LITIGATORS CORNER:

The Long Walk From the Gobi Desert to the River Styx

HOW THE POOR INVENTOR VIEWS THE SYSTEM

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There's a book, *The Long Walk* by Ronald Downing, about trying to find the yeti, the legendary Abominable Snowman of Tibet. But on the way, while researching his book, Downing heard stories of something far more remarkable: a man who had walked from eastern Siberia, through Mongolia and the Gobi Desert, through China, Tibet and the Himalayas, to India. The protagonist of *The Long Walk*, Slavomir Rawicz, a Polish army officer captured by the Russians and accused of being a Nazi, was tortured and imprisoned by the Communists. He trekked 5,000 miles after escaping from a Russian prisoner of war camp. He survived the ordeal, which took about a year. His story is remarkable.

I occasionally think of Rawicz's trek when I see what some inventors go through, especially those who end up in litigation. The average inventor faces a lot of obstacles, and isn't even aware of most of them. One of our clients, a doctor, said he never would have invented or persevered in his invention had he known how difficult it was going to be to make a go of it. He saw a problem, conceived his invention, researched and found suitable materials, scraped together a few dollars, paid machinists to make tools, cobbled together prototypes of his invention, tested the prototypes, hired patent attorneys, filed a patent application, wrote to and called any number of medical companies, visited many of them, negotiated license agreements, got sued, was deposed for weeks, hired new attorneys, fought through the lawsuits, designed improvements of his inventions, filed more patent applications, and on and on and on. More than ten years of crushing work preceded any success. No wonder that this man never would have invented or persevered in his invention had he known beforehand how difficult it would be!

But unlike Rawicz, the inventor's trek isn't over when he achieves his initial success by getting claims allowed and a patent issued. Instead, the inventor faces even more obstacles, such as having to persuade skeptical companies to license his invention or, even worse, seeing someone infringe his patent. Instead of ending his journey in an oasis, he finds himself on the banks of the River Styx, waiting for the boatman to take him into the Hades of litigation. Being a successful inventor takes real grit.

The first thing an inventor has to learn about being in a lawsuit is that he has a good chance of being treated as badly or worse than a bank robber or embezzler. Criminals have rights: *against* self-incrimination and *to* representation by a lawyer, to name two. Miranda warnings are used to insure that a person suspected of or charged with committing a crime knows what his rights are. Inventors, however, get no such "heads up." After seeing how so many intellectual property lawsuits go, I often think that an inventor ought to be given Miranda warnings before he or she files for a patent, and again before the lawsuit begins.

One of the Miranda warnings is, "Anything you say can and will be used against you." Well, that is certainly good advice for an inventor embarking on a patent application. Abstracts can now be used to interpret the invention according to the Federal Circuit, even though 37 CFR 1.72 says that abstracts are *not* to be so used. Even after the patent issues, the fights over its meaning are just beginning. *Markman* encourages pettifoggery, with arguments over the meaning of words that any sane bystander would regard as absurd. Claims and the specification are parsed, interpreted, and reinterpreted, with people arguing over the meaning of every word, even including what "a" means. According to the decision in *Festo* just a few days ago, anything said concerning patentability can preclude the doctrine of equivalents from applying. The inventor and his patent prosecuting attorney have to understand that anything said in the prosecution is not only going to be used in litigation; it may well be warped and twisted, to boot.

Another Miranda warning is, "You have the right to remain silent." A wise idea, and not just for crooks. One very experienced patent prosecution attorney told me that all he writes these days for the abstract in the patent application is a reiteration of the claims. Saying anything else can be hazardous to your inventor's health later on in litigation, if a hastily-written abstract is used to support an interpretation of the claims that isn't favorable to the inventor. I jokingly suggested the other day to a patent prosecutor friend of mine that he skip from the title directly to the claims and not write anything in between. Information disclosure statements can be used to interpret the claims, too.

An inventor who speaks up during prosecution and describes the prior art he has found may be punished at a later trial for being forthright.

The third Miranda warning is that "you have the right to an attorney." On this one at least, the inventor and the felon are on an equal footing. Both can have a lawyer.

The inventor's problem comes about in how to pay for his lawyer. Again, the crook has the edge. The fourth Miranda

warning is, "If you cannot afford an attorney, one will be appointed for you." A bank robber can have an attorney at no expense, but an inventor is out of luck, unless he or she works for a corporation that can afford the expense of attorneys working on an hourly billable basis. Individual inventors can rarely afford the costs of litigation, which the AIPLA estimates can reach $1,000,000, or more. Contingent fee representation is therefore a solo inventor's only recourse. Our firm's attorneys have found that this form of litigation works well, but requires a much different approach; the old-fashioned turning over of every rock doesn't work. A contingent fee lawsuit is to a conventional lawsuit like a Ferrari Formula One racer is to a Mercedes-Benz sedan. Both are great cars. But the racer, like the contingent fee lawsuit, is designed only for getting there: no seats for passengers, no luggage space, and designed for speed and handling -- to the exclusion of all else.

So, at the outset of his involvement with the legal system, the inventor can rest assured that his rights aren't as solid as those we grant to persons charged with criminal acts. One could say that the inventor isn't charged with a crime; instead, only his property is at stake. But this is *important property*, so important that it appears in our Constitution. If we have learned or re-learned anything in the past decade, it is that technology is crucial to a successful economy. Innovation is at the heart of that technology. If we do not have innovators, we will lose our edge. And committees don't innovate. People do. Thomas Edison, Chester Carlson, Robert Goddard and so many others were not corporate employees. They were individuals with ideas who brought their ideas to life. Robert Goddard described the process of invention pretty well when he said: "It is difficult to say what is impossible, for the dream of yesterday is the hope of today and the reality of tomorrow." Established corporations tend not to invest in dreams.

But one of the first things too many inventors see in the litigation process is a mean-spirited assault on their character by lawyers, many of whom never held a real job between college and law school and have no appreciation for the inventive struggle. The inventor sees the average defendant allege that he has cheated the Patent Office and then cheated the public. Despite the Federal Circuit's criticism of this kind of behavior on the part of intellectual property defendants, and the poisonous atmosphere it generates, these lawyers keep acting this way, without insuring that they have the evidence to prove all the elements of inequitable conduct, and without adhering to the high burden of proof that is required, to the detriment of all concerned.

If the inventor did anything to raise funds to develop his crude invention into a refined and marketable product with a chance for commercial success, during litigation he is told that he put it "on sale," and that it is therefore in the public domain. If he told a potential investor about the invention in order to raise capital, he has "publicly used" it, and it is therefore in the public domain. No matter what art he may have cited to the Patent Office, he never got it right. Every obstacle, without regard to its merit, is thrown in the inventor's path. We even have a suit where the defendant has argued both *that too little art was cited, and that too much was cited*. Everything is litigated, regardless of merit.

So the inventor in litigation feels like he has lived through an experience reminiscent of the title of the movie about Audie Murphy, *To Hell and Back*. So why do inventors persist, and why does our firm like to represent them? Because, despite the obstacles, we enjoy our contingent fee cases. There is another angle to contingent fee cases, besides the financial rewards they offer, and it makes up for all the hassles along the way. We get the chance to represent the individual inventor, that solitary and often lonely individual with an idea, who had the courage to take a risk in order to achieve a goal. You can accuse these inventors of just being interested in money, but my take on it is that they are interested in achievement, at least as much as the money, if not more. I admire them.

We contingent fee attorneys take a risk, too, albeit a much smaller one than most of our clients have taken, and this increases the camaraderie, and makes these cases more fun. We are rewarded only if we succeed, and only if our client succeeds. When you win one of these cases for an inventor you like, you are on the side of the angels. We like the feeling, because you have to admire a person who succeeds against the odds. IPT