Litigation Strategies for Intellectual Property Cases

Leading Lawyers on Adapting to New Trends, Improving Courtroom Tactics, and Understanding the Impact of Recent Decisions
Case Strategies to Succeed in the Changing World of Patent Litigation

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Recent Changes and Developments in Patent Litigation Law Relating to Willful Infringement, Induced Infringement, Business Method Patents and Obviousness

Perhaps more than ever before, businesses need to weigh the economic cost and potential benefits prior to pursuing a claim of patent infringement. As the cases discussed below indicate, there are additional and growing challenges in the arena of patent law that will affect both patentees and infringers alike. In terms of the most recent intellectual property cases—and in particular patent cases—the Supreme Court of the United States and the Federal Circuit have issued numerous decisions in the last two years that have materially changed the law in the field of patents.

In re Seagate: A Sea of Change in What Constitutes Willful Infringement

The In re Seagate Technology decision changed the standards for proving willful infringement and reversed decades of law that failure to introduce an opinion of counsel in defense to a willful claim could give rise to an adverse inference. In Re Seagate Technology, LLC, 497 F.3d 1360, 1371 (Fed. Cir. 2007) ((en banc)). Previously, willful infringement was determined from the “totality of the circumstances” and based on an “affirmative duty of care.” See Knorr-Bremse Sys. fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1342-43 (Fed. Cir. 2004) (((en banc)); see also Underwater Devices v. Morrison-Knudsen Co., 717 F.2d 1380, 1389-90 (Fed. Cir. 1983). The Federal Circuit changed the standard for willful infringement under In re Seagate where it replaced the “duty of care” standard, which was akin to negligence, with a higher standard of “objective recklessness” and reemphasized that there is no affirmative obligation to obtain an opinion of counsel. In re Seagate, 497 F.3d at 1371. The patentee’s burden of proof, however, has not changed; the patentee is required to prove objective recklessness by clear and convincing evidence. Id.

Prior to the In re Seagate decision, the breach of the duty of care standard entitled patent holders to seek the treble damages allowed under the patent statute—an otherwise strict liability statute to determine infringement. Unsurprisingly, willfulness allegations proliferated. Alleged infringers often asserted an advice of counsel defense in response to willfulness claims. Typically, that advice of counsel came in the form of an opinion that
concluded that the patent in question was invalid, unenforceable, and/or not infringed. Proffering that opinion clearly waived some portion of the primary privileges associated with the retention of counsel—the attorney-client and work product privileges—but the extent of the waiver had received inconsistent treatment in the district courts. Then came *In re Seagate*.

In *In re Seagate*, the patent holder claimed that the alleged infringer’s assertion of the advice of counsel defense constituted a waiver of the attorney-client and work product privileges of all relevant counsel—including Seagate’s separate trial counsel. The district court agreed and granted an order compelling Seagate’s patent litigation counsel to make themselves and their work product available for discovery. Granting Seagate’s writ of mandamus, the Federal Circuit overruled the long-standing standard of proof for willfulness, and addressed the scope of the waiver of privileges when an advice of counsel defense is raised.

First, the court overturned *Underwater Devices*. It held that proof of willful infringement now requires a showing of objective recklessness. The patent holder must offer clear and convincing evidence that the infringer acted “despite an objectively high likelihood that its actions constituted infringement of a valid patent.” Once satisfying that threshold, the patentee must also show that the objective risk was either known or so obvious that it should have been known.

Second, *In re Seagate* clarified the scope of the waiver of privilege if the potential infringer asserts an opinion of counsel. Should a potential infringer choose to pursue an advice of counsel defense, in most cases that defense will not serve to waive separate trial counsel’s attorney-client or work product privileges. The rule is not absolute. If the trial court determines that there has been “chicanery,” it retains the discretion to extend privilege waivers to trial counsel.

The problem is, therefore, in how the courts and litigants determine what constitutes objective recklessness. Accordingly, patent holders will want to look to firms that have experience establishing recklessness in other practice areas, such as mass tort. *In re Seagate* may also encourage patent holders to file for preliminary injunctions, in order to set up a willfulness
case for post-filing conduct. Though it can put patent validity into play, a preliminary injunction effort can curb willful infringement activities that start after the commencement of litigation or pave the way for treble damages later.

*In re Seagate* will also necessarily affect pre-litigation tactics. The notice letter a patent holder used to send to establish willfulness likely will not suffice to meet the higher standard of proof—but it may be enough to establish a sufficient controversy for the alleged infringer to bring a declaratory judgment action under *MedImmune Inc. v. Genentech Inc.* and *SanDisk Corporation v. ST Microelectronics Inc. et al.* See *MedImmune Inc. v. Genentech Inc.*, 549 U.S. 118 (2007) (altering the declaratory judgment standard to a more lenient “totality of the circumstances” review versus the earlier reasonable apprehension review); accord *SanDisk Corp. v. ST Microelectronics Inc. et al.*, 480 F.3d 1372 (Fed. Cir. 2007) (altering the standard for determining when a declaratory judgment action may be brought). So tread lightly.

*Following In re Seagate: The Continued Practicality in Obtaining an Opinion of Counsel Under Broadcom Corporation v. Qualcomm Inc.*

While failure to obtain an opinion no longer creates an adverse inference, in practical effect, it is still wise to obtain one. The Federal Circuit’s *Broadcom Corp. v. Qualcomm, Inc.*, 543 F.3d 683, 699 (Fed. Cir. 2008), decision gave life back to opinions of counsel by finding that such opinions may negate the “intent” element under *DSU Medical Corporation v. JMS Co., Ltd.*, 471 F.3d 1293 (Fed. Cir. 2006) (*en banc*), discussed below. In *Broadcom*, the jury returned a verdict that Qualcomm had willfully infringed and induced the infringement of Broadcom’s patents for 3G mobile phone technologies. 543 F.3d at 687. Qualcomm had elected to maintain its attorney-client privilege rather than introduce the opinion of counsel letter prepared by its attorneys in response to Broadcom’s willful infringement claim. *Id.* After the trial court set aside the jury’s willfulness determination in the wake of *In re Seagate*, Qualcomm chose to accept the jury’s verdict on liability and damages rather than have a new trial on all issues, including the willfulness question. *Id.* After the court’s entry of an injunction, Qualcomm appealed. *Id.* at 687-88.
On appeal, Qualcomm argued that *In re Seagate* required a change in the rules for determining infringement claims based on inducement. *Id.* at 698-99. Before *In re Seagate* infringers had an “affirmative duty of due care” to avoid willful infringement, and opinion of counsel letters often served as evidence of the exercise of that duty. *Id.* at 699. When *In re Seagate* eliminated that duty, it looked as if the need for opinion of counsel evidence had also been eliminated as well. Qualcomm claimed the trial court had erred in its instructions regarding conclusions the jury could draw from Qualcomm’s failure to offer its opinion of counsel letter. *Id.* Qualcomm argued that it could not be liable for inducement if it was not liable for willfulness since the specific intent standard for inducement is greater than the recklessness associated with willful infringement. *Id.*

The Federal Circuit rejected these arguments and held that inducement may be found even when willfulness is absent. The Court found the inducement standards unchanged since its opinion in *DSU*. *Id.* at 699. Under *DSU*, proof of induced infringement under 35 U.S.C. § 271(b) requires evidence that the accused infringer “intended to cause the acts that constitute the direct infringement,” and that the accused “kn[ew] or should have known [that] its action would cause the direct infringement.” *Id.* In other words, to determine the “specific intent” required, courts both before and after *DSU* look at whether the inducer had a good faith belief that its actions would not lead to infringement, which encompasses whether the alleged inducer had a competent opinion of counsel. *Id.; see also Wing Shing Prods. (BVI) Ltd. v. Simatelex Manufactory Co.*, 479 F. Supp. 2d 388, 408 (S.D.N.Y. 2007).

Relying on *In re Seagate*—and its evidentiary requirements—the *Broadcom* panel determined that it “would be manifestly unfair to allow opinion-of-counsel evidence to serve an exculpatory function . . . and yet not permit patentees to identify failures to procure such advice as circumstantial evidence of intent to infringe.” *Id.* In the end, the Federal Circuit invalidated one of Broadcom’s patents, but left the district court’s judgment and injunction standing. *Id.* at 704-5.

From the perspective of an alleged infringer, *Broadcom* offers plenty to keep the accused infringer up at night. A close reading of *Broadcom* might lead to the conclusion that the “specific intent” requirement of inducement is not so specific. Further, an alleged infringer in an induced infringement action
who cannot conjure an opinion of counsel letter may be faced with a difficult challenge. In short, while there remains no requirement to obtain an opinion of counsel, there is a clear benefit to doing so, particularly when a defendant is vulnerable to an inducement claim.

A Renovation of What Business Method Patents Are Valid Under the In re Bilski Decision’s “Machine-or-Transformation” Test

A patent shall be presumed valid. 35 U.S.C. § 282 (2009). This presumption of validity means that courts will not substitute their judgment for the patent examiner’s unless there is clear and convincing evidence that the examiner was incorrect. Yet, despite this presumption of a patent’s validity, the Federal Circuit’s In re Bilski, 545 F.3d 943 (Fed. Cir. 2008), decision (and pending appeal) has dramatically changed the landscape for what business method patents are now considered valid under its “machine or transformation” test. This en banc decision of the Federal Circuit is currently on appeal before the Supreme Court of the United States.

At the Federal Circuit, the appellate court held that the petitioners’ method for hedging risk in the purchase and sale of commodities—a technique for organizing human economic activity and one which did not identify any machine to be used in the implementation of that method—was not eligible for patent protection under 35 U.S.C. § 101. Id. at 954. Specifically, the nine-member majority opinion (penned by Chief Judge Michel) spelled out the “machine-or-transformation” test as the sole test of subject matter eligibility for a claimed process:

The Supreme Court . . . has enunciated a definitive test to determine whether a process claim is tailored narrowly enough to encompass only a particular application of a fundamental principle rather than to preempt the principle itself. A claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state of thing.
Further, the court held that the petitioners’ claimed process for hedging risk was not directed to the operation of a particular machine or apparatus, nor did it involve the transformation of matter into a different state or thing. As the Federal Circuit stated, the petitioners sought to patent “[p]urported transformations or manipulations simply of public or private legal obligations or relationships, [or] business risks,” and as such, the invention was not eligible for a patent under 35 U.S.C. § 101. *Id.* at 963.

The Supreme Court granted certiorari on the *In re Bilski* case on June 1, 2009 and oral argument on the patent applicants’ appeal was heard on November 9, 2009. A decision is pending and it is largely suspected among intellectual property practitioners that the Federal Circuit’s decision will be affirmed by the Supreme Court.

*A Shift in the Obviousness Analysis Under KSR International Co. v. Telexflex Inc.*

The Supreme Court’s decision in *KSR International Co. v. Telexflex Inc.* materially altered the standards for determining obviousness under 35 U.S.C. § 103 by effectively diluting the prevailing test for obviousness in favor of an arguably less stringent, more subjective standard and suggested, without deciding, that the clear and convincing standard may be relaxed for prior art that was not considered by the United States Patent and Trademark Office (USPTO). 550 U.S. 398, 423-24 (2007).

In *KSR*, the patent under consideration involved electronic sensors that communicate between an automobile’s computer-controlled throttle and the gas pedal. *Id.* at 408-9. The prior art dealt with the use and placement of such sensors. The *KSR* patent claimed an innovative combination of those mechanisms that allowed assembly of simpler, smaller, cheaper adjustable pedals.

The Supreme Court found that the patent did not survive a review for obviousness under 35 U.S.C. § 103, which limits issuance of a patent on a subject that would have been obvious to a “person having ordinary skill in the art.” The Court recognized most inventions utilize some combination of prior advancements. The Court stated that the key to demonstrating true innovation rests with the identification of the novel reason motivating a new combination. *Id.* at 423-24. Scolding the Federal Circuit for its
“narrow, rigid manner inconsistent with § 103 and our precedents”—the “teaching, suggestion, or motivation” test—the Supreme Court announced that the obviousness inquiry must be guided by “common sense” rather than any particular formula. Id at 401-2; 427-28. Although the “teaching, suggestion, or motivation” test remains relevant to the obviousness inquiry, the Court emphasized that the practical realities of what was going on in the marketplace at the time of the claim invention—as opposed to express references in technical materials—can supply such motivation. Id at 401-2.

Following the Supreme Court’s decision in KSR, the Federal Circuit appeared in the first year following the decision to read KSR to invalidate many claims, yet the most recent year has been more moderate. See, e.g., Kinetic Concepts Inc. v. Blue Sky Med. Group Inc., 554 F.3d 1010 (Fed. Cir. Feb. 2, 2009) (denying new trial request because none of the applied prior art performed the key action recited in the claims). Nonetheless, plaintiff patentees are well advised to concentrate their efforts on developing a record of factual differences regarding the scope of prior art and necessary skill levels before going into battle. Patent holders should be prepared to show how prior art taught away from—and not toward—the solution the patent provides. As KSR allows consideration of other fields of endeavor, patentees will likely see defendants stringing together a broader variety of art to establish obviousness and patentees will consequently need detailed technical analysis to support their position.

Claim Construction: A Continuing Contentious Issue in Patent Litigation

Claims construction continues to be the most hotly contested issue because it is often outcome determinative on infringement and invalidity. And it traditionally has a higher reversal rate at the Federal Circuit because it is reviewed de novo. See e.g., Cybor Corp. v. FAS Techs. Inc., 138 F.3d 1448, 1454 (Fed. Cir. 1998) (en banc). For plaintiffs or defendants, depending on the facts of a case, an early Markman hearing may be advantageous. For plaintiffs, a favorable claims construction may set the stage for a willfulness finding or set up an early settlement opportunity. For defendants, a favorable claims construction may set up an early summary judgment finding or the possibility of an “exceptional case” finding for plaintiffs who continue with a case after an adverse construction.
Additional Considerations for the Patent Litigator to be Aware of

In each case discussed above, at least one party pushed for a substantive change in law—many not incremental in nature. For example, following the dicta in *KSR* regarding whether the presumption of validity still has applicability when art is not before the examiner, many litigants have objected to the clear and convincing standard during jury instructions and have appealed that issue to the Federal Circuit. (*See, e.g., Alcatel Lucent v. Microsoft* (2009)). So far, the Federal Circuit has not found that such an instruction is error. However, in light of *KSR*, putative infringers will likely continue to push for this additional change. The upshot? Unlike any other area of substantive law, the law of patents seems to be rapidly changing in recent years as discussed above.

It is important, as well, that litigators be aware of the many defenses available to a defendant (dependent, of course, on the actual facts of the dispute), to escape a finding of patent infringement, including without limitation: anticipation, obviousness, on sale bar, indefiniteness/written description, enablement, best mode, improper claim dependency, utility and patentable subject matter, inequitable conduct, laches, equitable estoppel, waiver, and of course, non-infringement arguments. Defendants can essentially bring a myriad of defenses at the onset of the litigation (although, notably, oftentimes one will generally amend the complaint to allege inequitable conduct after discovery provides a basis for said defense) to cause the plaintiff to spend time, energy, and resources to respond to these defenses. Only as trial approaches will the defendant potentially consider dropping weaker less plausible defenses so as to streamline the presentation of the case at trial.

A Patent Litigator’s Response to Recent Changes and Developments in Patent Litigation Law

Some statistics have shown that patent applications and patent litigation have declined modestly in the last several years. *See* USPTO, U.S. Patent Statistics (Calendar Years 1963-2008), available at [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf). This could be due to corporate budget pressures but also, some practitioners have indicated that given *KSR* and other decisions which arguably have made it
easier to invalidate patents (though statistics do not bear it out), companies are making strategic choices to keep some inventions protected as trade secrets.

Yet, as the above decisions illustrate, the number of patent cases going to the Supreme Court has increased, see, e.g., In re Bilski, 545 F.3d 943 (pending appeal before the Supreme Court); KSR, 550 U.S. 398, consequently, one could speculate that there is a rising interest in such cases and controversies by the Supreme Court. And, following that line of thought, an argument can be made that it is more important than ever to protect new and innovative technologies through patent applications, licensing, and litigation. Indeed, in light of the current economic recession, many companies are moving their operations abroad for a cost-savings and perhaps the only real obstacle to having these companies infringe is through patent protection by filing patent applications and enforcing them through litigation.

*Staying Ahead of the Curve and Trying Your Case in Light of Material Changes in Patent Law*

**Trying Your Case Ahead of the Curve . . . And Toward Where the Law Is Headed**

The law in the patent field continues to evolve in material ways. Patents may be prosecuted under one set of rules and litigated against a revised set. Important rules of law can substantively change even in the midst of litigation, which makes litigating the cases and providing clear advice to clients a difficult challenge. These continuing changes, coupled with the cost to prosecute or defend patent cases to trial, make trying the cases for affirmance at the Federal Circuit a game of practicing in front of the curve.

Smart litigants will look not only to the law as it then exists, but also where it is going as well. For example, for years there appeared to be two lines of cases setting forth two separate standards for proving inducement to infringe, Manville Sales Corp. v. Paramount Systems, Inc., 917 F.2d 544 (Fed. Cir. 1990), and Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F.2d 1464 (Fed. Cir. 1990), with the former applying the “specific intent to cause infringement” standard and the latter providing support for the lower
“general intent to cause actions” threshold, later held inadequate to prove inducement under DSU.

In the TriStrata Technology Inc. v. Mary Kay Inc, 423 F.Supp.2d 456 (D. Del., 2006) case, we tried a case on behalf of TriStrata alleging the infringement by Mary Kay of certain patents relating to the use of alpha hydroxyacids. This case was tried prior to the aforementioned DSU decision—and during the period of time where there were two competing standards for proving inducement to infringe—and we made a crucial decision to ask for a jury instruction based on the higher standard set forth in Manville, which was later adopted by the en banc portion of the DSU opinion. Our strategy was to take away an issue on appeal and, importantly, we believed our evidence would support a finding under the higher standard. We received a finding of infringement which was summarily affirmed on January 10, 2007. No issue was raised by defendant on appeal on the inducement jury instruction. Subsequently, the DSU decision came down from the Federal Circuit affirming the Manville standard. The lesson is for litigants to be looking to where the Federal Circuit is leaning and both preparing and trying the cases with the appeal in mind.

Responding to Where the Law is and Where it is Headed

Another example of a change in patent law that practitioners must respond to is the use (or non-use) of an opinion of counsel at trial and in light of In re Seagate. Prior to the Federal Circuit’s decision in In re Seagate, failure to produce an opinion of competent counsel to defend against a claim of willful infringement gave rise to an adverse inference and juries were instructed that they could assume that no advice was given or that any advice received was negative. As a result, putative infringers would often produce opinions—waiving fundamental attorney-client privilege—just to avoid the instruction. Most patentees would allege willful infringement—regardless of the strength of the claim—to force either waiver or such an instruction.

The downside for the defendant was clear: plaintiffs often received a road map to the defendant’s case and also could argue for broader subject matter waiver. While most viewed In re Seagate as a sea change, there were some hints that courts were troubled by the long-standing law of willfulness prior
to issuance of that opinion. See, e.g., Knorr- Bremse Sys., 383 F.3d 1337, 1343 (stating that that the unilateral implementation of adverse inferences precedent “resulted in inappropriate burdens on the attorney-client relationship”). Indeed, the In re Seagate decision replaced the “duty of care” standard under Knorr-Bremse, which was akin to negligence, with a higher standard of “objective recklessness” and reemphasized that there is no affirmative obligation to obtain an opinion of counsel. In re Seagate, 497 F.3d at 1371.

In another vein, for patent trial lawyers and their clients, the practicalities are that patent cases are expensive to prosecute or defend. From the prosecution perspective, evolving decisions on infringement, invalidity due to lack of enablement under 35 U.S.C. § 112, and damages can cut massive amounts of potential damages from your case mid-stream. As the above examples illustrate, a patentee may start the lawsuit with an expectation of certain elements of patent law that end up having fundamentally changed by the conclusion of the case.

On the defense side, the recent invalidity decisions in particular provide credible means of blowing up meritless patents. However, the cost of defense becomes a huge obstacle. More and more, patentees are suing scores of defendants in a single case and pricing the cost of settlement well below the cost of defense for an individual defendant. It becomes a “stick me up” in the eyes of many companies. The patent may well be worthless, particularly when the Supreme Court gets through deciding In re Bilski; in the meantime, however, getting from the answer to a summary judgment motion on invalidity can be an expensive proposition. Do you advise the client to pay the nominal amount to settle? How many times do you advise a client to pay nominal settlements to various patentees before a business strategy for defense becomes a necessity?

In addition, on the defense side, there are a number of strategies for consideration when faced with a patent of marginal value and questionable validity. First, naturally, is to value the cost of defense against the settlement offer by plaintiff. Cost of defense should not only include expenses associated with legal counsel but also business disruption to those internally who will need to help with the defense. In addition, “cost of defense” must give strategic consideration to whether settling early will give rise to
additional “nuisance value” patent cases by patentees looking for low-hanging fruit. If there are multiple defendants, pooling resources may prove beneficial. However, often subtle differences between defendants’ products or systems may give rise to conflicts on claims construction and infringement. Pooling works better when invalidity is the main defense to the patent.

Second, an evaluation of the merits of both infringement and invalidity needs to be performed. A clean non-infringement argument may be the easiest way out of a case, but if the case is venued in a jurisdiction that does not conduct early Markman hearings or render early summary judgment decisions, the road to the decision can be long and expensive—a fact the patentee is probably banking on and likely considered in connection with its venue selection. If looking at a strong non-infringement argument, one option is to lay your cards on the table with the plaintiff early in the case—set forth in detail why no infringement exists and request dismissal. Even if not accepted, it sets up for a possible recoupment of fees in the event you can prove an “exceptional case” for plaintiffs continuing with the case after being told why infringement does not exist. The complicating factor in this scenario is often a plaintiff can hide behind the fact that the claims had not yet been construed by the court. If faced with this scenario, one strategy is to use the Initial Rule 26 Case Management Conference to educate the court about the technology and patent at issue and request early determination of the issue. See, e.g., Fed. R. Civ. P. 26 Advisory Committee Notes 1993 Amendment (stating purpose of Rule 26 is to “accelerate the exchange of basic information . . . and the rule should be applied in a manner to achieve such objectives.”). Success is judge dependent.

Third, options for redesign need to be discussed regardless of the dubious merits of the claim or patent. Although often faced with initial reluctance by the business units, many times some up-front analysis will yield design options that could avoid any claim of infringement on a go forward basis. If litigation continues, at least new damages are avoided. If a settlement possibility exists, a design-around option gives rise to more options for resolution. For example, if a plaintiff is seeking a cash payment and then ongoing royalties, one option is to push down the cash component in exchange for higher ongoing royalties. After settlement, implement the design-around and avoid the ongoing royalty stream.
Fourth, re-examination options need to be reviewed at the outset. According to statistics by the USPTO of requests for *ex parte* re-examination, 92 percent are granted. While claims are confirmed approximately 25 percent of the time, in 11 percent of the cases the claims are canceled, and in 64 percent of the cases, claims are changed. Approximately 31 percent of patents undergoing re-examination are also in litigation. For *inter parte* re-examinations (which have grown to 258 requests in 2009), 68 percent are known to be in litigation, and 54 percent of the claims are cancelled or disclaimed. For some defendants, an *inter parte* procedure, coupled with a request to stay litigation pending a decision, may be a viable and less expensive option. However, losing the re-exam, either *ex parte* or *inter parte*, can give rise to estoppel and pave an easy road to recovery for a plaintiff if unsuccessful. Likewise, if a stay of the litigation is not granted, a defendant must bear the costs of a re-exam along with the litigation costs.

Finally, recent decisions by the Federal Circuit have made it easier for a putative infringer to file a declaratory judgment claim. *SanDisk*, 480 F.3d 1372. If in receipt of a letter accusing infringement, an aggressive but proper strategy may be to file a declaratory judgment of non-infringement or invalidity and at least secure a venue of choice and the advantage of going first during the proceedings, and importantly, at trial.

This differs from previous strategies in that the re-exam tool is being used more often, particularly with the advent of *inter partes* re-exams. It is jurisdiction dependent, however, as to whether a stay will be granted. Some judges will stay; others will not—particularly if the request does not come until later in the litigation.

The substantive changes that continue to occur in the patent area have caused some unease with clients. The substantive changes through case law, coupled with the reversal rate at the Federal Circuit, have caused some companies to now seek additional avenues for enforcement of intellectual property rights. Many are filing complaints—without initial service—thereby securing choice of forum, and then attempt to enter into licensing negotiations. As noted above, more plaintiffs are suing multiple defendants with the hopes that early licensing campaigns and reasonable rates will cause some defendants to drop out and take a license.
Components of the Litigation Strategy

Conducting a Reasonable Inquiry into the Merits of the Case Prior to Filing a Patent Infringement Suit

If you are a plaintiff, pre-suit investigation is a must. Rule 11 of the Federal Rules of Civil Procedure requires submissions to the court to be based upon “the best of the person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances.” Fed. R. Civ. P. 11(b) (2010); see also Bus. Guides Inc. v. Chromatic Commun’ns Enters. Inc., 498 U.S. 533, 551 (1991) (interpreting Rule 11 pre-1993 amendments). In short, an attorney can neither discard nor delegate their responsibilities to their client by blindly following a client’s assertion of patent infringement. Prior to filing a patent infringement suit, the attorney is responsible for conducting an investigation into the merits of the claim of infringement. Such an inquiry could—and should—include conducting an independent examination of the accused products, an analysis of the patent claims and file history, a preliminary claim construction analysis, a comparison of the claims to the accused product, a search of the relevant prior art, and interviews of any key person and/or third party. In addition to these patent specific inquiries, the plaintiff should also determine the most appropriate venue for the litigation, e.g., seeking venue in a known rocket docket or taking advantage of a hometown advantage. See U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending Mar. 31, 2009.

For example, in the View Engineering Inc. v. Robotic Vision Systems, Inc. decision, the Federal Circuit affirmed Rule 11 sanctions against an attorney filing an infringement counterclaim on eight patents without the attorney ever having seen the accused product or conducting an independent formal or informal claim construction and infringement analysis for each of the asserted patent claims. 208 F.3d 981, 986 (Fed. Cir. 2000). Instead, the attorney improperly based the infringement claim solely on the accused infringer’s advertising materials and the purported knowledge of an employee of the patentee as to the patents. Id.
Conducting a Sufficient Inquiry into the Merits of a Claim of Infringement Where Information about the Accused Product is Unavailable

Products that can be purchased and analyzed for infringement should be. Hoffmann-La Roche Inc. v. Invamed Inc., 213 F.3d 1359, 1364 (Fed. Cir. 2000) (affirming denial of Rule 11 sanctions and attorney fees where patentee could not reverse engineering accused product to determine whether one aspect of the accused infringer’s process met claim limitations). One interesting area relates to software analysis. Many software licenses contain provisions that prohibit reverse engineering and other aspects which otherwise may be important to establishing infringement pre-suit. Courts are just beginning to sort out the ethical implications of such licenses. The other relates to Web-based software that requires sign-up information and has specific use clauses. Again, ethical implications exist depending on what the putative plaintiff is planning to do with the services.

One example of how a patentee can seek to obtain information on software, firmware, and/or hardware so as to support its infringement allegations is found in the Advanced Micro Devices Inc. v. Samsung Electronics Co. et al. case. There, the Magistrate Judge ordered Defendant Samsung to produce firmware source code (i.e., a software program or set of instructions programmed on a hardware device) for its products to opposing counsel for infringement analysis. See Advanced Micro Devices v. Samsung Electronics Co. et al., Case No. 3:08-cv-00986-SI (N.D. Cal. Mar. 9, 2009), Order on AMD’s Recent Discovery Requests, Docket No. 119 (attached as Appendix).

In opposition to plaintiff’s request for its firmware source code, Samsung argued that the scope of the patent claims did not cover certain aspects of their accused products, and on that basis argued against producing the source code. Advanced Micro Devices disputed that contention and argued that it needed the source code to assess infringement. The Court invoked “the broad discovery contemplated by” Rule 26 of the Federal Rules of Civil Procedure and ordered Samsung to produce the source code for the graphical user interfaces in approximately 7,095 accused Samsung televisions, cell phones, camcorders, and digital cameras. In ordering the production of such source code, the Court reasoned that to do otherwise
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would require the Court to interpret the scope of the patent prematurely, prior to the claim construction hearing.

Making the Argument and Proving the Case of Patent Infringement at Trial

To prove infringement, each limitation of the claim needs to be read on the accused device. For mechanical patents, this requires simple purchase of the device (or one obtained during discovery) and expert testimony to show how the limitations are met. For example, in the handling of the *Honeywell v. Minolta* case, we purchased cameras that we believed to contain our client’s autofocus technology and used these infringing devices at trial—along with expert testimony—to illustrate how the claim limitations from the client’s patent were met and infringed by certain cameras’ use of specific autofocus technology.

For software patents, however, proving infringement becomes trickier. For example, most software patents contain method claims that often require indirect infringement claims. To show indirect infringement, however, a patentee must show that there is direct infringement by someone first. *Epcon Gas Sys. v. Bauer Compressors Inc.*, 179 F.3d 1022, 1033 (Fed. Cir. 2002). If source code is produced by the putative infringer, compiling that code and running it in the courtroom is a must. These cases are often won or lost by the expert testimony. Thus, picking a forensically attractive expert—one who can teach and persuade—is critical. Also, it is important to retain an expert who is willing to put in the necessary preparation time to become a formidable expert.

Factors

The Challenges Faced by Intellectual Property Practioners and How to Succeed in Spite of These Challenges

Knowing and Staying Up To Date With Your Client’s Technology, Business and Industry

Because of the constant changes in technology, it is important that the intellectual property lawyer stay up to date and educated. One example often employed by our firm and others is constant training on emerging
technology and evolving law by way of in-house seminars (for example, our firm’s “Exceptional Advocate” training program), outside courses through the Practising Law Institute, the National Institute for Trial Advocacy and others, as well as workshops sponsored by our own clients. Another example of staying up to date on the area of intellectual property litigation is by way of the ten full-time Ph.D. scientists of various disciplines that our firm employs. These scientists are used to help investigate and defend claims, as well as a resource for helping get specific lawyers up to speed on particular technology. As always, it is important to get an outside expert on board very early in the case to ensure that constructions, claims, and defenses will withstand scientific scrutiny.

Another factor in securing success both in and out of the courtroom is to create and maintain a positive and constructive relationship with your client. Our firm, for example, works closely with its clients to learn and understand the intricacies of their business and the technologies that they invent and/or employ. In addition, over the course of working with a client on many cases, we are able to deepen our understanding of that client and their needs, business pressures, technical expertise, and their expectations. A continuing involvement with your client results in a better understanding for you of their business and they, in turn, obtain a better understanding of the commitment, expertise, and case strategy you bring to the table.

Along with the challenge of staying educated, industry type can determine the strategy needed and how often litigation appears. Some industries are clearly more litigious than others—medical technology comes to mind given the large damages figure these cases can generate. In addition, nascent industries are much more likely to aggressively secure their space through patent enforcement. Often the more mature industries have entered into broader cross-licenses and attempt to compete solely in the marketplace rather than the courtroom. In the past twelve years, the Internet and e-commerce space have seen exponential increases in litigation. In light of KSR and the pending In re Bilski decision, however, the continued increase of suits in this area is an unknown. Currently, many of the cases pending are Internet-based software method claims.
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The expense of patent litigation, especially electronic discovery and expert aspects, has underscored the importance of an economic analysis at the start of every case. Is the candle worth the flame? In addition to expense, companies need to be cognizant of retaliatory lawsuits. For companies practicing in the same space, this likelihood is real. You do not want to sue out a modest-sized case, only to find yourself defending a much larger patent infringement claim brought by the defendant whom you have just sued.

Smaller-sized defense cases, where the claims are meritless, are probably the most problematic. If the case is large, the defense cost is necessary and prudent. For example, faced with a case where a company is one of many defendants, those defendants may band together in a joint representation, hiring a single law firm to defend them and split bills for a common defense. For example, in *Balthaser Online Inc. v. Art Star Design LLC* in the United District Court for the Northern District of California, one firm represents ten of the twenty-one defendants in a suit related to an allegedly infringing Web site design patent. See Sheri Qualters, “Patent Lawyers, Including Small Firms, Jointly Representing Numerous Defendants,” *Nat’l Law J.* (Jan. 8, 2010). Of course, the issue becomes how the claims of the patents will be construed and how numerous defendants can or will propose a unified set of proposed claim construct in the face of differing technologies, business, and the like. Further, there is the issue that the alleged infringing products themselves are not identical and infringement positions among the defendants are foreseeable and conflicts will arise. Alternatively, if the case is smaller, as noted above, creative strategies are often required so to manage costs, at a minimum.

Proving a Case of Infringement under the Doctrine of Equivalents or Indirect Infringement

The most straightforward infringement case is to prove literal infringement under 35 U.S.C. § 271(a) whereby the patentee must prove by a preponderance of the evidence that the accused device contains each limitation of the asserted claim. *Lucent Tech. Inc. v. Gateway Inc.*, 543 F.3d 710,
Yet, a product or a process that does not correspond to the literal terms of a patent claim may still infringe under the doctrine of equivalents. Under this doctrine, a product or process infringes a claim if it differs only insubstantially—for example, if it performs substantially the same function in substantially the same way to obtain substantially the same result as the claimed subject matter. See Aquatex Indus. Inc. v. Techniche Solutions, 479 F.3d 1320, 1326 (Fed. Cir. 2007) (Aquatex II). There have been repeated efforts to do away with this doctrine, yet the Supreme Court continues to reaffirm its validity. See generally Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 122 S. Ct. 1831 (2003) (Festo VIII); Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 117 S. Ct. 1040 (1997).

Pursuing an infringement claim under the doctrine of equivalents is a difficult row to hoe, yet the best way to be successful in proving infringement under this doctrine is through a beneficial claim construction.

In addition to literal infringement and infringement under the doctrine of equivalents, an infringer can indirectly infringe a patent by being involved in conduct that eventually leads to direct infringement—contributory infringement and induced infringement. 35 U.S.C. §§ 271(b) and (c) (2010). But note, there can be no liability for contributory infringement nor inducement without direct infringement. Epcon Gas Sys. 179 F.3d at 1033. Contributory infringement occurs where something less than the whole patented invention is sold; in other words, where someone sells, offers to sell or imports some important part of a patented invention. To make out a case for contributory infringement, a patent holder must demonstrate that the alleged infringer knew that the combination for which its components were especially made was both patented and infringing. Husky Injection Molding Sys. Ltd. v. Re&D Tool & Eng’g Co., 291 F.3d 780, 784 (Fed. Cir. 2002). In some cases, a finding of contributory infringement may hinge on the distinction between permissible repair and impermissible reconstruction of the patented machine. For example, in Husky Injection, the Federal Circuit held that infringement cannot occur if the particular part of the patented article is readily replaceable. Id. at 784. There, the Court concluded that the defendant’s use was more akin to permissible repair than impermissible reconstruction because part of the plaintiff’s patented article was readily replaceable. See id.
As discussed in the DSU case above, induced infringement is where someone does not make, use or sell anything, but is still involved in infringement. Indirect infringement can occur, for instance, when a device is claimed in a patent and a third party supplies a product which can only be reasonably used to make the claimed device. Under DSU, proof of induced infringement, under 35 U.S.C. § 271(b), requires evidence that the accused infringer “intended to cause the acts that constitute the direct infringement,” and that the accused “kn[ew] or should have known [that] its action would cause the direct infringement.” DSU, 471 F.3d at 1305. In light of DSU’s requirement that there be evidence of a “specific intent” to prove active inducement to infringe, it may be difficult for a party to allege inducement in the original complaint prior to discovery.

Litigating Complex Cases

Defending a Likely Infringer

Defendants should remember that patent litigation, perhaps more than any other area of law, presents a great deal of uncertainty. Several factors, including the higher chance of reversal on appeal, changing law on claim construction, venue choices, jury unpredictability, the burden of litigation, and the threat of treble damages, should be considered in determining how to successful defend an action, or alternatively, evaluate the reasonableness of settlement option.

In addition, patent defense cases where infringement likely exists are the most complicated to litigate. If found to infringe before trial—and the jury is so instructed—it makes proving invalidity even harder. Juries think if infringement exists then defendants are just looking for a loophole out. If bad “copying” facts also exist, there is a high likelihood of an adverse finding. Often infringers will seek to exclude “copying evidence” if infringement has been found prior to trial. However, if an infringer is seeking to invalidate the patent based on obviousness, then the copying evidence is likely coming in as a “secondary consideration of non-obviousness.” In addition, if there is a willfulness claim pending, the copying evidence will likely come in on that claim. Defendants who are found to infringe before trial need strategies for dealing with these issues.
For example, one might seek to bifurcate willfulness from the rest of the case and claim that the copying evidence is irrelevant.

**Litigating Trademark Cases**

As noted above, patent cases are also difficult due to continuing changes in the law and the expense and time associated with these cases. In addition to litigating complex patent cases, we are also seeing litigation in trademark and copyright cases. Oftentimes a company’s trademarks and brand images may be its most valuable assets. Accordingly, attorneys must work to vigorously protect their client’s assets against infringement, dilution, and other unfair competition. An example of a recent trademark dispute is *Great Clips Inc. v. Hair Cuttery of Greater Boston L.L.C. & Great Cuts Inc.* There, our firm successfully represented Great Clips in upholding a settlement agreement with the Hair Cuttery giving the hair salon chain Great Clips, Inc. the right to use the trademark “Great Clips” in the Boston market. The United States District Court for the District of Massachusetts granted Great Clips’ motion for declaratory judgment in that case and dismissed a counterclaim of trademark infringement against the company. On January 5, 2010, the First Circuit Court of Appeals affirmed the District Court’s ruling (Case No. 09-1376). This is a good example of pursuing a declaratory judgment action on behalf of your client and securing an early victory.

**Securing Success Beyond Our Borders: International Litigation**

With increasing frequency, commercial transactions and ensuing business disputes know no boundaries. Litigating across national borders is often legally complex and difficult to predict. It requires experience and legal training to coordinate and implement an effective litigation strategy. Accordingly, attorneys practicing in this area must have extensive experience in obtaining justice in such cases. For example, our firm has experience in handling international litigation, including arbitrations before the International Court of Arbitration of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) pursuant to its International Rules, the London Court of International Arbitration (LCIA), and the World Intellectual Property Law Organization (WIPO). In addition, we routinely handle litigation where jurisdiction is within the United States District Courts, but where international entities serve as either
plaintiff or defendant. For example, in a series of cases involving digital camera patents, we have sued a number of international camera companies that make, use or offer to sell or sell within the United States an alleged infringing product in violation of 35 U.S.C. § 271(a) and have handled discovery in those cases. Accordingly, we routinely work with the United States’ Federal Rules of Civil Procedure, the provisions of the Hague Convention, and other applicable rules and treaties to litigate claims in the United States involving international entities.

When litigating an international arbitration, however, one must be cognizant of the inherent limitations of that process. For example, to engage in international arbitration one must have a contractual basis for doing so, i.e., the parties must have previously acquiesced to arbitrate. Further, once in international arbitration, one is limited in the discovery they can seek. For example, the ICC follows the International Bar Association (IBA) rules that principally permit the exchange of some document discovery with a limited scope to only those materials that are relevant and material to the outcome of the dispute and does not permit the taking of deposition testimony. See IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999). Further, what paper discovery is contemplated by the IBA is limited in scope and does not extend to, for example, discovery relating to “any nonprivileged matter that is relevant to any party’s claim or defense” as contemplated by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(b)(1) (2010).

An example of a successful handling of an international arbitration is found in the Haagen-Dazs International Shoppe Company Inc. v. Corporacion Todosabor C.A. case our firm handled under the rules of the International Centre for Dispute Resolution, the international arm of the AAA whose rules, process, and enforceability have been adopted by an international convention to which most countries are signatories. The arbitration was held before an international panel in Miami and the outcome was in favor of our client.

**Approach to Cases**

A good litigation team includes knowledgeable and active in-house and client participants. While an outside expert can provide invaluable advice and testimony, a component of any winning strategy has to include an in-
house team that is active in helping chart the strategy and making key
decisions along the way. Outside lawyers know the case law and how to try
a case, but often, the subtle nuances of how a product operates, or business
sensitivities, are known only to those working at a company. Trial lawyers
who ignore the vast knowledge base of corporate personnel are cutting off
one leg of the stool.

There are a number of changes to be made to stay current with the evolving
nature of patent law. One example relates to the end of “licensing letters.”
In light of the recent case law, e.g., the MedImmune and SanDisk decisions
discussed above, most plaintiffs no longer send “licensing letters” until at
least one suit is in litigation and a venue selection is made so as to alleviate
an alleged infringer ability to bring a declaratory judgment action in a
potentially less desirable venue. As a result, more plaintiffs are holding the
letters until after the suit is filed. In past decades, a patentee could sit back
and send carefully worded letters to avoid a declaratory judgment action
and hope that licensing talks could occur first. Now, it is sue first and
negotiate later—often with a stay of service pending initial talks.

Conclusion

Intellectual property lawyers need to understand the economics of a case—
from both the plaintiff and the defense side. A favorable jury verdict to a
plaintiff may not be a win, depending on the amount of time, energy, and
resources spent securing the victory and the time it took to get to trial. With
rapidly changing technology, a win after four to five years may not be a win
at all to your client if, during the pendency of the litigation, the technology
moved in another direction. The same is true from a defense standpoint: Is
the candle worth the flame? Can the time to trial provide an opportunity to
move into space that is clearly non-infringing?
Jan M. Conlin, partner and chair of Robins, Kaplan, Miller & Ciresi L.L.P.’s Business Litigation Group, is experienced in trials, arbitrations, and appellate work in a wide variety of areas. Ms. Conlin has served as trial counsel and special counsel for numerous corporations and individuals in patent and complex commercial disputes. She is a member of Robins, Kaplan, Miller & Ciresi’s Executive Board.

Ms. Conlin was named by Minnesota Lawyer as one of its “Attorneys of the Year” in 2008 and one of the “25 Women Industry Leaders” by Minneapolis/St. Paul Business Journal in 2007. Lawdragon named her one of the “3000 Leading Plaintiffs’ Lawyers in America,” and a “500 Leading Lawyers in America Finalist” in 2007. She was named a “Super Lawyer” and one of the “Top 100 Women Super Lawyers” and a “Top 40 Intellectual Property Super Lawyer” by Minnesota Law & Politics. Ms. Conlin was named to “The BTI Client Service All-Star Team” in 2007, 2008, and 2009. Ms. Conlin has been listed in The Best Lawyers in America (2007, 2008, 2009, 2010 editions) and as one of “Minnesota’s Leading Attorneys” by Leading American Attorneys.

Ms. Conlin is a member of the American Intellectual Property Law Association (AIPLA); the Minnesota Intellectual Property Law Association (MIPLA); the Minnesota State Bar Association (MSBA); and the American Bar Association (ABA).

Ms. Conlin received her J.D., cum laude, from the University of Minnesota Law School and her B.A., magna cum laude, from the University of St. Thomas.

Marta M. Chou, an associate of Robins, Kaplan, Miller & Ciresi L.L.P.’s Business Litigation Group, concentrates her practice in all types of complex commercial and business litigation as well as patent litigation, licensing and antitrust litigation, representing both corporations and individuals in enforcement of and defense of their rights. Ms. Chou was named by Minnesota Lawyer as one of its “Up and Coming Attorneys” in 2006 and one of the “25 on the Rise, Lideres Hispanos” in 2006 by the Hispanic Chamber of Commerce of Minnesota.

Ms. Chou is similarly a member of AIPLA, the MSBA; and the ABA. She received her J.D., from the University of Wisconsin Law School and her B.A. from, cum laude, from Michigan State University.
Advanced Micro Devices, Inc. (“AMD”) has filed two letter briefs asking the Court to compel the Samsung defendants and counter-claimants to produce certain documents requested by AMD. The Court will consider each in turn.

1. **AMD’s request for firmware source code [Docket No. 103]**

AMD has accused Samsung products of infringing various AMD patents, including U.S. Patent No. 6,784,879 (“the ‘879 patent”). In general terms, the ‘879 patent describes a “user interface” (i.e. a system by which a user interacts with a device) that displays images in the foreground of the device’s screen while the background video remains in focus. The parties dispute the scope of the ‘879 patent. Samsung contends that the ‘879 patent claims only the visual design and operation of the user interface, while AMD argues that the patent also comprises the system whereby the interface “interacts” with the displayed video.
AMD requests an order compelling Samsung to produce the “firmware source code” (i.e. a software program or set of instructions programmed on a hardware device) that generates the graphical user interfaces in approximately 7,095 accused Samsung televisions, cell phones, camcorders and digital cameras. AMD contends that, because the ‘879 patent claims a system for controlling background video while an application is displayed in the foreground, AMD must examine the firmware source code of the accused devices to determine whether the computer programs in those devices have the same effect as limitations claimed in the ‘879 patent. Samsung responds that AMD has no need to analyze the firmware in the accused devices because the ‘879 patent describes only a user interface; AMD can therefore determine whether the accused devices infringe the ‘879 patent by examining screen images already produced by Samsung.

The Court finds that AMD is entitled to the documents it requests under the broad discovery contemplated by Federal Rule of Civil Procedure 26. See Fed. R. Civ. Pro. 26 (“For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”). To find otherwise would require the Court to interpret the scope of the ‘879 patent, which it cannot do at this early stage in the litigation, before the Court has conducted a Markman hearing or issued a claim construction order. Accordingly the Court GRANTS AMD’s request for Samsung to produce the firmware source code for the accused Samsung televisions, cell phones, camcorders and digital cameras offered for sale or sold in this country on or after February 19, 2008. Samsung must produce this discovery within twenty-one days of the issuance of this Order.

2. AMD’s request for documents and supplemental interrogatory responses [Docket No. 114]

AMD has also filed a letter brief requesting an order compelling Samsung to (1) produce documents responsive to AMD’s Document Requests Nos. 260, 262, 263, 279, 283, 284, 291 and 292 and (2) provide supplemental answers to AMD’s Interrogatories Nos. 17, 18, and 20. Samsung contends that AMD’s request should be denied as moot because Samsung has either already produced or agreed to produce the discovery at issue. Based on the representations made by Samsung’s counsel in their March 6 letter brief, the Court agrees with Samsung that AMD is premature in seeking the Court’s
intervention in this matter. It appears that the only issue that remains in dispute is Samsung’s response to Document Request No. 291, which seeks documents relating to Samsung’s testing of third-party products prior to the filing of the Samsung counterclaim patents. Samsung (as counter-plaintiff) contends that these documents are irrelevant to the issue of whether AMD’s products infringe the Samsung patents. The Court disagrees. Evidence of third-products in existence before the filing of the Samsung patents could be relevant to anticipation and obviousness defenses. Accordingly, the Court GRANTS AMD’s request with respect to Request No. 291, insofar as AMD requests documents relating to testing of third party products that was not performed at the direction of Samsung’s attorneys. All other requests are DENIED without prejudice. Samsung shall produce these documents within twenty-one days of the issuance of this Order.

IT IS SO ORDERED.
Dated: March 9, 2009

SUSAN ILLSTON
United States District Judge
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