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VIEWPOINT

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Cutting Through the Patent Thicket

The current U.S. system is harming innovation. A simplified process with stronger patents would encourage economic growth

For over 200 years, the U.S. patent system has catalyzed economic growth and protected the national interest. Unfortunately, over the past few decades, patents have become irrelevant -- even harmful -- to the innovation process.

I say this as someone who grew up believing in the value of patents. As a teenager, I sat raptly in the U.S. Supreme Court gallery listening to attorneys argue *University of Illinois Foundation v. Blonder Tongue Laboratories*, a landmark patent-infringement case involving my father's company. As an inventor, I earned some 70 patents. And as a scientist, I managed research labs generating hundreds of patents a year.

But now, as a venture capitalist, I have come to the conclusion that protecting intellectual property (IP) with today's patents is virtually worthless -- despite the large court awards you may read about in the morning paper.

HIDDEN FROM VIEW. The first problem with patents is that the entire process takes too long: three years on average, often as long as five, and getting longer all the time. So when a venture capitalist invests in a company, its IP "dowry" remains, at best, provisional. How much would you pay for a company when its assets are hidden from view?

Second, a company's most valuable IP almost always results from later insights, gleaned by developing its early products and interacting with customers, not from the IP it originally filed. Competitors are busy inventing as well, and since the U.S. Patent & Trademark Office often grants trivial and overlapping patents, IP minefields may be waiting to explode. Or perhaps the IP is all duds. Who knows?

Third, the \$50,000 to \$100,000 lifetime cost of patent application, protection, and maintenance effectively limits the number of patents a young, financially constrained company can file. Much patentable IP is left on the cutting-room floor, at the risk of allowing trivial variations filed by competitors to block the originator's path to market.

Fourth, and probably most important, few venture-capital-backed companies will ever dare to defend their IP in court. If they do, they'll risk losing customers and squandering anywhere from \$1 million to \$5 million of their precious venture funding.

REDUNDANT CONCEPTS. So what good is owning something you can't quantify or won't defend? Very little. It's a bluff, mere saber rattling.

The greatest value in patenting IP for a young company, ironically, may lie in the fact that it's often essential in attracting venture capitalists -- who, I would argue, are often pursuing a misguided model of company creation. Successful companies transform ideas into products customers want to buy. But the existence of IP usually has little to do with that ability.

Outside of venture capital, the situation is no better. Common business practices, obvious to anyone in the field, are enshrined in overly broad and problematical patents that reduce competition. Patent "trolls" are buying up dubious IP, then suing companies actually engaged in productive activities, such as building products and serving customers. Wasteful court cases, like the recent BlackBerry imbroglio, occur because patents are granted for narrow, redundant concepts that courts find difficult to unravel, and so are open to interpretation.

We need to invent ourselves out of this mess.

DEAD ENDS. The patent system was designed to encourage the free flow of ideas, in exchange for a temporary monopoly. Not all ideas, however, are worth pursuing, worth defending, or worth backing financially. And this gets to what, at bottom, is wrong with the patent system: We issue patents too easily for trivial ideas, thus diminishing protection for true breakthrough ideas.

Patents are meant to be useful. Yet most studies show that something like 95% of all patents have never been used in any product and have created zero economic value. Nor, as far as anyone can tell, have they ever been used as evidence in a

patent lawsuit. They are evolutionary dead ends.

Patents are government-sanctioned short-term monopolies, and not supposed to be "obvious to those skilled in the art." Yet, anecdotally, all VCs remember days when a half-dozen companies pitching the same idea, in the same market, using the identical technological approach, appeared at their doorstep seeking investment. Isn't that what is meant by "obvious"? None of these companies should be granted IP to exclude their competitors. They should compete instead on execution.

SCIENCE OR INVENTION? More quantitatively, I have observed firsthand how easy it is for experts to generate good, but similar, ideas. While at AT&T (**T**) in the early 1990s, I sponsored two separate ideation sessions around a potential new market, bringing in 50 experts each time to brainstorm for applications. Both groups generated ideas with real commercial value.

Both groups, however, generated more than 95% of the same ideas in common. They were "obvious" in the fullest sense of the word and would have been commercialized with or without the incentive of a patent. But the Patent Office found them "novel," and issued AT&T claims by the basketful. I would argue that none of those ideas deserved a patent.

And much of what the Patent Office sees as invention is merely science applied to a new field by equation or analogy. At AT&T, we took old microwave patents and filed identical claims on optical inventions, which are also radio waves, only 10,000 times smaller. We were able to do this even though it was obvious to anyone who ever picked up a physics textbook that once you have the ability to make things smaller, the physics just translates over.

RADICAL SIMPLIFICATION. The solution is for the Patent Office to set the bar much higher for new patents. It should reject applications for ideas anyone well versed in the art would automatically develop, once faced with that problem. That includes minor changes in size, shape, or properties whose impact is definitely predicted by science, as well as eliminating entire classes of ideas that are "in the air."

The Patent Office should invite third-party comments and expert testimony as soon as the patent filing is made public. These communities have much greater knowledge than the Patent Office about what's truly new, and will help raise the bar for everyone.

Such radical simplification would have a huge positive impact on both innovation and economic growth:

- It would encourage people to work on hard problems -- without the fear that someone else could capture the lion's share of the benefit with a trivial variation on their pioneering idea.
- It would speed the patent-granting process, aligning business timescales with IP timescales.
- It would give companies and their investors IP certainty they could bank on.
- It would reduce the number of patent cases that go to court -- a huge waste of time and money for society.

INTERNATIONAL DIALOGUE. A patent is a license to exclude others from practicing your invention, but businesses need freedom to operate. A broad patent would repel competitors from blocking its value with trivial variations. Instead of applying for 10 minor patents, inventors would apply for just one of true economic value. The flow of information surrounding invention would accelerate -- and so would innovation.

In such a scenario, America would become the gold standard for patents. Other countries might continue the practice of patenting the hair-splitting and trivial. But as it became clear that a U.S. patent was the strongest in the world -- the one that attracts capital -- the discipline would win worldwide recognition.

Moreover, countries like China and India, which are just agreeing to respect intellectual property, would be much easier to engage in dialogue if infringement were clear and the number of issues reduced.

LESS IS MORE. Patent simplification, as I have outlined it, presents some problems. For example, the greater barriers to patents would probably require higher upfront costs -- perhaps too much for lone inventors to pay.

But these are details that stand a good chance of resolving themselves. For instance, a group of patent lawyers might emerge who would represent such money-strapped individuals on a contingency basis. After all, the resulting patent would cut a clearing in the forest, where new economic growth could thrive.

Higher standards and greater simplicity are the path to a better patent system -- for our nation and for its inventors. In my case, probably no more than a dozen of my 70 patents would reach this bar. Yet they would be more valuable in the end. Sometimes more isn't better.

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