

Patents: A License To Sue

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Robert J. Marks:

Welcome to Mind Matters News. I'm your non patentable host, Robert J. Marks. Today we talk about whether artificial intelligence should be named as an inventor on a United States patent. Some believe a patent gives an inventor the right to manufacture their invention without any competition. The truth is a little bit more sobering. Hal Philip, the inventor of the modern touchscreen you probably use daily, says patents only give the owner the right to sue, if a patent owner doesn't sue anybody can use the technology. Patents are written into the United States Constitution, but the US government will never defend a patent. That responsibility belongs to the owner of the patent. Hal Phillips sued Apple when Apple used his touchscreen technology on their iPod. Big companies often use patented interventions without permission. Big companies know that patent holders must spend big bucks to sue them in federal court. Rich big companies can either bully or negotiate and buy the patents for big bucks. Defending a patent is expensive, so is filing for a patent.

The rule of thumb is that the writing and submitting of a patent costs the same as a new high-end car. Even after that, there are periodic payments that must be made to the US patent office to keep the patent valid. I have served as an expert witness in more than one patent dispute, and the money patent owners pay attorneys and expert witnesses would make your head spin. Patents are issued to inventors to protect the inventor's intellectual property. Should an artificial intelligent computer program ever be listed as an inventor of a patent? If Hal Phillip is right and the only utility of a patent is the ability to sue, would AI have any right to sue for a patent infringement? Does AI have the right to sue? That's our topic today. Our guest is Richard W. Stevens, Esquire.

Richard is an attorney and an author, and he is written extensively on how code and software systems, evidence design, and biological systems. He holds a JD with high honors from the University of San Diego Law School and a computer science degree from UC, San Diego. Richard has practiced civil and administrative law litigation in California and in Washington DC. He's taught legal research in writing at George Washington University Law School and at George Mason University Law School, and he now specializes in writing dispositive motions and appellate briefs. Now, I had to look up the term dispositive, and so I'm going to make the listeners look it up also, he specializes in writing dispositive motion to the appellate briefs. He has authored or co-authored four books and has written numerous articles and spoken on subjects including legal writing, economics, the Bill of Rights, and Christian Apologetics. His fifth book Investigation Defense is forthcoming. Is it still in the hopper, Richard, or are you done with it?

Richard Stevens:

Thank you, Bob. No, I'm actually finished with the book. It's just a matter now of packaging and getting it out. Yeah.

Robert J. Marks:

Okay. Well, congratulations. So welcome to the podcast. Before we start, I have a question for you. An attorney's degree is called a JD or a Juris doctor. That's the degree that you have. It's the equivalent of a PhD, but nobody calls an attorney doctor. I don't think they ever have. What they do is they call him

Esquire, attorneys often use a suffix, like I introduced you as Richard W. Stevens, Esquire. What's the deal with Esquire? Why don't they use the doctor? What does Esquire mean? Do you know?

Richard Stevens:

Oh, I don't know the precise background of it, but somewhere along the line, Esquire in England came to identify somebody of some prestige and typically a landowner and that kind of thing who was not in the royalty or the royal family in any way. And somewhere along the line in the 1800s, somebody picked up the idea of appending that to lawyers' names. I don't usually use it much, but sometimes you want to use it in correspondence because you want to tell a judge or another reader that you're a lawyer without putting that down in writing, Hey, I'm a lawyer, period. That kind of thing.

Robert J. Marks:

I see. And so it's a pretty universal indicator then, huh?

Richard Stevens:

Very often. You can put JD after your name, but fewer persons know what that means. Yeah.

Robert J. Marks:

Okay. Well, let's talk about patents. I have three US patents. All three of them are totally worthless. They were patented at a great expense, but nobody ever picked up the notion to develop them and to reduce them to practice and to market them. What's the criteria for being granted a United States patent?

Richard Stevens:

The whole procedure is one thing, and we can talk a little bit about that. The other is though, what the meat of a patent is, what exactly the law is trying to look for and what the patent office is looking for. So we can talk about that, because I think that's most relevant to our listeners. There are basically three things that have to be established for something to be patentable that go to the merits of the patent, not looking at the application and all the paperwork. First is that it has to be new or novel. Whatever the idea is that you're deploying or producing here has to be new or novel. That simply means that it hasn't been done before. Beware of a simple answer like that, but that's what it means, a novel, it hasn't been done before. It's not predicted inside some other patent. For example, sometimes a patent will have multiple elements and you try to patent one part that's already been patented. When they say it's not new and novel, somebody else already incorporated that idea.

The second thing is utility or useful, is the thing useful? And that eye of the beholder, but a lot of things have some use. That's not a tough one to overcome. But what that does is it keeps the patent office from having to process applications for silly things that don't do anything, but they're new. So, that's great. The third one is the term non-obvious, and that's probably the most litigated issue. It has to be non-obvious, which reminds me of back in the day, I don't know if it's still done a lot, but in software we used to talk about things that were non-trivial. It's the same idea, non-obvious meaning it's not something that would've been obvious to somebody who works in the same area as the inventor, and that's subjective, but that's what it is. Those are the three things you really need to show.

Robert J. Marks:

It sounds, Richard, like these are kind of judgment calls, if you will. And I think one person might say that a patent passed all these three and another one doesn't. The same thing as true with art, I believe,

except that art's a little bit more subjective. It's in the eye of the beholder. Do you think that these things being new, being useful and being non-obvious are in the eye of the beholder?

Richard Stevens:

I think that's true, but what happens, and it's part of the tradition of the common law and part of the tradition of any bureaucratic agency, is that the people who are in the decision making business, they talk to each other. They oftentimes have to write opinions about why they made the decision they did. And so the patent examiners, the professionals who work at the US Patent Trademark Office, who do this, who evaluate patents, they talk to each other. They have their conferences, they have journals, it's a whole body of understanding so that if you are going to be a patent examiner, you're going to learn how to do this and how to would be, what does everybody else do? So you start to get a body of understanding of, okay, we never consider ABC to be new and novel. We consider DEF to be new and novel.

And you start to get a sense of it. And once that body of understanding goes, and then it propagates through the court system, then the practitioners, people who are drafting the patents, people litigating the patents will have a body of knowledge to refer to and say, Okay, what we're proposing today is new and novel, because after all, look at these other cases where it was found to be new and novel. And ours is like that. That's the method of the common law. And that's how it happens. So it's subjective. Yes. But it becomes a body of understanding so that you can somewhat predict it's not totally random.

Robert J. Marks:

Yeah. This is interesting. In the filing of my patents and in other patent applications that I'm familiar with, the patent office usually looks at it, and I think they're almost required to come back with some prior art. They reference some previous patents. And in my case, when they came back with this that the other patents were just, I don't know, they were just out in left field. They had very little to do with my patent. And my patent attorney said, Well, these guys, they're technical, but they live in DC and they have a high cost of living and not many people live there. And so therefore these examiners are not top of the drawer people. Do you have any comment on that or maybe you'd like to stay away from that as a third rail? I don't know.

Richard Stevens:

Well, it's actually not my area of knowledge. Very, very good friend of mine, we started practicing law together way back in the day, and she was a regular civil litigator. Then she went on to become a patent lawyer, and you have to take a special bar exam for that, by the way. But I've kept in touch with her over the many years now, and she would be probably a better person to ask that kind of question, although she'd probably want to go off the record too. But as far as whether they're qualified people or not, I don't know. I do a lot of litigation in the federal government, and I think it's safe to say that you can be pretty high up in the federal government and not really be all that strong in your field of practice.

Robert J. Marks:

And it could be that every organization has its weak links and maybe we just hit a weak link and the experience it as I'm talking about.

Richard Stevens:

Well, actually it's very common. I see this all the time, whether it's regular litigation or administrative litigation, which is the patent stuff, is that sometimes the people working in the trenches have to show

their boss. Okay. They have to show their boss, Hey, I did my job. See, I checked in, I looked for prior art, and here's what I found it. They're documenting that they looked at what the edges around your patented concept and your patented deployment is. And so they've oftentimes, in the common law, and certainly in patent, you want to be able to define the edges are that you haven't reached. Okay, if this far to the right, then it wouldn't be. If it's this far to the left, it wouldn't be. But we're in between. And so that's sometimes why prior art or other precedents in cases are cited, is to draw perimeter around your decision to say see mine's justifiable because it doesn't go to the edges.

Robert J. Marks:

I would imagine that the patent examiners have a quota that they need to meet in terms of the number of examined patents. And it reminds me of my job as a professor, the number of papers that I write is more important than the quality of the papers. So if they're meeting a quota, unfortunately it's the quality of the examinations that goes out the door, and they're just looking at the number of examinations. We have a saying at academia that the dean can't read, but the dean can count. So they can count the number of publications that we have. And I suspect that's the same way with the patent examiners, that they have a certain quota that they have to meet. Hey, what is the criteria for being granted a US patent? Do you have to be a US citizen or can anybody apply for a patent?

Richard Stevens:

I'm not aware of a citizenship requirement. If there is one, it's new to me. It doesn't ever come up within anything I've ever looked at. Pretty much the person who wants to apply for a patent has to be a human.

Robert J. Marks:

Okay.

Richard Stevens:

Well, that might have seemed obvious until recently, but it has to be human. And the recent decision by the federal circuit held to that extent that under current law, you have to be a natural human being, natural person. You can't be a corporation. And under the recent holding, you cannot name a hardware software combination, which we might call AI. You can't name that as the inventor on the application because the law requires you name a person.

Robert J. Marks:

Well, you just answered my next question was that companies are certainly not human beings. And I suspect that, I think what you're telling me is that companies cannot be enlisted as the inventor of the patent, but in my patents, they were assigned to a company that's different, right?

Richard Stevens:

Absolutely. Absolutely different. And indeed, well, there's a whole world of issues between employees and their employers about who owns intellectual property. And oftentimes that's the subject of contracts, employment contracts or nondisclosures and that sort of thing where you sign up and say, Okay, if I do anything and I work for this company, this corporation, and I create something that's patentable, the owner will be the corporation, not me, but on the application, the person who invented it will have to be named as the applicant.

Robert J. Marks:

Okay, because we're going to talk in a little bit about the rights that artificial intelligence has as a non-human. Certainly corporations have rights in some sense that a human doesn't have. And so I wonder if that's an open door, but we'll talk about that in a little bit. How long does a patent last? It's not that long, if I recall.

Richard Stevens:

Yeah, there's a couple of deadlines on it and it's changed a couple times. Hang on a sec. I wrote that down because I wanted to have that handy for you. If I recall, it's 17 years and 14 years, but I'll double check that for you. That was my last recollection. 17 years is for the utility patent, 14 for the design patent.

Robert J. Marks:

What is a utility patent and what is a design patent? What's the difference between the two? And are those the only two types of patents there are?

Richard Stevens:

No, there's more. But there's a plant, plant patent. I say that three times.

Robert J. Marks:

Plant.

Richard Stevens:

Plant patent, you can actually patent a plant.

Robert J. Marks:

Really?

Richard Stevens:

Yes, you can. And so that's fun. And that not an area that I know very much about, except I know that it's true. And you can read about it, people who invent new plants. So all the people doing that biotech work using plants can patent the results of their work. But a utility patent is the one that everybody thinks of when you think of a patent, it's a machine, a tool, a device app or a process. Software, for example, can be patented. So, any number of things like that. So it's when you think of an adventure working in his or her garage, that's the usually a utility patent. A design patent on the other hand, has to do with the design of a product. For example, you could have a product that did the same thing, but the external design or the design of the internal and external parts is sufficiently different to be novel, useful, and not obvious to warrant being recognized and protected.

So for example, the iPhone itself, when it came out, Apple made that device. There were some patents for some of its utility functions, but there could also be patents for its design, the way it looked, the way it was presented. So somebody couldn't make an exact knockoff of an Apple iPhone and then market it as their own, because that would be infringing the patent, assuming they got one.

Robert J. Marks:

I see. But that reminds me more of trademarks in terms of shapes that's patentable as opposed to trademarkable?

Richard Stevens:

Okay. So that's a really nice question. A trademark is a completely different beast, it's protected under different law, actually has a common law basis. And then there are statutes in the states, and there's federal statutes and all the rest. A trademark is the way you present yourself in business to others. Okay. It's a way you present yourself. So it could be something like something that would have a shape, but can also be a phrase, words or words written in a certain format. For example, the perfect example is the Coca-Cola symbol. It's a very stylized script text. It's been the same for a hundred years or more. Coca-Cola, you write it that way, and that is trademarked, and it can be trademarked indefinitely, unlike a patent which expires. So a trademark, sometimes called trade dress, there's all kinds of other terms. Trademark's a wholly different matter, but the design of a product is not considered that, it's considered the design of the product. It's the physical manifestation, not something that just communicates the business identity.

Robert J. Marks:

I see. So that's the reason, for example, the shape of an Apple phone would be patentable, but not copyrightable. It's a physical shape. Is that right?

Richard Stevens:

Good question too. Copyright would protect a sculpture, for example. And so that's why one might ask the question, Well, wait a minute, isn't this more like a sculpture than it is like a device? But the patent law protects the incarnation, as it were, of the piece of hardware in a certain way. So you might argue copyright, but the law protects it much better if it's patent.

Robert J. Marks:

I see. I visited France one time and went to a place where they made perfume, and I met an interesting guy that was called the nose. And the nose, his job was to sit around and sniff different perfumes. And he could, I guess there's also the equivalent of tongues that can taste something, for example, wine and tell you all of the different nuances of the different flavors that go in there. But I've heard that aromas and tastes are not patentable because they can't be quantified. They can't be measured. I thought that was interesting. I guess it's on the list with the perpetual motion machine of things that can't be copyrighted.

Richard Stevens:

Oh, you don't mean copyright. Patentable.

Robert J. Marks:

I'm sorry. You're right. Patented. I'm sorry. Yes.

Richard Stevens:

No, that's fine. But it's always good to have the opportunity to correct you or you to correct me because the clarity on this is important. Well, a smell or a taste is a configuration of neural impulses from stimulation. So that wouldn't, it's not a device and it doesn't have a design, and it's not something...

That's one of the things that you have to do. Now, we talked about new useful and non-obvious, but you also have to be able, when you file for a patent, you have to be able to adequately describe it in a way that someone else could build one.

Robert J. Marks:

Okay. But couldn't you do that chemically with say, a perfume or something that tasted good?

Richard Stevens:

True. You could do the chemistry, but the sense of smell and taste or the overall composite of flavor is entirely in your mind.

Robert J. Marks:

I see. I see. Okay. Let's take a hypothetical. I sue you for infringement on a patent. It seems like this is kind of personal damage that you've done to me, and I would think it would be best tried in a civil court, but all patents are tried in federal courts. And why is that?

Richard Stevens:

I can explain that, but I wanted to correct myself. It used to be 17 years for utility patents. It's now 20 years. I just want to say that.

Robert J. Marks:

Okay. Thank you.

Richard Stevens:

Yeah. Okay. So to sue on a patent, okay, the first thing you recognize is that the legal right to protect a patent, which is what this whole process is, the legal right to protect a patent is a creature of the US Constitution. And so that's what makes it a federal matter. And the way that the constitution reads it and the way that Congress has adjudicated it, or I should legislate on it, and then how the courts have held that patent litigation is federal litigation. And the courts that have the jurisdiction over that, under section three, are the federal courts, that's who has jurisdiction just by law. It's not off of Sinai, it's just the way it's set up.

Robert J. Marks:

I see. I was an expert witness in a patent dispute case that was tried at the New York City Federal Court, which is just a beautiful court. It's right near Wall Street. It was close to the World Trade Center. So we were sitting there waiting for our item to come up in the docket and in bounce these guys all in orange suits. And the judge had to rule whether these guys were guilty of violating the RICO statutes, which is also a federal crime. And she got mad at one attorney and said, Look, I had problems with you with the World Trade Center bombing. This was not the 9/11 incident, but a few years before that, they had put in a truck into the bottom of the World Trade Center and tried to explode it. And she says, the judge says, I've had problems with you before, just go away.

Now, this, Richard, this was right before the same judge that was ruling on a RICO statute had to confront us and decide the difference between a neural network and a fuzzy decision tree. That struck me as an incredibly broad area of expertise these federal judges have to know. I just wonder how they can be competent across the spectrum.

Richard Stevens:

That's a very good question. Just to clarify, also, when you asked me earlier, I wanted to be sure that it was clear to people that patent litigation of the sort we're talking is not criminal, it's civil. Just so they won't think that it's like the World Trade Center bombing.

Robert J. Marks:

Oh, it's still civil, but in a federal court. Is that right?

Richard Stevens:

Yes.

Robert J. Marks:

Oh, okay.

Richard Stevens:

Yeah. So now your question is what does a judge have to know? It turns out that probably the single most powerful judicial official in the United States is a sitting US district court judge.

Robert J. Marks:

Yes. That's who we were before, by the way.

Richard Stevens:

Yeah. As a result, they're the first line of federal litigation, civil or criminal, and they have to know their stuff now, But they don't necessarily have to have encyclopedic knowledge. They don't have to be subject matter experts in everything. That's what the lawyer's job is. So for example, my job is to write up, usually most of the work is actually in writing, some of it is oral, but you have to be able to educate the judge. Okay, your Honor, this is the law that we're looking at and this is why our side ought to win. And then the other side says, No, you ignorant idiots it's, the law is this, and this is how we ought to win. And so the judge, you can get educated about a matter and indeed factual matters, for example, things about fuzzy logic and whatnot that judge may not have heard of before, but it's up to the lawyers to try to educate the judge. And whether it's in briefs or sometimes through testimony, which I'm gathering you gave.

Robert J. Marks:

Yes. Yeah, that's exactly correct. The incredible part is that really, as an expert, I really got to dummy it down. I have to make sure that the common person can understand it. And that's difficult sometimes.

Richard Stevens:

Very and indeed. And you have to recognize that the judge, although we oftentimes might want to revere them, they're a person like you and me in the sense that they don't know everything, notwithstanding what some of them may say. And so that you do have to educate them like a person just off the street, a smart person, an educated person, someone who wants to know, but someone who doesn't already know.

Robert J. Marks:

And I tell you, I have all the respect in the world for attorneys, because the attorneys on the case, they had to become expert more than the judge in neural networks and fuzzy decision trees. And the case ended and I asked them, What are you going to do with all that knowledge about neural networks and fuzzy decision trees? Because they had been students, they had gone through a couple of graduate courses in that, and they said, Well, we move on to something else. We take some more graduate courses and some other litigation. So I was really impressed by that, their utility and their ability to adapt to the different cases. That was really, really impressive. So attorneys are good in defending patents. I was advised that you needed an attorney to prepare and file a patent. What would your advice be on that?

Richard Stevens:

Absolutely. I referred to my female colleague who lives in Silicon Valley, and that's what her career has been for the last 25 or more years. She worked for Hewlett Packard. Now she's on her own, she worked for some law firms as well, but almost her entire practice was drafting patents. It's a whole world unto itself. It's different from litigation just as drafting contracts is different from litigating contracts. So similarly drafting patents, but drafting patents is a real challenge because we talked earlier about new useful and non-obvious. Well, there's an art to drafting a patent so that you can show novelty in the words, because you have to describe this thing at length for the patent examiners and maybe judges to understand. So you've got to be able to show them, Okay, this is why it's new. You have to show, this is why it's useful and this is why it's non-obvious and you want to draft your patent in a way that it's narrow enough to be defensible, but broad enough so that somebody can't knock it off. It's a real nuanced writing.

Robert J. Marks:

So it sounds like it's an art then, huh?

Richard Stevens:

Very much so. And that's why you definitely want to get someone who does it all the time.

Robert J. Marks:

Okay. Well, Richard, I want to talk to you some more about humans being the only entities that can be issued patents, but we'll talk about that next time. We've been talking to lawyer and author Richard W. Stevens, here on Mind Matters News. And until next time, be of good cheer.

Announcer:

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