

SOFTWARE

Intellectual

property

STRATEGY

START-UPS MUST PRESERVE THEIR RIGHTS

INTELLECTUAL PROPERTY STRATEGY COMPLIMENTS A COMPANY'S BUSINESS STRATEGY BY HELPING THE COMPANY ACHIEVE ITS BUSINESS OBJECTIVES AND TO REALIZE ITS VISION. FOR START-UP SOFTWARE COMPANIES, A VERY IMPORTANT PART OF THE BUSINESS STRATEGY IS TO OBTAIN ANGEL OR VENTURE CAPITAL FUNDING. FOR MANY INVESTORS, IT IS CRUCIAL THAT THE START-UP DEMONSTRATE A COMPETITIVE ADVANTAGE SUCH AS A BARRIER TO ENTRY IN ORDER TO INTEREST THEM IN INVESTMENT. NEVER HAS THAT BEEN MORE EVIDENT THAN IT IS IN TODAY'S SOFT CAPITAL MARKET.

Barriers to entry can be established through contracts as well as through intellectual property (IP) rights such as copyrights and patents. Start-up software companies must seek protection of their IP early, often before they receive funding. Fortunately, a relatively inexpensive strategy for preserving patent rights is available: filing a provisional patent application.

TIMING

First and foremost, a successful software company must be aware of its rights and be conscious of the fact that timing has much to do with whether or not such rights will be preserved. Copyrights, the paradigm of protection for software companies for many years, are created automatically. It is therefore critical to define who owns these rights. If contracts, employment agreements, confidentiality agreements and assignments are not put in place in a timely manner, the company may be unhappy to learn that although valuable copyrights exist in their software, these rights belong to someone else. Trademarks and Domain Name rights are time sensitive as well, but not nearly so sensitive as trade secrets and patents. Yes, patents. If there is any doubt, I can confirm that software and business methods are patentable in Europe.

EUROPATENTS

In August of this year, the President of the European Patent Office amended the European patent rules, essentially "codifying" certain Board of Appeals decisions that favor the patentability of computer software and business methods. Now, European Patent Examiners are required to treat computer software and business method applications just as they would any other invention. Patents, however, complicate matters because, unlike copyrights, the rules that must be respected in order to obtain them are rigorous. For example, nonconfidential disclosure of the invention to a third party can destroy patent rights.

ADVICE

To avoid this loss of rights, the start-up should file its patent applications before it promotes its product or, at the very least, require that anyone with whom they discuss the project sign a nondis-

closure agreement. However, many companies and potential partners refuse to sign nondisclosure agreements. Also, start-ups typically feel they need funding to afford to protect their rights, yet they can't get funding until they've protected their rights. Thankfully, for Swiss applicants, an effective and inexpensive interim solution to this dilemma is available. Swiss entities can take advantage of the fact that they can file the first priority patent application as a provisional patent application in the US in the French language. Further, there are few formal filing requirements – consequently, it is possible to file quickly and inexpensively. Still further, within a year of the filing of the US application, follow-up applications can be filed in Europe and most other industrialized countries, claiming the filing date of the US application as their effective filing date. Filing in the US first can preserve a start-up's right to protect their invention via the trade secret laws as well.

IN SUM

Software is now clearly patentable, both in Europe and elsewhere. Software IP strategic options are first and foremost time-sensitive – errors are not often forgivable. The US provisional patent application is very often the best choice for the first filing, as it is relatively simple to prepare, can be filed in any language, and can act as the priority document for later applications filed in just about any other industrialized nation in the world. Preserving IP rights will provide start-ups with more tools with which to form their Software IP Strategy as well as significantly increase their chances of obtaining funding.

For further information, visit www.patent.info.



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