

Intellectual property basics for startups: patents

The crown jewel of a typical technology company is its intellectual property portfolio. Having a good basic understanding of intellectual property protection is essential for entrepreneurs to extract value out of their company's key assets and manage opportunities and risk arising from them. One important type of intellectual property that may be part of an intellectual property portfolio is a patent.

What is a patent?

Utility patents are the types of patents that are typically filed by technology-oriented startups.¹ They protect inventions which are new, useful and non-obvious. Such inventions can be electrical, biological, mechanical, chemical or even a business process. In order to obtain any patent rights, the startup must apply to the government in each jurisdiction in which protection is sought and comply with such jurisdiction's legal criteria. Currently, a patent in the United States has a term of 20 years from the filing date but the term may be extended under certain conditions.

When do you need a patent?

Most products and services can be protected by a combination of intellectual property rights. For example, computer software can be protected by patents, copyrights, trademarks and trade secrets. Microsoft protects certain functions of its Windows software with patents; it uses copyright to protect the actual code of the Windows software from copying; it uses trademark law to protect the "Microsoft" and "Windows" trademarks which identify the product; and it uses trade secret law to protect the structure and methodology of its source code. However, once a patent is issued, trade secrets in the part of the computer software protected by the patent will be disclosed and will no longer be protected by trade secret law.

Patents permit the owner to "exclude" others from making, using, selling, offering for sale, and importing a product or service embodying the invention. The fact that a patent is a "negative" right is very important because it means that obtaining a patent does not give a startup the right to sell a product or provide a service: many products and services are covered by the claims of multiple patents owned by different parties. Patents are generally viewed as the strongest form of intellectual property because they can prevent a competitor most effectively from making its product.

Many startups miss the opportunity to protect the most important elements of their products by not understanding the deadlines in patent law or not implementing a strategy for patent protection of products and services. Briefly, most countries will not permit patent protection for an invention unless the application is filed prior to public disclosure of the invention, such as by demonstrating a product at a trade show, publishing technical papers or offering it openly for sale to third parties. The United States, like the rest of the world, now follows the "first to file" rule with certain modifications rather than the previous "first to invent" rule. Startups need to be aware of this framework and ensure that they make appropriate decisions regarding protection before demonstrating their products at a tradeshow, publishing technical papers about it or offering it for sale to third parties.

Patents are sufficiently important that we have included a separate overview specifically discussing patent strategies for startups, including a discussion about the deadlines for patent prosecution. You can access our patent strategy overview.

Why are patents valuable?

Patents have substantial inherent, economic, and deterrence values. The inherent value of patents validates the worth and viability of a company's products or ideas. They provide proof that the government believes the ideas are inventive. They also provide a right to exclude others from copying the innovations over the life of the patent. Angel investors, VCs, potential suitors, and Wall Street professionals appreciate the inherent value and importance of patents.

A patent also can translate into tangible economic value in the following ways: (1) patents can be sold outright to another person or entity; (2) patents can be licensed to others to practice the patented invention; (3) patents can be asserted against others in lawsuits to obtain damages for infringing the patent.

Patents can also have a significant deterrent effect against other entities filing patent lawsuits. Any entity who is sued can counter sue by asserting its own patents to level the playing field. A diligent patent holder will research the patents of the potential target to determine if they own patents that could be asserted against the patent holder. If a company owns patents that pose a threat to the products or services of others, then others will think twice before suing that company, and often times will instead pursue easier targets who do not own any threatening patents.

What happens if my company does not own the patents to inventions created by one of its founders?

The most common mistake by startups is failing to obtain proper written assignments or licenses of intellectual property rights that are developed by the founders prior to the startup's incorporation or rights developed either by employees or consultants after the startup's incorporation. If a startup does not actually own or have a license to the intellectual property in its products, a disgruntled founder or employee can hold the startup hostage until the company either revises the product to remove his contributions or makes a deal to obtain assignment or license of the rights. A very common form of this problem is the failure to obtain the assignment of the intellectual property rights to the inventions developed by the founders either prior to incorporation of the startup or prior to the founders becoming employees of the startup. This mistake can be very expensive to resolve; in some situations, it can be fatal to the startup when it's seeking investment or about to be acquired.

Inventions are owned by the individual developer and if the invention is created while employed by the company, the company receives a "shop right" or license to that invention. However, most companies want to have the patent application for the invention to be filed in the name of the company and so the typical form of employee proprietary information and inventions agreement will include a provision that requires an employee to assign its inventions to the company. Though the individual employee will still be named as the inventor on the patent application, the application will be owned by the company.

Where do I find sample agreements that will document the assignment of a patent to my company?

For a sample form of assignment agreement that would be used by founders assigning intellectual property, including inventions before a company's formation, see the form of assignment agreement attached to the founder stock purchase agreement .

For a sample form of independent contractor agreement that would be used by a company hiring a contractor who will could



create inventions for the company, see our form of independent contractor agreement.

For a sample form of employee proprietary information and inventions agreement that would be used by a company with its employees, see our form of agreement.

What are alternatives to an assignment of an invention?

Sometimes an outright assignment of a patent may not be possible. Short of getting an assignment, it may be sufficient for some startups to obtain a broad exclusive, perpetual and irrevocable license. Such licenses may be royalty-bearing or royalty-free.

What do I do if I have a question?

If you have questions about ensuring that your company has all the intellectual property rights it needs to get started we're here to help. Reach out to our Technology Sourcing and Commercial practice.

If you would like to discuss a patent prosecution strategy for your company, please reach out to our Patent Prosecution practice.

In the meantime, feel free to review our starter kit for forms of employee inventions and proprietary information agreement, independent contractor services agreement and founder stock purchase agreement with intellectual property assignment.

Also, if you're interested in learning more about copyright protection in other key jurisdictions around the world, see [the IPT volume in our "Guide to Going Global" series](#). The current version provides an overview of intellectual property protections and key commercial terms in over 40 countries.

I Design patents and plant patents are not discussed in this overview.

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