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Two Simple Questions Will Determine Whether IP Strategy is Critical to an Entrepreneurial Business Venture

Intellectual property ("IP") is often a subject that is "out of sight, out of mind" for entrepreneurs who are launching new business ventures. And, why shouldn't it be: business schools rarely teach much about law in general, let alone about the highly specialized world of IP law. Since non-business school trained entrepreneurs generally take their cues from the methods of their colleagues, it can be said that a significant majority of entrepreneurs do not consider IP to comprise a necessary step when they are formulating their business plans. My conversations with entrepreneurs over the years bears this out.

When IP does form a fundamental basis of an entrepreneur's new venture, it is likely because scientific or technical subject matter forms the basis of the business. In this context, it makes sense that the scientific or technical subject matter core of the business model must be protected by seeking patent protection. In my opinion, this is a far too narrow view when a new entrepreneurial concept requires IP protection, however.

Put simply, an entrepreneur needs more than a yes or no decision centering on whether she should obtain one or more patents to protect her idea. Rather, prior to launching her new business venture, an entrepreneur must develop and execute on an IP strategy focused on determining whether she needs to pursue IP protection in order to meet her business goals.

While IP can seem somewhat arcane and impenetrable to people who have not been trained in this specialized legal area, fortunately, formulation of an IP strategy requires an entrepreneur to ask just two simple questions:

- What aspects of my business model differentiate me from my competitors?
- Would I find it difficult to stay in business and obtain my desired payback if someone copied the differentiated aspects of my business model?

With regard to the first question, most entrepreneurs should find it easy to define the differentiated aspects of their business models. Indeed, the large majority of business models will be based upon one or more perceived needs in a particular market that are not being met by competitors. These one or more differentiations serve as the competitive advantage provided by the entrepreneur's business model and serve as the reason that the entrepreneur seeks to develop the business in the first place.

As for the second question, most entrepreneurs will agree that it would be difficult for them to succeed in their business goals if a competitor were able to copy the differentiated aspects of their business models. In answering "yes" to each of these questions, the entrepreneur should understand that an executable IP strategy should form an essential aspect of their business plan preparation.

It is important to clarify here exactly what I mean by "IP strategy." Significantly, IP strategy does not necessarily mean that the entrepreneur's end goal is to obtain enforceable IP rights, whether a patent or otherwise. Rather, an IP strategy centers on understanding whether and how protection of the differentiated aspects of the business model will enhance the entrepreneur's ability to achieve her business goals.

With regard to patents, the IP strategy may indicate that it may not be cost effective to obtain a patent, but that filing of a patent application may nonetheless provide significant competitive protection. For example, because it takes many years and significant expense to see a patent through to the end in most technologies, it would not make sense for an entrepreneur to seek a patent when the business model is expected to significantly evolve over time. In this instance, by the time the patent issues, it likely will not actually cover the products, technology or services of the company. Even so, the IP strategy may indicate that it would nonetheless be valuable for the entrepreneur to provide her competitors with the perception that she is seeking to obtain a patent on some aspect of the business model.

To this end, the entrepreneur might wish to file a patent application with the full expectation that it may not issue as a patent. Such a filing will allow the entrepreneur to advertise that its business involves "patent pending" technology. I have found that in some industries the use of "patent pending" can assist in keeping competition at bay and can substantially assist in a company's marketing efforts. This "patent pending" IP strategy can be accomplished fairly cheaply if undertaken by a strategically focused IP attorney. The end goal with such an IP strategy is not to obtain an enforceable IP right at the end but, rather, to leverage the "patent pending" to potentially reduce competition or give a product or service greater marketplace cache.

Moreover, by applying an under-utilized provision of US patent law, the entrepreneur can request that the application remain unpublished, a technique that will effectively keep her competitor in the dark about what she may be seeking protection on and whether she is likely to prevail. The uncertainty afforded by the unpublished application may be enough to keep potential competition away from the entrepreneur's growing business. Thus, the end goal of this IP strategy effectively serves as a "shield" to keep competition at bay, rather than a sword to attack others *via* litigation.

Another way for an entrepreneur to use IP strategy to protect the differentiated aspects of her business model is to include brand equity development in the earliest stages of the launch of the venture. This brand equity must be associated with strategic trademark and service mark filings. As the business becomes more successful, consumers will increasingly associate the strong brand with the entrepreneur's product, technology or service. Successful strategic protection of a brand will hopefully result in the entrepreneur's solution being the go-to brand.

One example of an entrepreneur's establishing immeasurable value from developing brand equity is the [LifeLock](#) identity theft prevention product. This company was not the first to offer a product of this type; rather, it was the first to offer a \$1MM guarantee that a purchaser would not experience identity theft as long as she paid \$10 a month to LifeLock. Interestingly, LifeLock provides identity theft protection services in ways analogous to those of its competitors, both those coming before and after. This guarantee served as the basis of LifeLock's competitive differentiation.

Notably, the LifeLock business concept or the guarantee itself could not be protected by a patent. Instead, LifeLock's owner (Todd Davis) decided to advertise the guarantee and build his company's brand equity around it. To this end, Mr. Davis

flooded the airwaves with commercials in which he recited his social security number as proof that his company's product was foolproof--so foolproof, in fact, that he was willing to give the \$1MM guarantee. Today, it is likely hard for many potential purchasers of identity theft protection products to think of going anywhere else than the company "where the owner tells us his social security number." The entrepreneurs responsible for the successful launch of LifeLock realized that the guarantee made them different from their competitors and made sure that the company's marketing strategy was focused toward ensuring that the public associated that guarantee only with LifeLock.

There are certainly many other ways for an entrepreneur to protect the differentiated aspects of her business model from competition using IP strategy. Further illustrative examples include strategic agreements and first mover advantage. Indeed, there are likely as many ways to protect a business model from competition as there are business models. The key is for entrepreneurs to fully engage with the need to include IP strategy in their business plans and to ensure that they execute on that IP strategy. Put simply, IP strategy is not about getting IP as an ultimate end goal. Rather, IP strategy can ensure that the entrepreneur's business model not only provides a competitive advantage but that is also sustainable.