

Widex: Reputational Damage keyed to § 285

Tomorrow the Supreme Court has scheduled a *certiorari* vote in *Widex A/S v. Energy Transp. Group, Inc.*, Supreme Court No. 12-1136, *proceedings below, Energy Transp. Group, Inc. v. William Demant Holding A/S*, 697 F.3d 1342 (Fed. Cir. 2012)(Rader, C.J.), where the accused infringer argues that the Federal Circuit should have considered its appeal as a willful infringer even though it suffered no monetary damages for willful infringement. The decision on grant of review is expected to be announced in the Orders List on Monday morning.

The Supreme Court is taking this case up at its Conference tomorrow to consider whether to grant *certiorari*. The decision as to whether *certiorari* is granted is expected on Monday.

What makes this petition interesting is the cultural difference between Continental Europe and the United States which was not taken into account in the appellate proceedings in this case.

The first *Question Presented* asks:

“Whether the ... Federal Circuit may refuse to review a fully briefed challenge to a jury's finding of willful patent infringement solely because the trial court did not enhance damages based on the jury's finding, even where the finding of willfulness itself leads to serious, albeit non-pecuniary, reputational harms[.]”

There is no factual dispute on this point: In the opinion below, Chief Judge Rader explained that

“Widex appeals the district court's denial of JMOL of no willful infringement. The district court denied [the patentee]’s motions for enhanced damages and for attorney's fees, however, and [the patentee] has not appealed that decision. Because no consequences flow from the district court's decision regarding willful infringement, this court does not reach the issue.” *Energy Transp. Group*, 697 F.3d at 1355 (citation omitted)

The Danish Government Defends its Citizens

The Government of Denmark filed an *amicus curiae* brief arguing that its citizen-litigant had been wronged by the failure of the Federal Circuit to treat the willfulness issue:

The Government of Denmark has a strong interest in the treatment of Danish companies by the courts of the United States. The Petition ... raises serious legal questions about the treatment of two Danish companies, Widex A/S and Widex USA, Inc. who were wrongfully found to have willfully infringed respondent's patent. The Government of Denmark files this *amicus* brief for four reasons.

First, this case raises substantial questions about the rigor and quality of the Federal Circuit's review of an erroneous patent infringement decision. The treatment of international parties in U.S. federal courts is vital, both as a matter of U.S. law and as a means of ensuring strong international relations.

Second, the Government of Denmark considers it critically important for the continued operation of Danish companies in the United States that the legal framework for doing business be stable, reliable, and, to the greatest extent possible, predictable. ***

Third, the United States and Denmark have for centuries enjoyed exceptionally strong diplomatic and commercial ties. ***

Fourth, the Government of Denmark is concerned about the damaging effect that the Federal Circuit's ruling might have on other Danish companies. The Federal Circuit upheld the lower court's finding that *Widex* was a willful patent infringer without any meaningful review of that ruling. If allowed to stand, this lack of review may well deter other Danish companies from pursuing commercial opportunities in the United States, contrary to the strong economic ties that the Government of Denmark has sought to foster with the United States.

A Difficult Row to Hoe

One may well question the intervention of the Danish government in this case which, if anything, draws attention to a heretofore routine judgment that has gone largely unnoticed.

If it is the reputation of the Danish companies that is at stake, the act of the Danish government entering an *amicus* appearance only serves to underscore and publicize the trial court's determination of willful infringement.

If anything, a denial of *certiorari* may well be understood by the public as an approval of the actions below. (A scenario where the Supreme Court would grant *certiorari* is difficult to imagine.)

HCW

April 18, 2013