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Q. We are a small company with some patents. We have noticed copies in the marketplace but are worried about the costs of taking action. What can we do?

A. Patent litigation costs can be high, partly because patent cases usually involve detailed legal and technical issues. Further, under the English courts' "loser pays" system for costs, there is a risk that an unsuccessful party will have to pay the successful side's hefty costs, in addition to its own. Unsurprisingly, this may cause many potential litigants to be wary.

In one recent case, the costs incurred by the successful party were five or six times more than those incurred by the unsuccessful party. In his judgment, the judge expressed his strong dissatisfaction with this situation and suggested that courts should make more use of their case management powers to proactively keep a rein on costs.

An ongoing review of the entire civil litigation system by Lord Justice Jackson may be very pertinent to intellectual property disputes involving small businesses. He has expressed a preference in his preliminary report for the Patents County Court to be reconstituted as a low cost forum, which would be distinguished from the Patents Court by having an upper financial limit.

There is also a concerted move to encourage the use of arbitration and mediation, which can be used to resolve disputes without recourse to the courts and usually has clear cost implications.

Other low cost routes to obtaining an official view as to whether or not the 'copy' actually infringes a patent, or whether a patent is valid, can be obtained from The Patent Office under their (non-binding) opinion scheme.

The writer should, firstly, establish if the infringement falls within the scope of the patent (a qualified patent attorney can help here) and establish who is actually infringing and how they are doing so (making, selling etc).

Once a case of infringement has been established, the writer needs to determine a strategy. Cost and management time are usually live issues and the strategy needs to be alive to that.

The writer should always consider the overall commercial aims of a dispute, *e.g.* to stop the infringement at all costs, to generate licence revenue or, for instance, to sell the patent to the infringer. The writer should also understand that if litigation is the chosen route it will take time, money and almost certainly will involve a challenge to the patent (which needs to be a factor if existing licensees are in place).

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