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Foreword

Alan D. Lourie

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Foreword

FOREWORD

THE HONORABLE ALAN D. LOURIE*

I thank the *American University Law Review* for asking me to write this Foreword. I have often been reticent in expressing my views on the court and patent law, mostly because one frequently regrets what one writes and because it quickly becomes out of date. Also, I am no seer, but perhaps what I have to say here will be timely and of interest.

Our court has been the subject of much criticism in recent years. Questions have been raised as to whether it has been a success, or at least as to whether its exclusive jurisdiction over patent appeals should continue.¹ It has been said that the court is too pro-patent, but others have said that we are insufficiently so.² Much has been

* Alan D. Lourie was appointed to the United States Court of Appeals for the Federal Circuit on April 6, 1990, by President George H. W. Bush. He was formerly Vice President, Corporate Patents and Trademarks, and Associate General Counsel of SmithKline Beecham Corporation. Born in Boston, Massachusetts, on January 13, 1935, Judge Lourie received his Bachelor's degree from Harvard University (1956), his Master's degree in organic chemistry from the University of Wisconsin (1958), and his Ph.D. in chemistry from the University of Pennsylvania (1965). He received his J.D. degree from Temple University in 1970. Before being appointed to the court, Judge Lourie played leadership roles in a number of national and international organizations relating to intellectual property. Since becoming a member of the court, he has received a variety of bar association and other awards. In addition, he was a member of the Judicial Conference Committee on Financial Disclosure from 1990 to 1998 and was a member of the Committee on Codes of Conduct from 2005 to 2013. Judge Lourie is married and has two daughters, four grandchildren, and a great grandchild.

1. See, e.g., Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1, 1 (2013).

2. Compare Timothy B. Lee, *Obama Wants to Fix the Patent System. Here's a Crucial Reform he Overlooked.*, WASH. POST (Jan. 29, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/01/29/obama-wants-to-fix-the-patent-system-heres-a-crucial-reform-he-overlooked>, and Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 25–30, 54 (1989), and Ryan Davis, *'Terrified' Fed. Circ. Will Follow High Court, Michel Says*, LAW360 (Mar. 26, 2015, 7:55 PM), <http://www.law360.com/articles/636271/terrified-fed-circ-will-follow-high>

made of the increase in Supreme Court review and frequent reversals of our decisions. Although I do not follow critiques of the other circuit courts of appeals, probably few appellate courts, other than the Supreme Court, have been subjected to as much criticism as ours.

I digress briefly to note that little criticism has been made of the court's jurisprudence regarding its federal claims, international trade, veteran's law, and government employee law decisions. The only obvious exception has been government employee claims involving alleged whistleblowing. That the court has only infrequently found in favor of employees claiming to be whistleblowers is because it has limited jurisdiction over fact questions, and most whistleblower assertions are made by petitioners whose personnel actions the Merit Systems Protection Board found were independent of the alleged whistleblowing. Also, major whistleblowers appear to bring qui tam suits in district courts.

It is not surprising that our court has been looked over so carefully. It was a new court when it was created in 1982. It was created for a specific purpose—to establish uniform patent law in the interest of enhancing innovation in the United States.³ Thus, it is reasonable for observers to examine whether the court has served its intended purpose. I believe that it has.

As someone who observed the first eight years of the court's life from the outside, it was never my view that the court was pro-patent.

court-michel-says (“With numerous reversals of patent decisions in the past year, most of them unanimous, the Supreme Court has made clear that it thinks of the Federal Circuit as a ‘rogue court’ that is too pro-patent and that is bound to influence the appeals court’s thinking.” (quoting Judge Michel)), with Paul M. Janicke & LiLan Ren, *Who Wins Patent Infringement Cases?*, 34 *AIPLA Q.J.* 1, 3–6 (2006) (concluding that statistics do not show a pro-patent bias at the Federal Circuit), and Timothy R. Holbrook, *Patents, Presumptions, and Public Notice*, 86 *IND. L.J.* 779, 803 (2011) (describing the Federal Circuit’s disclosure jurisprudence as “creat[ing] an unwarranted bias against patents”), and Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 *SUP. CT. ECON. REV.* 1, 3 (2004) (finding that claims of patent infringement are as likely to succeed now as those claims were before the advent of the Federal Circuit).

3. See, e.g., S. REP. NO. 97-275, at 2 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 12 (“Part A of Title I has three purposes[. Two of them are] to fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in the law where Congress determines there is a special need for nationwide uniformity[, and] to improve the administration of the patent law by centralizing appeals in patent cases To achieve these goals, the bill establishes a new [f]ederal court of appeals, to be called the United States Court of Appeals for the Federal Circuit.”). See generally Report on Patent Policy, in ADVISORY COMMITTEE ON INDUSTRIAL INNOVATION: FINAL REPORT 147, 155 (1979) (proposing, inter alia, to provide a specialized appellate court for patent cases).

I thought that it was pro-statute, restoring to the law the statutory rights to preliminary injunctions, lost profits, the presumption of validity, and jury trials, among other things that were part of the law, but believed not to have been consistently applied by other circuits. Indeed, in its early years, the court resolved conflicts among the circuits on a variety of issues.⁴ As Chief Judge Markey remarked, “the Federal Circuit has, in exercising its patent jurisdiction during its first few years, attempted to scrape from the body of patent law a heavy encrustation of rhetorical barnacles.”⁵

Moreover, having been a member of the court for its ensuing twenty-five years, I have not seen that the judges have put their fingers on the scale to favor patentees or that the court has met, in panels or en banc, to decide as a matter of policy whether a particular result would favor patentees or innovation. Cases have been decided on their merits, applying law to facts and respecting the standard of review.

Another reason why the court has been subject to criticism is the enormous growth in academic commentary about the court. When I entered the patent profession, patent law was taught in very few law schools, and there were few professors writing about patent cases. Today, every respectable law school has at least one faculty member teaching patent law and seeking to climb the academic ladder by studying the court and writing papers about it. Few papers get noticed in the academic world if they are not, in part, critical of the subject about which they write. That is what academic criticism is about. It is perhaps worthy of comment that so many of the lawyers teaching and writing about the court are former law clerks. In effect, we have shown them how the sausage is made and then sent them out to critique the process. Foodstuffs aside, there is now a cottage industry of writers watching the court, hearing our arguments, reading our opinions, arranging conferences, and otherwise subjecting us to their microscopes. This degree of scrutiny occurs with respect to few other circuit courts. It is an unsurprising result of both the purpose of the court’s creation, the growth in importance of the patent law, and the increase in the academic patent community.

One criticism of the court has been the fact that many of our en banc decisions have been by close votes. Of course, the Supreme Court decides many of its important cases by 5-4 votes. It should not

4. Howard T. Markey, *The Patent Jurisdiction of the United States Court of Appeals for the Federal Circuit*, 18 INT’L R. INDUS. PROP. & COPYRIGHT L. 693, 699-700 (1987) (describing ten such conflicts that the Federal Circuit resolved during its first few years).

5. *Id.* at 700.

be surprising that difficult issues can divide this court as well. The fact that this occurs is actually testimony to the lack of a pro-patent (or anti-patent) bias in the court. Different views lead to different votes—and the fact that we are often split on difficult issues is one response to the assertion that our law would be better reasoned if there were a variety of voices weighing in on issues from different circuits. We have internal diversity.

It should also not be forgotten that industry and the Bar are often divided on issues that come before us. Differences on the court are thus not surprising. Finally, regarding diversity, we have many new issues relating to new technology. Followers of the court are well aware that the fields of computers, software, genes, and diagnostics have raised new and frequent issues that have to be decided. The answers are often not so clear that everyone agrees. On cases that do not involve major issues of law, we can at times defer to the reasonable views of colleagues, but, on important issues of continuing consequence, we each cast our vote as we conscientiously see them.

On issues that the regional circuits review, percolation among the circuits at times helps to elucidate the best view on an issue that may lead to a uniform rule, and it often must be resolved by the Supreme Court. Our court likewise experiences that percolation, but internally. One might note the case of *Akamai Technologies, Inc. v. Limelight Networks, Inc.*,⁶ where, after some ups and downs and a visit to the Supreme Court, our court unanimously settled a rule of law not resolved by the Supreme Court.⁷ The seminal case of *CLS Bank International v. Alice Corp.*⁸ was also one where it was said that we were badly split.⁹ In fact, while no opinion garnered a majority of the court, two of the three issues were decided by a 7–3 margin, and the Supreme Court ultimately affirmed the decision expressed by the plurality opinion.¹⁰

Another reason for criticism of the court is the increased interest of the Supreme Court in our cases. Writers have applied various pejoratives to describe what the Court has done with our cases.¹¹

6. 797 F.3d 1020 (Fed. Cir. 2015).

7. *Id.* at 1022.

8. 717 F.3d 1269 (Fed. Cir. 2013), *aff'd*, 134 S. Ct. 2347 (2014).

9. *Id.* at 2352–53.

10. *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2352 (2014).

11. See, e.g., *Supreme Court Rebukes Federal Circuit on Patent Inducement*, FENWICK & WEST LLP (June 18, 2015), https://www.fenwick.com/publications/Pages/Intellectual-Property-Bulletin-Spring-2015.aspx#_idTextAnchor006 (“Unlike some of its prior rebukes of the Federal Circuit, [*Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920 (2015),] had very little disparagement of the specific reasoning of the court below.”); Steven Auvil et al., *Again Reversing the Federal Circuit, the Supreme Court Vests District Courts*

Writers will say what they will. First, one must note that the Court has reviewed more than just our patent cases.¹² We have been affirmed and we have been reversed across the spectrum of subject matter. It is not surprising that if the Court takes a case from a circuit court, there is a better than even chance that it will reverse.

Many guesses have been made as to why the Court has taken more of our cases in recent years, particularly our patent cases. They include an otherwise low caseload, the importance of patent law in today's economy, the large amount of money involved in some patent cases, and the number of leading appellate advocates appearing in our court and filing petitions for certiorari. Only the justices know. But, just as our court can split on difficult issues, as the Supreme Court itself does, it is not unreasonable for the Court to make different interpretations of our statutes than the judges on our court. They are at the top of the judicial pyramid and are entitled to have their say on important issues of patent law, just as in other areas of the law. And they do not always reverse us. For example, they affirmed our decisions in *Bilski v. Kappos*,¹³ and *Alice Corp.*,¹⁴ two of the most closely watched of our cases that the Court has reviewed in recent years. Furthermore, it is not surprising that the Supreme Court wishes to have its input on the major issues of our areas of jurisdiction. It is, after all, the Supreme Court.

Our court respects the Supreme Court's decisions and does its best to follow that precedent, and it is not for us to criticize our highest

with Deference for Claim Construction, SQUIRE PATTON BOGGS: GLOBAL BUS. IP & TECH. BLOG (Jan. 20, 2015), <http://www.iptechblog.com/2015/01/again-reversing-the-federal-circuit-the-supreme-court-vests-district-courts-with-deference-for-claim-construction> ("Continuing its string of decisions reversing Federal Circuit precedent, today the Supreme Court rejected the Federal Circuit's de novo standard for reviewing district court claim construction rulings."); Jason Rantanen, *Is the Federal Circuit Really Worse Than the Cubs?*, PATENTLY-O (June 3, 2014), <http://patentlyo.com/patent/2014/06/federal-circuit-really.html> ("[T]he Supreme Court has not been kind to the Federal Circuit this term."); Vera Ranieri, *Supreme Court Overrules Federal Circuit Again. And Again.*, ELECTRONIC FRONTIER FOUND. (June 2, 2014), <https://www.eff.org/deeplinks/2014/06/supreme-court-overrules-federal-circuit-again-and-again> ("The Supreme Court issued two unanimous patent opinions today, both overruling the Federal Circuit.").

12. See, e.g., *Dep't Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015) (reviewing a whistleblower case); *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012) (reviewing a takings case); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) (reviewing the extent to which the trustee fiduciary duty exception to the attorney-client privilege applies to the trust relationship between the United States and an Indian tribe).

13. 561 U.S. 593, 613 (2010).

14. 134 S. Ct. at 2352.

court. Contrary to some public comments, the fact that on remand we may arrive at the same result as before does not mean that our court is attempting to evade the ruling of the Court, only that a new or modified rule does not always lead to a new result on the particular facts. Overall, I consider the Supreme Court's interest in our cases to be a reflection of the importance of the cases we review and not unwelcome.

Finally, the Supreme Court often takes cases to resolve circuit splits. In our cases, except for tax cases, where we do not have exclusive jurisdiction, our circuit splits are mostly internal. Thus, if the Court wants to resolve a split on issues in our court, it obviously must take cases from our court, whereas, if it wants to resolve a split on an issue not exclusive to our court, there are various circuits from which it can choose. And most of the certiorari petitions coming to the Court from this court are, of course, denied.

The Federal Circuit decides many cases outside of the patent field. These other areas of its jurisdiction do not seem to have been central to the reasons for creating the court, and, for the most part, have not engendered the criticism of the court from the relevant bar communities. I leave it to others, particularly the practitioners in those fields, to opine on the success of the court in competently deciding cases outside the field of patent law—but silence suggests satisfaction.

All institutions are subject to flaws and to error, but it is my view that the Federal Circuit has discharged its duties efficiently, competently, and collegially. It has met the goals that Congress set for it and, with its recent infusion of new blood, is looking to the future.