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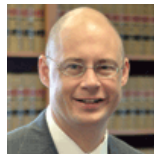
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Column: Patents on a purse string

Thursday, 30 August 2012 08:40 Kurt Rylander Law

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Clients invariably ask how much it will cost to patent an invention. Usually, the question comes after a lengthy explanation of patent law and the patent prosecution process. People want an estimate, a flat price, a round figure, a budget; something that they can metricize and hang their hat on.

The short answer is: we don't know for certain. Patent application drafting and patent prosecution have a number of variables, many of which are not under the control of the patent attorney. Any estimate is an educated guess. The most a patent attorney can ever do, if they are not negotiating a flat fee (which has its own hazards), is provide an estimate based on their experience and a consideration of the relevant factors. Entrepreneurs, however, have the ability to manage costs. To explain this, it is necessary to understand some of the factors that go into cost:

- **Prior art search:** whether a prior search is ordered, and how extensive; whether the client wants the patent attorney to evaluate the prior art search results; whether the prior art search results will require a design around; whether the client wishes the patent attorney to start drafting the patent application prior to the prior art search results being returned. All of these considerations can increase or decrease costs, dramatically.
- **Stage of invention and production:** whether the client has built a prototype or is working off unproven sketches; whether the client has made a production model; how complete is development of the invention; whether the client has a business plan. It is more costly to draft a patent application that is forever morphing as the client keeps on inventing.
- **Complexity of invention and technology:** what art area is the invention in – mechanical, electrical, computer science, material science, chemical, etc.; does it have multiple embodiments or variations. It should go without saying, drafting a patent application for a garage door opener is likely significantly less expensive than a new pharmaceutical.
- **Number of inventors:** How many inventors there are and are their relative contributions known. Inventorship is a tricky area of patent law that can have large repercussions down the road if not analyzed and identified correctly. The more inventors, the more complex the analysis can be.
- **Purpose for patenting:** Whether the client is applying for a patent application defensively or offensively. This can affect the depth and breadth of claiming required. Claim drafting is a serious analytical and somewhat time-consuming process.
- **Plan on foreign rights:** Whether the client wishes to pursue foreign patent rights. Foreign patent protection can significantly increase the costs of the process.
- **Public status of invention:** Whether the invention is on the market now or has it

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otherwise been publicly used or made known to others not under a duty of confidentiality. Just as designing around prior art can be costly, so too can the need to design around the client's own prior potentially barring public disclosures.

- Existence of prior applications: prior applications (such as a provisional application) of the same invention can lower the cost – but can also create difficulties increasing the cost.
- Cross-agency jurisdiction: Whether other government agencies need to be involved (such as the FDA or the Department of Agriculture). The more agencies involved, the more expensive.
- National security: Whether the invention implicates national security. This can sky rocket the cost and the difficulties in getting a patent. In the worst case scenario, a secrecy order is slapped on the patent application and secret proceedings then go forward preempting the patent application process.
- Federally funded: Whether the invention is partially funded with federal money. Federal money comes with federal strings.
- Size of the client: If the client is a small entity (as defined by federal regulations) the patent office filing fees are lower.

This is not a complete list, but it does provide the entrepreneur with factors that can be used to help manage costs. Obviously, entrepreneurs have a significant ability to manage patent costs in a number of these areas.

In short, if there is a prior art search, it will cost more. If there are multiple embodiments, it will cost more. If the client keeps adding to the invention, improving, and making changes, after the patent drafting has started, it will cost more. If the client wishes to pursue foreign patent rights, it will cost more. If the invention is incipient instead of developed, it will cost more. Etc... Wise entrepreneurs will make a comprehensive business plan. That plan should certainly include consideration of the above factors at a minimum.

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