

Execution can be as valuable intellectual property as a patent

While few people would dispute that patents have played a pivotal role in our economic growth or our propensity to innovate, I would encourage entrepreneurs and investors alike not to become overly fixated on patents alone. On countless occasions, I have seen investors grill entrepreneurs on their patent portfolios' strength or lack thereof — nevermind that the entrepreneur may be pitching something as innocuous as a new healthy potato chip.

While startups should always endeavor to protect their innovations and understand their potential for infringement, patents are not your only competitive advantage.

In fact, I believe a neat thing happens when an entrepreneur isn't burdened by patents. In the absence of patents that legally prevent others from following suit, an entrepreneur is forced to rely on his or her execution as a barrier to entry. Companies like Facebook and LinkedIn aren't successful because they prevented someone else from doing something. They are successful because they did what someone else was trying to do, but they did it bigger and better. Their ability to execute on their go-to-market strategies effectively prevented others from doing the same thing — at least for

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now.

At TEXO Ventures, we have an investment thesis based on the reapplication of compelling business models to suit the health care industry, a historical laggard when it comes to adopting and implementing innovative solutions. For example, I recently had the pleasure of learning more about OpenMarkets from its founder and CEO, Dan Michalek.

The U.S. health care capital equipment market is \$70 billion and growing, but many hospitals pay uneven and inconsistent prices due to resource constraints, inelastic clinical demand and a lack of purchasing power. Compounding this problem is the fact that hospitals are facing reductions in revenue and major group purchasing organizations often focus on more predictable supply-chains like consumables and pharmaceuticals.

Michalek started OpenMarkets to apply the best principles of GroupOn, but with an important distinction. Rather than being "supply-driven" as GroupOn is, OpenMarkets is a "demand-driven" platform that enables it to efficiently aggregate capital equipment purchasing needs and then leverage the combined volume to negotiate better prices with suppliers. With a rapidly growing network, OpenMarkets brings pricing transparency and leverage to hospitals for everything from anesthesia machines to hospital beds to televisions.

From OpenMarkets to ZocDoc to Cas-

flight, enterprising entrepreneurs like Michalek continue to adapt common consumer Internet models to deliver a similar utility to key health care stakeholders.

While I applaud the audacity of the human imagination to push the boundaries of science, I would encourage entrepreneurs not to overlook more obvious concepts in search of never-before-seen technological marvels. The latter not only may create a patent liability, but also could make selling more difficult given that the novel nature of something newly patented can in many instances equate to more uncertainty and less evidence of efficacy.

All this is not to say that owning a patent is a bad thing. In many cases, it can be an invaluable asset.

According to a recent Brookings publication, the average patent is worth more than \$500,000 in direct market value and considerably more in social value as the technology and its ideas diffuse.

At the same time, there is growing concern about a perceived decline in the quality of patents being issued, excessively broad claims, inappropriate subject matter and the abuse of the legal system by so-called nonproducing entities, or NPEs, more commonly known as "patent trolls." Several studies, to include Price-waterhouse Coopers' most recent Patent Litigation Study, report that NPEs initiate 40 percent of lawsuits and have extracted more than \$25 billion in payments, while often targeting startups.

In an apparent attempt to start addressing such concerns, the Leahy-Smith America Invents Act was signed into law in September 2011, converting our patent

system from a first-to-invent" to a first-to-file system. In addition, the 25 percent rule of thumb for damages was eliminated, and a 2012 Supreme Court decision clarified limitations on patenting laws of nature. Many critics are also calling for a similar clarification of rules with respect to software patents in order to prevent functions from being granted patents.

And while it may seem like anyone can get one — patent US6960975 describes a spaceship powered by perpetual motion technology consisting of, among other things, "a hollow superconductive shield, an inner shield, a power source ... and a flux modulation controller"; no, not a flux capacitor — the reality is that the patent approval system is complex.

So if you are one of those brave souls sailing uncharted waters, I would caution you to have a healthy appreciation and respect for your patent landscape. Just as every startup should seek good corporate counsel, a good patent lawyer can save you a lot of time, money and headache.

Entrepreneurs often fail to engage someone soon enough because they are trying to save money, but there are many local intellectual property lawyers such as Joey Gray at Baker Botts who routinely work with cash-strapped startups to ensure they are on the right track.

After all, innovations and our ability to protect them through patents or execution will continue to drive our economic growth for generations to come.

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