DEVELOPMENTS IN PATENT LAW 2013

Court Decisions

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INTELLECTUAL PROPERTY LAW

OUTLINE OF WRITTEN MATERIALS

A. Patentability, Validity, and Procurement of Patents

1. Statutory Subject Matter – Computer Software and Genes
2. Anticipation
3. On-Sale Bar to Patentability
4. Obviousness-Type Double Patenting
5. Reexamination Results Trump Litigation Validity Determination
6. Obviousness
7. Patent Trial & Appeal Board – New Ground of Rejection
8. Inequitable Conduct
9. Public Use Bar to Patentability

B. Interpretation and Infringement of Patents

1. Claim Construction
2. Interpretation of Means Plus Function Clauses
3. Disclaimer of Claim Scope – "Implicit Disclaimer"
4. Induced Infringement – Belief in Invalidity as Defense
5. Divided Infringement/Joint Induced Infringement

C. Enforcement of Patents

1. Standards-Essential Patents
2. Preliminary Injunctions
3. Attorney Fees for Misconduct
4. Patent Exhaustion
5. Permanent Injunctions
6. Legality of Provisions Prohibiting Challenging Patent Validity in Settlements
7. Reverse-Payment Settlements May Invoke Antitrust Liability
8. Patent Malpractice – Is it a Federal Case?
9. Avoiding Litigation Without Giving a Covenant Not to Sue
10. Appeals of Liability Before Damages Determined
11. Complaint that Complies with Form 18 is Sufficient for Pleading

D. Patents at the U.S. Supreme Court

A. Patentability, Validity, and Procurement of Patents

1. Statutory Subject Matter – Computer Software and Genes

CLS Bank International v. Alice Corp. PTY. Ltd., 717 F.3d 1269 (Fed. Cir. 2013), *superseding* 685 F.3d 1341 (Fed. Cir. 2012). Alice Corp. is the owner of four patents that cover a computerized trading platform for exchanging obligations in which a trusted third party settles obligations between a first and second party to eliminate settlement risk, which is the risk that only one party's obligation will be paid. Three types of patent claims were at issue: (1) method claims; (2) computer-readable media claims; and (3) system claims. The district court held that all the claims were not patent- eligible under 35 U.S.C. § 101 because they fell within the "abstract ideas" exception to patentability. A panel of the Federal Circuit initially reversed, holding that the claims were directed to practical applications of the invention falling within the categories of patent eligible subject matter. The panel stated that it must be "manifestly evident that a claim is directed to a patent ineligible abstract idea" before it will be ruled invalid. The Federal Circuit later granted a petition for rehearing en banc.

The *en banc* court (decided by 10 judges who were eligible to hear the case) reversed the panel decision and issued a total of 6 separate opinions, plus a seventh "additional views" passage by Chief Judge Rader. In a per curiam opinion, a majority of the judges agreed that the method and computer-readable media claims were invalid, but disagreed as to the reasoning. An equally divided (5-member) court affirmed the district court's decision that the system claims were also invalid. Judge Lourie (joined by 4 others) concluded that all claims were invalid because they "preempt a fundamental concept" – the "idea" of the invention is third-party mediation, and clever claim drafting cannot overcome that preemption. Judge Rader, writing for a 4-member minority, agreed that the method and computer-readable media claims were invalid because they recited an abstract concept, but would have upheld the patentability of the system claims, pointing out that a machine cannot be an "abstract idea." Judge Moore, writing for 4 judges, also pointed out that the system claims should not be considered an abstract idea. Judge Newman would have found all of the claims patent-eligible. Judges Linn and O'Malley would also have found all claims to be patent-eligible because the parties agreed that all claims required the use of a computer. Judge Rader's "additional views" lamented the lack of agreement on the issue.

Ultramercial, LLC v. Hulu, LLC, 722 F.3d 1335 (Fed. Cir. 2013), *on remand from WildTangent, Inc. v. Ultramercial*, LLC, 132 S.Ct. 2431 (2012) (vacating earlier decision). A claim for a method of distributing copyrighted materials by allowing free access to the materials in exchange for watching an advertisement was held to constitute statutory subject matter under 35 U.S.C. § 101. The district court held that the claims were invalid because they did not recite statutory subject matter. The Federal Circuit reversed, concluding that many of the recited steps required computer programming, and one step even recited that the media products be provided "on an Internet website." The Supreme Court vacated and remanded the case for further consideration by the Federal Circuit.

On remand, a panel of the Federal Circuit reaffirmed its earlier decision, concluding that judicially-recognized exceptions to patentability (e.g., laws of nature, physical phenomena, and abstract ideas) should be interpreted narrowly. Moreover, attacks on patent validity, including whether an invention falls within an eligible category, must be proven by clear and convincing evidence. The panel relied in part on a dictionary definition of "abstract" to conclude that "An abstract idea is one that has no reference to material objects or specific examples – i.e., it is not concrete." Relying in part on the Supreme Court's 1981 decision in *Diamond v. Diehr*, the panel noted that it is improper to dissect a claim into old and new elements and then to ignore the presence of the old elements in the analysis. According to the panel, "a claim may be premised on an abstract idea . . . the question for patent eligibility is whether the claim contains limitations that meaningfully tie that abstract idea to an actual application of that idea through meaningful limitations." The panel also stated that, "[if] the computer plays a meaningful role in the performance of the claimed invention, it is as a matter of fact not likely to pre-empt virtually all uses of an underlying abstract idea, leaving the invention patent eligible."

Based on the facts in this case, the panel concluded that the district court had erred in requiring that the patent owner come forward with an interpretation of the patent claims that would render them patent-eligible; the claims should instead have been presumed to be patentable. The panel also concluded that the district court erred in characterizing the invention as "the mere idea that advertising can be used as a form of currency," instead of looking at specific claim limitations invoking computers and applications of computer technology. Based on the specific steps recited in the claim, the panel held that it did not cover the abstract idea of using advertising as currency. It pointed specifically at the step of "providing said media products for sale on an Internet website." In viewing the claim as a whole, the panel majority concluded that the invention involved an extensive computer interface.

Judge Lourie wrote a concurring opinion, arguing that the court should have applied the five-member plurality opinion from *CLS Bank v. Alice Corp*., 717 F.3d 1269 (Fed. Cir. 2013). Applying that two-part test, Judge Lourie concluded that first, a court must identify whether the claimed invention fits within one of the four statutory classes set out in 35 U.S.C. § 101; and second, it must assess whether any of the judicial exceptions to subject matter eligibility applies, including whether the claims are drawn to an abstract idea. In this case, Judge Lourie agreed that the patent claims required more than merely the abstract idea of using advertising as an exchange or currency.

Association for Molecular Pathology v. Myriad Genetics, Inc., 133 S.Ct. 2107 (2013). Myriad obtained several patents directed to detecting the location and sequence of certain genes that can lead to a dramatic increase in breast cancer risk. Several plaintiffs sued Myriad, contending that the patents are invalid, and the district court granted summary judgment that the patents were invalid. The Federal Circuit reversed, but the Supreme Court vacated the decision and remanded for reconsideration in view of the Supreme Court's 2012 decision in *Mayo Collaborative Services v. Prometheus Labs*, 132 S.Ct. 1289 (2012). Following remand, the Federal Circuit again affirmed, but the Supreme Court again granted certiorari, and issued a decision upholding the patentability of certain claims directed to synthetically created composite DNA (cDNA), but concluding that claims directed to isolated DNA segments were not patent-eligible. According to the Court, DNA segments were an unpatentable product of nature, whereas the cDNA segments were entirely man-made. The Court noted that no method claims were at issue in the case.

Accenture Global Services, GMBH v. Guidewire Software, Inc., 728 F.3d 1336 (Fed. Cir. 2013). A district court held on summary judgment that all claims of Accenture's patent, directed to a system for generating tasks to be performed in an insurance organization, were invalid because they were not directed to patent-eligible subject matter. Accenture appealed only the holding as to the system claims, which recited elements including "an insurance transaction database," "a task library database," "a client component in communication with the insurance transaction database," and "a server component in communication with the client component." Judge Lourie, writing for a panel majority, applied the test set forth in his plurality opinion in *CLS Bank* (see above) and concluded that the system claims recited merely an abstract idea. Judge Lourie concluded that the system claims were quite similar in structure to the method claims, which Accenture had not appealed. According to Judge Lourie, the various "components" recited in the system claim were all present in the invalidated method claims, although worded differently. Chief Judge Rader filed a dissenting opinion, stating that "any claim can be stripped down, simplified, generalized, or paraphrased to remove all of its concrete limitations, until at its core, something that could be characterized as an abstract idea is revealed."

2. <u>Anticipation</u>

Cheese Systems, Inc. v. Tetra Pak Cheese and Powder Systems, Inc., 725 F.3d 1341 (Fed. Cir. 2013). Cheese Systems brought a declaratory judgment action against Tetra Pak, seeking a declaration that it did not infringe a patent directed to a cheese-making machine. The district court held that Cheese Systems infringed and that the patent was not invalid as anticipated by a prior art reference. The Federal Circuit affirmed, holding that a brief mention of a critical feature in a prior art reference was insufficient to anticipate. According to the Federal Circuit, "Without a clear and unambiguous teaching, a jury could only speculate, hardly a compelling case for anticipation."

3. On-Sale Bar to Patentability

Hamilton Beach Brands, Inc. v. Sunbeam Products, Inc., 726 F.3d 1370 (Fed. Cir. 2013). Hamilton Beach sued Sunbeam for infringing patents relating to latching slow-cooker lids that allowed slow-cooker pots to be carried to a party with food in them. (Hamilton Beach's commercial product is the "Stay or Go" slow cooker, whereas Sunbeam was selling its product under the "Cook & Carry" name.) The district court concluded that the patented claims were invalid because there were offers to sell the Stay or Go cooker more than one year before the filing date of the patent. A divided panel of the Federal Circuit affirmed, noting that the on-sale bar applies if (1) the claimed invention was the subject of a commercial offer for sale more than one year before the filing date; and (2) the invention was ready for patenting. The panel noted that Hamilton Beach's foreign supplier offered to sell the later-patented invention to Hamilton Beach more than one year before the filing date. Hamilton Beach had issued a purchase order to its foreign supplier for 2000 units to manufacture the slow cookers, and the foreign supplier responded by email with a confirmation that it would produce the slow cookers. That, according to the majority, invoked the on-sale bar because it was a binding contract to sell the slow cooker, despite the fact that the email requested a "release" that was not agreed to until after the critical date. The majority concluded that "even if the parties had not entered into a *binding* contract when the supplier responded to the purchase order, the response was a commercial *offer for sale* that Hamilton Beach could have accepted at any time." The product was ready for patenting because Hamilton Beach had presented CAD drawings of the cookers to potential customers before the critical date. Judge Reyna dissented, arguing that there was evidence that the offer was for "experimental" purposes, pointing to ongoing design changes to remedy alleged defects in the original design.

4. Obviousness-Type Double Patenting Where No Common Ownership

In re Hubbell, 709 F.3d 1140 (Fed. Cir. 2013). The Federal Circuit upheld the PTO's determination that a patent application was not patentable because of obviousness-type double patenting over an issued patent to two of the three same inventors, even though the issued patent was owned by a different company and thus no terminal disclaimer could be filed.

5. Reexamination Results Trump Litigation Validity Determination

Fresenius USA, Inc. v. Baxter International, Inc., 721 F.3d 1330 (Fed. Cir. 2013), rehearing denied, 733 F.3d 1369 (Fed. Cir. 2013). Fresenius brought a declaratory judgment action against Baxter, alleging that its patent was invalid and not infringed. A district court granted summary judgment in favor of Baxter, concluding that its patent was valid. Meanwhile, in a parallel proceeding, the U.S. PTO found the identical claims to be invalid and that decision was affirmed on appeal. Then, the district court entered a final judgment enforcing the patent claims, and then the Federal Circuit affirmed the PTO's invalidity finding. The Federal Circuit held that the PTO's invalidity ruling trumped the district court's validity ruling, because the district court's ruling was not "final" while it was on appeal to the Federal Circuit. Judge Newman dissented, alleging that the decision allowed an administrative agency decision to trump a federal court decision. Four judges dissented from the denial of the petition for rehearing en banc.

6. **<u>Obviousness</u>**

Leo Pharmaceutical Products, Ltd v. Rea, 726 F.3d 1346 (Fed. Cir. 2013). The Federal Circuit overturned a decision of the PTO's Board of Appeals in an inter partes reexamination holding that a claimed invention would have been obvious. The Federal Circuit held that the claimed invention would not have been obvious in view of the objective evidence of non-obviousness, including evidence of unexpected results, commercial success, and long-felt need. According to the Federal Circuit, "the objective indicia – taken in sum – are the most probative evidence of nonobviousness – enabling the court to avert the trap of hindsight."

Apple Inc. v. ITC, 725 F.3d 1356 (Fed. Cir. 2013). Apple brought an ITC action against Motorola Mobility, seeking to block imports of smartphones and tablets that allegedly infringed Apple's patents. The ITC ruled that one of Apple's patents was invalid, and the Federal Circuit reversed in part. The Federal Circuit chastised the ITC for failing to take into account the objective evidence of nonobviousness. The court stated that, "The ITC, however, never even mentioned, much less weighed as part of the obviousness analysis, the secondary consideration evidence Apple presented. It stated only that it did not review the ALJ finding regarding secondary considerations." The court concluded that "secondary considerations evidence can establish that an invention appearing to have been obvious in light of the prior art was not and may be the most probative and cogent evidence in the record." The court further stated that "This evidence guards against the use of hindsight because it helps turn back the clock and place the claims in the context that led to their invention."

Plantronics, Inc. v. Aliph, Inc., 724 F.3d 1343 (Fed. Cir. 2013). Plantronics sued Aliph for infringing a patent relating to a headset. The district court held that the patent claims were obvious. The Federal Circuit reversed, holding that the district court concluded that the claims were obvious *before* considering objective evidence of nonobviousness. "To the extent the district court conducted a post hoc analysis of objective considerations, it was improper."

Rambus Inc. v. Rea, 731 F.3d 1248 (Fed. Cir. 2013). Following reexamination, Rambus appealed from the PTO's determination that its patent claims were unpatentable. The Federal Circuit agreed with Rambus that the PTO's Board failed to properly take into consideration objective evidence of nonobviousness. In particular, the Board "erroneously found that Rambus's evidence relating to high-speed memory systems was not commensurate with the scope of the claims because the claims do not recite a specific clock speed and therefore embrace slow memory devices." According to the Federal Circuit, "Objective evidence of nonobviousness need only be 'reasonably commensurate with the scope of the claims,' and we do not require a patentee to produce objective evidence of nonobviousness for every potential embodiment of the claim."

7. Patent Trial & Appeal Board – New Ground of Rejection on Appeal

In re Biedermann, 733 F.3d 329 (Fed. Cir. 2013). The Federal Circuit overturned the PTO's determination that an invention directed to a bone screw would have been obvious, because the Board based its decision on a rejection that differed from the patent examiner's reasoning. The patent examiner rejected the claims based on a combination of three earlier patents: Cotrel, Steinbock, and Ortloff. The Board upheld the rejection, but instead relied on Cotrel and Steinbock and, for the first time, a different book authored by Oberg. The Federal Circuit concluded that reliance on this new reference, along with its new reasoning, warranted vacating the Board's decision.

8. Inequitable Conduct

Intellect Wireless, Inc. v. HTC Corp., 732 F.3d 1339 (Fed. Cir. 2013). Intellect sued HTC for patent infringement over a patent relating to wireless transmission of caller ID information. The district court ruled that the patents were unenforceable due to inequitable conduct, and the patent owner appealed. The Federal Circuit affirmed, concluding that the inventor had submitted a false declaration to the PTO stating that the invention had been reduced to practice prior to a certain date. The patent owner argued that the declaration was corrected by filing a subsequent declaration that omitted the statements regarding the prior reduction to practice. The Federal Circuit disagreed, concluding that the second declaration did not specifically point out the errors in the earlier declaration. As to intent, the court noted that the inventor submitted a press release to the PTO asserting that a "prototype" of the invention had been submitted to the Smithsonian museum, although it turned out that a wood and plastic imitation phone had been submitted.

9. Public Use Bar to Patentability

Dey, L.P. v. Sunovion Pharm., 715 F.3d 1351 (Fed. Cir. 2013). Dey sued Sunovion for infringing patents relating to a treatment for lung disease. In defense, Sunovion argued that Sunovion's own clinical tests involving its own treatment for lung disease constituted an invalidating public use under 35 U.S.C. § 102(b). The district court agreed and granted summary judgment to Sunovion, but the Federal Circuit reversed. The specific formulation given to the human test subjects was not publicly available, and test subjects were informed only that the study concerned the effects of an experimental medication to treat COPD. The participants were instructed to take the medications but were not prohibited from speaking with others about the study. The test administrators signed a confidentiality agreement directing them to hold all proprietary information in confidence for 5 years. In reversing, the Federal

Circuit first noted that it was not clear that the use was open and free, or used "without restriction." Second, the court noted that the test administrators were required to sign a confidentiality agreement, whereas the test subjects were given only limited information about the particular drug or formulation they were receiving. Based on these facts, summary judgment of invalidity was inappropriate.

B. Interpretation and Infringement of Patents

1. Claim Construction

Lighting Ballast Control LLC v. Philips Electronics North America Corp., 2013 WL 1035092 (Fed. Cir. Mar. 15, 2013) (en banc). The Federal Circuit recently heard arguments en banc to decide whether it should overrule its prior case law holding that claim construction is reviewed de novo on appeal. More specifically:
(1) Should the court overrule *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998)?
(2) Should the court afford deference to any aspect of a district court's claim construction?
(3) If so, which aspects should be afforded deference?

2. Interpretation of Means Plus Function Clauses

Tecsec, Inc. v. Int'l Business Machines Corp., 731 F.3d 1336 (Fed. Cir. 2013). Claim clauses reciting "system memory means for storing data" and "digital logic means" were interpreted to not invoke the provisions of 35 U.S.C. § 112(6) (i.e., means plus function claiming). As to the claimed "system memory means," the Federal Circuit concluded that the term "memory" recited sufficient structure for performing the recited function of "storing data" and thereby overcame the presumption created by the term "means." As to the claimed "digital logic means," the Federal Circuit noted that no function was recited, so it also did not properly invoke the provisions of 35 U.S.C. § 112(6).

3. Disclaimer of Claim Scope – "Implicit Disclaimer" of Claim Scope

Skinmedica Inc. v. Histogen Inc., 727 F.3 1187 (Fed. Cir. 2013). Skinmedica sued Histogen for infringing two patents relating to pharmaceutical compositions. The district court granted summary judgment in favor of the defendant, concluding that the claim term "culturing . . . cells in three dimensions" meant growing the cells in three dimensions but excluding growth in monolayers or on microcarrier beads. Skinmedica argued on appeal that the court should not have excluded growing on beads because beads could be used in three dimensions.

A divided panel of the Federal Circuit affirmed, concluding that the patent specification contrasted the use of beads with three-dimensional culturing. The specification stated that, "Cell lines grown as a monolayer or on *beads, as opposed to* *cells grown in three-dimensions*, lack the cell-cell and cell-matrix interactions characteristic of whole tissue in vivo." Another passage noted that "The cells are cultured in monolayer, *beads (i.e., two-dimensions)* or, preferably, in three-dimensions." The majority found that these passages amounted to an "implicit disclaimer" of claim scope, excluding the use of beads from the claimed three-dimensional culture, stating that "We have held . . . that a specification's use of 'i.e.' signals an intent to define the word to which it refers." Judge Rader dissented, concluding that the specification was not as explicit as the majority stated, and he credited expert testimony on that point.

4. Induced Infringement – Belief in Invalidity as Defense

Commil USA, LLC v. Cisco Systems, Inc., 720 F.3d 1361 (Fed. Cir. 2013), *rehearing en banc denied*, ___ F.3d ___ (Fed. Cir. Oct. 29, 2013). In a ruling of first impression, the Federal Circuit held that an accused infringer's good-faith belief that a patent was invalid could defeat an accusation of induced infringement. Previously, the court had ruled that a belief that the patent was not infringed was sufficient to defeat a claim of induced infringement. According to the court, "We see no principled distinction between a good-faith belief of invalidity and a good-faith belief of non-infringement for the purpose of whether a defendant possessed the specific intend to induce infringement of a patent." Five judges dissented from the denial of the petition for rehearing en banc. According to Judge Reyna, "infringement and invalidity are separate issues under the patent code and our precedent."

5. Divided Infringement/Joint Induced Infringement

Limelight Networks, Inc. v. Akamai Techs., Inc., Supreme Court No. 12-786 (on petition for certiorari to review *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301 (Fed. Cir. 2012)). The Supreme Court has asked for the views of the U.S. Solicitor General on whether to accept this case. The Federal Circuit held that although no single entity performed all the method steps of the patent claim, the accused infringer could be held liable for induced infringement by inducing others to perform the remaining steps of the claim.

C. Enforcement of Patents

1. Standards-Essential Patents

Microsoft Corp. v. Motorola, Inc., 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013). Microsoft sued Motorola for breach of contract, alleging that Motorola had an obligation to license patents to Microsoft at a reasonable and non-discriminatory ("RAND") rate, and that Motorola breached its RAND obligations by sending two offer letters. The district court held a bench trial in November 2012 with the aim of determining a RAND licensing rate and RAND royalty range for Motorola's patents.

Both Microsoft and Motorola were members of the IEEE and ITU organizations, both of which create standards for various types of technology. The standards at issue involve WiFi (802.11) and video coding technology (H.264). Motorola owned patents that were "essential" to both standards (meaning that to be compliant with the standards, one would necessarily have to use patented technology), and Motorola had committed to license them on RAND terms. Motorola sent two letters to Microsoft, offering to license each set of patents for a royalty rate of 2.25% of the price of any end product that incorporate the patented technology. The total cost to Microsoft would have been $100 million to $125 million per year. Microsoft then sued for breach of contract, and in a series of orders, the district court found that Microsoft could sue as a third-party beneficiary of Motorola's agreement with the standards-setting organizations, and that Motorola's commitments required that initial offers by Motorola must be made in good faith.

The court started by noting that both standards organizations required members to disclose a potentially essential patent and to either (1) agree to license the patents for free; or (2) license the patents on RAND terms; or else (3) the approved standard would not include the patented provisions. The court noted that certain industry standards can require hundreds or thousands of essential patents, and certain devices such as PCs may be required to comply with as many as 90 different standards. Motorola had submitted documents to the European Telecommunication Standards Institute (ETSI) in which it pointed out that in order to comply with RAND, compensation must reflect the patent owner's proportion of all essential patents, such that judges should look at the overall cumulative royalty for a given standard, not just offers made by one patent owner.

Microsoft and Motorola submitted competing theories regarding how a RAND range or rate should be calculated. Motorola owned 16 patents that are essential to the H.264 standard, but the court concluded that most of Microsoft's products made only minor use of the technology. Motorola owned 24 patents that it asserted are essential to the 802.11 standard, and Motorola agreed that only Microsoft's XBOX used its 802.11 standards-essential patents (SEPs).

Motorola's proposed license fee of 2.25% was based on expert testimony that relied on earlier settlements with different companies for the same patents. The court discounted this testimony because the earlier settlements were made in the course of settling patent litigation, and in one case, included other patents not at issue in this case. The court noted concerns about "patent stacking" in view of the relatively minor contribution that Motorola's patents made to the standard.

Microsoft's proposed approach focused on two patent pools, one for the H.264 standard and the other for the 802.11 standard. In such pools, each participant received a share of the total royalties based on the number of its patents included in the pool. The first 100,000 units were royalty-free; for units between 100,000 and 5 million, the royalty was $0.20 per unit; and for volumes above 5 million, the royalty rate was $0.10 per unit, with a cap of $6.5 million. The court noted evidence tending to show that royalty rates in patent pools are generally lower than rates negotiated independently. The court also concluded that patent pools did not consider the importance of individual patents to the standard. Consequently, the court found that a patent pool rate did not per se constitute a RAND rate. Nevertheless, in view of the success in licensing the patent pool, the court found that it was a "strong indicator" of a RAND royalty rate.

Starting with the H.264 pool, the court considered the effect of adding Motorola's H.264 patents to the pool, and concluded (based on expert testimony) that Microsoft would end up paying 0.185 cents per unit, but that Motorola would also obtain value in the form of having full access to other patents included in the pool. Evidence from Microsoft showed that it received about twice as much in value from the pool as it paid in, so the court concluded a similar amount for Motorola would apply. This meant that Motorola would receive 0.555 cents per unit as a lower-end RAND rate. The court found no reason to increase this rate, partly because there was no evidence concerning how important to the pool Motorola's patents were. After considering anti-stacking concerns and evidence of a highest fee of $1.50 per unit discussed during formation of the pool, the court set an upper bound of $0.16389 per unit.

Moving to the 802.11 pool, the court started with a calculated pool value royalty of $0.05 per unit but adjusted it to account for the fact that Motorola no longer claimed that 53 of its U.S. patents were essential to the 802.11 standard (adjusted down to 24 patents) and concluded that Motorola's royalty payments would be $0.06114 per unit, or 6.114 cents per unit.

The court also considered other evidence based on other comparable scenarios, resulting in royalty rates of 3 to 4 cents per unit, and 0.8 to 1.6 cents per unit. **The court then concluded that "In relation to the amount Motorola seeks in this litigation -- $6.00 - $8.00 per Xbox unit – these three indicators are very close to one another**. The court then averaged the three royalty values and arrived at a rate of 3.471 cents per unit. The court also adopted a lower range value of 0.8 cents and an upper range value of 19.5 cents per unit.

Microsoft Corp. v. Motorola, Inc., 2013 WL 4053225 (W.D. Wash. Aug 12, 2013, 2013). Following its decision on RAND royalty rates (see decision above), Microsoft moved for summary judgment that Motorola had breached its RAND obligations by offering to license the patents at a rate of 2.25% of the cost of each unit, which was a breach of the duty of good faith and fair dealing. Microsoft also contended that Motorola's seeking of injunctive relief and the ITC frustrated the purpose of Motorola's RAND obligations. The district court denied the motion, stating that disputed issues of fact should be decided by a jury, including such questions as whether the offers were commercially reasonable.

Note: On September 4, 2013, a jury ordered Motorola to pay Microsoft $14.5 million for breaching its obligation to license its standard-essential patents to Microsoft on fair terms.

In re Innovatio IP Ventures, LLC Patent Litigation (MDL), 2013 WL 3874042 (N. D. Ill. July 26, 2013). Innovatio sued numerous hotels, coffee shops, restaurants, supermarkets, and other users of Wi-Fi internet technology throughout the United States, alleging that providing Wi-Fi access for their customers infringed 23 patents owned by Innovatio. The manufacturers of the devices, including Cisco, Motorola, HP and others, filed declaratory judgment actions against Innovatio, seeking a declaration that their products do not infringe and that the patents are invalid. Innovatio then alleged that the manufacturers' devices also infringed, and the cases were consolidated into this multi-district litigation case.

The manufacturers alleged that Innovatio's patents are "essential" to the IEEE 802.11 wireless standard, and that Innovatio is therefore subject to the promises of the prior owners of the patents to license the patents on reasonable and non-discriminatory (RAND) terms. The parties agreed to waive a jury trial and allow the court to decide all RAND-related issues in a bench trial. The manufacturers alleged that all of the asserted claims were "essential" to the standard, whereas Innovatio contended that only 168 of the asserted claims are essential, but others were not.

The court started by noting the IEEE's requirement that patent owners of standard-essential patents promise to license their patents on RAND terms before the standard is adopted. Innovatio's patents were previously owned by Intermec Technologies Corp, Norand Corp., and Broadcom, each of which had agreed with the IEEE to license any standard-essential technology covered by their patents on RAND terms. The court held that those agreements were binding on Innovatio, and that Innovatio could be held in breach of the agreement if it failed to live up to the promises. The court then reviewed the IEEE's bylaws regarding standards and "standards-essential" patents. The court also treated all the different variations of the 802.11 standard as a single standard for purposes of the lawsuit.

The court adopted the meaning of "essential patent claim" contained in the IEEE bylaws, which referred to a patent claim the use of which was necessary to create a compliant implementation of either mandatory or optional parts of the standard, when there was no commercially and technically feasible non-infringing alternative. The court put the burden on the manufacturers to prove that (1) the only commercially and technically feasible way to implement a particular mandatory or optional part of the standard was to infringe the claims; and (2) the patent claim includes technology that is explicitly required by the standard. Based on this definition, the court concluded that all of the categories of claims asserted by the manufacturers were "essential" and thereby subject to RAND licensing terms. In some cases, the court relied on the fact that non-infringing alternatives would not be commercially feasible. <u>Note 1</u>: One implication of finding that patent claims are subject to RAND licensing terms is that no injunction would ordinarily be issued, thus decreasing the amount of leverage by the patent owner. <u>Note 2:</u> This appears to be the first court decision addressing the question whether patent claims are "standard-essential." <u>Note 3</u>: On September 27, 2013, the court ruled that the companies must pay a royalty of 9.6 cents per unit if they are found to infringe standard-essential WiFi patents owned by Innovatio, a small fraction of what Innovation had sought. The court held that the damages should be based on the price they paid for each WiFi chip that provides the claimed functions, instead of the price of the entire device incorporating such chips.

Realtek Semiconductor Corp. v. LSI Corp., 2013 WL 2181717 (N.D. Cal. May 20, 2013). LSI Corp owns two patents that it states are "essential" to the 802.11 WiFi standard, and its predecessor (Agere) submitted Letters of Assurance (LOA) to the IEEE stating that it was prepared to grant licenses on a FRAND basis (fair, reasonable, and non-discriminatory). Agere contacted Realtek to offer a license under the patents at a rate of 5%, but Realtek did not respond. Years later, after LSI acquired Agere, LSI sent a letter to Realtek demanding that it cease and desist from infringing the patents. Less than a week later, LSI filed a complaint in the ITC, seeking to block Realtek products from being imported into the U.S. A month later, Realtek sent a letter to LSI, requesting that it make the patents available under FRAND license terms. LSI responded with an offer letter that applied a royalty rate to the total value of the end product rather than to the value of the components that Realtek supplied. Realtek then sued LSI asserting that LSI breached its FRAND licensing obligations, and Realtek moved for partially summary judgment. The district court granted the motion, concluding that Agere's LOA letter to the IEEE constituted a binding contract to license their patents, and that filing an ITC action before offering a RAND license constituted a breach of that agreement. According to the court, "The court's breach of contract holding is limited to the situation here, where defendants did not even attempt to offer a license, on 'RAND' terms or otherwise, until after seeking injunctive relief. This conduct is a clear attempt to gain leverage in future licensing negotiations and is improper." The court also granted a preliminary injunction enjoining LSI from enforcing any exclusion order or injunctive relief by the ITC.

In the Matter of Motorola Mobility LLC and Google Inc., U.S. Federal Trade Commission, Docket No. C-4410 (July 23, 2013). The FTC investigated certain acts by Motorola Mobility (now owned by Google) that purportedly constituted violations of the Federal Trade Commission Act by its actions in seeking injunctions on standards-essential patents against companies willing to pay RAND licensing fees. The FTC reached a final settlement barring Motorola/Google from seeking injunctions against "willing" licensees of the standards, although it could continue to seek injunctions against those who refused to pay a RAND royalty as determined by a court or binding arbitration. The final order requires Google to follow specific procedures to offer licenses or to submit to binding arbitration.

2. <u>Preliminary Injunctions</u>

Aria Diagnostics, Inc. v. Sequenom, Inc., 726 F.3d 1296 (Fed. Cir. 2013). Aria Diagnostics brought a declaratory judgment action seeking a ruling that its test for detecting chromosome abnormalities did not infringe a patent owned by Sequenon.

Sequenon countersued for infringement and sought a preliminary injunction, which was denied by the district court. The Federal Circuit reversed the denial of the preliminary injunction, concluding that the district court erred in evaluating the factors needed to obtain a preliminary injunction. First, the Federal Circuit noted that the patent owner's price erosion and loss of market share could be "irreparable," despite the district court's assumption to the contrary. Second, the district court erroneously criticized an expert for failing to consider market share in a different market that did not compete with the patented invention. Third, the Federal Circuit held that the district court placed too much weight on the fact that a preliminary injunction might put the competitor out of business. Finally, the Federal Circuit noted that the district court should consider the fact that the patent owner only marketed the patented invention to a small market segment, whereas Aria Diagnostics served a much broader market.

3. <u>Attorney Fees for Misconduct</u>

Monolithic Power Systems, Inc. v. O2 Micro International Ltd., 726 F.3d 1359 (Fed. Cir. 2013). Following several suits by O2 Micro against Monolithic Power alleging patent infringement, Monolithic Power filed a declaratory judgment action against O2 Micro, alleging non-infringement of various patents. O2 Micro then filed a complaint in the ITC seeking to block importation of Monolithic Power customers' equipment. O2 Micro countersued in the district court for infringement, adding Monolithic Power customers to the suit. Later, O2 Micro dropped some of the patents from the suit and the ITC action. In both the ITC action and the district court litigation, O2 Micro asserted that the remaining patent was entitled to an earlier conception date based on schematic drawings bearing a certain date, which was later shown to have been manually altered. After the parties submitted pretrial submissions, O2 granted a covenant not to sue, and the district court dismissed the suit. But Monolithic Power and its customer moved for attorney fees and sanctions, which the district court granted on grounds of vexatious litigation, including repeatedly suing customers and then granting a covenant not to sue, and the alterations to the schematic drawings. The district court also granted expenses incurred in the ITC action because discovery in the ITC action was deemed to apply to the district court case. The total award of attorney fees was $8.4 million.

The Federal Circuit affirmed, concluding that Monolithic Power need not show "bad faith" or "objectively baseless" litigation in addition to "litigation misconduct" in order to prove that a case is "exceptional" under the patent statute. The court specifically noted that "the district court's findings of an overall vexatious litigation strategy and numerous instances of litigation misconduct are sufficient to support an exceptional case determination." The Federal Circuit also upheld the award of fees from the ITC litigation on the basis that the parties agreed that discovery in the ITC case would have "dual use" in the district court litigation.

Taurus IP, LLC v. DaimlerChrysler Corp., 726 F.3d 1306 (Fed. Cir. 2013). The Federal Circuit upheld an award of $1.6 million in attorney fees against an attorney commonly referred to as a "patent troll." The Federal Circuit held that the case was objectively baseless because Erich Spangenberg, the attorney who controlled Taurus IP, maintained the infringement allegations on the basis of an unreasonably broad claim construction. The Federal Circuit held that this met the test of (1) litigation brought in subjective bad faith; and (2) the litigation being objectively baseless. The patent owner's initial interpretation of the claim terms was also deemed to be unreasonable.

4. **Patent Exhaustion**

Bowman v. Monsanto Co., 133 S.Ct. 1761 (2013). Monsanto, which holds patents covering various genetic alterations to soybean seeds that allow the seeds to withstand herbicide treatments, sued farmer Bowman for patent infringement. Monsanto's licensing agreement permits farmers to plant the patented seeds for only one growing season, but does not permit the farmers to re-plant seeds harvested from plants grown from the patented seeds. Bowman purchased the patented seeds; planted them; treated the plants with the herbicide; and harvested the resulting soybeans. He then used seeds from the harvested soybeans to plant additional soybean crops. Bowman argued that under the "patent exhaustion" doctrine, the initial sale of a patented article terminates all patent rights to that item. But the Supreme Court agreed with the Federal Circuit that Bowman was really making new copies of the patented seeds, which did not invoke the "patent exhaustion" doctrine.

Lifescan Scotland, Ltd. v. Shasta Tech., LLC, 2013 WL 5878598 (Fed. Cir. Nov. 4, 2013). Lifescan, which manufactures the "OneTouch Ultra" blood glucose monitoring system, sued Shasta for infringement of patents covering a method of measuring blood glucose. The method refers to steps performed by a measuring strip and steps performed by a blood glucose meter. Lifescan sells 40% of its meters below cost, and distributes the remaining 60% of its meters for free, but it makes money by selling the blood glucose test strips for use with its meters, with the expectation that customers will purchase strips from Lifescan. Shasta does not sell blood glucose meters, but it does sell test strips that are designed to be used with Lifescan's meters. Lifescan sued for indirect infringement, arguing that people who purchased test strips from Shasta would be direct infringers. The district court agreed, granting a preliminary injunction against Shasta. The district court concluded that Lifescan's free distribution of its meters did not "exhaust" its patent rights because it had received no money for the meters so distributed. It also concluded that exhaustion did not apply because the "inventive feature" of the patent related to the test strips, not to the meters.

The Federal Circuit reversed, concluding that the Supreme Court's decision in *Quanta Computer v. LG Electronics,* 553 U.S. 617 (2008), was controlling. According to the Federal Circuit, *Quanta* confirmed that the exhaustion doctrine applied to method patents, including where the sale of an item "that embodied the method" were sold. In this case, the sale of the meters by Lifescan had no reasonable non-infringing use other than to be used with the test strips. The Federal Circuit rejected Lifescan's argument that the meters had some reasonable non-infringing uses. The court also rejected Lifescan's argument that the meters did not embody the "inventive features," pointing to prosecution history showing that claims directed to the test strips by themselves were rejected, and only claims involving the meter were allowed. Because the "inventive features" were in the meters that were given away for free, the patent owner exhausted any patent rights in the meters, including method claims covering the meters, which had no other use other than in the claimed method. The court also noted that "allowing LifeScan to control sale of the strips would be akin to allowing a tying arrangement whereby the purchasers of the meters could be barred from using the meters with competing strips." The court explained that "the authorized transfer of ownership in a product embodying a patent carries with it the right to engage in that product's contemplated use." Finally, the court rejected Lifescan's argument that because it gave the meters away for free, it had not received any reward for its patent. The court explained that "in the case of an authorized and unconditional transfer of title, the absence of consideration is no barrier to the application of patent exhaustion principles." According to the court, "patent exhaustion principles apply equally to all authorized transfers of title in property, regardless of whether the particular transfer at issue constitute a gift or a sale."

Judge Reyna dissented, concluding that the test strips, and not the meter, embodied the "essential features" of the patented method. Judge Reyna explained that the steps performed by the meter could only be carried out by the unique configuration of the test strips.

Keurig, Inc. v. Sturm Foods, Inc., 732 F.3d 1370 (Fed. Cir. 2013). Keurig sells single-serve coffee brewers and cartridges for use in those brewers, and holds patents directed to brewers and methods of using them to make beverages. Sturm sells cartridges for use in Keurig's brewers, but does not itself sell brewers. Keurig sued, alleging that the use of Sturm's cartridges in Keurig's brewers directly infringed its patents. The district court granted summary judgment of non-infringement based on the principle of patent exhaustion – i.e., that Keurig's sale of its brewers exhausted any patent rights in the method of using the cartridges in combination with the brewers. The Federal Circuit affirmed, concluding that method claims are exhausted by an authorized sale of an item that substantially embodies the method if the item (1) has no reasonable noninfringing use, and (2) includes all inventive aspects of the claimed method. The court also held that where a person has purchased a patented machine of the patentee, the purchase carries with it the right to use of the machine so long as it is capable of use. According to the court, Keurig sold its patented machines without conditions and its purchasers obtained the right to use them in any way they chose. Consequently, Keurig's right to assert infringement of the method claims were exhausted by the authorized sale of Keurig's patented brewers. "Here, Keurig is attempting to impermissibly restrict purchasers of Keurig brewers from using non-Keurig cartridges by invoking patent law to enforce restrictions on the post-sale use of its patented products." The court also rejected the argument that patent exhaustion must be determined on a claim-by-claim basis: "The Court's patent exhaustion jurisprudence has focused on the exhaustion of the patents at issue in their entirety, rather than the exhaustion of the claims at issue on an individual basis."

5. Permanent Injunctions

Douglas Dynamics, LLC v. Buyers Products Co., 717 F.3d 1336 (Fed. Cir. 2013). Douglas Dynamics sued Buyers Products for infringement of several patents related to snowplow mounting assemblies that are mounted on the front of a truck. A jury concluded that two of the patents were valid and infringed, but the district court denied a permanent injunction and instead assigned an ongoing royalty for infringement, concluding that Douglas Dynamics had failed show irreparable harm. The district court noted evidence that people willing to pay for a Douglas snowplow were unlikely to purchase a Buyers Products snowplow as a substitute, and that Douglas's market share increased about 1% a year after Buyers introduced its infringing snowplows.

The Federal Circuit reversed, concluding that "simply because a patentee manages to maintain a profit in the face of infringing competition does not automatically rebut a case for irreparable injury. . . . Here, the district court likened Douglas's snowplow to a Mercedes Benz S550 and Buyer's snowplow to a Ford Taurus. . . . if the Ford made its place in the market by infringing on the intellectual property of the Mercedes and capitalized on its similarity to the better product, then the harm to the Mercedes product might go beyond a simply counting of lost sale – some of which would occur anyway if the Ford marketed itself effectively as a "Mercedes as half the price." The court also noted that Douglas's reputation as an innovator in the marketplace would be harmed if customers found the same "innovations" appearing in competitors' products. Douglas had also chosen not to license its patents, further supporting its position that it was being forced to compete against its own innovations.

Broadcom Corp. v. Emulex Corp., 732 F.3d 1325 (Fed. Cir. 2013). Broadcom sued Emulex for patent infringement for a patent relating to a communication device. Following a jury trial, the district court entered a permanent injunction against Emulex, and Emulex appealed. Emulex argued that an injunction was improper because there was no evidence of irreparable harm because there was no link between Emulex's and Broadcom's market share, and no nexus showing that the infringement caused harm to Broadcom. The Federal Circuit disagreed, concluding that Broadcom was excluded from a fair opportunity to compete in a market in which a winner of a design competition had an advantage for future business including established goodwill.

6. Legality of Provisions Prohibiting Challenging Patent Validity in Settlements

Rates Technology Inc. v. Speakeasy, Inc., 685 F.3d 163 (2d Cir. 2012). The Second Circuit held that a pre-litigation settlement agreement prohibiting a patent licensee from challenging the validity of a patent was void as against public policy. The court based its decision on the Supreme Court's 1969 decision in *Lear v. Adkins*, 395 U.S. 653 (1969). The plaintiff, Rates Technology, owned patents relating to automatic routing of telephone calls based on cost. After accusing the defendant of infringing its patents, the parties reached an agreement to settle for $475,000. The agreement stipulated that Speakeasy would not challenge the validity of the patents and that, if Speakeasy challenged the patents, it would pay liquidated damages of $12 million to the patent owner. A successor-in-interest to Speakeasy filed a declaratory judgment action seeking to invalidate the patents. Rates Technology filed a competing lawsuit, claiming that the successor-in-interest breached the "no-challenge" provision by bringing the declaratory judgment action. The district court dismissed the complaint, based on the Supreme Court's *Lear v. Adkins* decision. The Second Circuit affirmed, holding that even pre-litigation settlement agreements are subject to the *Lear* doctrine, concluding that the policies underlying challenging the validity of patents outweighed the contract considerations involved. "We therefore hold that covenants barring future challenges to a patent's validity entered into prior to litigation are unenforceable, regardless of whether the agreement containing such covenants are styled as settlement agreements or simply as license agreements."

7. **<u>Reverse-Payment Settlements May Invoke Antitrust Liability</u>**

FTC v. Actavis, Inc., 133 S.Ct. 2223 (2013). Solvay Pharmaceuticals sued Actavis for infringing patents relating to its brand-name drug AndroGel. Actavis obtained FDA approval to sell a generic version of the drug to the market, but instead of doing so, it entered into a "reverse payment" settlement with Solvay whereby Actavis agreed not to bring its generic product to market in exchange for payments from Solvay. The FTC sued Actavis, alleging violation of the Federal Trade Commission Act by refraining from launching a generic in exchange for sharing "monopoly profits" with the patent owner. The district court dismissed the complaint, and the 11^{th} Circuit affirmed, concluding that public policy favored settlement, making the acts immune from antitrust liability. The Supreme Court reversed, concluding that the settlements could hurt competition, and remanded for further consideration. The Court did not hold that reverse payments would be per se unlawful, but instead that they must be reviewed under the "rule of reason."

8. Patent Malpractice – Is it a Federal Case?

Gunn v. Minton, 133 S.Ct. 1059 (2013). A client brought a malpractice claim in state court against a former attorney, alleging that the attorney had negligently failed to represent it in a patent infringement case. The Texas state court granted the attorney's motion for summary judgment. The Court of Appeals held that it had subject matter jurisdiction and affirmed summary judgment. The Supreme Court of Texas held that exclusive federal jurisdiction existed because the specific patent-related legal question – the applicability of the experimental use exception as a defense to the on-sale patentability bar -- was a substantial issue in the legal malpractice claim, reversed the grant of summary judgment, and dismissed the claim. The Supreme Court reversed, concluding that a legal malpractice claim for failing to raise the experimental-use argument did not "arise under" federal patent laws. Although the resolution of a federal patent question was necessary to the case, the question was not "substantial." Consequently, a state court was the proper venue for bringing the malpractice claim.

9. Avoiding Litigation Without Giving a Covenant Not to Sue

Organic Seed Growers and Trade Assn v. Monsanto Co., 718 F.3d 1350 (Fed. Cir. 2013). A group of farmers and seed sellers sued Monsanto for a declaratory judgment of non-infringement and invalidity regarding Monsanto's patents relating to genetically modified seeds. The modified seeds produce plants that are genetically resistant to a certain herbicide found in Monsanto's Roundup. Farmers using such seeds can eliminate weeds by spraying Roundup on the plants without damaging them. Monsanto sells the seeds and licenses others to grow the seed under a license that permits only a single planting of the seeds – i.e., the farmers are not authorized to harvest seeds from the plants and then re-plant another round of plants.

Monsanto enforced its patents against farmers who planted the genetically-modified seeds without authorization, bringing more than 100 lawsuits between 1997 and 2010. The plaintiffs contended that their conventional crops were subject to "cross-contamination" by the genetically-modified plants, and that they must take costly precautions to avoid such contamination by planting "buffer" zones between their farms and their neighbors. The plaintiffs requested that Monsanto provide a written covenant not to sue them for patent infringement, but Monsanto refused, referring the plaintiffs to a provision on Monsanto's website stating that its policy was to not sue any farmers who inadvertently grew genetically modified plants as a result of cross-contamination. The district court dismissed the complaint, concluding that there was no justiciable controversy because of Monsanto's assurances that it would not sue. The Federal Circuit affirmed, concluding that Monsanto's history of aggressively enforcing its patents did not overcome the unequivocal representations by Monsanto that it would not sue the plaintiffs for planting or selling mere "trace amounts" of genetically modified seeds, which the parties agreed meant approximately 1% contamination of non-modified seeds. The Federal Circuit treated the issue as one of judicial estoppel that would prevent Monsanto from taking a contrary position over the same patents.

10. Appeals of Liability Before Damages Determined

Robert Bosch, LLC v. Pylon Mfg., 719 F.3d 1305 (Fed. Cir. 2013) (en banc). Robert Bosch sued Pylon for patent infringement, and the district court bifurcated the issues of liability and damages. Following a jury trial on liability and motions for judgment as a matter of law, the district court entered judgment and appeal was taken. At issue was whether the judgment was "final except for an accounting," as required by the statute. The Federal Circuit decided that even though damages had not been decided, the decision was final and appealable. The court also decided that the decision could be appealed even though the question of willfulness had not yet been determined. The en banc court returned the case to the merits panel for a decision on the merits.

11. Complaint that Complies With Form 18 is Sufficient for Pleading

K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc., 714 F.3d 1277 (Fed. Cir. 2013). The Federal Circuit held that a complaint that complies with the bare-bones pleading style of Form 18 of the Federal Rules of Civil Procedure is sufficient to defeat a motion to dismiss for failure to state a claim.

D. Patent Cases at the U.S. Supreme Court

Medtronic Inc v. Mirowski Family Ventures, LLC, Supreme Court No. 12-1128 (granting cert. in 695 F.3d 1266 (Fed. Cir. 2012)). The Federal Circuit held that a patent licensee who brings a declaratory judgment action against the licensor has the burden of proving non-infringement of the patent claims, which is different than the normal rule (i.e., that the patent owner carries the burden of proving infringement). The Supreme Court heard arguments on November 5, 2013. Most observers expect the Federal Circuit's decision to be overturned.

Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., Supreme Court No. 12-1163 (granting cert. in 687 F.3d 1300 (Fed. Cir. 2012)). The Supreme Court took this case to decide whether a district court's finding that a case is "exceptional" is entitled to deference on appeal. A deeply split Federal Circuit held that there should be no deference.

Octane Fitness, LLC v. Icon Health and Fitness, Inc., Supreme Court No. 12-1184 (granting cert. in 496 Fed. Appx. 57 (Fed. Cir. 2013)). The petitioner challenges as too "rigid" the Federal Circuit's two-part test for determining whether a case is "exceptional" under 35 U.S.C. § 285. Under that test, an accused infringer can only establish that a case is exceptional if it shows that (1) the case was "objectively baseless," and (2) the case was "brought in subjective bad faith" by the patent owner.