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Patent Litigation Update

Discovery Ordered Regarding Identification of Anonymous Web-Posters: In *In re Anonymous Online Speakers*, 2011 WL 61635 (9th Cir. Jan. 7, 2011), the Ninth Circuit addressed for the first time whether and when a provider of online content must disclose the identities of individuals who have used pseudonyms when making website posts. The answer, the court held, depends on the type of speech involved.

The defendant had allegedly facilitated an online smear campaign against the plaintiff via postings on the defendant's websites. On First Amendment grounds, the defendant refused to reveal the identities of the individuals posting on its websites. The plaintiff moved to compel, and the pseudonymous posters contested the motion.

The trial court distinguished between statements that were "factually based and thus capable of a defamatory meaning" and statements that constituted opinions. It ordered disclosure of the identities of those who had posted fact-based statements and denied the motion to compel with respect to those who had posted opinions. The pseudonymous posters then sought a writ of mandamus from the Ninth Circuit.

Although the Ninth Circuit declined to adopt a particular approach to issues related to anonymous and pseudonymous postings, it held that the district court had offered the posters too much protection. It noted that although both online speech and the right to speak anonymously are protected by the First Amendment, "the degree of scrutiny varies depending on the circumstances and the type of speech at issue" and that commercial speech enjoys less protection than political speech. The Ninth Circuit left to the district court "the details of fashioning the appropriate scope and procedures for disclosure of the identity of the anonymous speakers." It did not provide any specific guidance to the district court other than to identify a protective order with different levels of disclosure for different categories of documents as "just one of the tools available to the district court to oversee discovery of sensitive matters that implicate First Amendment rights."

Federal Circuit Abolishes 25 Percent Rule for Calculating Damages: The Federal Circuit recently rejected the so-called "25 percent rule of thumb" for calculating damages in patent lawsuits.

Prior to *Uniloc USA, Inc. v. Microsoft Corp.*, 2011 WL 9738 (Fed. Cir. Jan. 4, 2011), damages calculations in patent cases often began with a baseline royalty rate of 25 percent of the value of the accused product. That rate was then adjusted up or down in accordance with applicable *Georgia-Pacific* factors.

In *Uniloc*, however, the Federal Circuit found that "evidence relying on the 25 percent rule of thumb ... fails to tie a reasonable royalty rate to the facts of the case at issue." Specifically, the court found that the 25 percent rule: fails to account for the unique relationship between the patent and the accused product; fails to account for the unique relationship between the parties; and is essentially arbitrary because it bears no relationship to the hypothetical negotiation model that should guide a damages analysis. As the Federal Circuit explained, "the 25 percent rule of thumb would predict that the same 25% / 75% royalty split would begin royalty discussions between, for example, (a) TinyCo and IBM over a strong patent portfolio of twelve patents covering various aspects of a pioneering hard drive, and (b) Kodak and Fuji over a single patent to a tiny improvement in a specialty film emulsion." Accordingly, it held that evidence relying on the 25 percent rule of thumb is inadmissible under *Daubert* and the Federal Rules of Evidence.