

Obtain Patents with Strategic Value¹

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I. Over 90% of U.S. Patents Lack Strategic Value.

It is estimated that over 90% of patents lack strategic value, i.e., they can be easily circumvented and do not block competitors.² The main reasons for this are: (1) the invention has little or no inherent value; (2) the inventor or business lacks the ability to get the invention to market; and/or (3) patent protection for the invention is narrow and others can easily circumvent it. This article examines the third reason – patent protection being too narrow.

II. The Goal Is to Make Money and Not to Merely Get a Patent.

Intellectual property represents about 80% of the value of large American businesses.³ For a small business or startup, most of its value may lie in the strength of its patents, because without meaningful patent protection others can freely copy its products.

Without meaningful patent protection others can freely copy the products of a small business or startup.

Patents are often prepared and/or prosecuted with only the thought of obtaining a patent regardless of value, i.e., pushing something through the United States Patent and Trademark Office (“USPTO”) quickly and cheaply. There is no forethought about the end game, which is selling or licensing the invention, and the impact strong patents have on business value. It makes no sense to spend any money, regardless of how little, on a patent worth nothing.

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¹ This article is for educational purposes and does not constitute legal advice. It represents current, general opinions of the author, and not of his law firm or colleagues.

² See Jackie Huttler, *Strategic Patenting Part 1: Why So Few Patents Create Real Value*, IP Asset Maximizer Blog (Jan 24, 2014) (only an estimated 5% of patents of the most sophisticated companies create strategic value); Eric Haller, *Why 90% of the Patents Are Valueless?* GreyB Services (Feb. 2016) (“shortsighted thinking leads to taking a low-cost approach”); Louis Carbonneau, *What makes a patent valuable; a patent broker’s perspective* (Feb. 5, 2015) (“Every patent should be drafted (especially the claims) with the anticipation and competitors will want to replicate, improve upon or design around your solution . . . If you only protect against basic cloning, it will be very easy for others to avoid infringement by removing a single non-essential element.”)

³ *Intangible Assets Increase to 84% of the S&P 500’s Value in 2015* Report, Business Intangibles (March 11, 2015); Marshall Phelps, *5 Ways Intellectual Property will be Critical to your Career*, Forbes (June 30, 2016) (“IP and other intangible assets represent 80% of the market value of U.S. public companies today.”)

III. The Name of the Game Is the Claim.

A patent defines a piece of intellectual property. Analogous to the size of a parcel of land, the size of a patent (usually referred to as its scope) is important in determining its value. A patent ends with numbered sentences called claims, and it is the claims that are or are not infringed and that largely determine patent scope and value. The rest of the patent specification and any drawings basically act as a dictionary to define the claims and satisfy other legal requirements.

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Many patents have lengthy, detailed claims and often sketchy specifications, sometimes describing only a single, narrow example of the inventive concept. Such an approach leads to weak patents that potentially leave large swaths of valuable intellectual property unprotected and free for competitors to copy. Weak patents usually generate little or no value.

Most strong patents have relatively short independent claims that broadly define the invention. Uncluttered with minute detail, such claims are usually difficult to design around in a cost-effective manner and carve out a valuable technology sector in which the patent owner can exclusively operate.

IV. Conclusion.

Businesses that obtain patents with strategic value carve out valuable technology sectors in which they can exclusively operate. Such businesses usually have higher sales, profits, and market valuations than businesses that fail to properly protect their intellectual property.



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