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Patents harder to obtain now, attorney say

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By Ralph Schaefer TBLN Correspondent

GableGotwals attorneys face multiple challenges as they seek patent protection for clients. They are, from left, Todd A. Nelson, Scott R. Zingerman, James F. Lea III, and David G. Woodral. Ralph Schaefer/For TBLN

Back in 1899, Charles H. Duell, then-commissioner of the U.S. patent office, purportedly said "everything that can be invented has been invented" and the office should be closed.

The quote has been debunked over the years, but the quote is worth a chuckle 118 years later by looking at what has happened as technology has exploded and changed the face of the world. Anyone from that era would get a different perspective from four GableGotwals lawyers who are facing challenges the 19th century commissioner could not have imagined.

Todd A. Nelson, Scott R. Zingerman, James F. Lea III and David G. Woodral are registered patent attorneys.

Patents are still very much intact, said Woodral. There have been changes, and the public perception of patents has changed, but it no longer is easy for a person to find an attorney to file papers for a concept or an idea, start a business and go to market.

Now they have to protect that patent they have invested in and worked to develop either in federal court or through the Inner Party Review in the America Invents Act.

Challenges have resulted in a pushback from the U.S. Patent Office that makes it harder to get patents, particularly on software, Woodral said. Many objectors claim the sought-after patent is not prior art, that someone has done it or it is a variation on something done earlier.

One objection is that the idea is too abstract and no patent will be issued because it is not embodied sufficiently in the patent world, he continued. "I have done a lot of patents and tried to convince the patent office they are dealing with the embodiment of an idea, not a concept."

Lea noted the patent office has struggled with various issues and is less liberal in allowing software patents. Some inventions might be purely mechanical, but if they aren't cast in the right light, then it is considered abstract, Woodral said.

It might have been possible 10 years ago to tie abstract methodology to hardware, and perhaps it would have been possible to draft a method claim for software, Lea said. Now a mechanical device is required where action is involved.

A patent attorney plays a critical role by keeping up with the law. If an idea disclosure is sent to a patent attorney and there is no working relationship, the attorney will do the best job possible based on provided information.

Patent infringement is a concern, he said. If it is made overseas or in the inventor's secret lab, it often is difficult to know if there are problems, Woodral said.

If the inventor is asking the patent office for a monopoly, something that generally is frowned upon, the patent office will try to squeeze the product down and give it as tiny a piece of the market as possible. If the patent is narrow, it will protect the client's interest.

Woodral tells clients there are no patent police and typically it is a private action with a client bringing a lawsuit against an alleged infringer.

The four attorneys have their areas of expertise, but if the water "gets too deep" they turn to others, including firm lawyers Paul Rossler and Frank Catalano to fill in the blanks.

That outreach includes partnering with law firms in 25 foreign countries and utilizing their legal communities involving patents, trademarks and other Intellectual Property law.

“None of us are European attorneys, British barristers or solicitors,” Woodral said. “When we have clients in those jurisdictions, as well as Asian countries, we interface with colleagues we respect in those jurisdictions.”

There is no worldwide copyright law, he said. A client must use “a rifle approach” when seeking patent, copyright or Intellectual Property protection on the international market, Woodral said.

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