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New Product Licensing

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You have a new product idea that you believe would sell very well were it only available on the market -- but you don't have the time or resources to "venture" the product, i.e., to manufacture it (or have it contract-manufactured) and sell it yourself. What now?

Realistically, the best advice you could be given is to forget the idea -- and get on with your life.

Your *only* alternative is to try to "license" the product idea, i.e., to find an existing product-line manufacturer already selling other products into your target market -- and try to convince them that they should add your product to their product line -- and share their profits on that product with you (typically by paying you a "royalty" on their sales of that product).

But your odds of licensing that idea are tiny -- no better than 1 in 1,000 (and probably much lower). Why?

1. **Your idea is *probably* not new.** Just because you haven't seen it in the market says little. There are many times more products available from specialty catalogs than you'll see in your local stores. (Many of these specialty catalogers now have websites, where you can find their offerings with *diligent* searching -- but *many* still do not.) It's possible (even likely) that your idea has already been tried and failed (because of market or technology reasons that still hold true) -- and the only way you can find that out is by talking with old-timers in the industry. And even if it hasn't been tried, it's possible (even likely) that important product features of your idea have been already patented by someone else -- and the only way you can find that out is through a *professional* patent search (which will cost you upwards to $1,000.)

2. **Manufacturers are *not* looking for new products.** They have a 3-5 year queue of new products and product improvements already in development. They've thoroughly researched the profit potential of each of these -- and are well along in developing them. When you submit your new idea to them, your idea is in *competition* with what they're already working on. They'll displace or defer one of their projects *only* if yours shows significantly greater profit potential -- and if you can't quantify and substantiate that profit potential (as thoroughly and accurately as an industry insider), then the profit potential of your idea has to be *much* greater (and *obviously* much

greater) to tempt them to research that profit potential themselves.

3. **It may not be possible to manufacture your product at the cost necessary for it to retail at a price customers will pay.** A new consumer product typically must be manufacturable at no more than 1/6 of its retail price to adequately compensate the product's distribution channel (e.g., the manufacturer must sell at 2 times their manufactured cost to cover their operating costs and profit, the wholesaler must sell at 1.5 times their cost and the retailer at 2 times their cost -- 2 x 1.5 x 2 = 6). There are *many* good product ideas that simply can't be manufactured for the needed cost -- in fact finding a way to manufacture a product at the needed cost is frequently the *much* more difficult problem than simply designing the functionality.

4. **Adequate intellectual property protection may not be available.** Understand that a patent does not protect the *function* you intended -- it protects only your particular design or method -- and only those *features* of your design or method that have not already been patented (or made known) by someone else. If it is not possible to get a *broad* patent (i.e., one that protects all economical ways of providing your intended user benefits), it's unlikely anyone will license your idea. Why should they share their profits with you on a product which -- if the product sells as well you hope -- they *know* that their competitors will soon be selling the same or similar product *without* having to share their profits.

5. **Other.** And there are a virtually infinite number of reasons why any *single* company might not be interested in your product or improvement.

    - **The product's potential sales aren't large enough to be of interest.** If expected sales are less than 1% of their current sales into that market, they'll almost certainly not be interested -- it's just not worth the hassle to them. At 1%, they *might* have interest -- if the product just naturally flows right into their existing manufacturing and marketing structure -- but it will typically take 10% or more for them to have any *strong* interest. (A large company, like P&G, frequently simply *abandons* products whose sales, although too low for P&G, would be top-sellers for a smaller company.)

    - **The required front-end investment is just too large or too uncertain.** A smaller company can't afford the investment that a larger company can. But even a larger company may not have interest if the engineering costs can't be *accurately* pinned down -- the risks are just too great. And virtually no company will try to develop a new market (new to them) for a new product from the outside -- that's *far* too risky.

    - **The required operational changes are too great.** Many large

companies have so much invested in their existing tooling and training that they're virtually *chained* to the status quo. General Motors, for example, gets about 25,000 new idea submittals a year -- and, on average, licenses only 1 -- and not because there weren't some very good ideas among them -- but because they simply can't *afford* to change.

- **They have *no* interest in outside ideas.** Some companies have decided that looking at ideas from the outside is simply not worth the effort -- and purposefully reject *any* attempts at submittal. Yes, they may miss something that they may later wish they'd seen -- but they've made the *business* decision that that possibility isn't worth the time and effort to review all the ones that weren't.

- **You approached them incorrectly.** Companies live by *systems and procedures* -- without them there'd be chaos. Companies that may have some interest in outside ideas have set up a system and procedure for reviewing those ideas. If you use that system and procedure, your idea will get the most complete review that the company is willing to give -- and if you don't, you'll likely get an incomplete, or no, review.

- **The company's going through hard times... or a management change... or just have too many new products on their plate right now.** If you had approached them last year -- or maybe next year -- they *might* have been interested -- but not *now*.

- **Other.** And besides the many *objective* reasons like those above, there are as many or more *subjective* reasons: Your presentation wasn't clear enough -- or someone in the decision loop decided you'd be too difficult to deal with -- or there's something about you that they just don't like or trust -- or they were just having a bad day...

You want to try anyway?

You now understand that the odds are stacked heavily against you. But you *may* have a licensable idea -- it *does* happen -- people outside the industry sometimes *do* see things that those inside the industry don't. If you want to give it a shot -- despite the odds -- how can you go about it?

First, avoid the "invention promotion" companies you may see advertised who "promise" to do it all for you -- they almost *certainly* won't -- despite the *substantial* monies you'll have to pay them.

There are a *few* "invention agents" -- who don't advertise (you'll have to dig deeply through the inventor community to find them) -- who *might* take on your idea on spec (i.e., for a share of your share of the possible profits) -- but

they're even less likely to take on your idea than the companies themselves -- and most of them will charge you an "evaluation" fee (which will only evaluate whether *they* think *they* can license the idea).

So face up to the fact that if a licensee is to be found for your idea, *you* are the one who must do it -- there's *no one* who will do it for you -- and if you feel you *can't* do it, go back to my original advice to "forget the idea and get on with your life".

What about a patent? If you're thinking that companies might go looking through issued patents to find new products -- they *don't*. The only reason they look through issued patents is to find "prior art" (i.e., already patented features and methods) that they must design around in the development of their *own* new products.

Does that mean that patents are a waste of time and money? Generally, *"yes"*. What good will a patent do you if your idea proves not licensable for *any* of the reasons above? A patent will cost you several thousand dollars -- and your risk/reward ratio is in the same neighborhood as "investing" it in your state lottery. (The lottery's odds are a bit longer, but its jackpot is greater.) And don't expect a patent attorney to tell you whether you can get a sufficiently *broad* patent -- only *you* can determine that. The attorney simply doesn't have the market knowledge to assess what's important in *your* market.

If you're prepared to research your idea -- fully and thoroughly -- see the series of articles by Andy Gibbs for a better understanding of what's involved -- a patent (or more likely patents) may make sense. But do the research *first* -- as your research will most likely show you why your idea isn't licensable. And even if it appears to be licensable, you'll find that the time and costs to *make* it licensable will be substantial -- *much* greater than simply the patent costs.

When the Provisional Application came into being, I had hopes that people with a new-product idea might *finally* have a way to safely show their ideas to industry at a reasonable cost -- see The Provisional Application. But that has proved not to be the case.

For a provisional to offer any "protection", it must be both *enabling* (i.e., must completely and accurately describe how to make and use the device) and *thorough* (i.e., it must also describe the device *broadly* enough to provide adequate support for all of the patentable features of the device in a later non-provisional application).

Evidence indicates that *most* people trying to use the provisional cannot do this even close to adequately -- and if they go to a patent attorney to draft it for them, they find that the cost is almost as much as filing a non-provisional patent application (and many practitioners will, rightly, urge them to bypass the provisional and simply file the non-provisional).

So we're back to where we were before the provisional came into law -- *spend a lot of money -- to safely show a new product to industry -- that they probably don't want.*

There is a solution.

In the "old days" (before the provisional), cost-conscious inventors would try to arrange with their patent attorney to hold their important intellectual-property papers in the attorney's file -- and then contact their licensing prospects to see if there was any interest. This was a relatively "safe" method because -- if a company was interested -- and knowing that a patent attorney was involved -- it would be extremely unlikely that the company would try to do anything with the idea without at least talking with the patent attorney. And if it appeared that useful patent protection could be obtained, the attorney and the company would work together to ensure that the best possible protection *was* obtained (and that the inventor received a "fair" deal).

This is still a fine approach to licensing. However... You'll find it difficult to find a patent attorney who will work with you in this way -- you're a "nuisance" to his normal workflow. And even if you do find one, he will likely insist that you first pay him to do a professional patent search -- if one of the companies you contact does contact him, he needs to be prepared to discuss with the company exactly what might be patentable. And you may find it awkward -- when the licensing prospects you contact ask whether your idea is patented -- to explain that no it isn't, but your important intellectual-property papers are in your patent attorney's files.

Although the provisional does not provide the low-cost *vehicle* that I had hoped it would, its existence in current law does open up a variation on the old approach that avoids the difficulties. Here are the steps:

1. **Compile a list of your licensing prospects.** See The Provisional Application article for how to do this.

2. **Write up and file a provisional application.** It doesn't have to be a "good" write-up because you're never going to show it to anyone

3. **Contact all the companies on your "prospects" list.** When they ask whether your idea is patented, say that it's "patent-pending". If they ask if that's by provisional or non-provisional, say "provisional". If they ask what the idea is, tell them as much as they want to know -- there's nothing to gain by holding anything back (and much to lose if you do). If they want to see more information, send them a clear and complete description of the product or improvement -- but *not* one that looks like it might have been written as a provisional application.

As noted above, you'll *probably* find that none of your prospects are interested -- however it's only cost you the provisional application filing fee (currently $80) and a couple of months of emails and phone calls.

But, hopefully, one of those prospects *is* interested. They'll ask to see your provisional. Do *not* show it to them -- put them off by saying something like, "I've made some design changes since the provisional -- so I won't be citing the provisional in my formal application". (*Never* give any indication that you might not be following through with a formal application.)

Then negotiate with them to pay for the formal application. The cost to them is trivial compared with the other costs they face in bringing the product to market -- and if a broad patent is possible, that's as much in their interest as in yours. (The patent will be in your name, as only the true inventor can file for patent.)

If the company likes your product and wants to bring it to market, you've put them in a bind:

- **They can't go ahead without you** -- because they don't know what you're patenting -- they have to assume it's the broadest patent possible -- and they have to assume that you'll be following through with your formal application, so that -- about the time they get the product to market -- and it's starting to make money for them -- they have to expect that they'll be faced with your patent issuing.

- **And they can't "wait you out"** -- because a patent can take several years to issue -- and it will be a long time (probably past the market window) before they can be *sure* you didn't follow through with your formal application.

Their *only* rational business decision is to work with you.

Understand that this approach has nothing to do with "intellectual property law" (other than that the existence of the provisional in the law makes it possible). What you're doing here is running a business *bluff* -- but a bluff in which no one can ever see your hand, unless you accidently show it -- or you allow someone to trick or coerce you into showing it.

The people you'll be contacting are pros -- they're fully capable of bluffing back. You're very likely to hear, "We're very interested in licensing your idea -- but we can't move forward until we see your provisional". You have to be prepared to simply say goodbye. They weren't *really* interested in licensing at all -- all they wanted was to see what you were planning to patent.

Summary

Given a product idea -- that you're not prepared to "venture" -- you really have only three choices that are at all rational:

1. Go about it "right" -- the Andy Gibbs approach cited earlier. Do the research and prepare a presentation that offers -- not just an *invention* -- but a documented, substantiated *profit-making opportunity*. This is

the approach used by the "pros" -- the "professional" inventors. It provides *by far* the greatest odds of successfully licensing -- not because the pros are necessarily more creative, but because -- as they research their ideas -- and encounter the obstacles that are always present -- they *improve* their inventions to overcome or bypass those obstacles -- and, hence, when they're ready to present -- they have something they *know* will license -- and generally to *who* -- and *why*.

2. Use the 'business bluff" approach outlined above. The odds of successfully licensing are obviously much lower than the first choice (but certainly better than not trying to license at all). This isn't likely to get you a license with any of the giant companies (but neither is any approach other than choice 1). But it may well get you a license with a company that is not the market giant -- and it *may* get you a license even if there are serious patent obstacles. If you present them with a patent (or provisional) that they can design around, they will very likely do so. But if you leave the patent issue up to them, they may well decide that they don't care about patent protection -- that first-to-market is enough for them. And even if they do care, you've given them the opportunity to get the *broadest* possible patent protection -- which it's unlikely you would have discovered (or have paid for) on your own.

3. Or "forget the idea and get on with your life".

Any approach you try between the extremes of choices 1 and 2, will almost *certainly* be a waste of time and money. Yes, you may well get a license with a only a half-baked patent and mere submittal of your "invention" -- but if that's the case, you would have obtained that same license with choice 2 -- without the front-end costs and hassle.

One final note... I've used the word "idea" throughout this paper -- substitute the word "invention". An "invention" is an idea "reduced to practice" -- see Ideas vs. Inventions for a better understanding. Ideas are *not* licensable -- *only* inventions are. Do *not* use choice 2 to try to license an idea -- doing so will only make it more difficult for others with actual inventions to get industry to look at them.

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