

What is a Patent?

A patent for an invention is the grant of a property right to the inventor, issued by the United States Patent and Trademark Office. The right conferred by the patent grant is, in the language of the statute, “the right to exclude others from making, using, offering for sale, or selling” the invention in the United States or “importing” the invention into the United States. What is granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the invention. Once a patent is issued, the patentee must enforce the patent without aid of the USPTO. U.S. patent grants are effective only within the United States, U.S. territories, and U.S. possessions. Foreign patents must be obtained in order to enforce rights in other countries.

There are three types of patents in the United States—utility, design, and plant. A design patent may be granted for new, original, and ornamental designs for an article of manufacture. A plant patent may be granted for a distinct and new variety of plant that can be asexually reproduced. A utility patent is the most common type and is generally referred to simply as a patent. Generally, utility and plant patents enjoy a term of 20 years from the date on which the application for the patent was filed in the United States. Design patents have a term of 14 years from the date of issue.

The patent law specifies the general fields of subject matter that can be patented and the conditions under which a utility patent may be obtained. In the language of the statute, any person who “invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a [utility] patent.” The word “process” is defined as a process, act or method. The term “manufacture” refers to articles that are made, and includes all manufactured articles. The term “composition of matter” relates to chemical compositions and may include mixtures of ingredients as well as new chemical compounds. These classes of subject matter taken together include practically everything that is made by man and the processes for making the products.

To obtain a patent, the subject matter must be “useful.” The term “useful” in this connection refers to the condition that the subject matter must have a useful purpose and also includes operativeness; that is a machine which will not operate to perform the intended purpose would not be called useful, and therefore would not be granted a patent. A patent cannot be obtained upon the laws of nature, physical phenomena, or a mere idea or suggestion.

In addition, the subject matter must be “novel.” The patent statute defines what is novel, or new, by specifically excluding patentability if certain circumstances exist. For example, if the

invention has been patented or described in a printed publication anywhere in the world, or if it was known or used by others in this country before the date that the applicant made his/her invention, a patent cannot be obtained. If the invention has been patented or described in a printed publication anywhere, or has been in public use or on sale in this country more than one year before the date on which an application for patent is filed in this country, a patent cannot be obtained. In this connection it is immaterial when the invention was made, or whether the printed publication or public use was by the inventor himself/herself or by someone else. The inventor must file on or before the date of first public use or disclosure of the invention, however, in order to preserve patent rights in many foreign countries.

Even if the subject matter sought to be patented is not exactly shown by the prior art, a patent may still be refused if the differences would have been obvious at the time of the invention. To be non-obvious, the subject matter sought to be patented must be sufficiently different from what has been used or described before it to a person having ordinary skill in the area of technology related to the invention. For example, substitutions of one color for another, or changes in size, are ordinarily not patentable.

If the inventor feels that the subject matter meets the aforementioned criteria, and is therefore patent eligible, a decision regarding pursuit of a patent must be made. There are several advantages to obtaining a patent. A patent will give you the right to exclude others from conducting the activities discussed above. Related to this advantage, patent protection will preclude a competitor from patenting the invention. Additionally, the fixed patent term gives you a pre-determined monopoly period, thereby allowing for more reliable and predictable business models and strategies. Alternatively, you can license your patent for others to use, or sell it like any other asset. Finally, you can employ a patent as a deterrent. It may deter or stop infringing activity of a competitor.

Conversely, if the invention would be difficult to reverse engineer, then keeping the details of the invention as a trade secret may be a better choice. As with any business decision, time and money are also important considerations.

The above-mentioned criteria to obtain a patent, as well as the considerations briefly discussed, are merely a cursory overview of the factors that must be examined when deciding to obtain patent protection. Consultation with a patent attorney is the most reliable and efficient way to acquire the information necessary to make the best decision. After attaining the necessary information, the ultimate decision should be made based on how the technology fits into the overall business plan of the owner of the invention.