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THE FEDERAL CIRCUIT AT THIRTY

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Thirty years marks another milestone in the life of the Federal Circuit, another marker in this experiment in providing economic incentive by eliminating regional differences in judicial rulings. The Federal Circuit was formed to bring this attribute to the patent law, for the differences among the regional circuits had become so extreme as to affect the economics of industrial innovation. The disparity of judicial decisions among the regional circuits was believed to have destabilized the commercial law by producing forum differences so extreme as to affect research and development of new technologies. Concern for the adverse impact on innovative industry was fueled by the economic recession of the 1970s, and led to a restructure of the federal appellate system whereby patent appeals from the district courts were removed from the regional circuits and placed in a single national court, along with patent appeals from administrative agencies, accompanied by several unrelated areas of national jurisdiction.

This change in federal judicial structure did not come easily. It was hotly debated, for the nation reveres its juridical tradition whereby regional diversity is viewed as providing depth to the policy-laden issues of evolving law, sharpening judicial understanding based on varied perspectives, for eventual resolution of any national differences by the Supreme Court. This annual review by American University is valuable not only for its overview of the areas of law consigned to the Federal Circuit, but also to aid in the continuing evaluation of how this structure is working, in all the areas for which the Federal Circuit is the sole appellate tribunal. The combination in

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the Federal Circuit of the existing jurisdictions of the Court of Claims and the Court of Customs and Patent Appeals led to a range of subject matter no less diverse than that of the regional circuit courts. The original scope has been further enlarged to include the appeals from the Court of Appeals for Veterans Claims, from actions under the National Vaccine Injury Compensation Program, and a few other enactments. Additional assignments continue to be discussed.

The patent appeals that were removed from the regional circuits, in the early years of the Federal Circuit, constituted about twelve percent of the court's total caseload. The ratio of patent-related cases is now about twenty-five percent, for the progress of technology has led to statutory changes, competitive pressures, and increases not only in litigation activity, but also in appeals from the Patent and Trademark Office tribunals and the International Trade Commission. Adjustment has also occurred in the other areas of our assigned jurisdiction, as discussed in this volume.

In addition, new appointments have brought the Federal Circuit bench close to its full complement of twelve active judges, bringing further strength and experience through the most recent appointments: Judge Kathleen O'Malley, coming from the federal district bench in Ohio; Judge Jimmie Reyna, whose primary practice was in trade policy and international trade regulation; and Judge Evan Wallach, from the Court of International Trade. They have already made important contributions to all of the court's areas of jurisdiction.

As I contemplate the cases now reaching the Federal Circuit, it seems to me that their most common characteristic is their factual complexity. In each of our assigned areas there is a large body of Federal Circuit precedent, and the disputes that now arise raise close questions of law and application of the law. The issues in litigation tend to reside in the grey areas where conflicting policies abut, where their decision often requires rethinking of the policy underlying the law. The cases in this annual review illustrate this evolution. It is noteworthy that the United States is a party to most of the cases in the Federal Circuit, and the issues as well as the decision of cases involving the government demonstrate both rigor and humanity, as the particular subject matter warrants.

Conspicuous in not only the evolving patent jurisprudence, but in many other litigation issues, are the newly developed and evolving technologies. New capabilities raise new issues of statutory interpretation and application of precedent. For patent issues arising from computer-related technologies, as well as from the ongoing

advances in the biological sciences, precedent is sparse, and new legal issues are intertwined with questions of philosophy and sociology, amidst high human and commercial stakes. Yet the importance of stable and predictable law is as critical as when the Federal Circuit was formed.

The modern economy depends on its intellectual capital; not as abstraction of thought, but as embodied in its technology. This "knowledge capital" is the foundation of the industrial vigor of today. The laws of intellectual property govern the value of this critical resource, and thus affect its development. Today's judicial decisions continue to seek the optimum incentive to the flow of ideas and their practical embodiments. Each judicial ruling can have consequences beyond its facts.

Only a few years ago, the critical issues raised by today's new technologies were not merely hypothetical; they were inconceivable. Nonetheless, in the tradition of the common law, new issues are reviewed in the context of venerable legal principles. We do so, knowing that the legal framework that is developed in the courts will control the balance among creativity, entrepreneurial risk, competition, and the growth of intellectual and industrial capital. Each new judicial decision adjusts this balance, as each new set of facts raises policy as well as legal concerns, often with international as well as national consequences.

Whenever I'm asked about the increased importance today of the patent law and other fields of intellectual property, my answer is that they have always been important. The difference is the power of today's technology in the economy and the culture, and the commensurate power of its legal framework. Traditional economic factors like labor productivity and capital investment have been dwarfed by the effects of technology-based industry on economic growth, as well as the societal benefits that have ensued.

The philosophers of science and the philosophers of the law come together in patent disputes. Those who urge that the evolution of scientific principle must always be viewed in social and historical context, and those who urge that the principles of law are inseparable from their economic and cultural roots, converge in a patent law that daily becomes more complicated, more detailed, more nuanced. Yet experience continues to demonstrate the rapidity with which entrepreneurial activity responds to changes in legal and commercial opportunity—the burden that underlay the initial impetus to form the Federal Circuit. The breadth of the jurisdictional assignment to the Federal Circuit was foreseen as providing a cross-fertilization of

the law, in historical, societal, and economic context. This volume illustrates that experience, as the Federal Circuit continues to take on the complexities of all of our assigned areas of jurisprudence, seeking the combination of stability and wisdom that is called the rule of law.