

Over one hundred years ago Coca-Cola was developed. The inventor chose to keep the formula a secret rather than file for a patent to have the formula protected. Had the inventor filed for a patent it would have expired by now, the formula would be public knowledge, and any company could make it. In contrast, IBM obtained over 3,400 patents in 2003, at a cost of millions of dollars. In the past 11 years IBM has been granted over 25,000 patents and views obtaining patents as an important part of the path to true innovation. Both companies are successful in their markets, and both companies take a different strategy on Intellectual Property protections. Entrepreneurs need to understand the types of Intellectual Property protections available to them, know the advantages and disadvantages of applying for patents, and decide how best to protect their original ideas.

### OVERVIEW OF COPYRIGHTS, TRADEMARKS, AND PATENTS

Copyrights, trademarks, and patents all provide varying degrees of intellectual property protection that Entrepreneurs can use to protect their ideas. This protection can range from relatively inexpensive copyrights to potentially cost prohibitive patents.

Copyrights are protections which apply to works of authorship such as pictures, music, written text, and computer software.<sup>1</sup> Copyrights are registered with the Library of Congress, United States Copyright Office, and are in effect for the life of the author plus an additional 50 years. In the case where a copyright is granted to a corporation, the copyright is in effect for 75 years. Copyrights are relatively inexpensive (for a few hundred dollars an author of an original work can have it protected under copyright laws) and the process to obtain a copyright can be completed without a lawyer.

Trademarks are words, names, symbols, or devices, used to distinguish or identify a good.<sup>2</sup> Trademarks are registered through the United States Patent and Trademark Office (PTO) and can last indefinitely. The protection is on the mark itself, be it a distinguishing word, name, or symbol used to identify a product.<sup>3</sup> Trademarks do not have to be officially registered with the PTO to be protected; however, registering the mark allows the owner certain protections such as;<sup>4</sup>

- constructive notice to the public of the registrant's claim of ownership of the mark;

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<sup>1</sup> U.S. Copyright office (2004) Retrieved October 25, 2004 from the World Wide Web: <http://www.copyright.gov/>

<sup>2</sup> U.S. Patent and Trademark Office (2004) Retrieved October 25, 2004 from the World Wide Web: <http://www.uspto.gov/web/offices/pac/doc/general/index.html>

<sup>3</sup> Entrepreneurship, 6th edition, Hirsch, Peters, and Shepherd, McGrawHill Publications (P 166)

<sup>4</sup> U.S. Patent and Trademark Office (2004) Retrieved October 27, 2004 from the World Wide Web: <http://www.uspto.gov/web/offices/tac/doc/basic/register.htm>

- a legal presumption of the registrant's ownership of the mark and the registrant's exclusive right to use the mark nationwide on or in connection with the goods and/or services listed in the registration;
- the ability to bring an action concerning the mark in federal court;
- the use of the U.S registration as a basis to obtain registration in foreign countries; and
- the ability to file the U.S. registration with the U.S. Customs Service to prevent importation of infringing foreign goods.

Trademark applications are subject to fees associated with filing and reviewing the trademark for suitability. The process to obtain a trademark can take approximately 13 months from the initial filing and can be completed without a lawyer.

Patents are granted by the Patent Trade Office (PTO) and essentially give the inventor a monopoly on their invention, idea, or intellectual property for a specified period of time. There are three types of patents; *Utility Patents* are the most common type of patent, they protect the owner from anyone else making, using, or selling the invention. Utility Patents are granted for a period of 20 years. *Design Patents* cover designs for articles of manufacture, reflecting the appearance of an object. Design patents are granted for 14 years. *Plant Patents*, the third type of patent issued by the PTO, cover new varieties of plants and are granted for a period of 20 years.<sup>5</sup> Patents can be expensive, time consuming, and difficult to obtain. And, once issued, they can be difficult and expensive to enforce.

#### ADVANTAGES AND DISADVANTAGES TO FILING PATENTS

The decision to patent an idea depends upon the answers to some important questions such as; Is the idea or product commercially viable? Is it susceptible to reverse engineering? Does it warrant a patent? And, can you afford to obtain and to enforce the patent?

Intellectual property protection rights, such as patents, encourage entrepreneurs to spend their time and money developing new processes and products for customers. Without the protections patents afford, small businesses could invest their resources in developing new ideas only to have their efforts copied by big companies with the resources to get them quickly to market.

#### **Advantages**

Patents provide exclusive rights to intellectual property and are a vehicle to prove and profit from those rights. Jerome Lemelson, an inventor who held over 500 patents, first applied for a patent on his "machine vision device" in 1956. By the time Mr. Lemelson received the patent in 1989 bar code scanning technology had been developed and was in use around the world. Because of his patent, he

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<sup>5</sup> Entrepreneurship, 6th edition, Hirsch, Peters, and Shepherd, McGrawHill Publications

collected hundreds of millions of dollars from Japanese, European, and American companies that had used his idea.<sup>6</sup> The rewards offered by the patent system encouraged him to create his idea and to see it through the patent process.

Patents can secure a competitive advantage by excluded competitors from using certain processes which can prevent them from competing in a particular market. Jeff Bezos successfully sued Barnes and Noble for infringing on his patented 1-click technology and while the internet public disagreed in the validity of the idea as "patent-worthy," the patent allows Amazon to maintain a competitive advantage over competitors.<sup>7</sup>

Patents will be required by venture capital firms when looking to secure financing to fund growth. Investors want to know the idea's they are investing in are both secure and proprietary in order to realize maximum rewards.

### **Disadvantages**

Patents can be difficult and expensive to obtain, a single patent application can cost over \$1,000 and attorney's fees are in addition to this amount. Most ideas require several variations in order to fully protect the idea. The patent system is set up in such a way that the inventor must specify the characteristics and details of the idea and this provides competitors with most of your products characteristics, giving them a blue-print which they can use to create a similar idea but with enough variations so as not to infringe on your patent. Therefore, as the patent requestor, you may need to think through those variations and apply for subsequent patents to better protect the product. This can become very costly.

Patents provide protection of ideas, but patents don't improve ideas or add appeal. Sales earn money, patents cost money. Patents can be very costly and do not guarantee a return on investment.

Patents are essentially a right to sue but they are worthless if they are not enforced. This requires a proactive effort such as searching out companies that may be infringing on a patent and prosecuting them. This is assuming that a small business has the resources to do this, and that they can afford both the time and money this requires. And to make this process more challenging, the PTO has a service companies can subscribe to, which notifies them of the issue of new patents in any category. Therefore, when new ideas are patented, companies with resources can immediately pursue developing them for a profit, sometimes before the original patent owner is able to.

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<sup>6</sup> America's Inventor (1997) Retrieved October 25, 2004 from the World Wide Web:  
<http://www.inventionconvention.com/americasinventor/dec97issue/section16.html#Friday>

<sup>7</sup> PC Magazine (2003) Retrieved October 28, 2004 from the World Wide Web:  
<http://www.pcmag.com/article2/0,4149,916103,00.asp>

## AN ALTERNATIVE TO PATENTS

In 2003 IBM was granted 3,415 patents, an average of almost 10 patents per day.<sup>8</sup> Large companies can afford the high costs of obtaining and protecting patents but small businesses need to find a better way. "Trade secrets" is the legal term for confidential business information (secrets belonging to a business). The most famous example of a closely held trade secret is the formula for Coca-Cola. Rather than patenting the formula, essentially giving it to competitors, Coca-Cola has kept it a secret and has been able to profit from it for well over 100 years. Other examples of trade secrets include customer information, vendors, product information including manufacturing processes and pricing, marketing strategies, company finances, and other competitively valuable information. Under the Uniform Trade Secret Act, information must meet three criteria to qualify as a trade secret; 1) the information must not be "generally known or readily ascertainable" through proper means, 2) the information must have "independent economic value due to its secrecy," and 3) the trade secret holder must use "reasonable measures under the circumstances to protect" the secrecy of the information.<sup>9</sup>

Trade secrets provide an alternative to the high costs of intellectual property protection. Trade secrets are not specifically granted by a government agency; companies draw up legal agreements which their employees can be bound by, protecting the confidentiality of certain company secrets which if disclosed could negatively impact the business. As long as the trade secret remains confidential, state laws will protect businesses and allow them to sue any current or former employees who may breach non-disclosure or confidentiality agreements. The agreements should be drafted and reviewed by an attorney.

In addition to trade secrets, entrepreneurs can implement marketing strategies to convince people to try out or keep using particular products or services. Entrepreneurs must attract and retain a growing base of satisfied customers. Entrepreneurs can develop successful marketing strategies by knowing their customers, analyzing and capitalizing on their competitive advantages, using target marketing to narrow their customer base, and developing a marketing mix that satisfies current and

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<sup>8</sup> IBM (2004) Retrieved November 1, 2004 from the World Wide Web:  
<http://www-306.ibm.com/software/data/awards/patents.html>

<sup>9</sup> About (2004) Retrieved October 23, 2004 from the World Wide Web:  
<http://inventors.about.com/gi/dynamic/offsite.htm?site=http%3A%2F%2Fwww.patentcafe.com%2Ffaq%2Findex.asp%3Fid%3D13>

future customers.<sup>10</sup> A patent won't make a company successful or help it increase sales, but a well designed marketing strategy can ensure the company is customer-oriented and can grow with the market.

Entrepreneurs can also focus their resources on constant improvement of their product. Competitors are going to be at a disadvantage if they are attempting to copy and reproduce another company's idea if that company is regularly improving the product. Patents won't be as important to an entrepreneur who is improving their product and growing their customer base.

### SUMMARY

Coca-cola was never patented, the logo was trademarked and the formula is a trade secret. The Coca-Cola formula was developed over 100 years ago and is still a secret today. Had the company chosen to patent the formula it would be public knowledge, the patent would have run out, and anyone who wanted to would be making it. It is important that entrepreneurs understand the types of Intellectual Property protections available to them, know the advantages and disadvantages of applying for patents, and decide how best to protect their original ideas. Entrepreneurs with limited resources should seek to protect their ideas through the use of trade secrets, improving their marketing strategy, and constantly improving their product.

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<sup>10</sup> Small Business Administration (2004) Retrieved October 27, 2004 from the World Wide Web:  
[http://www.sba.gov/starting\\_business/marketing/basics.html](http://www.sba.gov/starting_business/marketing/basics.html)