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A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert

Keywords

Due process, jury, jury selection, capital defendant, Fourteen Amendment, jury selection, Ake v. Oklahoma

FOREWORD

THE FUTURE ROLE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT NOW THAT IT HAS TURNED 21

THE HONORABLE RICHARD LINN*

INTRODUCTION

Much has been said and written about the formation of the Federal Circuit and the performance of the Federal Circuit in the first two decades of the court's existence.¹ Articles abound about the lack of uniformity in the interpretation and enforcement of the patent laws prior to 1982 and in the problem of widespread forum shopping in patent cases as a result of the differing legal standards reflected in the precedent of the regional circuits at that time.² The common theme

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1. See, e.g., Daniel J. Meador, *Retrospective on the Federal Circuit: The First 20 Years—A Historical View*, 11 FED. CIR. B.J. 557, 558 (2001) (discussing the formation of the Federal Circuit); Chris J. Katopis, *The Federal Circuit's Forgotten Lessons?: Annealing New Forms of Intellectual Property Through Consolidated Appellate Jurisdiction*, 32 J. MARSHALL L. REV. 581, 597-605 (1999) (reviewing the formation of the Federal Circuit, analyzing criticisms surrounding the Federal Circuit, and appraising the results of the Federal Circuit's performance); Gerald Sobel, *The Court of Appeals for the Federal Circuit: A Fifth Anniversary Look At Its Impact on Patent Law and Litigation*, 37 AM. U. L. REV. 1087, 1139 (1988) (concluding that after its first five years, the Federal Circuit was meeting its challenge of "hammering out a coherent, comprehensive, rational—and yes, improved—jurisprudence").

2. See, e.g., Christopher A. Cotropia, "Arising Under" Jurisdiction and Uniformity in Patent Law, 9 MICH. TELECOMM. & TECH. L. REV. 253, 259 (2003) (explaining that prior to the formation of the Federal Circuit, patent cases were appealed either in regional court or the Court of Customs and Patent Appeals, leading to widely varying results); see also Elizabeth I. Rogers, *The Phoenix Precedents: The Unexpected Rebirth of Regional Circuit Jurisdiction Over Patent Appeals and the Need for a Considered Congressional*

expressed in many of these articles is that uniformity of the patent laws was critically necessary, and a single court of appeals would be an efficient and effective way to achieve that desired goal.

I. THE EARLY YEARS

After the Federal Circuit was formed,³ the new court quickly began the work of bringing uniformity and clarity to patent law. The problem of appellate forum shopping ended at the very moment of the court's formation on October 1, 1982 with the elimination of regional circuit jurisdiction over patent cases.⁴ The court began its substantive work with the decision made in its very first reported case.⁵ In that case, the court adopted as binding precedent the law of its two predecessor courts,⁶ abandoning, in that one decision, all of the prior patent decisions of each of the various regional circuit courts.⁷ The court then moved quickly to expand on the precedent it had adopted and to settle areas of patent law that had been left in turmoil by the differing opinions of the other circuit courts.

Within the first two years of the Federal Circuit's operation, the court had identified and resolved over a dozen of the most significantly disputed issues of patent law; further, many of the court's early opinions were written as comprehensive tutorials in keeping with the court's mission to bring understanding and uniformity to judicial interpretations of the patent statutes.⁸ Notable

Response, 16 HARV. J.L. & TECH. 411, 414-20 (2003) (recounting the early history of patent appeals in regional circuit courts).

3. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified as amended in scattered sections of 28 U.S.C.).

4. *Id.* § 127(a) (codified at 28 U.S.C. § 1295(a)(1)) (establishing exclusive jurisdiction of the Court of Appeals for the Federal Circuit over appeals from, *inter alia*, an appeal from a final decision of a district court of the United States, if the district court's jurisdiction was based, in whole, or in part, on 28 U.S.C. § 1338).

5. See *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982) (en banc).

6. *Id.* at 1369 (announcing that the holdings of the United States Court of Claims and the United States Court of Customs and Patent Appeals issued before the close of business September 30, 1982, are binding as precedent in the Court of Appeals for the Federal Circuit).

7. *Id.* at 1371 ("Other than that created by our predecessor courts, no body of law established by any other court or set of courts would appear a suitable candidate for adoption.").

8. See, e.g., *Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 730 F.2d 1452, 1459 (Fed. Cir. 1984) (adopting a clear and convincing standard of proof for evidence of patent invalidity); *C.R. Bard v. Schwartz*, 716 F.2d 874, 880 (Fed. Cir. 1983) (clarifying the circumstances in which a licensee may challenge the validity of a patent subject to the license); *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 1363 (Fed. Cir. 1983) (adopting a more lenient approach than applied by regional circuits in analyzing "file wrapper estoppel"). See generally Sobel, *supra* note 1 (reviewing the importance of these, and numerous other cases, in early Federal Circuit jurisprudence).

improvements in this early jurisprudence include the early rulings on obviousness that made it more difficult for challengers to invalidate patents.⁹ As a consequence, the Federal Circuit was soon perceived to be a pro-patent court.¹⁰ That perception may have been justified. Comparative statistics from the years just before and just after the court's establishment show that patentees stood a better chance of enforcing their patents after the formation of the Federal Circuit than they did before.¹¹

While the effect the Federal Circuit has had on the development of patent law is easy to trace, the effect of those changes on the economy is more difficult to establish. Other factors were at work—such as the positive messages sent by the Supreme Court in 1980 in *Chakrabarty*,¹² that a live, man-made microorganism is patentable subject matter,¹³ and in 1981 in *Diehr*,¹⁴ that patent eligibility extends to “anything under the sun that is made by man.”¹⁵ What is plainly evident is that, starting in the mid-1980s, dramatic changes began to take place in the U.S. economy. The information age was driving a renewed interest in patents. Patent protection was seen as critical to competition and to the protection of investment in many Internet and biotechnology-related businesses. Reforms undertaken by the U.S. Patent and Trademark Office began to reduce backlogs and were perceived as leading to an increase in the quality of issued

9. See Sobel, *supra* note 1, at 1094-1101 (discussing early rulings on obviousness that, among other things, required a motivation to combine references, *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1552 (Fed. Cir. 1983), stressed the importance of avoiding hindsight, *id.* at 1553, and elevated the consideration of secondary factors, *Alco Standard Corp. v. Tenn. Valley Auth.*, 808 F.2d 1490, 1501 (Fed. Cir. 1986)).

10. See John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 773 (2003) (noting that a lenient consideration of nonobviousness is considered to be a pro-patent viewpoint).

11. See John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 206 (1998) (percentage of patents held valid rose from thirty five percent in the 1970s to fifty four percent in the early 1990s); Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CAL. L. REV. 805, 821 (1988) (reporting that between 1982 and 1985, “the court invalidated only forty-four percent of the patents it adjudicated on appeal from trial courts, a marked contrast to the old invalidation rate of approximately sixty-six percent”).

12. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

13. *Id.* at 310 (“[T]he patentee has produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility. His discovery is not nature’s handiwork, but his own; accordingly it is patentable subject matter.”).

14. *Diamond v. Diehr*, 450 U.S. 175 (1981).

15. *Id.* at 182 (recognizing that it was the intent of Congress when the patent law was recodified in the 1952 Act that the word “process,” which replaced the word “art,” refers to subject matter which “include[s] anything under the sun that is made by man”) (citations omitted).

patents. There was a dramatic increase in the filing of patent applications in the United States.¹⁶ Patents began to receive wide media attention.¹⁷ The general public, and business leaders in particular, began to pay much more attention to patents. Patents were no longer just of interest to scientists and engineers, but entered the mainstream of discussion and debate.

During the decades of the 1980s and 1990s, the focus of government shifted away from antitrust concerns. Starting with the Bayh-Dole Act,¹⁸ the government began to encourage new investment and the commercialization of the fruits of research undertaken at government expense at universities.¹⁹ Meanwhile, the decisions of the Federal Circuit were bringing greater certainty and uniformity to the patent laws. Together, these shifts made the enforcement of patents more predictable and increased incentives for licensing of patents. Patents became central to the new, information-age economy in the United States and were recognized as having significant value as intellectual assets.

The precise role the Federal Circuit played in the successes of the U.S. economy following the formation of the court has not, to my knowledge, been quantified. This remains to be determined by future scholars. But I think it is fair to conclude that the Federal Circuit played an important part. To me, it is clear that inventors and corporations are more likely to seek and enforce patents when there is greater clarity in the applicable legal standards and greater certainty in the outcome of litigation. Likewise, corporations are more inclined to license patents if they and their attorneys are better able to evaluate the chances that those patents will withstand a legal challenge. While I admit to some bias, I think the Federal Circuit has in large measure lived up to the expectations of its proponents bringing greater uniformity and clarity to U.S. patent law. I say this

16. TECHNOLOGY ASSESSMENT AND FORECAST BRANCH, U.S. PATENT & TRADEMARK OFFICE, U.S. PATENT STATISTICS, CALENDAR YEARS 1963-2001 (2002) (indicating that in the early 1980s, the number of patent applications hovered around 110,000, while in 2001, it grew to 345,000 applications).

17. See, e.g., Edmund L. Andrews, *Patents; Algorithm Ruling May Aid Software*, N.Y. TIMES, Nov. 11, 1989, at A1; *Court to Hear Patent Suit on Medical Devices*, WASH. POST, Oct. 11, 1989, at A6.

18. Pub. L. No. 96-517, 94 Stat. 3015 (1980).

19. In outlining its policy to encourage new investment, Congress stated:

It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development; to encourage participation of small business firms in federally supported research and development efforts; to promote collaboration between commercial concerns and nonprofit organizations, including universities

Id. § 6(a) (codified as 35 U.S.C. § 200 (2000)).

not only as a judge on the Federal Circuit, but as someone who, prior to coming on to the bench, was a practicing patent lawyer and litigator over the entire lifetime of the court.

II. THE PRESENT TIME

While achieving uniformity of the patent laws is the most often cited reason for the formation of the Federal Circuit, I think the successes of the court in its adolescent years come not entirely from uniformity but from something less apparent yet more significant. After all, the goal of uniformity was achieved procedurally not by years of decisions but by a single act of Congress in granting the Federal Circuit exclusive appellate jurisdiction in patent cases.²⁰ In my view, much of the success of the court can be attributed to the consistent reflection in the court's opinions of the value patents command as legal documents, deserving of full and fair consideration by the courts and entitled to enforcement under the same rules of construction and statutory interpretation applied in other areas of the law. Through its body of precedential opinions, the Federal Circuit has quietly but deliberately moved the patent laws firmly into the mainstream of federal jurisprudence. Apart from the presence of technology-based issues of fact, and the complexities attendant thereto, the Federal Circuit has demonstrated in its opinions that patent cases are no different than any other civil case. The jurisprudence of the Federal Circuit in patent cases, and the court's position as one of the thirteen Article III circuit courts within the federal judiciary, have increased the respect enjoyed by patents in the United States and the value patents command in the global economy. In my mind, this is the real success of the court and is one reason the U.S. patent system has become a model for many other countries of the world.

III. THE FUTURE ROLE OF THE COURT

In the United States, decisions on the law are generally made at the appellate level. For cases involving complex issues of law, expertise and experience at the appellate level is sensible. On the other hand, decisions on factual matters—and that includes questions on technology—are generally made at the trial level. The scope of appellate review of factual issues is very narrow and quite limited. Thus, for cases involving complex technology and detailed issues of

20. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127(a), 96 Stat. 25 (1982).

fact, expertise and experience at the trial level is sensible. For patent cases, which often involve complex questions of both technology and law, it follows that some expertise, or at least some level of significant experience, is warranted at both the trial and appellate levels. The exclusive jurisdiction of the Federal Circuit in patent appeals brings that level of experience to the appellate level. But that same level of experience does not always exist at the trial level.

A short time ago, my colleague, Senior Judge Plager, compiled some interesting statistics about patent cases in the United States.²¹ He found that in a five-year period, there were about 1250 published district court decisions in patent cases, heard by some 375 district court judges.²² Thus, on average, each trial judge heard about three cases over the five-year period.²³ The data indicate that the majority of judges heard two or fewer patent cases in the entire five-year period.²⁴ On the other hand, three district judges, two at the District Court of Delaware, and one at the District Court for the Eastern District of Virginia, handled more than five times that number.²⁵

What this suggests is that for most district court judges, patent cases are infrequently argued or tried. For those judges, it is understandable that the task of handling the technical and legal complexities of a patent case is particularly challenging. That is not to say that district judges are not up to the task or that some sort of specialized patent trial court is needed. A specialized trial court raises the risk of tunnel vision or narrow-mindedness and is an unsatisfactory answer. The broad exposure to cases in different areas of the law serves to enhance a judge's development, to enrich a judge's understanding, and to widen a judge's perspective. District judges, exposed to cases in a varied range of areas, bring precisely such perspective and understanding to all cases before them, including patent cases. However, complex patent cases presented to district judges who have had little or no experience with them can be an especially difficult, and sometimes unsatisfactory, experience for both the court and the parties. For this, I see a larger mission for the Federal Circuit.

21. S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-First Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69.

22. *Id.* at 77.

23. *Id.*

24. *Id.*

25. *Id.* (identifying Judges Robinson and McKelvie in the District of Delaware and Judge Ellis in the Eastern District of Virginia as the three judges who handled more than five times the number of cases than average).

2004]

FOREWORD

737

Just as the regional circuit courts play a role in the administration of cases before the district courts in their circuits, I believe the Federal Circuit has a future role to play within the federal judiciary in educating and, as appropriate, assisting the district courts in the handling of the patent cases that come before them.

In the twenty one years of its existence, the Federal Circuit has defined itself as a court and has found its place in the American judicial system. In large measure, the role of the court in the future in the patent area will be no different than in the past in striving to bring uniformity, certainty and clarity to the patent laws. But I believe the court will play an expanded role in its interaction with the regional circuits and district courts in the just and efficient administration of patent cases at the trial level. This may include such things as developing judicial training programs, hosting judicial seminars, or facilitating the exchange of effective practices in patent cases among trial judges. I am confident that we are ready to confront these new challenges as we enter our third decade of operation.

CONCLUSION

I thank the editors of the *Law Review* for giving me the opportunity to participate in this edition, and I commend the authors for their observations and commentary on the work of the U.S. Court of Appeals for the Federal Circuit.