

When to Patent: Common Mistakes Business Leaders Make

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Suppose a newly hired engineer on your team sketches a promising new concept for a health monitor in a notebook. Excited by the idea, you loop in marketing, and soon, your company is promoting the product's features through emails, vlogs, and website posts. The sales team runs with it, offering the product to customers even though the device isn't fully developed. Meanwhile, you start seeking investors, sharing pitch decks that highlight the product's potential, projected revenues, and market opportunity. Then comes the first investor call. The question is immediate: "Is it protected?" You haven't filed a patent, but you sidestep the question and end the conversation. Only then do you call your patent counsel. After hearing the story, their response is sobering: "Much of the damage is already done. We may not have a strong path to protection."

What went wrong? In short, you missed the critical window to file a patent application—after the concept was created but before any public disclosure or marketing. That single misstep may have cost you your ability to secure patent rights. But in reality, a sketch alone usually isn't enough to file a strong application. So what should have happened instead?

When is the Right Time to File for Patent Protection?

Knowing when to file for patent protection is critical. Filing too late, as described above, and you risk losing key rights or losing the patent race to your competition. File too early, before there is a business case or before further concept development, and you may not have all the details needed to secure quality patent rights. Filing the right patent applications at the right time transforms your patent portfolio into a high-return investment that protects your competitive edge and supports your next phase of growth. The ideal time would be:

Before You Go Public

To preserve your rights—in the United States and especially in international markets—it is critical to file for patent protection before your invention is made public, especially in the way it is "made public," as in the example described above. U.S. law bars the grant of patents for inventions that are patented, described in a printed publication, in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention. 35 USC § 102(a).

Thus, the first stage of review should occur before emails, vlogs, posts on your website, and publications about the product are created. Indeed, these publicity-raising tactics are all things that potentially bar patent rights. Even offering your invention for sale, with a price term and quantity, to customers, as in the scenario above, is sufficient to invoke this provision of patent law, which prohibits securing patent protection in the future for the product sold. Finding a mechanism to alter or delay publication or offer for sale is a critical aspect of a patent strategy that can help preserve patent rights, which any business should implement.

In short, any activity that includes publishing, pitching, selling, presenting at a conference, or even demonstrating your invention in public or a non-confidential setting can cause harm to your patent strategy.

Despite the bars to patent described, U.S. law grants innovators some exceptions to this rule, such as the inventors' own work, if made within one year of filing for protection. For example, should an inventor publish the invention in some form, you have one year to file patent protection to avoid losing those patent rights. However, this can be risky, as you often do not know what your competitors may be working on or even if they have completed a patent filing within that one-year timeframe. Additionally, should an inventor share the invention with a third party, such as a potential investor or supplier, there is a risk that the third party could file for its own protection for the concept before you do. They could even combine that shared content with their work, making it difficult for you to secure patents. While there are some provisions under U.S. law to sort this out, for example through derivation proceedings, these complex procedures can be avoided by filing for patent protection before sharing the invention with any third party, as in our example above.

When It's More Than an Idea

A completed product that is ready for marketing and manufacturing is sufficient and ready for patenting. Mere concepts and ideas are often not enough to secure quality patent rights. Patent law requires an enabled, written description of the invention, along with patent claims that specifically set out the scope of the invention. This often demands a reasonable level of detail of the invention, its working principle, and a description of various alternatives that might be used in the future by the market you are planning to serve through your business. There is no requirement to submit a working model or software code for software-related inventions, for example. However, there is a need to include reasonable details related to the invention and alternatives, so that meaningful patent protection can be secured.

The objective is to do more than merely describe the conceptual goals of the product; details matter here as you and your patent counsel will want to rely on passages of the patent text to craft the desired patent claims during the prosecution of the patent application in the future. This ensures that you can cover the technology you are developing and also address competitive threats through amendments to the claims as needed. Without details in the patent application that anticipates what might happen in the future regarding the underlying products, your options for securing meaningful patent protection are limited, if not barred altogether.

Conclusion

So when do you file for protection? In our example above, a significant amount of engineering and development remains in order to get the product ready for the market and manufacturing at scale. In this case, it would make sense to consider filing for patent protection once the idea has been developed enough that you can describe how it works and how it will be used in the market. That clarity also increases the strategic value of your patent, as described above. In addition, while there is ongoing product development is common, consider filing for patent protection at key development milestones, such as completion of market studies, when a significant technical hurdle is overcome, and before substantial capital outlays are required, such as the development of production models or the purchase of capital equipment. Do not consider a single patent filing sufficient enough to protect the product adequately. Additional filings should be made as the product changes over time. This ensures that your patents align with the business's commercial plans.

If there's an urgent business need, it's important to file a patent application quickly, even if the product is still in development. For instance, investors and partners want to see that you're protecting the innovation that underpins your business. Filing a patent application before sharing the idea is critical and an appropriate step, as it creates a tangible asset that can help secure funding or favorable deals. This changes the conversation with investors completely, in our example, and focuses the discussion on the more important aspects of an investment, such as valuation and revenue. Sometimes, this requires filing before the concept is fully vetted and complete. That is okay, as you can file as a provisional application and then file follow-on patent applications that cover the key innovations you develop as the product matures into a business-ready revenue stream. If you have partners or employees that make premature publication of the invention, as discussed above, be sure to file a provisional application ahead of time, even if there is only enough information to cover the broad concept. Again, follow-on patent filings can be used to strengthen earlier filed but "sparse" provisional patent applications.

Filing a patent at the right time is a strategic move that protects the investments you've already made in R&D, product development, and innovation. Getting the timing right is a vital aspect of implementing a robust patent strategy that secures patent rights for the business.

Best practice is to file for patent protection, via a provisional application or regular patent application, before any public facing activities begin. Furthermore, executing a robust non-disclosure agreement (NDA) with anyone whom you plan to share information regarding the invention will give you added protection, while also minimizing the effect of such disclosure on foreign patent rights. For instance, you might consider an NDA with a potential investor before sharing information with them, or other situations with a potential supplier or contract manufacturer.

Losing patent rights can be significant and can undermine your commercial objectives. More specifically, delaying patent protection can cost you:

- Priority rights, if a competitor files first.
- Ability to license or sell the technology.
- Legal protections in global markets.
- The opportunity to support valuation and fundraising efforts.

In short, failing to file timely or filing late can remove a competitive advantage you once had, minimizes potential revenue streams, and lessens likelihood of meaningful investment.