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Why Do Start-Ups Patent?



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SUMMARY			
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Abstract

Patents generate great returns on the patented products by preventing others from making, using and selling those products. The patent system incentivises inventors to develop new technologies and promotes innovation considering that the inventions are made public. There is a number of different reasons why inventors or their employers file for patents. The objective of the authors is to examine the reasons why start-ups patent by reviewing the dominant theories, cataloguing common observations and examining existing empirical data.

Keywords

Start-ups; patent; intellectual property; revenue; patent dispute; licensing.

Summary

While for mature and well-established companies patents play a big role in maintaining the supra-competitive prices on their products and services, this might not be the same for start-ups and small companies. With a limited IP budget, those companies are more willing to choose trade secrets over patents-even if patenting is a better strategy for the business-since filing for a patent demands high expenditure.¹

Patents also generate revenue in form of licensing fees or damages awarded in litigation. Licences can be used to extract value from different geographic or product markets, in which the patentee doesn't practice its patents. In the case of litigation, it is likely that the defendant will settle for a licence due to the high cost of litigation.²

The authors listed eleven further reasons commonly used to explain why patentees file for patents:

¹ Graham, Stuart J.H. and Sichelman, Ted M., Why Do Start-Ups Patent? [2008]. Berkeley Technology Law Journal, 1072

² *Ibid*, 1065

1. **Non-practicing entity (NPE)**– Patentees can choose not to sell any products and just provide the technology to other entities in a better position to use it by licensing their patents. Some of these NPEs license their patents and related know-how to non-innovators who possess the manufacturing capacity, market channels to manufacture and sell a patented product or any other form of using it and making it effective.³
2. **Defensive reasons** – Sometimes companies acquire patents following a strategy of blocking others from suing them for patent infringement. Using patents as a base for counter-claims can make the plaintiff subject to an injunction, which will remove its infringing products from the market.⁴ In addition, it is risky for the plaintiff to continue with the litigation, if the value of its possible infringing products is greater than the defendant's.
3. **Cross-license negotiations** – Cross-licenses are a common mechanism often used by large companies to avoid suing one another for patent infringement.⁵ Such agreements usually impose royalty payments on the company that has fewer patents.⁶ Because start-ups do not have enough funds to build an arsenal of patents, the authors argue that these companies would be in disadvantage.
4. **Securing Investment** – Investors may consider a high number of patents on a specific technology as a sign of mastery.⁷ Researchers also suggest that a good patent portfolio can push up initial public offering.⁸ Yet, the belief that a high number of patents that are not useful are beneficial to the company may sometimes mislead the business and/or the investor.
5. **Improve market chances** – Some patentees file for patents to improve their chances of being acquired, take their company public through an initial public offering, or maybe increase their assets in a case of bankruptcy.⁹
6. **Competition** – Companies use patents as a strategy to drive up the costs of their competitors (due to the high expenditures for litigation or license fees) to access their technology or to push them out of the market.¹⁰
7. **Preempt others from patenting its inventions** – Some patentees file patents on their inventions to avoid a situation where competitors acquire patents on the same inventions and later file a lawsuit against them.¹¹
8. **Improve patented products** – Businesses can focus their inventive efforts on patenting essential or improved components of patented products sold by another business to benefit themselves by licensing their patents or even blocking other companies to use their patented technology.¹²

³ *Ibid*, 1064

⁴ *Ibid*, 1066

⁵ *Ibid*

⁶ *Ibid*

⁷ *Ibid*, 1067

⁸ *Ibid*, 1078

⁹ *Ibid*, 1068

¹⁰ *Ibid*

¹¹ *Ibid*, 1069

¹² *Ibid*

9. **Boost sales** – Marketing studies suggest that consumers attach meaning to the idea of a patented product and that patenting can boost the sales of the respective product.
10. **Personal accomplishment** – Some inventors may find it fulfilling, having a patent under their names.
11. **Substitutes for non-disclosure agreements (NDA)** – The authors argue that patents can offer a more effective protection of inventions than NDAs. NDAs are contracts used to restrict the disclosure or use of confidential information by the employees.¹³ It can, however, be difficult to prove that there was a breach of an NDA, and even if this is the case the injunctive relief available would prohibit the disclosure of information, not the sale of a product implementing said information. On the other hand, the infringement of a patent is clear, because the information is already disclosed and protected.

Despite the reasons listed above, the authors observe that-according to researchers-businesses face difficulties when deciding to patent due to high cost of patenting and patent litigation, unawareness of when an invention can be patentable and the belief that patents provide weak protection and can be designed around.

With regards to the reason forming the decision of small and start-up companies whether to patent or not, although the Kauffman Foundation Survey of Patents and Entrepreneurship survey provided important information about the behaviour of some small firms in specific areas, the authors held that it was inconclusive due to the survey's failure to target start-up companies.

Since the survey was inconclusive, the authors provided their own survey questions regarding the reasons that lead start-ups to patent.

The first question regards the reason why the firms didn't patent their latest major technology information.¹⁴ The answers include:

- Did not want to disclose information
- Cost of the patent, including attorneys' fees
- Ability of the competitors to invent around the patent
- Believed that trade secret was adequate protection
- Cost of enforcing the patent, including actions in court
- Did not believe the technology was patentable
- No need for legal protection

As for the second question, it regarded the level of importance of a series of statements regarding the reasons that lead the company to seek patent protection in the United States.¹⁵ Some of the statements were:

- Prevent others from copying
- Improving our chances of securing investment
- Enhancing reputation

¹³ *Ibid*, 1082

¹⁴ *Ibid*, 1094

¹⁵ *Ibid*, 1095

- Obtaining licensing revenues
- Preventing patent infringement