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Attorney Explores Common Misconception About Patents

by Rebecca Ann Krefft

Lexington, KY - Inventors often ask me about obtaining a patent to market or sell an invention "safely" without the risk of another patent owner asserting a different but similar patent against the inventor. In fact, the notion that a patent gives an inventor the right to practice or sell an invention free from the claims of other patent holders is one of the most common misconceptions about patents. As I explain to clients, what a patent does give is the right to prevent others from selling an invention, as well as the right to prevent others from making, using, importing or offering for sale the invention.

While at first this might not seem like much of a distinction, it is especially meaningful when you consider that most inventions draw from previous ideas. For example, let's say an inventor has a patent on a chair with a built-in cup holder. This particular patent gives the inventor the right to prevent others from selling a chair with a built-in cup holder but does not actually give the inventor the right to sell such a chair. Why? Because the owner of a previously issued patent for a different invention could prevent the inventor from practicing his/her invention. For example, a company that owns a previously issued patent on chairs in general could prevent everyone else from selling chairs, including chairs with cup holders, blue chairs, chairs with ottomans, etc.

So, you ask, what is an inventor to do if he/she wants to practice his/her invention? Let's continue with our chair example. If the company with the general patent on chairs is interested in selling chairs with cup holders, the inventor could approach the company and offer to enter into an arrangement commonly referred to as a "cross-license." Under the terms of a cross-license, the inventor would agree that the company can sell chairs with cup holders in exchange for the company permitting the inventor to sell chairs in general. If the company is not interested in selling chairs with cup holders, or if the inventor does not want to allow the company to do so, the inventor could offer to purchase a license from the company, giving the inventor permission to sell chairs in general.

Unfortunately, even if our inventor is able to enter into a license or cross-license agreement with the company, he/she still might not be "safe" to sell chairs with cup holders free and clear because there could be another company out there that owns a patent on cup holders, for example. In that case, the inventor might also have to get a license from the cup holder company to sell the inventor's chairs with cup holders.

With all of this uncertainty, how can an inventor find out what other patents are out there and who owns those patents? The best way to identify patents that could cause a problem for an inventor is through what is commonly referred to as a "clearance" or "freedom-to-operate" search. Typically, a clearance search looks through the patents in a certain subject area, searching for inventions that could prevent an inventor from practicing his/her invention. Once an inventor knows what other patents are out there and who owns them, he/she can make an informed decision about the need to obtain a license to one or more of those other patents before trying to sell his/her own invention.

In summary, the right to actually practice or sell an invention free from the claims of other patent owners is not among the valuable rights that a patent gives its owner. A clearance search, however, can help assess the risk of other patent owners asserting their claims against a patent owner.

Rebecca Ann Krefft is a registered patent attorney with Stoll Keenon Ogden, PLLC, Lexington.

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