What To Do If You Are **Accused of Patent Infringment**

By Matthew R. Osenga – Goodman Allen Donnelly, PLLC

Being accused of patent infringement is serious and can have grave consequences. You could be liable for damages, including lost profits or reasonable royalties - maybe even attorneys' fees or treble damages. You could even be subject to an injunction. There are, however, a number of defenses to such an accusation.

Medical Activity Defense

One defense of particular importance to medical professionals is contained in § 287(c) of the Patent Act. This provision provides that no remedy shall apply to certain charges of patent infringement by listed medical professionals. Specifically, for qualifying activities, no damages, no injunction, no award of attorney's fees, and no civil action for infringement are available to the patent owner. Like many provisions in the law, this defense was the result of a compromise, so it is important to study the various provisions and requirements to determine the parameters of the defense.

The defense is available to "a medical practitioner's performance of a medical activity" that would otherwise constitute an infringement. If the defense applies, the remedies for patent infringement do not apply against "the medical practitioner or against a related health care entity."

The first issue to consider is to whom this defense is available. The statute defines a medical practitioner as "any natural person who is licensed by a State to provide the medical activity . . . or who is acting under the direction of such person in the performance of the medical activity." This definition seems to cover physicians, surgeons, nurses, and related health care practitioners. The statute also defines a related health care entity as "an entity with which the medical practitioner has a professional affiliation under which the medical practitioner performs the medical activity." Examples include nursing homes, hospitals, universities, medical schools, HMOs, group medical practices, or medical clinics. The statute also defines professional affiliation as generally requiring some type of contractual or employment relationship, staff privilege or membership.

Next, what type of medical activity falls within the defense? The statute defines medical activity as "performance of a medical or surgical procedure on a body," but then makes several very big exclusions from the definition. The defense does not apply to methods of use of a patented machine, manufacture, or composition of matter; nor does the defense cover the practice of a process in violation of a biotechnology patent.

The bottom line is that the defense applies to a relatively small number of patents directed to pure surgical or diagnostic procedures that are performed on a patient and that do not involve drugs or reagents to accomplish the result.

What Should You Do?

If you are accused of infringing another party's patent, it's advisable to speak with a patent attorney, who can assist you in determining the types of defenses that may be available, as well as an appropriate response to the party making the accusation.

The patent system can be a complicated and intricate experience. It is usually best to obtain advice from a patent attorney at an early stage in the process. ■

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