Protecting Patents Just Got Easier

Do Supreme Court decisions limit patent abuse?

April 29, 2014, was a big day for the littler guy. The United States Supreme Court, in a unanimous decision, decided companion cases regarding fee shifting in patent suits. The questions at issue were (1) under what circumstances a prevailing party in a patent suit could obtain an award for attorney fees (the Octane case) and (2) what type of review, on appeal, is required of the Federal Circuit (the Highmark case).

Prior to these decisions, it was almost impossible to obtain attorney fees in patent cases, even in outrageous cases. The two decisions significantly lower the bar for parties to obtain such fees.

The statute in question is Section 285 of the Patent Act. It reads in its entirety:

"The court in exceptional cases may award reasonable attorney fees to the prevailing party."

Fourteen words. So, what was the fight about?

First, the definition of the word *exceptional*. In a 2005 case, the federal court defined *exceptional* in a very stringent manner: A case was exceptional only when a party engaged in material inappropriate conduct or when the litigation (1) was brought in subjective bad faith *and* (2) was objectively baseless. Further, the 2005 case held, the improper conduct had to be established by a very high standard—clear and convincing evidence.

Octane and Highmark changed all of that. The Supreme Court stated that the Federal Circuit, which oversees all patent appeals, had made it too difficult to get attorney fees in egregious patent cases. The new rule articulated by the Court is that the word *exceptional* shall be defined by its ordinary meaning, including *uncommon*, *rare*, *not ordinary*. Something less than bad faith can be "exceptional." District courts now may determine whether a case is exceptional by looking at the totality of the circumstances.

Of the two-pronged test, the Court held that both factors need not be present; meeting one satisfies the test. And the Court lowered the standard of proof required for a showing of misconduct.

Second, the Court lowered the standard of review on appeal, making it easier to obtain an award for attorney fees.

Daniel Nazer, staff attorney at the Electronic Frontier Foundation, thinks the cases are a very good development for defendants in patent suits. "It's a real change," he says, "a real signal to lower court and district court judges that they can award fees."

More than 6,000 patent lawsuits were filed in 2013, a 12.4 percent increase over 2012, and nonpracticing entities (NPEs), or patent "trolls," were the top 10 filers of patent lawsuits in 2013, according to a report from Lex Machina.

But NPEs aren't the only abusers, and we can't pretend we haven't heard allegations of patent litigation abuse in our industry. Large operating companies sometimes also use patent infringement claims, seemingly as part of their acquisition strategies. Will the Court's decisions deter these abuses?

The word *exceptional* takes on new meaning.

They might, Nazer says. "It certainly makes the business model riskier," but not so risky as to eliminate the problem. When it comes to the big guys, because they typically have adequate capital allocated to litigation expenses, "they can consider these costs part of their operating expenses," says patent attorney Pejman Yedidsion.

Nazer believes the rulings should reduce the volume of cases brought by the worst kind of patent troll, but cautions, "Judges are generally reluctant to award attorney fees where statutes allow for fee shifting because it adds another layer to the litigation." It's like a new case; players can then question, for example, whether the amount of the award was justified.

In spite of courts' hesitance to award fees, just 15 days after the rulings, the Federal Circuit said in another case that the high court's new standard for fee shifting warranted remanding the case for a determination of fees. And, on May 30, a defendant in another case was awarded fees.

The precedent is a good start, but many, including Yedidsion, believe legislative reform is also necessary. "Having Congress enact legislation may be a better path for change than two companies appealing their cases all the way to the Supreme Court," he said.

The broader discretion the Supreme Court gave the Federal Circuit may deter patent holders from bringing frivolous claims. It certainly can't hurt. ☒

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