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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Is Apple V. Samsung The Beginning Of The End For Patents?


Robert W. Morris


Michael R. Jones

Law360, New York (March 25, 2016, 10:32 AM ET) -- The rights of a patent owner used to be powerful. For 150 years, it was a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."[1] This rule seemed logical considering patent owners have the right to exclude others from infringing on their patent. However, the rights of patent owners took a big hit in eBay Inc. v. MercExchange.[2]

In eBay, the U.S. Supreme Court test effectively eliminated the permanent injunction by creating a four-part test that is virtually impossible to pass.[3] EBay substantially changed the world of patent litigation by limiting almost every verdict solely to monetary damages. Because a patent's real value lies in the ability to exclude others from practicing the claimed invention, eBay marked a milestone in how patents are valued. Moreover, without the fear of a permanent injunction, parties are less likely to settle for reasonable amounts. EBay was applauded by industry, who believed that injunctions should not be available to patent trolls, since they didn't make anything. But now, even Apple can't get an injunction even in the face of blatant copying of its patented technology.

The assault on patents has steadily continued. Once eBay made permanent injunctions a remedy of the past, the Federal Circuit and district courts began a process of lowering or vacating damages awards at a remarkable pace. When you add in inter parties review and other post-grant proceedings to the mix (both of which are heavily tilted against the patent owner), it becomes clear that the entire patent system is under attack. If patents cannot protect the very inventions they claim, then what is a patent worth?

The Decline of Patent Rights

The United States Constitution gives Congress the power to "promote the Progress of Science and useful Arts."[4] Through that power entrusted to Congress by the Constitution, it passed the Patent Act of 1790.[5] Over time, interpretations of and additions to the Patent Act, and with it, the United States patent system as a whole, have grown increasingly complex and discretionary leaving one constant; patent owners have the right to protect their ideas. This constant that inventors have relied upon for centuries is at risk.

Subsequent to eBay, the Federal Circuit has demonstrated a disturbing willingness to repeatedly set aside jury verdicts of infringement and validity, often on the basis that no reasonable jury could make that factual finding.[6] The most recent example of this, Apple

Inc. v. Samsung Electronics Co. Ltd., is particularly troubling and demonstrates why this alarming trend appears to be removing fact finding from the jury, diluting the purpose patents were constitutionally intended to have, and in the process devaluing the incentive provided by the Constitution to inventors.

As large jury verdicts became a "public" concern, awards starting getting reduced or set aside completely.[7] Indeed, over 60 percent of the largest patent infringement verdicts have had their judgments lowered.[8] Now, even corporations like Apple cannot sustain smaller jury verdicts.

The decline seemed to begin with Lucent Technologies v. Microsoft Corp. In a series of cases that went to trial, Lucent claimed that Microsoft infringed patents. In 2007, the jury agreed and awarded Lucent $1.52 billion in damages. A few months later, the trial judge ruled that the jury's decision was not supported by the evidence and granted Microsoft a judgment as a matter of law and a new trial, and the Federal Circuit agreed. In the subsequent trial, the jury awarded Lucent $367.4 million in damages, roughly 24 percent of the initial verdict. Eventually, the parties settled.

The next big domino to fall was in Centocor Ortho Biotech Inc. v. Abbott Labs. Centocor alleged that Abbott infringed their patent on antibiotics that treat arthritis. Again, the jury agreed, awarding Centocor $1.67 billion in damages. Abbott, not surprisingly, moved for JMOL on invalidity, but this time the dstrict court did not agree. The Federal Circuit, however, came to the rescue, holding that the patent at issue was invalid for lack of written description, thereby throwing out another jury verdict.[9]

The trend continued with Carnegie Mellon University v. Marvell Technology Group. Carnegie Mellon alleged that Marvell infringed two patents relating to hard-disk drives. Once again, the jury agreed and found enhanced damages. The district court awarded CMU $1.54 billion in damages and a continuing royalty for the life of the patents. Marvell appealed and the Federal Circuit reversed the enhanced damages and continuing royalties.[10] Again, the bar for avoiding liability was lowered when the Federal Circuit created a new rule that as long as a defense is not "objectively unreasonable," enhanced damages are not possible.

When reviewing these cases, it might lead one to believe that this only happens when billions of dollars are at stake. Unfortunately, as it became easier for courts to set aside jury verdicts, more jury verdicts got set aside. Most recently, we saw the Federal Circuit set aside multiple findings of fact in the court's third round with Apple v. Samsung.

It has been well publicized that Apple has a lot of patents surrounding the technology we see today in most smartphones. All of these patents have led to the "smartphone patent wars." The recent case is the third appeal, and apparently the third time was the charm for Samsung. The jury had found infringement and awarded Apple $119 million in damages and an unspecified amount of ongoing royalties. After the verdict, Samsung moved for, and was denied, a motion for JMOL of noninfringement and invalidity. On appeal, the Federal Circuit reversed the JMOL decision and set aside the jury verdict, ruling that Samsung did not infringe one Apple patent and invalidated the other two Apple patents. The Federal Circuit reviewed the evidence and disagreed with the jury finding that the patents were valid and infringed,[11] tossing out another nine-figure damages award. Again, the Federal Circuit took the finding of fact out of the jury's hands.

While jury verdicts were being set aside by the Federal Circuit with increasing frequency, the Supreme Court continued to act to the detriment of patent owners. Markman[12] took claim construction away from the jury even though patents are intended as public notice of one's patented invention. Festo[13] reduced a patent owner's ability to use the doctrine of equivalents. KSR[14] made it easier to invalidate patents based on obviousness. Bilski[15] led to an onslaught of patent invalidity rulings based on abstract ideas, which was greatly

accelerated by the court's ruling in Alice.[16]
When viewed together, it seems that patents and the patent system are under attack.

Conclusion

While the size of many of the affected damages award might seem shocking to the outside observer, in the eyes of the jury, these awards were accurate since they were based on billions of dollars in sales. All of these awards were based on the juries' factual findings. Where will all of these reversals lead? While the idea behind the patent system has been to promote "the Progress of Science and useful Arts,"[17] today, the world of patent law leaves innovators wondering whether they really can protect their inventions. As the federal courts continue to eliminate the rights that come along with a patent, we are left with one question: Are patents even worth the paper they are printed on anymore?

—By Robert W. Morris and Michael R. Jones, Eckert Seamans Cherin & Mellott LLC

Robert Morris a member and Michael Jones is an associate in Eckert Seamans' White Plains, New York, office.

[1] MercExchange, LLC v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005).

[2] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (U.S. 2006)

[3] The second factor requires that other remedies, such as monetary damages, are inadequate to compensate for the patent infringement. Id. at 391.

[4] U.S. Const. art. I, §8, cl. 8.

[5] Patent Act of 1790, Ch. 7, 1 Stat. 109-112 (April 10, 1790).

[6] There are at least 19 cases that have had jury verdicts of infringement and validity set aside by the Federal Circuit. See, e.g., Apple Inc. v. Samsung Electronics Co., Ltd., No.2015-1171 (Fed. Cir. 2016)

[7] Ericsson Inc. v. D-Link Systems Inc., No.2013-1625, *40 (Fed. Cir. 2014) (worried about jury bias and confusion when awarding damages).

[8] Since 1995, there have been five billion dollar verdicts. Of those five, the top three have been reversed, lowering the damages significantly. See Lucent Techs., Inc. v. Gateway, Inc., 470 F. Supp. 2d 1163 (S.D. Cal. 2007); Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd., 807 F.3d 1283 (Fed. Cir. 2015); Centocor, 636 F.3d 1341, 1353 (Fed. Cir. 2011) (1.7 billion dollar verdict set aside, patent at issue invalidated due to lack of written description); see also Barry et al., 2014 Patent Litigation Study: As case volume leaps, damages continue general decline, p. 7, July 2014 (available at: https://www.pwc.com/us/en/forensic-services/publications/assets/2014-patent-litigation-study.pdf).

[9] Centocor, 636 F.3d 1341, 1353 (Fed. Cir. 2011).

[10] Carnegie Mellon Univ., 807 F.3d 1283 (Fed. Cir. 2015).

[11] Apple Inc., No.2015-1171 *3 (Fed. Cir. 2016).

[12] Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

[13] Festo Corp. v Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002).

[14] KSR Int'l Co. v. Teleflex, Inc., 550 U.S. 398 (2007).

[15] Bilski v. Kappos, 130 S.Ct 3218 (2010).

[16] Alice Corp. v. CLS Bank Int’l, 134 S. Ct. 2347 (2014).

[17] U.S. Const. art. I, §8, cl. 8.