The 'Almighty' Federal Circuit? Evolving Patent Policy & Jurisprudence

by Maggie Tamburro

Has the importance of the patent system on the U.S. economy propelled the Federal Circuit to be, *de facto*, the most powerful court of the land?

The Federal Circuit, with its fifteen learned judges, by virtue of the fact that it has exclusive appellate jurisdiction for U.S. patent law appeals, has been catapulted to superstar and perhaps unprecedented legal status, holding within its grasp the authority to profoundly affect a growing area of law which serves as a primary driver of U.S. innovation and economic growth.

Consider the following:

• According to a U.S. Commerce Department report released last April, IP-intensive industries comprised 34% of the U.S. gross domestic product in 2010, contributing more than $5 trillion dollars in value. The report found, “The entire U.S. economy relies on some form of IP, because virtually every industry either produces or uses it.”

• Among the 75 industries the report identified as IP-intensive, 26 of those were patent-intensive industries, which accounted for 3.9 million jobs in 2010.

• Between 2010 and 2011, the report showed a 2.3% growth rate in patent-intensive industries, which outpaced gains in industries categorized as non-IP intensive.

• The report also noted that patent-intensive industries have seen faster wage growth in recent years than non-IP-intensive wages. Wages of IP-intensive industries, which have nearly doubled since 1990, were 42% higher in 2010 than average wages in other non-IP-intensive private industries, with patent- and copyright- intensive industries leading the way.

As stated by retiring Secretary of Commerce for IP & Director of the USPTO David Kappos, in a Nov 20, 2012 Keynote Address, “It is increasing clear that intellectual property, or IP, is a key driver of economic growth, exports, and job creation. IP rights are the global currency for creating value for products and

services, for all innovators, in all markets. And the protection provided by patents is critical to the innovation ecosystem.*"*

Citing a portion of the above-referenced U.S. Commerce Department's report, Kappos concluded, "So it is in this context that we are seeing multi-billion dollar acquisitions of patent portfolios and a number of high profile patent lawsuits, involving some of the most innovative companies on the planet, who are producing some of the most popular technologies ever created."

The 'Almighty' Federal Circuit – Why So Powerful?

As many readers know, the U.S. Court of Appeals for the Federal Circuit, established in 1982 under Article III of the U.S. Constitution, has exclusive subject matter jurisdiction for U.S. patent law appeals originating under 28 U.S.C. §1295. Generally speaking, the Federal Circuit has jurisdiction over patent-related appeals involving (1) final decisions of U.S. district courts in any civil action arising under any Act of Congress relating to patents, (2) the Patent Trial and Appeal Board of the U.S. Patent and Trademark Office (USPTO) under title 35 of the U.S.C., and (3) appeals from final determinations made by the U. S. International Trade Commission (ITC) under 19 U.S.C. § 1337.

Although the Federal Circuit's subject matter jurisdiction extends to subject matters beyond patent law, the bulk of its appeals and breadth of legal influence relates to patents. According to infringement appeals is on the rise. In 2012, 471 patent infringement appeals were filed in the Federal Circuit from the U.S. District Courts, up from 399 in 2010. The fact that almost 500 patent infringement appeals were made to the Federal Circuit last year means that the Federal Circuit holds enormous judicial opportunity, if measured in numbers of patent appeals alone, to render decisions which influence patent law, public policy, and the economy.

Case in Point: *InterDigital Communications, LLC v. Intern'l Trade Comm'n and Nokia Inc.*

A recent case demonstrating the power of the Federal Circuit to influence the economy in the midst of a changing patent landscape is its January 10, 2013 decision in *InterDigital Communications, LLC v. Intern'l Trade Comm'n and Nokia Inc.* At issue was whether InterDigital's patent licensing activities fell under the "domestic industry" requirement of section 337, allowing for a ban on the importation of allegedly infringing products.

The Federal Circuit held,

> [S]ection 337 makes relief available to a party that has a substantial investment in exploitation of a patent through either engineering, research and development, or *licensing* (emphasis added). It is not

> necessary that the party manufacture the product that is protected by the patent, and it is not necessary that any other domestic party manufacture the protected article."

Thus, the Federal Circuit's decision has paved the way for an entity engaged in the licensing of patents, but not necessarily the manufacture of the goods involved, to seek exclusion of the allegedly infringing products under section 337. In its decision, which sided with the licensing entity, the Federal Circuit's decision speaks (even if not directly) to the larger and (often stickier) issues of U.S. trade policy and public policy issues involving the activities of NPEs.

U.S. Supreme Court's Role

Although Federal Circuit decisions are appealable to the U.S. Supreme Court, aside from a few notable 2012 Federal Circuit reversals, (including *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk* and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*), the U.S. Supreme Court seems hesitant to step on the authority of the Federal Circuit, or otherwise usurp the patent law subject matter jurisdictional authority granted to it. Rather, the U.S. Supreme Court seems to jump in only when necessary to determine matters, whether involving critical statutory construction (as in *Caraco*) or more broader fundamental questions, such as the patentability of laws of nature (as in *Mayo*), it deems essential to the very underpinnings and construction of patent law.

The U.S. Supreme Court seems to prefer leaving the bulk of the decision making to the Federal Circuit when such opportunity allows. For example, shortly after issuing its decision in *Mayo*, the high court sent another high profile patent case regarding the patentability of certain genes, *Ass'n for Molecular Pathology v. Myriad Genetics*, back to the Federal Circuit for further consideration in light of the *Mayo* decision. Most recently, in January of this year the U.S. Supreme Court denied a petition for certiorari seeking review of a 2011 Federal Circuit decision issued in *Classen Immunotherapies, Inc. v. Biogen IDEC*.

Patent Law and Policy Experiencing Unprecedented Change

Evolving public policy, increasing trends in business practices which monetize and enforce patents, and sweeping changes to patent law have resulted in some of the most aggressive changes to the patent system than perhaps in any other time in recent U.S. history. The very fabric of our patent system is under undergoing legal redesign as well as redefinition in the public eye. Consider a few notable developments:

• Various provisions of the America Invents Act (AIA), enacted into law on September 16, 2011, will continue to take effect over approximately a two year period following enactment (the USPTO provides a reported that USPTO director David Kappos would be leaving his post by the end of January 2013. Many have

questioned the timing and effect of his resignation, but in the meantime those affected wait for news of a permanent replacement.

• Businesses that engage in monetization of patents have now caught the attention of governmental regulators. In December of 2012 the Department of Justice and the Federal Trade Commission (FTC) held a technical amendment to the American Invents Act (AIA) was signed into law in order to make corrections to certain provisions of the Act.

In the midst of changes, the Federal Circuit finds itself at the helm, and is often tasked with the onerous duty of steering judicial appellate evolution of those changes, through interpretation and application of patent law in way that will indelibly shape the future of the U.S. economy. In this manner the Federal Circuit is unique among the U.S. Circuit Courts – it is the only Circuit Court with subject matter jurisdiction of patent law appeals. This unique grant of jurisdiction concentrates judicial authority involving the majority of patent law appeals into one incredibly powerful circuit panel where its hardworking judges are present for the long haul, as they are appointed by the President for life.

Meanwhile, patent filings continue to grow globally – a recent article in Patent Docs reported that the World Intellectual Property Organization (WIPO) concluded patent filings increased by almost 8% in 2011, marking the second year in a row that growth has exceeded 7%.

In an evolving patent landscape, has the power of the Federal Circuit gone too far, eclipsing even the U.S. Supreme Court in ability to wield economic influence – with unprecedented power to impact the U.S. economy? Or do you think the patent appeal system operates as envisioned when the Federal Circuit was created some three decades ago?

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