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President's Message

by Alexander R. Schlee

Welcome to the March issue of the LAIPLA Bulletin. The February 25th annual Litigation Roundtable was a big success. Thanks to the generous sponsorship by Jones Day, we were able to offer this event at a very reasonable rate. The meeting room in the Jones Day offices could not have been better for the purposes of this event, accommodating comfortably the more than 40 attendees. Professor Robert Merges of the U.C. Berkeley School of Law is not only one of the most recognized academics in the field of Intellectual Property, but turned out to be also an excellent and entertaining speaker. Our special thanks to Brent Sokol from Jones Day, who was the main organizer and moderator of the event. His ability to bring his former Professor Merges down to Southern California allowed us to offer this unique and memorable event. Our thanks also go to the Litigation Roundtable committee member Sanjesh Sharma and our Board Liaison Michelle Kim, both from Connolly Bove.

The next big event is approaching very rapidly, namely our annual Judges Night, co-sponsored by the IP Section of the State Bar. Laura Burson from Kirkland Ellis chairs and moderates this event and is helped by our Board Liaison and Vice President/President Elect Brian Arnold from Thomas Whitelaw. Without bothering you with too many details, we had some challenges with setting the event date, but have now chosen March 21, 2011. Laura and Brian have put together a very impressive Judges Panel featuring the Honorable Federal Circuit Judge Gajarsa, District Court Judges Guilford, Lew, Carter and Baird (ret.). Apart from this impressive panel, we expect a number of additional Judges to be in attendance. The Michel Inn of Court has moved its regular event and recommends its members to attend the Judges Night, which should further boost attendance. We keep this event as a more upscale event and focus on participation by a high number of judges. Like last year, the venue will be the Biltmore Hotel in downtown Los Angeles. We feel that this format has its place as a blend between an educational event with high profile speakers and a social event allowing members to meet Judges in a relaxed but appropriate atmosphere. Like in the many years before, we hope that this setting again finds your support, and we hope for a strong attendance.

On April 12, we will have a monthly meeting in the California Club. This will also be our annual meeting voting on our new slate of LAIPLA board members. Our monthly meeting chair Scott Hansen from Fulwider Patton was able to secure long-time LAIPLA member and Past-President Laurence Pretty as a speaker. This meeting will be co-sponsored by the Federal Circuit Bar in Orange County. We have been quite successful recently in our joint efforts with other organizations, and expect this to be so as well.

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Event Notice: March 21, 2011 Judges' Night

Annual Judges' Night
March 21, 2011
Millennium Biltmore Hotel
506 S. Grand Ave., Los Angeles, CA 90071

LAIPLA is pleased to announce our Annual Judges' Night will be held on Monday, March 21st at the Millennium Biltmore Hotel. We will begin at 5:30 p.m. with a panel discussion of judges, including *Honorable Arthur J. Gajarsa, Honorable David Carter, Honorable Andrew J. Guilford, Honorable Ronald S. W. Lew, and Honorable Lourdes G. Baird*. This will be followed by a reception and dinner at 6:15 p.m. Details and registration information are attached to this Bulletin. Register today and don't miss out on this great event. We look forward to seeing you on the 21st.

Event Notice: Spring Seminar 2011

Spring Seminar 2011
June 3-5, 2011
Hotel del Coronado

We are happy to announce for the first time a way to save extra on this year's Spring Seminar. (See attached flyer for more info).

Prepay by March 31, 2011, \$925* (Early Bird Special)

April 1, 2011 – May 15, 2011 \$975* (Regular Price)

After May 16th \$1,025* (Late Registration)

*Add \$105 if not LAIPLA or SDIPLA member

Hotel will be available at group rate of \$229/night

To register and pre-pay contact: laiplaoffice@aol.com or (626) 974-5429

LAIPLA Announces LinkedIn Groups

We are happy to announce that we have created a **LAIPLA Group on LinkedIn**. Join the group to connect with other LAIPLA members and add them to your professional network. We will publicizing events through LinkedIn.

Join LAIPLA Group: www.tinyurl.com/LAIPLAGroup

Alternatively, search "LAIPLA" in "GROUPS" in LinkedIn.

Join LAIPLA/SDIPLA Spring Seminar Group: www.tinyurl.com/SpringSeminar2011

Alternatively, search "LAIPLA" in "GROUPS" in LinkedIn.

Event Summary: February 25, 2011 Round Table Lunch

By: Sanjesh Sharma
Connolly Bove Lodge & Hutz

LAIPLA's Litigation Roundtable on Friday, February 25th at the Los Angeles office of Jones Day was a huge success. Over forty attorneys heard Professor Robert Merges speak on patent enforcement by non-practicing entities (NPEs) and the impact of this on the secondary market for patents. With Brent Sokol of Jones Day moderating, Professor Merges discussed valuation of litigation behavior and posited models accounting for whether the patent asserted by the NPE added value to society. Audience participation at the program was commendable, drawing an interesting and highly academic question-and-answer session. So moved were some that they stayed beyond the two hour-program to indulge in additional questions on NPE enforcement. All in all, a high-quality educational program.

President's Message

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Speaking of joint efforts, our June 3 to 6 annual Spring Seminar is shaping up nicely. It will take place in the famous "Del" on Coronado Island in San Diego. Although still in progress, I can assure you that we have already an impressive list of speakers. We have not only secured immediate past Federal Circuit Chief Judge Michel, but will also have high ranking in-house counsel speakers and I have just learned that PTO Director David Kappos is going to speak as well. We have included our "Save the Date" flyer with this Bulletin, offering also a discounted early bird rate. Stay tuned and please, save the date! You will not regret it.

For the event, we have teamed up with the San Diego Intellectual Property Law Association (SDIPLA). From LAIPLA's end, the Spring Seminar Committee consist of Phil Graves and Nikki Ma, both from Graves Walton, Mark Treitel from Quinn Emanuel, and Sanjesh Sharma from Connolly Bove. I take the position as our Spring Seminar board liaison, and lucky me, our committee is so well organized that I just need to give some general guidance. On SDIPLA's end, we have SDIPLA President John Peterson of Perkins Coie and SDIPLA Secretary Kurt Kjelland of Goodwin Procter working on the program, both equally motivated as LAIPLA's team. Mark Treitel has set up a LinkedIn group, both in general for LAIPLA, and an event-specific LAIPLA group for the Spring Seminar. This allows participants not only to network prior to the event, but also to stay in touch after the event. We are aware of the fact that the IP community can get information easily from the Web. This is why we are putting a lot of emphasis on combining high profile speakers with social events and networking opportunities. Also, the event allows and organizes for sufficient recreational activities and is very family friendly, including organizing child care options. So whether you come alone, with your spouse or a guest, or as a family, this will be the right event for you.

Article: All Aboard For Post-Grant Patent Review in Detroit

The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members.

By: Jeremy R. Kriegel
Marshall Gerstein & Borun LLP

Law360, New York (February 23, 2011) — **4:50 a.m.:** The alarm clock goes off. A little earlier than usual, but a good night's sleep in your own bed and an adrenaline rush from anticipation of the day ahead gives you extra motivation to get up.

5:45 a.m.: Arrive at Union Station with plenty of time to catch the Wolverine Express, Amtrak's high-speed rail service from Chicago to Detroit.

6:00 a.m.: Recline your seatback and pull out your laptop, connecting to the train's free Wi-Fi. After setting your "out-of-office" autoreply and responding to some overnight e-mails, you spend the next couple of hours reviewing some prior art patents, reviewing your client's patent specification, and poking some additional holes in the opponent's anticipation and obviousness arguments. After all, you worked hard to get those claims allowed and believe firmly in their patentability.

10:30 a.m. (Eastern Standard Time): You almost forgot to adjust your watch, but fortunately your smartphone reminded you that you passed into the Eastern time zone as the train pulls into the station in Detroit. With some time to spare before the hearing, you make your way over to the satellite U.S. Patent and Trademark Office, find an empty room and draft some "substitute claims" you thought of on the train as a backup in case the panel doesn't see things your way regarding the claims of the issued patent and you need to make a motion to amend the patent, as permitted by the post-grant review chapter of the Patent Reform Act of 2011. These claims delicately avoid the prior art while still reading not only on your client's commercial embodiment, but also arguably on the post-grant review petitioner's product.

5:35 p.m. (EST): After a successful hearing, you call the client's in-house counsel as the train pulls out of the station to relay the great news: The Patent Trial and Appeal Board panel agreed with your arguments and sustained the claims of the issued patent. You celebrate with a Coney Island hot dog that you picked up on the way back to the station, lean back and relax for the high-speed train ride to Chicago.

8:00 p.m. (Chicago time): Back at Union Station a few minutes early. Having already read your e-mails on the train (including a congratulatory one from the CEO of the client, notified by the in-house counsel after your call), you catch a cab home and think about the next post-grant review hearing coming up in a few weeks.

A decade ago this timeline would have sounded like a pipe dream. But if high-speed rail, the USPTO's plans to launch the satellite patent office in Detroit, and the Patent Reform Bill of 2011 all come to fruition, this scenario could actually come to pass in a few years.

The satellite patent and trademark office, which will be the first branch of the USPTO outside of the Washington, D.C., area, offers convenience to Midwest technology companies, research institutions and patent practitioners. While it remains unclear what services will be offered at the satellite patent office, if patent examiners are on-site at that facility then at a minimum it could be a location for productive personal interviews with examiners to advance the prosecution of applications. If the satellite patent office also houses panels of the proposed Patent Trial and Appeal Board, post-grant review hearings could be held there as well.

The proposed Patent Reform Act of 2011 (S.23) calls for post-grant review. Similar to post-grant oppositions in Europe and Australia, but with some notable differences, this procedure would provide third parties a window of nine months in which to request an inter partes administrative challenge to the validity of a patent, complete with limited discovery and an opportunity for an oral hearing.

Even without the benefit of proposed regulations explaining how the USPTO would implement post-grant review, the bill proposing the Patent Reform Act of 2011 spells out procedural deadlines that will keep both patentees and challengers on their toes as they jockey for position to gain subtle advantages. For example, despite the nine month window to petition for post-grant review, a defendant to a lawsuit alleging patent infringement has no later than six months after being served with a complaint to petition for post-grant review, meaning a patentee who is aware of an infringer possesses the power to shorten, by up to three months, that infringer's window of time in which it might search for prior art to try to invalidate claims of the patent in a post-grant review petition.

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The Patent Reform Bill incentivizes patent holders to file infringement actions promptly after issuance of a patent in another manner: If the patentee files an infringement suit within three months of the patent's issue date, while the defendant would still have six months in which to file a petition with the USPTO for post-grant review, the court hearing the infringement action would be precluded from staying the litigation pending outcome of the post-grant review.

The Patent Reform Bill also offers at least some opportunity for the patentee to accelerate the timing of a final disposition of a post-grant review. The bill requires the director of the USPTO to determine whether to institute a post-grant review within three months of the patentee's preliminary response to the petition for post-grant review or, if no preliminary response is filed, within five months from the filing of a petition for post-grant review, and give notice of that determination "as soon as practicable."

The director's determination is not appealable. To initiate a post-grant review, the director must determine that the information presented in the petition, if not rebutted, would demonstrate it is more likely than not that at least one of the claims challenged in the petition is unpatentable. Once a post-grant review is instituted, the Patent Trial and Appeal Board would have to make a final determination within a year of the director's notice of institution of the proceeding, which final determination would then be appealable to the Court of Appeals for the Federal Circuit.

The preliminary response is the patentee's opportunity to challenge the petition on procedural grounds (such as the petitioner's failure to identify all real parties in interest or failure to identify each challenged claim with grounds on which the challenge is based and evidence supporting the grounds for the challenge). By filing a preliminary response sooner than two months after the petition for post-grant review is filed, the patentee could move up the three-month deadline by which the director must decide to institute the post-grant review, thereby advancing the one year date by which the Patent Trial and Appeal Board would be required to reach its final determination (although the director of the USPTO may, for good cause, extend the one-year period by up to six months). The limited ability to get to a final disposition of a post-grant review up to two months sooner, by filing a preliminary response very soon after receiving a petition for post-grant review, may come in handy for a patentee facing a stay of any parallel infringement litigation on the patent filed more than three months after the issue date of the patent.

Just as the satellite patent and trademark office in Detroit is seen by the USPTO as a solution for working down a backlog of patent applications, it is possible that the satellite patent office in the Midwest may also be seen as a forum for conducting post-grant review hearings in a timely fashion so as to meet the ambitious timelines set forth in the proposed Patent Reform Act of 2011. The next few years may offer exciting fundamental changes to Midwest participants in the patent system. With renewed interest in patent reform and an administration in Washington looking toward the patent system and public transit as essential building blocks in the road toward economic recovery, high-speed rail commutes from Chicago to argue post-grant review hearings in Detroit may be closer than you think.

Article: Microsoft, Therasense and Burdens of Proof By: Christopher Ohly & Sailesh K. Patel Schiff Hardin LLP

The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members.

Law360, New York (February 17, 2011) — The Court of Appeals for the Federal Circuit has complained that "the habit of charging inequitable conduct in almost every major patent case has [been] an absolute plague." [1] In almost every case in which inequitable conduct is alleged, the assertion is predicated on a failure to disclose information in patent prosecution, often relevant prior art. Since 1982, the Federal Circuit has repeatedly restated the elements and burden of proof in inequitable conduct cases, it has redefined the meaning and level of materiality, and it has re-described the relationship between intent and materiality.

On Nov. 15, 2010, *Therasense Inc. v. Becton Dickinson and Co.*, No. 2008-1511o (Jan. 25, 2010), was argued en banc. In *Therasense*, the nondisclosed information was not prior art. Instead, the litigated patent was initially declared "unenforceable for inequitable conduct based on a failure to disclose statements made to the European Patent Office (EPO) during a revocation proceeding." The Federal Circuit ordered en banc review to consider whether "the materiality-intent-balancing framework for inequitable conduct [should] be modified or replaced?" and if so, how? The Federal Circuit also asked for briefs addressing whether the standards should "be tied directly to fraud or unclean hands," the "proper standard for materiality," and the circumstances in which it is proper to infer intent from materiality.

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Prior to oral argument, it might have been anticipated that the Federal Circuit would again answer these questions by narrowing the range of cases in which inequitable conduct may be asserted, for example by reinvigorating a “but for” test of materiality or by enhancing the type of required proof of intent.[2] However, oral argument and the questions asked by the court left one guessing at the direction the Federal Circuit may take, or whether any change will occur at all.[3] A critical moment occurred during questioning of Abbott’s counsel (the patentee), in rebuttal. The court asked whether the challenged conduct would “satisfy the but-for causation test?” Abbott’s counsel replied it was necessary, but it could not meet that test.[4] An opposite answer may have ensured affirmance. However, if the conduct challenged in Therasense did not satisfy the but-for causation test, almost no case would.

The Therasense Facts

The patent in Therasense covered disposable diabetes glucose test strips, which measure the level of glucose in a sample of blood, usually a single drop. A prior art patent, U.S. 4,545,382 (the ‘382 patent), issued to the same inventors, disclosed strips as follows: “Optionally, but preferably when being used on live blood, a protective membrane surrounds both the enzyme and the mediator layers, permeable to water and glucose molecules.”

In the EPO, Abbott was faced with possible revocation of a European counterpart to Abbott’s ‘382 patent, EP 0 078 636 (the ‘636 patent), a patent “with virtually identical specifications.” The ‘636 patent was revoked as obvious over a German reference. In the EPO, Abbott argued that the ‘636 patent was distinguishable from the German reference because the “optionally, but preferably” language in the EU ‘636 patent, identical to the language in the US ‘382 patent, was “unequivocally clear” and that the “protective membrane [described in the EU ‘636 patent] is optional, however, it is preferred when used on live blood.”

Abbott pursued the patent for 13 years in the USPTO through several continuation applications that were repeatedly rejected for anticipation and obviousness, including rejections over the prior art ‘382 patent. However, none of the EPO statements and proceedings were disclosed to the USPTO. At some point, new claims were drafted including electrochemical sensors lacking a membrane. Abbott argued that they were novel because they taught a sensor that “did not require a protective membrane when testing whole blood.” Abbott argued that “optionally, but preferably” would not have been read by a person having ordinary skill in the art (PHOSITA) to confirm that “a membrane is not necessary when testing live blood in vivo or whole blood in vitro.”

In litigation over the U.S. patent, the trial court found that Abbott’s EPO statements directly contradicted its representations to the USPTO. By describing the “[o]ptionally, but preferably” language as “unequivocally clear,” in the EPO, Abbott contradicted representations to the USPTO that a PHOSITA would have understood the words as mere “patent phraseology” that “did not convey a clear meaning.” Rejecting the prosecuting attorney’s testimony, the trial court stated:

”This argument conveniently overlooks the fact that he consciously chose to withhold. Counsel who steer a course toward obtaining a strong patent should err on the side of disclosure, not nondisclosure. And, it must be said, after so many rejections over so many years, it seems clear that Abbott’s primary goal was to eke out some claim, saving a fight over enforceability for a later day.”[5]

The inventor disclosed the inconsistent EPO information to the patent prosecutor, and “made direct representations to the USPTO — representations that were materially misleading by omission.” Thus “he was obligated to avoid intentional deception,” and was “duty-bound to avoid making an intentionally misleading submission, whether or not he told [the prosecuting attorney] about the inconsistency.”[6] The trial court found that the patentee’s “explanations for withholding the EPO documents were so incredible that they suggested intent to deceive.”[7]

The Initial Therasense Appellate Opinion

As the initial Federal Circuit panel noted, these findings were based on assessments of credibility that are “virtually

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unreviewable” and were “amply supported.” Even under the clear and convincing evidence standard, the Federal Circuit panel found no error in the trial court’s finding of bad faith or intent to deceive the USPTO, by withholding the EPO documents. The panel concluded that the withheld EPO information was “highly material” and that to “deprive an examiner of the EPO statements — statements directly contrary to Abbott’s representations to the USPTO — on the grounds that they were not material would be to eviscerate the duty of disclosure.” It found that the district court did not abuse its discretion in holding the Abbott patent unenforceable due to inequitable conduct.[8]

If intentional nondisclosure of “highly material” information does not “satisfy the but-for causation test,” what does? In Therasense, the inventor admitted “that he affirmatively participated in the group discussion not to disclose the EPO submission, i.e., that he knew all along that no one was going to disclose the EPO submissions.” *Id.*, 565 F.Supp. at 1115.

What more should be required?

For those, like the trial court and the initial Federal Circuit panel, who may have found the challenged nondisclosure to be the type that should invalidate a patent for “unclean hands” or “fraud,”[9] the compulsion to adopt a lesser standard, or at least a standard other than the “but-for causation test,” may have been increased by a response that the challenged conduct would not “satisfy the but-for causation test.” To ensure that candid disclosures are made to the USPTO, a lower evidentiary standard may be required, so that the type of conduct challenged in Therasense is condemned and the appropriate incentive to candor is created.

Microsoft: An Intervening Event

Intervening action by the U.S. Supreme Court may well have changed the outcome of Therasense or, at least, the framework in which a decision will be rendered. On Nov. 29, the Supreme Court granted Microsoft’s petition in *i4i LP, et al. v. Microsoft Corp.*,[10] patent litigation resulting in a \$290 million damages award and a permanent injunction restraining Microsoft from selling certain versions of its best-selling Microsoft Word product. The Supreme Court granted certiorari to consider whether, in determining patent validity, the courts must require proof by clear and convincing evidence, rather than a preponderance of the evidence, especially where invalidity is based on prior art unreviewed during patent prosecution.

The Microsoft Facts

In Microsoft, the patent related to a “metacode map” that allows a computer “to understand the meaning behind certain text that a user placed in document,” without reference to the content of the text.[11] XML is a markup language that uses such “metacodes.” In 2003, Microsoft introduced a version of Word with XML editing capabilities. The plaintiff, *i4i*, accused Microsoft of willful infringement. Microsoft claimed that its products did not infringe and that the patent was invalid for inequitable conduct.

The inequitable conduct allegation centered on the plaintiff’s sale of the “S4” product prior to filing of the first patent application. Microsoft asserted that the S4 product embodied the patented invention, and that the patent was invalid because “the inventor failed to disclose the S4 system to the USPTO.” The trial court found no dispute that “the S4 system was not specifically disclosed,” that it is prior art, and that the S4 product employed a markup language, marketed and put to use more than a year before the first patent application was filed.[12] The parties dispute was “whether S4 was material to ... patentability because it taught the ‘metacode map’ limitation and whether [the inventor] had deceptive intent in failing to disclose the prior art.”

The “source code of S4 certainly would have been an ideal and key piece of evidence.” By the time of trial, however, the source code was discarded and could not be found. Moreover, the inventors testified that they “could not remember the internal operation of S4.”[13]

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While facts relating to the S4 source code may not have provided “clear and convincing evidence” of “unclean hands” or “fraud,” they may well have undermined the basis for the USPTO’s judgment that the patent should be issued. Nevertheless, Microsoft’s other invalidity arguments were determined at trial under the same clear and convincing evidence standard. Unlike the parties in Therasense, however, Microsoft argued that a different standard should apply.

The Microsoft Trial Court Opinion

The trial court found testimony about materiality and deceptive intent to be insufficient when considered under the “clear and convincing evidence” standard, and refused to invalidate the i4i patent for inequitable conduct.[14] The trial court also rejected Microsoft’s other invalidity arguments, holding that the “burden remained on Microsoft to prove invalidity by clear and convincing evidence.”[15]

Microsoft sought a new trial, quoting the Supreme Court’s statement in *KSR International Co. v. Teleflex Inc.* that “the rationale behind the clear and convincing evidence standard seems ‘much diminished’ when defendants present evidence of prior art not considered by the USPTO.”[16] The trial court rejected these arguments as well.[17]

Microsoft in the Federal Circuit

Microsoft’s similar arguments were rejected by the Federal Circuit, which affirmed the judgment and injunction issued against Microsoft:

”We conclude that the jury instructions were correct in light of this court’s precedent, which requires the challenger to prove invalidity by clear and convincing evidence. ... This court’s decisions ... make clear that the Supreme Court’s decision in *KSR* ... did not change the burden of proving invalidity by clear and convincing evidence. Thus, based on our precedent, we cannot discern any error in the jury instructions.”[18]

Microsoft petitioned the Supreme Court for review, focusing solely on the question “Whether the Court of Appeals erred in holding that Microsoft’s invalidity defense must be proved by clear and convincing evidence.”

Microsoft and Therasense Intersect

One of the amicus briefs filed in support of Microsoft’s petition noted the direct connection between the issue raised in the petition and the issues pending in Therasense.[19] After noting the conflict between the Federal Circuit’s unwavering application of the clear and convincing standard, and the more flexible standard applied by all of the regional circuit courts after enactment of the modern Patent Act in 1952, the Teva and Cisco amicus brief described an “additional reason” supporting Microsoft’s request for Supreme Court review.

In words evocative of the trial court’s comments in Therasense,[20] the brief argued that the Federal Circuit rule “encourages patent applicants to forgo any search for potentially invalidating prior art and to conceal from patent examiners such prior art and any other information that could undermine their applications.” Because litigants bear the burden of proving invalidity by clear and convincing evidence, it argued, it is to the patentee’s advantage “if problematic information is considered for the first time in patent litigation and not by the examiner during patent prosecution,” because “such evidence will carry less weight than it would have carried with the patent examiner.”

On the other hand, the brief asserted, if patent applicants know that the “preponderance of the evidence standard will apply in case involving previously undisclosed information — the incentives to willful ignorance and active deception created by the Federal Circuit’s rule would be significantly reduced.”[21] The “incentive to suppress material information,” the brief argued, “is not significantly counterbalanced by the inequitable conduct defense,” which is “even more difficult to establish than invalidity.” This is particularly true because, in inequitable conduct cases, the inference of deceptive intent in non-disclosure of even highly material information must be “the single most reasonable inference able to be drawn from the evidence to meet the clear and convincing evidence standard.”[22]

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Implications

The “absolute plague” of inequitable conduct allegations is a by-product of the Federal Circuit’s inflexible application of the clear and convincing evidence to overcome the statutory presumption of patent validity.[23] Alteration of this inflexible requirement may provide a vaccine against the “plague.”

If Microsoft has the better argument, the Supreme Court might well again reverse Federal Circuit precedent and rule that patent invalidity may be established by a preponderance of evidence, at least where the defense is based on previously unreviewed information. Application of the clear and convincing evidence standard supposedly “rests on the ‘basic proposition that a government agency such as the then Patent Office was presumed to do its job.’”[24]

However, “the strength of the presumption should logically depend on the depth and quality of the review the USPTO actually gave to an application.”[25] Whatever the implications of the “basic proposition as a matter of administrative law, the USPTO cannot remotely be “presumed to do its job” when the relevant evidence was never before it.”[26] As other courts have said:

”Where the validity of a patent is challenged for failure to consider prior art, the bases for the presumption of validity, the acknowledged experience and expertise of the Patent Office personnel and the recognition that patent approval is a species of administrative determination supported by evidence, no longer exist.”

In such cases, “there is no factual determination with respect to patentability that warrants deference in the form of a clear-and-convincing-evidence standard.”[27]

In many cases the fact of nondisclosure is undisputed. In such cases, if invalidity may be proven by a preponderance of the evidence, a patent challenger might well choose to refrain from asserting a defense of inequitable conduct to avoid the impact of the clear and convincing evidence burden. While this may change the nature of the “plague” and, in some cases, make it easier to prove a patent’s invalidity, the change may well be warranted, both by law and policy. Invalid patents “stifle, rather than promote, the progress of useful arts.”[28] As the Supreme Court noted in *KSR*, “Invalid patents confer market power ‘without consumer benefit,’ encourage litigation, raise ‘transaction costs,’ and create uncertainty that ‘may deter investment in innovation and/or distort its direction.’”[29]

While patent litigation has been “an important tool for ‘weeding out ... those patents that should not have been granted,’” it is also an expensive and inefficient tool when a heightened burden of proof allows patents to survive that would never have been issued if they had been examined, in light of all relevant evidence and without benefit of the protection of a “presumption of validity” enforced through application of the clear and convincing evidence standard.[30] The more “important tool” for “weeding out” bad patents is examination in the USPTO with an enhanced incentive for full disclosure by patent applicants, even of evidence that may undermine a pending application. Full disclosure, of course, will also serve to diminish the “absolute plague” of inequitable conduct allegations, especially those based upon nondisclosure of important information, like the allegations in both *Therasense* and *Microsoft*. When “highly material” information is disclosed, an element of both inequitable conduct and other invalidity arguments will be missing.

Arguments will be made, as they were in *Therasense*, that patent examiners are already overloaded and that a reduced burden in litigation will provoke pernicious “data dumping” by patent prosecutors, who may choose to inundate overburdened examiners with marginally relevant information, in order to avoid later charges of nondisclosure in an environment governed by proof by a preponderance of evidence. These arguments miss two points.

First, alteration of the evidentiary standard, in cases in which an assertion of invalidity is based on nondisclosure of “highly material” information that a patent examiner did not review during patent prosecution, does not eliminate the statutory presumption of patent validity. The burden will remain with a patent challenger to adduce evidence that demonstrates *prima facie* invalidity. Hence, it will not be a patentee’s nondisclosure of any evidence that will result in enhanced risk.

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Only nondisclosure of important or “highly material” information will persuade a fact finder that the initial burden has been met. That burden, of course, can be rebutted in a number of ways, whatever the burden of proof on the accused infringer.

Second, because invalidity will be established by nondisclosure of important information, “data dumping” is unnecessary and even counterproductive. Such “data dumping” may even yield charges that a patentee endeavored to conceal important information as a needle in a “data dumped” haystack. Instead, what will be required is real candor: in order to secure a strong patent a patentee will be required not only to disclose, but also to point out, what is important, and not simply to provide an examiner with everything or nothing.

The beneficial effects on patent prosecution and on the patent system are self-evident. In an environment in which candid and full disclosure is encouraged, examiners will be better able to do their job, with the assistance of a patentee’s counsel, and the presumption of validity will be more meaningful, because it will be applied to well-examined patents that embody real, novel invention, and that have earned the monopoly that patents confer.

Article: A Look at State Court Trade Secret Stats

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The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members.

Law360, New York (March 1, 2011) — Disgruntled employees, unscrupulous competitors, devious hackers — the threat of trade secret theft is a fact that every company in the 21st century must face. Countering this threat requires the best available information. To that end, five attorneys at O’Melveny & Myers LLP (the author of this article, Darin Snyder, Michael Sapoznikow, Whitney McCollum and Jill Weader) conducted the largest-ever statistical study of trade secret litigation in state courts. We read 2,077 state appellate court decisions issued between 1995 and 2009, and we coded 358 of them for 17 criteria. The results, summarized below, confirmed some long-held assumptions and contained a few surprises. One such confirmed assumption: In the vast majority of trade secret cases — over 90 percent, in fact — the alleged misappropriator was either the trade secret owner’s employee or business partner. And one such surprise: Alleged misappropriators (the defendants) won on appeal more often than trade secret owners (the plaintiffs).

Frequent readers of Law360 might be experiencing *deja vu*. The state study is the second of two parts, a sequel to the author’s article last year in Law360 summarizing the largest-ever statistical study of trade secret litigation in federal courts. For the federal study, the same five O’Melveny attorneys read 1,523 federal district court decisions issued between 1950 and 2008 and coded 394 of those decisions for 28 criteria. We conducted both studies because trade secret litigation takes place in both state and federal courts. State courts exercise original jurisdiction over trade secret claims because substantive trade secret law is primarily state law. Federal courts exercise supplemental or diversity jurisdiction over trade secret claims and exclusive jurisdiction over claims under the Economic Espionage Act, the federal statute that criminalizes certain types of trade secret misappropriation. *Gonzaga Law Review* published the state study in February of this year and the federal study last year. Those studies, available at <http://www.omm.com/davidalmeling>, contain a complete description of our methodology and data. This article summarizes our key findings from the state study and compares them to the federal results.

Who Steals Trade Secrets?

In more than 90 percent of trade secret cases in both state and federal courts, the alleged misappropriator was either the trade secret owner’s employee or business partner. A prudent trade secret owner should thus focus its efforts on protecting trade secrets from treasonous employees and unscrupulous business partners. This focus can be tricky. It is difficult to view employees as both valued members of the company and threats to the company’s trade secrets. Still, given the risks, a company should take reasonable precautions.

One key difference between state and federal courts is that while 78 percent of state cases involved alleged employee misappropriators, only 53 percent of federal cases did. The converse is true of business partners. Fewer state cases involved alleged business partner misappropriators (20 percent) than federal cases (39 percent).

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California, Texas and New York Have the Most Trade Secret Litigation

Just five states account for about half of all trade secret litigation in state appellate courts. California leads the pack, followed by Texas, Ohio, New York and Georgia. The top five district courts for federal cases are, in order, in Illinois, California, New York, Michigan and Texas.

California, Texas and New York are on both lists. This stands to reason, because these are the three most populous states. It also demonstrates that unlike patent law, where certain districts are preferred by plaintiffs and hear a disproportionate number of cases (e.g., Eastern District of Texas), there is comparatively less forum shopping in trade secret cases.

Two of the top states for trade secret litigation — Texas and New York — do not follow the Uniform Trade Secrets Act (UTSA). This is significant because all but four of the 50 states have enacted the UTSA in some form.

Trade Secret Litigation Is Increasing

Trade secret litigation in federal courts is growing exponentially. Trade secret cases doubled between 1988 and 1995, then doubled again between 1995 and 2004. At their current rate, trade secret cases will double once more by 2017. This growth is particularly pronounced because it compares with an overall decrease in federal litigation.

Trade secret litigation is also growing in state courts, but at a more modest pace. During the 15-year period of the state study, trade secret litigation did not double and, at the current rate, is not expected to double for another two decades or more. Still, trade secret litigation in state courts is growing faster than the overall rate of litigation in state courts.

Common Types of Trade Secrets

Trade secrets come in almost infinite variety. Here's just a sample of trade secrets the courts have recognized: chemical formulas, source code, methods, prototypes, pre-release pricing, financials, budgets, contract terms, business plans, market analyses, salaries, supplier and customer information, experiments, positive and negative experimental results, engineering specifications, laboratory notebooks and recipes. Despite this variety, two categories comprised more than 90 percent of trade secrets litigated in both state and federal courts: internal business trade secrets (i.e., customer lists and internal business information) and technical trade secrets (i.e., formulas, technical information and software or computer programs).

Unpacking the data reveals that state courts had a higher percentage of cases involving internal business trade secrets than federal courts (70 percent vs. 48 percent) and a lower percentage of cases involving technical trade secrets (36 percent vs. 56 percent). (These percentages add up to more than 100 percent because many cases involved more than one kind of trade secret.) A possible explanation for this difference is that plaintiffs often bring both trade secret and patent claims in the same case. Federal courts have exclusive jurisdiction over patent claims. Because patent cases involve inventions, which are more akin to technical trade secrets than internal business trade secrets, it follows that a greater number of federal cases involve technical trade secrets than business trade secrets.

State Appellate Courts Favor Defendants

In state appellate courts, alleged misappropriators (the defendants) won more often than trade secret owners (the plaintiffs), prevailing in 57 percent of cases and losing in 41 percent. Alleged misappropriators also succeeded more often in terms of reversal rates. Appellate courts reversed lower court decisions in favor of trade secret owners more often (58 percent) than lower court decisions in favor of alleged misappropriators (42 percent).

Suing a Business Partner? Consider Federal Court

Trade secret owners won 42 percent of the time on appeal when they sued an employee, but only 34 percent when they sued a business partner. One takeaway is that if a trade secret owner is contemplating suing a business partner, the owner should consider whether filing in federal court is an option. State courts hear relatively fewer cases against business partners than federal courts (above section titled "Who Steals Trade Secrets?"), and cases against business partners appear to be tougher to win in state courts than cases against employees (previous paragraph).

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Affirmance Rates

The state appellate court affirmed the trial court in a majority of cases (68 percent), but in a sizable minority (30 percent) the appellate court reversed. The rate of state trade secret cases reversed on appeal was similar to the rates of other types of IP cases. For appeals of claim construction rulings in patent cases, the Federal Circuit reversed in 30 percent of cases. And in appeals of fair use rulings in copyright cases, the appellate court reversed 34 percent.

Authority

For decades following its 1939 publication, the Restatement (First) of Torts “was almost universally cited by state courts, and in effect became the bedrock of modern trade secret law.” James Pooley, *Trade Secrets* § 2.02[1] (2010). Those days are over. Only 5 percent of the cases in the state study cited the Restatement.

Additionally, federal courts cited persuasive authority in more than a quarter of cases. State courts did so in a meager 7 percent of cases. While state courts rarely cited persuasive authority, this in no way suggests that practitioners should neglect providing the court with persuasive authority. All but four states have enacted some version of the UTSA, a central purpose of which is to make uniform the law of trade secrets. Further, trade secret law is complex. To the extent that the practitioner can supply the court with additional authority — even if that authority is from other jurisdictions — that authority improves the court’s decision-making.

The Prima Facie Case

No universal definition exists for what a plaintiff must prove to prevail on a prima facie case of trade secret misappropriation. But there are generally considered to be four core elements:

“Reasonable measures” is whether the trade secret owner engaged in efforts that were reasonable under the circumstances to maintain the secrecy of the alleged trade secret.

“Value” is whether the trade secret had sufficient value to qualify as a protectable trade secret.

“Misappropriation” is whether the alleged acquisition, use, or disclosure was wrongful.

“Validity” is whether the alleged trade secret constituted information that qualified as a protectable trade secret.

Courts addressed validity most frequently (69 percent of state cases and 61 percent of federal cases), followed by misappropriation (56 percent, 49 percent), reasonable measures (32 percent, 27 percent) and value (20 percent, 17 percent). The consistency is striking. It shows that when deciding trade secret cases, courts in both jurisdictions focus on the core elements of whether the information was a trade secret and whether the defendants misappropriated it.

The Importance of Confidentiality Agreements

To state a claim for trade secret misappropriation, the trade secret owner must establish that it took reasonable measures to protect its trade secrets. No bright-line rule defines the number or type of measures necessary. Lawyers commonly advise their clients to implement as many protective measures as reasonably possible. That’s a good starting point. But the data show that some measures merit special attention.

Of all the measures trade secret owners took in state and federal cases, only two statistically predicted that the court would find that this element was satisfied: confidentiality agreements with employees and confidentiality agreements with third parties. In short, both the state and federal studies confirm that confidentiality agreements with employees and business partners are the most important factors when courts evaluate reasonable measures.

3,500 Cases Later

The state and federal studies present the most complete objective analysis of trade secret litigation published to date. Yet these studies do not come close to satisfying the need for statistical analysis of trade secret litigation. When compared to the dozens of statistical analyses on patent, trademark and copyright law, the empirical study of trade secret law has a long way to go. We hope that our work over the last two years in the state and federal studies — reading more than 3,500 cases, coding more than 750 of those cases for dozens of criteria, and working with statisticians and others to interpret and explain the data — provides useful information about trade secret litigation and sparks further investigation into this important area of the law.

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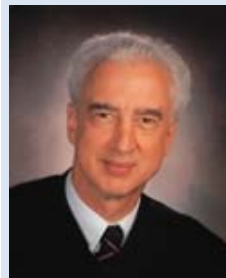
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