INSIDE THE MINDS™

RECENT TRENDS IN PATENT INFRINGEMENT LAWSUITS

LEADING LAWYERS ON UNDERSTANDING RECENT CASES AND CONSTRUCTING EFFECTIVE DEFENSE STRATEGIES

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From the Courtroom, to the Boardroom, to the Capital: The Current Landscape of Intellectual Property Litigation

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As in-house counsel and businesses continue to cope with an uncertain economic environment, understanding the legal landscape of intellectual property litigation—with its concomitant risks—becomes even more important. The battlefields for many IP cases have shifted as plaintiffs search for even more favorable ground, and as costs and litigation risks increase for defendants—particularly, the ever-evolving e-discovery risk. As a result, and in an effort to manage risk, potential IP litigants have sought business and legislative means to make the IP litigation landscape less treacherous.

The Venue Landscape: The State of the Rocket Docket

Without question, "rocket docket" patent litigation venues—such as the Eastern District of Texas—have garnered huge focus from in-house and outside IP counsel over the past few years. Huge concern and fear—oft engendered by the legal press—of being hailed into "plaintiff-friendly" venues with no apparent connection to the businesses involved have led companies to enter into licensing agreements or early settlements, when actual legal exposure appears limited. As one example of legal press coverage engendering fear, an October 11, 2010 story in the *Connecticut Law Tribune* reporting on a $625.5 million jury verdict against Apple Inc. contained a reference to the "pro-plaintiff 'rocket docket' courtrooms" of the Texas Eastern District, and this type of coverage in recent years has resulted in businesses negotiating a quick exit from looming patent cases in that district. See Thomas B. Scheffey, *Taking A Big Bite of Apple*, CONNECTICUT LAW TRIBUNE, October 11, 2010. While large companies like Apple might reasonably expect to be hailed into court in the Eastern District of Texas, regional businesses with few connections to the venue have faced similar risks, as the Federal Circuit has generally upheld decisions by the Eastern District of Texas that rejected transfers of patent cases to other venues. See L. Zhu, *Taking Off: Recent Changes to Venue Transfer of Patent Litigation in the Rocket Docket.* Minnesota Journal of Law, Science & Technology Vol. 11, 905 (2010) (citing Alisha Kay Taylor, *What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?*, 6 J. MARSHALL REV. INTELL. PROP. L. 570, 582 (2007) (stating that both the Eastern District of Texas and the Federal Circuit have previously approved of plaintiffs' forum shopping in patent cases)).

The rocket docket landscape—particularly in the Eastern District—has recently undergone considerable changes, requiring potential defendants as well as potential plaintiff patent holders to rethink many of their existing strategies. Plaintiff's choice of a rocket docket forum no longer guarantees that choice. Recent rulings relating to Eastern District of Texas patent litigation, both from the district courts there and U.S. Court of Appeals for the Federal Circuit in Washington, D.C., have heavily scrutinized whether that venue is proper for the ultimate disposition of the case. Indeed, the Federal Circuit has granted writs of mandamus (in essence, emergency requests to an appellate court) ordering the district courts in the Eastern District to transfer cases to other venues not considered patent rocket dockets. See, e.g., *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008). At present, the CAFC has granted 50 percent of the writs of mandamus filed arising out of Eastern District patent cases. Actions such as these have led defendants to more thoroughly and strenuously challenge venue, with the result of more district court transfer orders or stronger perfection of the record for appeal.

Further, the notoriety and popularity of many rocket dockets—like the Eastern District of Texas—has substantially slowed the docket down. The obvious attraction to plaintiffs, particularly licensing entities, is an early trial date and the concomitant pressure exerted on the defendant, particularly in meeting discovery obligations. However, due to the large volume of filings, early trial dates are not as easy to come by with cases in Marshall, Texas now routinely put on schedules for trial that exceed twenty-four months. As a result, other patent-friendly venues, such as the Central District of California, are rising in prominence, although the jury pool appears less favorable, as historical plaintiff win rates in patent cases shows that the Eastern District of Texas is the most "patentee friendly." See Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 206 (2007) (referring to the Eastern District of Texas as "the patentee plaintiff's best friend" because patentees won 90 percent of jury trials in the district between 1998 and 2006).

Whether a litigant is seeking to enforce a patent or being hailed in to defend a product in a venue such as the Eastern District of Texas, careful strategic consideration should be given to the state of that particular rocket docket battlefield, as a strong challenge to venue or a too-distant trial date could prove devastating to a plan of attack. In many ways, the preconceptions about many rocket dockets have become misconceptions.

The International Landscape: The International Trade Commission

Intellectual property disputes between US and foreign entities will likely trend toward the International Trade Commission (ITC), as opposed to U.S. District Court. Where many foreign jurisdictions (such as the People's Republic of China) do not recognize or enforce US judgments, obtaining an IP infringement judgment after absorbing the concomitant cost is a pyrrhic victory at best. A successful ITC case, however, allows the IP holder to stop the importation of infringing products at the border, shifting risk to the accused infringer and raising settlement leverage.

The ITC is an independent, quasi-judicial agency of the U.S. Government with broad powers to investigate matters relating to US trade. One of the five main operational areas of the ITC is the adjudication of "cases involving imports that allegedly infringe intellectual property rights." See United States International Trade Commission, *available at* http://www.usitc.gov/press-room/about_usitc.htm. The ITC's intellectual property investigations are authorized pursuant to Section 337 of the Tariff Act of 1930, which is codified in the U.S. Code at 19 U.S.C. § 1337. This statute prohibits unfair trade practices, particularly the "importation into the United States, the sale for importation, or the sale within the United States after importation" of articles that infringe valid and enforceable intellectual property rights, including patents, copyrights, and trademarks. See 19 U.S.C. § 1337(a).

Litigation pursuant to Section 337 begins with the filing of a complaint at the ITC by the IP holder. Upon the filing of such a complaint, the ITC's Office of Unfair Import Investigations, an independent third party, reviews the complaint and subsequently provides a recommendation to the commission about whether to institute an investigation under Section 337.

Before instituting an investigation, the ITC must ensure certain requirements are met. The jurisdiction requirements for the ITC are quite different from those of a federal district court. The ITC has broad *inrem* jurisdiction over imported goods. Once the ITC complainant establishes that it has made significant investments in the United States for plant and equipment, capital and labor, or substantial investment in exploiting the patent technology, including engineering, research and development, or licensing, with respect to its product (19 U.S.C. § 1337(a)(3)), and that the imported product practices the patent at issue before the ITC, the ITC can issue an exclusion order preventing the importation of infringing goods coming into the United States, even in a situation where a federal court might not have personal jurisdiction over the respondent/accused infringer.

Another key distinction between an ITC proceeding and federal court litigation is the makeup of the participants. In addition to the complainant and the respondent(s) accused of infringement, the investigative attorney from the Office of Unfair Import Investigations also participates fully in the case. The investigative attorney works to ensure a complete record, objective advocacy, and to safeguard the "public interest" by considering the public health and welfare, competitive conditions in the United States, the production of like or directly competitive products in the United States, and US consumers. See, 19 U.S.C. § 1337(d)(1).

Section 337 promotes an expeditious resolution of the case, meaning that ITC cases often move at the speed of light compared to traditional district court litigation. To this end, the ITC requires that within forty-five days of initiating an investigation, the ITC establish a target date for final determination. See, 19 U.S.C. § 1337(b)(1). Usually investigations are completed within sixteen months, and an initial determination on whether there is a violation must be issued three to four months before the target date for a final determination. See, 19 C.F.R. § 210.42(a)(1). The remedies available at the ITC are unique and powerful. Upon a finding of infringement, the ITC may issue an exclusion order prohibiting the importation of infringing products. The order can be a limited exclusion order directed toward all infringing articles imported by parties found by the commission to infringe. It may also issue a general exclusion order prohibiting the importation of all infringing articles, regardless of whether those involved were parties to the ITC investigation. These general exclusion orders are less common, but they prevent the importation of goods by a party who disappears after an infringement finding, only to reappear shortly thereafter under a different name. See, 19 U.S.C. § 1337(d)-

(e). The exclusion orders are enforced by U.S. Customs and Border Protection.

Given the global nature of the US economy, the billions of dollars lost to global infringement and piracy practices, and the uncertainty of the enforceability of a US money judgment for IP damages in a foreign country due to lack of enforceability or susceptibility to collateral attack, companies are turning to the ITC for the swiftness of its procedures and teeth in its remedies. ITC investigations have increased substantially compared to the mid 1990s. Indeed, fiscal year of 2010 set a record for the most investigations ever instituted by the ITC. See United States International Trade Commission, available at http://www.usitc.gov/press-room/337_stats.htm. Many of these investigations are increasingly high profile and heavily monitored by the industry press.

One recent example of a high-profile case involving hundreds of millions of dollars is the ITC proceeding brought by Rambus Inc. against Nvidia Corporation seeking to stop the importation of Nvidia products with memory controls interfaced with other memory. See, Susan Decker and Ian King, *Nvidia to Pay Ramus Fees While Appealing ITC Ruling*, BLOOMBERG, July 27, 2010, http://www.businessweek.com/news/2010-07-27/nvidia-to-pay-rambus-fees-while-appealing-itc-ruling.html. Rambus, pejoratively referred to by some as a "chip troll," earned 96 percent of its revenue in 2009 from patent licensing royalties and refers to itself in press releases as "one of the world's premier technology licensing companies." Rambus filed its complaint against Nvidia with the ITC in November 2008 seeking an exclusion order to bar the importation of products allegedly infringing nine of Rambus' patents. See, Nick Farrell, *ITC backs Rambus against Nvidia*, TECHEYE.NET, July 27, 2010, http://www.techeye.net/business/itc-backs-rambus-against-nvidia. An Administrative Law Judge invalidated two of the patents in January 2010, but determined that three of the Rambus patents were valid, enforceable, and infringed. On July 26, 2010, the ITC sided with the Administrative Law Judge on the three infringed patents and issued an order that would ban imports of certain Nvidia chip products. See, Susan Decker and Ian King, *Nvidia to Pay Ramus Fees While Appealing ITC Ruling*, BLOOMBERG, July 27, 2010, http://www.businessweek.com/news/2010-07-27/nvidia-to-pay-rambus-fees-while-appealing-itc-ruling.html. The case is now on appeal before the Federal Circuit with no argument date scheduled. See, Susan Decker, *Rambus Defends Document Policy in Hynix, Micron Appeal Redux*, BLOOMBERG, October 7, 2010, http://www.bloomberg.com/news/2010-10-06/rambus-defends-document-policy-in-hynix-micron-appeal-redux.html. Although Nvidia is relying on a mandatory European Commission license scheme to continue shipping the allegedly infringing products, Rambus has filed a civil lawsuit seeking monetary damages for past infringement. See, Id. Meanwhile, Nvidia is appealing the underlying patent case, and challenging the patents in a review before the U.S. Patent and Trademark Office. See, Id. Also noteworthy is an August 13, 2010 Rambus press release announcing the signing of a patent licensing agreement between Rambus and Nvidia for certain memory controllers, but stating also that "the parties have not signed any releases of liability, nor dismissed any outstanding litigation between them." See, Rambus website, *available at* http://investor.rambus.com/releasedetail.cfm?ReleaseID=499125 (last visited October 24, 2010).

Undoubtedly there are other major players in the chip sector who were watching the Nvidia case from the sidelines who now feel compelled to enter into licensing discussions with Rambus. While South Korea's Samsung Electronics Co. agreed in January 2010 to pay $900 million and enter into a licensing arrangement with Rambus in order to end their dispute, Rambus also has chip-related disputes pending with South Korea's Hynix Semiconductor Inc. and Micron Technology Inc. See, Susan Decker and Ian King, *Nvidia to Pay Rambus Fees While Appealing ITC Ruling*, BLOOMBERG, July 27, 2010, http://www.bloomberg.com/news/2010-07-26/rambus-wins-patent-fight-against-nvidia-in-u-s-agency-ruling-shares-jump.html. It is highly likely that cases such as Rambus versus Nvidia will begin to dominate the IP litigation landscape, emphasizing the central role the ITC has in adjudicating such claims in a global economy.

The Emerging Landscape: Insurance, Discovery and Patent Reform

Insurance

The significant growth of IP-related litigation in recent years, particularly in rocket docket venues, has caused companies to seek out business solutions to manage IP-litigation risk—for example, emerging insurance products and coverage positions. Historically, little to no insurance coverage has existed for certain IP claims, particularly patent infringement, and such claims were routinely excluded in commercial insurance policies. However, along with the increasing value generated by IP on business balance sheets, the corresponding risks of economic loss from an IP legal claim not covered by insurance have also expanded. Indeed, with the American Intellectual Property Law Association (AIPLA) estimating the average cost of defense of an average patent infringement lawsuit at $1.5 million, and more complex cases averaging up to $4.2 million, legal fees alone could bring a company to its knees in a down economy, often forcing a large cost of defense settlement, regardless of exposure analysis or whether the company is the target defendant.

In the current landscape, companies and their legal counsel must maintain constant vigilance—through analysis of its insurance policy portfolio to staying abreast of recent court decisions impacting coverage positions—to ensure that their insurance coverage is sufficient and that all possible avenues of coverage are explored in the event an IP-related claim is filed against them. As an exemplar, what follows is a brief discussion on how insurance companies have responded to the growth of IP-related litigation, then an examination of several recent cases dealing with an insurer's "duty to defend" in patent cases arising from the coverage of advertising claims in Commercial General Liability (CGL) policies. The issue of insurance should be front and center in the evolving IP landscape in the coming years.

Insurance companies have adapted to the explosion of IP litigation by offering new tools for businesses to manage their risks of loss—loss measured both from the perspective of indemnity as well as defense costs. From offensive and defensive patent policies to loss of data protection plans, new products have been created to address these risks. The growth in new insurance products follows the reductions in coverage for certain IP claims in the CGL form by Insurance Services Office since 1998. See, Chris Drury, *Special Policies Provide IP Insurance*, CONNECTICUT LAW TRIBUNE Vol. 36, No. 16 at 1 (April 19, 2010). Specifically, the wording of the policy language on advertising injuries has been revised to limit coverage for IP claims. See, Id. at 1-2. As one example of a policy language change, the ISO revised the CGL policy form in 1998 to narrow the definition of "advertising" and require the insured to establish a connection between the alleged misconduct and the "advertising" activity in order for coverage to apply. See, Id. The ISO further revised the CGL policy form in 2001 to specifically exclude claims for advertising injuries "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights." See, Id. at 2. The changes made to the 2001 CGL form show the intent of insurers to exclude coverage under standard CGL policies and offer new products as an alternative. See, Id.

Although insurers have done their best to limit the scope of CGL policies in recent years, it is still incumbent upon company legal counsel to carefully scrutinize all the business's insurance policies for possible coverage of defense costs in the event of an IP lawsuit. Failing to do otherwise could even result in a malpractice claim. See, *Darby & Darby, P.C. v. VSI International Inc.*, 739 N.E.2d 744, 745 (N.Y. Ct. App. 2000). While new insurance products are now offered to specifically cover IP-related losses, existing CGL policies should still be carefully evaluated in the event of patent litigation, as several recent cases attest. These cases often hinge on the definition of "advertising injury" in the underlying CGL policies. The exact parameter of "advertising injury" has troubled the courts for years, and requires a fact-specific analysis. See *Frog, Switch & Mfg. Co. Inc. v. Travelers Ins. Co.*, 193 F.3d 742 (3d Cir. 1999). The cases below show that courts are capable of finding a trigger to the duty to defend in patent infringement cases where the advertising itself triggered the infringement..

Insurance - Hyundai Decision

Earlier this year, the US Court of Appeals for the Ninth Circuit ruled in *Hyundai Motor Am. v. National Union Fire Ins. Co. of Pittsburgh, PA* that coverage for "advertising injury" was available to Hyundai under its CGL policy for defense costs arising from a $34 million patent lawsuit. In this case, the "advertising injury" arose from the company's build your own vehicle (BYO) and parts catalogue feature on its website. In reaching its decision, the Ninth Circuit determined that Hyundai's website constituted "advertising," the BYO feature misappropriated the advertising ideas of the patent holder, and a "causal connection" existed between the alleged injury and the "advertising." See, *Hyundai Motor Am. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 600 F.3d 1092 (9th Cir. 2010).

The nature of the BYO website was analyzed in detail by the Ninth Circuit in determining that it constituted "advertising." The BYO feature "allowed users to navigate through a series of questions on a menu," and varied responses based on a user's input. Id. For example, a user of the website could select a specific engine type, color, transmission, and other options, then see a customized image of the vehicle with pricing information. Id. The parts catalogue feature of the website operated in a substantially similar fashion.

The court in *Hyundai* drew a distinction between advertising aimed at the public at large and solicitations aimed at individuals, finding that the BYO website fell into the former category. Id. The court quoted in its decision from the complaint filed against Hyundai in the underlying lawsuit, which alleged that the BYO feature constituted "making and using supply chain methods, sales methods, sales systems, *marketing methods*, *marketing systems* and inventory systems." Id. (emphasis added). According to the Ninth Circuit, the emphasized marketing language in the complaint "fits squarely within the definition of 'advertising'." Id. The court also noted that the BYO feature is distributed to "millions of unknown web-browsing potential customers," even if some of the information is varied based on user input, making it more akin to "advertising" than "solicitation." Id.

The Ninth Circuit determined in *Hyundai* that the BYO feature misappropriated the advertising ideas of the patent holder. Under Hyundai's CGL policy with its insurer, National Union, the insurer was, therefore, obligated to defend Hyundai against claims for the "misappropriation of advertising ideas." *See* Id. The patent holder suing Hyundai held a patent for a computer-based system to create customized product proposals at auto dealerships. In reaching its determination, the Ninth Circuit applied the contextual test set forth in *Mez Industries, Inc.* on whether the patents at issue "involve any process or invention which could reasonably be considered an 'advertising idea'." Id. quoting *Mez Industries Inc. v. Pacific National Insurance Co.*, 76 Cal.App.4th 856 (Ct. App. 1999).

Under the *Mez* test, the *Hyundai* court reasoned that the patent at issue involved a method of displaying information to the public at large to facilitate sales, meaning that the underlying process could be considered an advertising idea. Therefore, the underlying complaint's allegations against the BYO feature of Hyundai's website was based on the misappropriation of an advertising idea where "the BYO feature is the 'form' 'of the advertisement itself'." Id. In reaching its determination, the Ninth Circuit referred to a similar conclusion reached by another court applying Washington law, *Amazon.com International Inc. v. American Dynasty Surplus Lines Insurance Co.*, 85 P.3d 974 (Wash. Ct. App. 2004). In the *Amazon* case, a misappropriation of an advertising idea was found in a duty-to-defend case brought by Amazon.com against its insurer over a patent lawsuit where the misappropriation occurred by way of an interactive music preview technology that was integrated into Amazon's website. Just as the interactive music technology was itself part of the advertisement in *Amazon*, the BYO feature of Hyundai's website was determined to be a component of the advertisement in the *Hyundai* case.

The final issue addressed by the court in *Hyundai* was whether a causal connection existed between the BYO advertisement and the alleged advertising injury. Since the patent at issue in the *Hyundai* case itself concerned the method of advertising, and the BYO website feature was alleged (and determined) to infringe on said patent, the Ninth Circuit determined that the causation requirement was met. See, *Hyundai Motor Am. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 600 F.3d 1092 (9th Cir. (Cal.) 2010).

Insurance - DISH Network Decision

In another recent lawsuit brought against an insurer in federal court for defense costs arising from a patent lawsuit hinging on the parameters of "advertising injury" under a CGL policy, a Colorado federal judge found *no* duty to defend and indemnify. See, *DISH Network Corp. v. Arch Specialty Insurance Co., et al.*, No. 09-cv-00447 (Colo. Aug. 19, 2010). The underlying patent litigation sprung from an alleged infringement arising from the insured's automated telephone systems. The insured, DISH, maintained a CGL policy with five different insurers that included coverage for "advertising injury." Id. This case is now on appeal before the 10th Circuit.

In tackling the issue of whether the challenged conduct was "advertising," the *DISH* court analyzed whether the alleged infringing activity was aimed at the public-at-large, and thus "advertising," or was more a one-on-one "solicitation." Id. Although the *DISH* court focused on the two-party nature of telephone interactions, and stated "DISH fails to elaborate upon its usage of these telephone systems," it determined that DISH's automated telephone systems did constitute advertising for purposes of its judgment. Id. The court referenced both the *Hyundai* and *Amazon* decisions discussed above in reaching this conclusion.

On the issue of whether liability for an "advertising injury" existed under the CGL policy, the *DISH* court analyzed the coverage provided for "misappropriation of advertising ideas." Although the court acknowledged that there could be circumstances where patent infringement could constitute an "advertising injury," it asserted that the complained of advertisement must necessarily incorporate a patented technique as an element for the injury to exist. The court held that the underlying complaint did not allege that patented technologies were themselves incorporated as elements into the automated telephone systems and thus did not constitute "misappropriation of an advertising idea." Id.

After concluding there was no "misappropriation of advertising ideas," the *DISH* court examined whether there was any misappropriation of "style of doing business" under the CGL policy. Id. The court reasoned that only the technologies of the patent holder in the underlying lawsuit were misappropriated, rather than the "manner or style of business." Id. Therefore, according to the *DISH* court, the insured's automated telephone systems did not infringe a "marketing approach" of the patent holder, just its technology. Id.

The DISH court did not examine the issue of causation, since it determined that there was no "misappropriation of advertising ideas or style of doing business" and relief could therefore not be granted to DISH.

Insurance - Everest Decision

A 2009 decision by a federal court in the Northern District of Texas granted an insurer's motion for a declaratory judgment that the insurer, Everest, did not owe a duty-to-defend to its insured arising from a pending patent lawsuit under a CGL policy under Texas law. *Everest Indemnity Insurance Company v. Allied International Emergency LLC, et al.*, No. 08-CV-678-

Y (No. Texas, Jul. 14, 2009). The pending patent lawsuit revolved around nitrogen-foam firefighting equipment. In reaching its decision, the court found that the insured defendants failed to establish causation for the injuries in the underlying patent lawsuit from "an offense arising out of [the] business [of the insured]." Id. The court also analyzed the definition of "advertisement" in the CGL policy, and determined that it required broadcast or publication to more than one potential customer. Id.

Insurance - Summary

The emerging trend of plaintiffs pleading their claims in ways to trigger the duty-to-defend and duty-to-indemnify will surely continue, as new technologies and business models outpace the contractual terms intended to capture them. Although some of the language in the duty-to-defend cases based on an underlying patent claim discussed above may hinge on definitions contained in older CGL forms, the issues are still very much relevant. Both inside and outside IP counsel for companies should keep the issue of insurance at the forefront of IP risk management.

Discovery

As a matter of course in managing IP litigation today, electronic data that is considered potentially relevant to a case must be identified and preserved once litigation is *anticipated.* There are a number of reasons why this is so, one being that the Federal Rules of Civil Procedure require it. And yet, the real driving factor for managing discovery is fear of the penalties/damages (which seem to evolve by the week) wrought for failing to go through this process, apart from the legal duty.

Here is a potent example—in *Victor Stanley, Inc. v. Creative Pipe, Inc., et al*, (D.MD, Sept. 9, 2010), the court ordered the following sanctions based on the defendant's e-discovery "misconduct:"

> Among the sanctions that this memorandum imposes is a finding, pursuant to Fed. R. Civ. P. 37 (b) (2) (A)(vii), that Pappas's pervasive and willful violation of serial Court orders to preserve and produce ESI evidence be treated as contempt of court, and that he be imprisoned for a period

> not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs that will be awarded to Plaintiff as the prevailing party.

In addition to assessing possible jail time for civil contempt, the court imposed a default judgment and awarded attorney's fees as well as considered forwarding the case to the US Attorney's Office for criminal prosecution as a criminal sanction for discovery misconduct.

Numerous opinions also exist that impose penalties in the millions of dollars for allowing data to be permanently altered or deleted. Another concern is the fragility of electronically stored information (ESI). ESI can be easily and permanently lost or altered in ways that can be very costly unless a party acts as soon as reasonably practicable to identify and preserve the information. Even the simple act of re-booting a computer can make permanent changes to the data on that machine. Incorporate this with the exponential increase in the amount of ESI that businesses of all stripes and sizes can generate in just one day and from one custodian, and the concern for spoliation becomes very real.

The confounding thing is that the solution to this concern is really rather simple. United States District Court Judge Shira Scheindlin, in a number of her opinions, has laid out a relatively straightforward process by which companies and their counsel can minimize and likely avoid this spoliation concern. Without question, the specter of e-discovery will haunt the IP litigation landscape for years to come.

Patent Reform

Apart from the business and litigation approaches, a number of legislative proposals exist to manage IP risk, largely centered on so-called "patent reform." Much like "tort reform" did, patent reform has slowly gained greater momentum and increasing support on Capitol Hill in recent years, particularly following key compromises on certain hot-button issues. Nonetheless, despite the increasing support on both sides of the political aisle, the prospects for passing and enacting a comprehensive patent reform bill remain uncertain.

The current reform package with the most support is a more limited bill than earlier versions that reflects a number of compromises. To this end, some of the reforms in the bill, such as with venue, damages, and willful infringement, would simply codify standards recently articulated by the Federal Circuit and US Supreme Court. The most significant reforms in the bill include:

- Elimination of the current first-to-invent system with a first-to-file system. Supporters argue that transitioning to a system where the first inventor-to-file receives the patent would provide greater certainty of inventorship and bring the United States in line with the systems used in most other countries. Advocates of the first-to-invent system believe the current system is more helpful to small inventors unfamiliar with the patent process.
- Allowing third parties to submit prior art references to the patent office for consideration. Supporters argue this allowance would help ensure that all relevant information is considered during the examination process and reduce subsequent litigation over validity.
- The allowance of post-patent-grant review. Within nine months following the grant of a patent, it could be challenged on all issues of patentability.
- Providing the patent office with additional authority to adjust fees in an effort to recover its costs and upgrade its procedures and facilities.
- Elimination of the best mode requirement as a ground for invalidating a patent or otherwise finding it unenforceable.
- Ensuring that the courts serve as a gatekeeper on damages so that only methodologies and factors relevant and cognizable are considered with regard to damages awards.
- Allowing for recovery of damages for "willful infringement" only on a showing of "objective recklessness" by clear and convincing evidence.
- Requiring cases be transferred to venues that are clearly more convenient than the venue in which the case is pending.

Conclusion

From the courtroom, to the boardroom, to the Capitol, the current landscape of intellectual property litigation is as complex as the technology it is designed to protect. The courts, litigants, business leaders, and legislators continue through precedent, business products, and statute, to evolve in order to address and often shift the substantial risks associated with IP litigation in its ever-changing landscape.

In order to prepare for the coming changes, it is incumbent upon attorneys providing counsel on intellectual property issues—which, given the growing importance of IP across all business sectors, is nearly every attorney—to observe any new developments and adapt their practices accordingly. In order to avoid errors that jeopardize their clients' cases—or even result in a malpractice claim—legal professionals must constantly update their knowledge of the shifting IP litigation landscape.

Key Takeaways

- The rocket docket landscape has recently undergone considerable changes, requiring potential defendants as well as potential plaintiff patent holders to rethink many of their existing litigation strategies.
- Intellectual property disputes between US and foreign entities will likely trend toward the International Trade Commission (ITC), as opposed to US District Court. Many foreign jurisdictions do not recognize or enforce US judgments, but a successful ITC case allows the IP holder to stop the importation of infringing products at the border, shifting risk to the accused infringer and raising settlement leverage.
- Little to no insurance coverage has existed under standard CGL policies for certain IP claims, particularly patent infringement. Along with the increasing value generated by IP on business balance sheets, the corresponding risks of economic loss from an IP legal claim not covered by insurance have also expanded.
- Companies and their legal counsel must continually analyze the insurance policy portfolio and stay abreast of recent court decisions affecting coverage positions to ensure that their insurance coverage is sufficient and that all possible avenues of coverage are explored.

- It is incumbent upon company legal counsel to carefully scrutinize all the business's insurance policies for possible coverage of defense costs in the event of an IP lawsuit. Failing to do otherwise could even result in a malpractice claim.
- Electronic data that is considered potentially relevant to a case must be identified and preserved once litigation is anticipated, and failure to go through this process can lead to ever-changing penalties and damages.
- In order to prepare for possible "patent reform," it is incumbent upon attorneys providing counsel on intellectual property issues to observe any new developments and adapt their practices accordingly.

Chris L. Gilbert, a partner at Bryan Cave LLP, devotes his practice to high-stakes, complex litigation and appeals. He has a diverse practice but focuses on intellectual property with an emphasis on patent and trade secret litigation in a wide range of technologies, complex business disputes and dissolutions, international litigation, and entertainment and art law. He has litigated across the country in trial and appellate courts from New York to California, as well as multidistrict litigation panels (MDL), bankruptcy courts, the International Trade Commission (ITC), mediations and arbitrations. Internationally, Mr. Gilbert's practice centers on Asia.

Mr. Gilbert represents individuals, professional entertainers and athletes, closely held, private equity and Fortune 500 companies on both sides of the docket. Using state-of-the-art courtroom and litigation technology, he works closely with his clients, prominent experts, and jury consultants to efficiently prepare and win high-stakes, bet-the-company business and technology disputes whether at trial, on appeal or through alternative dispute resolution.

Mr. Gilbert also serves as outside general counsel for clients, regularly advising management and board members on corporate governance and transactions, strategic protection of intellectual property assets, and managing business risk.

Prior to joining Bryan Cave, Mr. Gilbert was a partner in the Dallas office of two international law firms, and a partner in a prominent law firm in Nashville, Tennessee, where he practiced complex business and music and entertainment litigation for several years, enforced and collected judgments amounting to over $450 million, and served as *litigation co-chair of an international legal network comprised of 140 law firms and more than 7,500 lawyers worldwide.*

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Dedication: *The authors dedicate this chapter to their families with love, humility, and gratitude.*

INSIDE THE MINDS™

TOP ATTORNEYS DISCUSS NEW DEVELOPMENTS IN PATENT LITIGATION

Recent Trends in Patent Infringement Lawsuits is an authoritative, insider's perspective on the latest developments taking place in patent infringement litigation. Featuring partners and chairs from leading law firms across the nation, these experts guide the reader through today's legal environment, offering insights on the new standards for obviousness and prior art as well as the new rules governing areas such as false marking and business method patents. These top lawyers demonstrate the importance of keeping up with legal trends, knowing the economic and legislative climate, and being aware of potential issues in a case or claim. Additionally, the authors discuss recent cases and laws relevant to patent infringement, such as *Pequignot v. Solo Cup*, *Stauffer v. Brooks Brothers*, and the Patent Reform Act of 2010. The different niches represented and the breadth of perspectives presented enable readers to get inside some of the great legal minds of today, as these experienced lawyers offer up their thoughts around the keys to success within this complex area of law.

ABOUT INSIDE THE MINDS:

Inside the Minds provides readers with proven business intelligence from C-Level executives and lawyers (Chairman, CEO, CFO, CMO, Partner) from the world's most respected companies and firms nationwide. Each chapter is comparable to an essay thought leadership piece and is a future-oriented look at where an industry, profession, or topic is heading and the most important issues for the future. Each author has been selected based upon their experience and C-level standing within the professional community.

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