



Crowdfunding Platforms and Patent Rights: What Healthcare Entrepreneurs Need to Know

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In recent years, online crowdfunding platforms such as Kickstarter, Indiegogo, and GoFundMe have emerged as popular resources for inventors to raise funds for projects. While these sites can be useful in raising awareness and funding, they may pose a risk to patent rights, which many entrepreneurs and investors view as critical to commercial success. While filing for patent protection before crowdfunding is the safest path forward for protecting rights, it can be viewed as cost-prohibitive and may take a back-burner to more tangible efforts – such as manufacturing, fundraising, and marketing – needed to bring a product to market.

Emerging healthcare device creators are increasingly looking toward crowdfunding platforms as an alternative to angel- or venture-backed investors, particularly at early stages of development. Be they health monitoring devices such as smartwatches or advanced heating pads, many innovations in healthcare have found success with crowdfunding sites.

Using these sites can fatally jeopardize patentability and commercial success if not done judiciously. To post a product, users typically provide a description, a fundraising goal, and related information to demonstrate the product's potential and encourage support. Disclosure of product information may become inevitable, even encouraged, to generate interest in a product, but innovative products that address an important consumer need may in fact spark copying by competitors and a race to market. By broadcasting inventive information on these platforms and, in turn, to the public, entrepreneurs may inadvertently lose their rights to patent the invention altogether, while encouraging competitors. Loss of patent rights is particularly likely outside of the U.S., as most foreign jurisdictions require absolute novelty to be patentable. That said, even within the U.S., which now operates under a first-to-file system, a public disclosure may allow someone other than the inventor to file in the U.S. patent office first, resulting in an

undesirable outcome.

Damage to patent rights can even occur if seemingly minor aspects of the invention are disclosed, or if the invention is described in a way that might be considered vague. That is, even if the invention is not completely divulged, enough information might be publicly provided to cause a patent office to find an invention “obvious” in view of that disclosure. Thus, a disclosure that an innovator might find “minimal” may negatively impact later patent rights.

An underappreciated pitfall that may fatally impact access to patent rights is the “offer for sale” that may arise when using an online fundraising site. On crowdfunding sites, the description of a product often includes pricing information and an offer to sell the product to investors once financial goals are met. Recently, the Federal Circuit Court found that a letter sent in response to a request for pricing information, as well as a price chart and specific commercial terms for a new design for a medical device, constituted a commercial offer for sale. The sale, which occurred prior to filing a design patent on the innovation, caused the later-filed patent to be invalidated. This nuance of U.S. patent law is underappreciated but important to note when considering use of a fundraising site that might include statements that are arguably an offer for sale with the potential to invalidate a later-filed patent.

It is crucial for healthcare innovators to fully inform themselves of best practices for preserving patent rights when using crowdfunding sites. Done appropriately, innovators can successfully use crowdfunding sites’ tools to finance their project while preserving patent rights to their product, which will be essential for the commercialization of the invention outside of these platforms.

In addition to patent protection, an innovation may have features that can be protected by other forms of intellectual property (IP), including copyright and trademark, even trade secrets. A proper strategy considers what should and should not be disclosed and at which time in the product’s development process such disclosures will best benefit its creator. To note, protection of IP rights may not be limited to patents, and innovators should take care to become familiar with their options. Because the law with respect to these public disclosures can be unclear and the effects irreversible, it is

essential to address these issues prior to a campaign to ensure fundraising efforts are not hindering the product's prospects in the long run.

By understanding the potential effects of a public disclosure before outsourcing funding online, well-informed entrepreneurs can:

- Effectively protect their project's patent (and other intellectual property) rights while minimizing initial costs related to such protection.
- Demonstrate to potential future long-term investors that the entrepreneur understands and leverages IP tools appropriately.
- Safely raise funds, evaluate commercial potential, and build a community of support while gaining a secure form of exposure for the product via online campaign sites.

While the best practice is to secure IP protections prior to a fundraising disclosure, the U.S. provides some recourse for those who ventured into the crowdsourcing space without first seeking protection of their IP. The America Invents Act (AIA) affords a grace period after a public disclosure under certain circumstances, such that inventors may be able to salvage patent rights after using a crowdfunding platform. Recovering these rights is time-sensitive – individuals may file a patent application up to one year after an initial disclosure. As such, if an inadvertent disclosure is made and patent rights are in jeopardy, it is important to determine what rights may be preserved as soon as possible, as these options will be lost if more than one year passes after initial disclosure on a crowdfunding site. Once lost, these rights cannot be recaptured. Internationally, entrepreneurs may be even less fortunate, as many countries have no such grace periods.

Takeaways for Healthcare Innovators

The two extremes of disclosing everything or disclosing nothing are rarely the best approach for maximizing the value of a product or business. Understanding the options when commercializing emerging companies and conducting fundraising is necessary for navigating the path from development to commercialization

successfully.

If you are considering posting your healthcare innovation to a crowdfunding platform, be sure to:

- Prepare a description of your business and product that carefully balances marketing information and excites your target audience, excluding information that should remain confidential for the time being.
- Determine which forms of IP may best protect your innovation – patent, trade secret, and copyright may all apply to various aspects of your innovation.
- Consider whether your public disclosure might easily be reverse-engineered or copied – this informs what type of IP may be most appropriate.
- Where applicable, file patent applications as soon as possible, preferably prior to using a crowdfunding site.
- Carefully consider how pricing and/or future sales are described.
- Document and date any disclosures of information to others, particularly when done outside of any obligations of confidentiality.
- Carefully review the terms and conditions of any crowdfunding platform.

If you disclosed your invention, please remember that you may still have time to preserve at least some of your patent rights in certain jurisdictions, particularly if the disclosure occurred within the one-year grace period.

Like most modern networking initiatives, crowdfunding sites offer advantages many emerging companies in the healthcare realm cannot find elsewhere. While interested inventors do not need to avoid these platforms entirely, it is crucial they are used wisely.

If you have questions or would like to learn more, please contact [Eric Volz](#) or [Nicole Tepe](#) of Frost Brown Todd's [Intellectual Property](#) and [Health Care Innovation](#) teams.

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