INTRODUCTION

THE FEDERAL CIRCUIT: JUDICIAL STABILITY OR JUDICIAL ACTIVISM?*

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These annual reviews of the jurisprudence of the United States Court of Appeals for the Federal Circuit nicely show the evolution of several important and complex areas of law. Some of this law is of critical importance to the nation's industry, particularly the patent, international trade, and government contract law. Other law assigned to the Federal Circuit serves additional national interests: constitutional takings law; childhood vaccine injuries; veterans appeals; customs law; trademark registration; federal employment law; Native American claims; tax and other claims against the Government; and the newly transferred jurisdiction of the Temporary Emergency Court of Appeals.

All of these areas merit critical attention. Decisions in each of them cast light on the court's persona. It is a lustrous court, favored with judges of talent and devotion, and I serve among them with pride. In meeting the court's responsibilities in each area of law assigned to it, the occasional "percolation" of divergent views illustrates the vigor of the judicial search for truth, the sometimes indirect progress toward the justice and fairness that animate the law. Such divergence also reflects the court's "activism," as new facts lead it into areas of uncertain public policy, and the court brings its own viewpoints to bear on the jurisprudence assigned to it.

REMEMBRANCE OF THE PAST

Critical review requires a return to the time of formation of the Federal Circuit, lest we forget the reasons for the judicial restructur-

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ing that established this court. These reasons illuminate the court's role in the judicial system, and indeed allow me to presume to the personal role of critic, drawing on my participation during the creation of the court, my knowledge of the problems that this new judicial structure was intended to solve, and my active support for its purposes.

This history has been much explored during this tenth anniversary of the Federal Circuit.¹ It places a spotlight on the court, focused on the national needs that brought it into being. Any examination of the jurisprudence of the Federal Circuit is not complete without evaluation of the extent to which the court has fulfilled the purposes for which it was formed. In brief summary, two distinct paths led to the formation of the Federal Circuit. On one hand there was the growing interest, after a succession of studies of federal judicial structure, in the theory of a national court at the appellate level. This interest is traceable through the studies of the Freund Committee in 1972,² the Hruska Commission in 1975,³ and the studies led by Professor Meador in 1978.⁴ In each of these studies the theoretical benefits of having some form of national court were viewed primarily as providing relief to the Supreme Court, and were countered by a variety of perceived problems. It was not until the coincidence of the Domestic Policy Review of Industrial Innovation, conducted by the Carter administration in 1978-79, that there arose an additional and ultimately controlling reason for establishing a national appellate court.⁵ The forceful concern of the nation's technological leadership about the effect on industrial innovation of judge-made patent law brought a new constituency to the rarefied precincts of judicial structure.

The interest of industry was the restoration of the patent system's constitutional and statutory incentive to promote technological pro-

⁴ Department of Justice, Office for Improvements in the Admin. of Justice, A Proposal to Improve the Federal Appellate System (1978) (recommending merging Court of Claims and Court of Customs and Patent Appeals).
⁵ Department of Commerce, Advisory Committee on Industrial Innovation, Final Report iii (1979).
gress. That incentive had been diminished by the inconsistencies of judge-made law concerning patent rights and remedies. The concept of a national court that would be free of intercircuit differences, and thereby provide a stable body of law upon which reliance could be placed by inventors and investors, was intended as a solution to a problem of practical importance to the nation.

Thus the twofold purpose of this novel judicial structure included the experimental one whereby a national appellate court would receive appeals from all of the district courts of the nation, accompanied by the intended stabilizing effect of this structure on the law supporting industrial innovation. Both of these aspects were premised on the court's patent jurisdiction, for most of the other areas of the Federal Circuit's jurisdiction were already well handled by the two national courts that were melded into the Federal Circuit. The existing jurisdictions of the Court of Customs and Patent Appeals and the Court of Claims, to which had been added appeals from the Merit Systems Protection Board, provided about eighty percent of the Federal Circuit's caseload. The remaining twenty percent were the appeals transferred from the regional circuit courts, of all cases tried in the district courts under the patent law and the Little Tucker Act.

The idea was ambitious yet simple: the idea that consistent application of the law, achieved by eliminating the opportunity for forum-shopping, would have a direct and salutary effect on industrial innovation, and thereby on the nation's technological strength and international competitiveness. Patent rights are a factor in much of the research, investment, and commercial risk-taking that comprise industrial innovation; yet the marked variations among judicial patent decisions in the regional circuits suggested to the technology community that this aspect was not always well understood.

The shaping of the patent law is to an exceptional degree in the hands of the judiciary, for in patent cases a relatively simple statutory law is applied to an extraordinary complexity of factual circumstances. These encompass the entire range of mechanical, electronic, biological, and chemical subject matter. The entrepreneurial and creative vigor of the nation's technology is metered by the system of laws governing patents. Review of the history of patent law over the economic cycles of the nation, indeed over the nation's evolution from an agricultural to an industrial economy, shows the judiciary reflecting in its patent decisions a variety of per-
ceptions of the place of patents in the nation's economy. Although there was often manifest prescience and great wisdom, increasingly, mirroring society, there appears to have been a failure of the "two cultures" of law and science to understand each other. Today we cannot afford this gap, for scientific and technologic issues underlie large segments of modern jurisprudence, as well as of our economy. As remarked by Professor Teece, "The United States today depends critically on its ability to innovate—and to capture the benefits from invention—for its economic prosperity."  

The Federal Circuit was born in the recessive economic period of the late 1970s, and was charged with the expectation that correct and wise judicial application of patent law would support technological innovation, as the law was intended to do, thereby contributing to capital formation and the industrial activity that is the foundation of our nation's economic and political strength. It is not easy to measure the impact of this change in judicial structure, and accompanying changes in jurisprudence, on industrial innovation. I have seen no definitive economic study, and perhaps none is possible, for the nation's economy is not a controlled experiment. However, it is possible to compare the state of patent law today with that of a decade ago, and to evaluate the extent to which the Federal Circuit fulfills these expectations and hopes. 

In the first few years of its existence the court resolved major differences among the regional circuits. In decisions of exemplary fidelity to the constitutional and legislative purposes of the patent law, drawing upon the mixture of economic theory and technological practicality that coalesce in the patent law, the Federal Circuit retrieved the law from much of the arcana with which it had been burdened in recent decades. For the first time in many years, the same law was routinely applied in review of patentability in the Patent and Trademark Office and review of patent validity in litigation, because these appeals now resided in the same court. The practical importance of this step is manifest when one considers that over 150,000 patent applications are processed annually by the patent examining system, yet each patented invention that is successful in the marketplace is subject to second-guessing in the courts. 

In its early decisions the Federal Circuit returned the patent law to its jurisprudential roots. For example, the measure of recovery

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for patent infringement was restored to the classical damages principle of making the wronged party whole. The court eliminated special rules such as synergism, and clarified many of the rules of patentability. The court removed many of the artifices and doctrines that had puzzled inventors and confounded jurists. The growing number of jury trials in turn required lawyers and judges to demystify the law. Patent law was placed in the perspective of the marketplace: the destination contemplated in the Constitution.

Patent law is a living law, and the court has advanced the jurisprudence at a rate that would have been impossible were not all appeals concentrated in one court. In so doing the principles of stare decisis have occasionally been overtaken. This counsels caution, for the value of the court depends on the success with which it provides a stable and consistent law on which the technology community can rely. The most important value of the rule of law is in the provision of a stable and reliable framework for behavior, and the avoidance of litigation.

Patent law is practiced mainly through legal advice and counseling over the course of the commitment of creative and capital resources, to manage legal risk in the already risky business of industrial innovation. Like all commercial law, the cost of guessing wrong about the law and its application is rarely recoverable. The responsibility placed on the Federal Circuit mirrors that placed on all courts, for a useful and reliable law requires that the law is known and knowable. In testifying on behalf of supporters of the court, I said:

A centralized court that understands the processes of invention and innovation, and the economic and scientific purposes of a patent system, would be expected to apply a more consistent interpretation of the standards of patentability and the other complex provisions of the patent statute. With a consistent nationwide application of the law, I would hope for and expect a greatly enhanced degree of predictability of the outcome of patent litigation. The predictability that patents improvidently granted will be held invalid is of no less interest to us as manufacturers and purveyors of goods than the predictability that patents will be held valid if they represent proper protection of a valuable investment in innovative technology. As in all contested situations, a more predictable outcome may encourage the contestants to avoid litigation: the rules of law need not be challenged daily, to

reinforce the rule of law.  

Indeed, unless there can be reasonable reliance on legal advice given during the stages of invention and innovation, unless that advice can correctly predict the legal principles to be applied by the court, the court is not fulfilling its obligations to the public.

Although I have concentrated on the Federal Circuit's patent jurisdiction because of its role in the court's origin, I do not mean to slight our other areas of jurisdiction, for they are not slighted in our daily concern. These areas involve questions of complexity and importance; each field of law requires stability and predictability; and all receive the court's careful attention. All merit critical review, in terms both of the evolution of the law of the Federal Circuit, and in evaluation of the judicial structure to which they are entrusted.

A Caution for the Future

In law, as in science, the most profound of theories is usually the simplest. Simplification requires, demands, the deepest and truest understanding of basic principles; complexity reflects, more often than not, an insufficiency of understanding. The Federal Circuit in its most effective opinions simplified the law so that judges and lawyers, inventors and juries, could understand it and use it. I caution against a retrenchment from that elegant simplicity, into a policy-driven activism whereby the application of the law will not be known until the Federal Circuit hears the case.

The Federal Circuit has been shielded, by its diverse jurisdiction and the breadth of experience of its judges, from the pitfalls of a "specialized" court wherein a cadre of experts, secure in its superior knowledge of the policy that the law should serve, comes to view itself as judge, advocate, and jury. Caution is needed lest our increasing maturity expose us to this pitfall. It is policy choices that lead to departure from precedent, into the judicial activism that weighs against legal stability. Although all judicial decisions reflect, to some degree, the judge's personal predilections, policy choices are not the province of judges. The nature of worldwide competition has changed dramatically, and the need to attune our laws to economic reality is greater than ever. I urge participation of the bar.

and the interested public in the direction of all of the areas of law assigned to the Federal Circuit. Working together, I am confident that the Federal Circuit will continue to meet its responsibilities with distinction.