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IP Due Diligence Has a Shelf Life: Why Investors Must Reexamine IP at Every Round

In an innovation-driven economy, intellectual property (IP) is often the single most valuable asset a high-tech or biotech company owns—frequently worth more than all its tangible assets combined. Sophisticated investors therefore treat IP diligence as key to de-risking a deal. Both sides benefit; whether you are investing in a company or raising a round of financing, the IP is often central to making the deal proceed. What many investors do not appreciate is that *IP diligence is not a one-time exercise. It has a shelf life, and it expires faster than most people think.*

Two features of the patent system working together—a lengthy time window during which new applications are invisible and an evolution of claim scope that often occurs for years after an application becomes public—are what cause IP diligence to go stale. Either one alone can cause a prior diligence report to go stale; together they make diligence at each round a necessity.

Reason one: There is an 18-month blind spot

When an inventor files a patent application, it is not published for 18 months after its priority date. During that window, the application is invisible—it cannot be found by any outside searcher. A competitor's application that might one day threaten a company's freedom to operate may already be on file yet entirely undiscoverable at the very moment an investor is running diligence. No amount of diligence skill can surface an application that the patent system has not yet disclosed. And some applications never enter this public timetable at all. For example, a U.S. applicant who forgoes foreign filing can request nonpublication, keeping the application invisible until it issues.

Reason two: Claims are a moving target

The second reason is less obvious and in practice just as important. The scope of what a patent application will ultimately protect is not fixed when it publishes. The claims that define its property rights, the precise boundaries of what the patent will and will not cover, routinely change, sometimes dramatically, as the application moves through the examination process. Applicants frequently file broad claims at the outset, then narrow or otherwise rewrite them before examination begins, and then perform further claim amendments throughout prosecution, a process that commonly spans several years.

The consequence is that even the applications an investor did identify at an earlier round of IP diligence cannot be taken at face value later. A third-party application whose claims appeared harmless during Series A diligence can issue years afterward with claims that squarely block a company's lead product. The reverse also happens; an application that once seemed threatening can emerge from prosecution with such narrow claims that it no longer poses any risk. A snapshot of pending claims has a short useful life because those claims are still being written.

Why prior diligence becomes unreliable

Put the two reasons together and the conclusion follows: Diligence performed for a Series A round cannot be relied on at Series B. New third-party applications may have surfaced from the blind spot, and throughout prosecution previously identified applications may have shifted in scope in either direction—generally narrowing but sometimes broadening or

otherwise migrating into a more troubling position. An investor entering at a new round of funding needs fresh diligence, even if a prior investor cleared the IP of the same company via diligence just one round earlier.

Why the stakes are highest in life sciences

For life sciences companies, research and development stretch over years, and revenue is often delayed far into the future by clinical trials and regulatory approval. In that environment, the IP portfolio is the asset, the thing an early-stage investor actually is buying. Obtaining strong rights of ownership that are enforceable is not a mere formality; it is the core of the investment thesis. These long timelines also tend to mean that more substantive prosecution activity transpires between financing rounds, which makes more opportunity for the claim landscape to shift under an investor's feet.

Four pitfalls that recur

1. **Relying on the last round's diligence.** For both reasons noted above, prior-round diligence is a starting point, not an answer. New patent applications and competitor positions surface and the claims of known applications keep evolving.
2. **Ownership and inventorship gaps.** It is surprisingly common, especially in university spinouts, for a company not to possess clean ownership of the IP it believes to be its own. Missing assignments, unresolved inventorship questions, and university license terms all can undermine the value on the balance sheet.
3. **Freedom-to-operate surprises.** A strong patent portfolio protects a company's own innovations; it does not guarantee that the company will affirmatively be able to sell its product without infringing on someone else's rights. Freedom to operate is a separate analysis, the one most exposed to both the blind spot and evolving claims.
4. **Weak trade-secret hygiene.** Unlike patents, trade secrets are protected only by secrecy. Confidentiality agreements, access controls, and documented protocols are what stand between a valuable trade secret and a worthless one. Their absence is a red flag.

What general counsels, chief financial officers, and investors should take away:

- **Renew diligence at every round.** Treat IP diligence as a living process tied to each financing or transaction event, not a document you inherit from the prior round.
- **Remember that known risks evolve.** Reexamination is not only about finding newly published applications; it is also about rereading the claims of applications you already knew about, because their scope may have changed materially since your last look.
- **Separate "what we own" from "what we can do."** Confirm both the company's ownership position and its freedom to operate. They are different questions that often yield different answers.
- **Match the expert to the technology.** The complexity of IP diligence scales with the complexity of the product. Ownership of a small-molecule therapeutic can be established with near certainty; however, assessing potential IP risks to cell and gene therapies demands reviewers possessing deep scientific and legal expertise. See our forthcoming deep dive on biotech and cell- and gene-therapy deals.
- **Build diligence into the deal timeline and budget**, including post-closing monitoring, because both the applications on file and the claims within them will keep evolving after the wire clears.

Day Pitney's Patent Prosecution & Strategy team advises investors and companies on IP due diligence across the high-tech and life sciences sectors.

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