of patents, thus improving position in asymmetrical collaborations, and it will encourage more investment in R&D



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The NORDIP project

- Supported by  **norden**
Nordic Innovation Centre
- Contributors
 
- Advisory board
 - Danish Patent Office
 - Abelia
 - Katarina Lundblad Pinnekamp

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Suggested mechanisms

- Patent litigation insurance
 - ex – CJA report : mandatory fee on European Patent per country opening to conditional investigations expenses and litigation coverage if chances are good
 - Limitations: insurance companies are not necessarily interested
- Patent Defence Union
 - concept described by Prof. Kingston (Dublin)
 - members pay a yearly fee on granted European patents, accept arbitration among them – the PDU takes in charge a few infringement cases per year.
 - Limitations: members must accept arbitration, membership does not guarantee protection, as it depends on the quality of the patent, and patents quality are not screened upon membership
- Private insurance
 - Expensive (analysis made upstream), demanding formalisation

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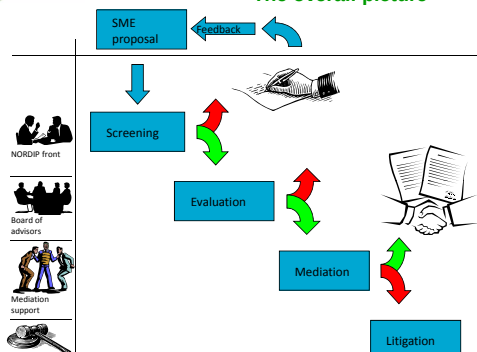
Improving the PDU model: NORDIP hypothesis

- Not all patents are good
- SMEs must contribute to NORDIP costs
- Mediation often preferred and cheaper than arbitration
- Dedicated membership model ?
- Feedback and education

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The overall picture



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Expectations and resources

	Possible outcomes	Conditions of eligibility	Competence	Finance
Screening	-Advice (IPR strategy) -Eligibility to evaluation	-Nordic SME -Member of business organisation	-Local IPR advisors, NORDIP approved	-Client SME -Public (basic funding) -Business organisation
Evaluation	-Advice -Eligibility to mediation / litigation -NORDIP approval	-Approved by the screening committee	-"Royal NORDIP" advisory board	-SME -Public (direct, indirect, "tax deduction") -Business organisation
Mediation	-Preferably agreement, alternatively litigation	-NORDIP approved	-Advisory board, including network -Others (WIPO, Stockholm Chamber of Commerce, +++)	-50 – 50 split between involved parties -NORDIP – pr. hour -Others – usual model
Litigation	-Advice -Network -Expert witness and support for the trial	-NORDIP approved	-Business organisation -Advisory board -Network	-NORDIP starting package (€ or hours/resources)

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Challenges

- Quality and marketing of the (certified?) network of NORDIP screening auditors
- SMEs will probably try and meet NORDIP too late, when they are finally feeling the pinch
- Investigation + a few legal cases to prove the model will require significant financial resources

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Issues

- What is a NORDIP approval worth to you? Segment?
- Would you be part of the Royal NORDIP Advisory Board ?
- Are we distorting competition?
- Room for NORDIP in the Nordic landscape ?

NORDIP project



- Contacts:
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 - Axel Moulin: am@leogriff.no, tel +47 41 47 41 10

Appendix 2: Presentation at Patsoft 2007



Intellectual Property Managers and Developers

NORDIP

Enabling the Nordic knowledge economy

Patsoft 2007
2007-06-04

Morten Landsgård

A project supported by:



Nordic Innovation Centre

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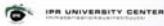
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Help SMEs manage (and enforce) their IPR wisely, and specifically help them signal their patents as

- valuable
- and
- enforceable assets.

This will improve credibility and tradability of patents, thus improving position in asymmetrical collaborations, and it will encourage more investment in R&D

Contributors:




Advisory board:

- Danish Patent Office
- Abelia
- Katarina Lundblad Pinnekamp

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Previously suggested mechanisms

- Patent litigation insurance
 - ex – CJA report : mandatory fee on European Patent per country opening to conditional investigations expenses and litigation coverage if chances are good
 - Limitations: insurance companies are not necessarily interested
- Patent Defence Union
 - concept described by Prof. Kingston (Dublin)
 - members pay a yearly fee on granted European patents, accept arbitration among them – the PDU takes in charge a few infringement cases per year.
 - Limitations: members must accept arbitration, membership does not guarantee protection, as it depends on the quality of the patent, and patents quality are not screened upon membership
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Improving the PDU model: NORDIP hypothesis

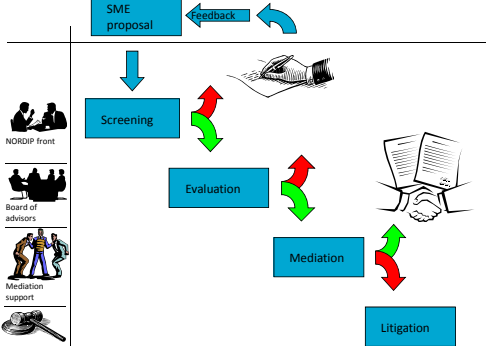
- Not all patents are enforceable
- SMEs must contribute to NORDIP costs
- Mediation often preferred and lower cost than arbitration
- Direct or indirect membership model ?
- Feedback and education

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The overall picture



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Challenges

- Quality and marketing of the network of NORDIP screening auditors
- Criteria for accepting cases at each step
- SMEs will probably engage NORDIP too late, when they are finally feeling the pinch
- Investigation + a few legal cases to prove the model will require significant financial resources

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NORDIP project



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Appendix 3: References and Endnotes

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Table of abstract

Series title, number and report code of publication: Nordic Innovation Centre publication, January 2008		
Author(s): Katarina Lundblad Pinnekamp, Bo Heiden, Morten Landsgård, Axel Moulin, Caroline Pamp, Marja-Leena Mansala		
Organisation(s): Center for Intellectual Property Studies, Gothenburg; Leogriff AS, Oslo; IPR University, Helsinki		
Title (Full title of the report): Nordic PDU – a Nordic Patent Defence Union		
Abstract: A modified Patent Defence Union for assisting Nordic SMEs in IP dispute resolution has been developed. The main features of the NORDIP Model are an Education part and a Dispute Resolution part. Small companies can apply for participation in the NORDIP program. In a first screening, the candidates and a NORDIP advisor will establish a diagnosis in common. All companies will be offered to participate in an education program specifically addressing IP strategies. The applicants successfully passing screening will be accepted in the Evaluation phase and receive a senior business advisor for developing a strategy for solving the problem at hand. Mediation will be offered and can be referred to traditional mediation institutes or be set up by NORDIP. If mediation should fail, also litigation assistance is provided by NORDIP, both in form of financing aid and legal and business advice. Financing could be set up as a fund open for private investors and where the participating companies will contribute on a contingency basis. The Model has received positive response when presented in interested circles. A crucial factor for realising the Model will be initial funding and organisation.		
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A modified Patent Defence Union for assisting Nordic SMEs in IP dispute resolution has been developed. The main features of the NORDIP Model are an Education part and a Dispute Resolution part. Small companies can apply for participation in the NORDIP program. In a first screening, the candidates and a NORDIP advisor will establish a diagnosis in common. All companies will be offered to participate in an education program specifically addressing IP strategies. The applicants successfully passing screening will be accepted in the Evaluation phase and receive a senior business advisor for developing a strategy for solving the problem at hand. Mediation will be offered and can be referred to traditional mediation institutes or be set up by NORDIP. If mediation should fail, also litigation assistance is provided by NORDIP, both in form of financing aid and legal and business advice. Financing could be set up as a fund open for private investors and where the participating companies will contribute on a contingency basis.

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