



THE

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## PATENT PROTECTION IS THE PREFERRED METHOD OF PROTECTING INNOVATION IN THE OIL AND GAS INDUSTRY

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Historically, the oil and gas industry has been a rich source of innovation. As technology has progressed, innovative companies have developed cutting-edge processes that successfully permit extraction of oil and gas from more complex completions. To maintain

the competitive advantage achieved through such innovation, it has become increasingly important for companies to safeguard their intellectual property through patent protection.

Why do certain companies choose to patent their innovation while others choose to keep it a secret? A successfully preserved trade secret could technically last forever, while a patent only lasts twenty years. However, during those twenty years, the protections and economic benefits available to patent holders are much stronger. Trade secrets derive legal protection from their inherently secret nature but that protection can be lost if the secret isn't kept. Sharing a trade secret can destroy the protection. By contrast, patents can only be

protected through public disclosure. In fact, an inventor may not obtain a patent, or rights in an issued patent may be invalidated (taken away), if the inventor does not describe the invention in sufficient detail to enable "one with skill in the art" to practice that which is protected.

Obtaining a patent provides its owner the exclusive right to exclude another from making, using, selling, or importing the invention. Patents serve an important purpose – they eliminate the need for secrecy, and allow technology to progress at rapid rates. Furthermore, at a patent's core is the concept that eventually, upon expiration of the patent holder's monopoly, the underlying technology will be available for others to use.

In the context of hydraulic fracturing, some of the earliest fracing process patents were applied for in 1948 by a company named Stanolind. Even before obtaining issued patents on their processes, Stanolind monetized its technology by granting a license to Haliburton in March 1949. The terms of the license required Halliburton to pay Stanolind a mere \$100 per frac job completed. If Halliburton completed at

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least 3,000 fracs within two years of entering into this commercial relationship with Stanolind, Halliburton would become an exclusive licensee. Without the foresight of where the advancements of fracking could take these two companies, neither Stanolind nor Halliburton could predict that the industry demand for use of Stanolind's patented technology would essentially force Halliburton to agree to a non-exclusive license, so that other fracking companies could enjoy the spoils and splendor of Stanolind's technology. Notwithstanding Halliburton's shift from an exclusive to a non-exclusive licensee, Halliburton's revenues nearly doubled from over \$57 million in 1949 to \$92.6 million in 1951.

An unfortunate result of successful monetization of a company's patents is—far too often—patent litigation. Stanolind learned this lesson in 1955 when a would be licensee, Magnolia

Petroleum Company (a subsidiary of Socony Mobil) refused to agree to Stanolind's license terms, and instead openly used Stanolind's patented technology to frac several wells. Stanolind did not stand for such blatant disregard

of its patent rights, and in particular its right to exclude others from infringing on its patents. Stanolind filed a patent infringement suit against Magnolia, which resulted in Magnolia capitulating and essentially paying Stanolind the royalty fees it would have been required to pay in the first instance.

The Stanolind story is just the beginning of the 70 plus year history of innovation in fracking processes. And while technological advancements pervaded the industry for that period of time, patent protection actually lagged. In fact, prior to the mid-2000s patents covering inventions related to drilling and fracking processes were relatively low (approximately 50 patents issued per year). But starting in 2004, the industry saw an uptick to over 150 patents being issued per year, and that increasing trend has continued through today.

Fast forward to present day — according to patent statistics available from the U.S. Patent

and Trademark Office, the number of patents issued for hydraulic fracturing processes and chemicals in the last two years has more than tripled since 2004. Specifically, from 2015 to the present more than 200 patents have issued, per year, relevant to the oil and gas industry. This explosive increase reflects the industry's focus on monetizing the value of procured patents. While patent procurement is not inexpensive, it has proven to be a worthwhile investment for companies ranging in size from the Halliburtons of the world to small-privately held companies.

Patent skeptics reading this article might inquire: what about this new procedural tool called an IPR (Inter Partes Review) that businesses are using to invalidate already issued patents? Well, fortunately patents related to fracking have been relatively unscathed by the

IPR phenomena that has been eroding the patent litigation landscape. For those who are unfamiliar with IPRs, they are a relatively new tool for competitors to challenge the validity of a patent. Historically, if a patent owner sued a potential infringer, one of the defenses to

infringement is whether or not the patent at issue is valid. Now, instead of waiting to be sued by a patent holder, companies have the ability to initiate a claim against a patent holder challenging the validity of the patent. If successful, the would-be infringer has avoided the time, risk and expense of being sued for patent infringement, and has essentially been given a green light to continue its allegedly infringing activity.

While the dawn of IPRs has had an adverse impact on patents in the computer software, business method, and electrical technology fields, it has not had as much of an impact on mechanical devices or chemical patents, the two most significant tech fields for the oil and gas industry. Based on these statistics, it is preferable to seek patent protection—as opposed to trade secret protection—for advancements you develop or invent in the oil and gas industry. 

**2017 REMAINING PIPELINE NEWSLETTER SCHEDULE****Winter – Copy Deadline:** November 15 for December Issue