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A novel idea

Getting rid of unnecessary disclosure will make patent litigation cheaper and faster, says Jonathan Radcliffe

One of the primary accusations levelled at patent litigation in England is its expense. Judgments since the turn of the nineteenth century have blamed this on the way in which patent litigation is conducted.

One of the main villains is disclosure. Most patent actions spawn mountains of documents to little real effect, apart from slowing things down and adding hugely to legal costs. In the last 20 years or so there have been very few instances of patent cases where disclosure has turned out to be crucial, yet there has been a growing trend towards yet more and more disclosure (and higher and higher costs).

This has not gone unrecognised, but in most cases attempts to reform the disclosure rules do not seem to have helped. In 1995 the old Rules of the Supreme Court were amended in patent cases to eliminate disclosure on validity to a two-year window either side of the patent's priority date and on the issue of commercial success.

While this has undoubtedly had a positive effect, many cases still generate mountains of disclosure on the issue of obviousness. The principal culprits are inventors' records and documents on the making of the invention. Even the completely new concepts of proportionality and of 'standard disclosure' seem to have had no impact.

Fast-forward to the recent Court of Appeal decision in Nichia v Argos, a case about white LED Christmas lights). Senior English patents judge Lord Justice Jacob firmly stated that the concept of standard disclosure no longer required automatic disclosure of inventors' notebooks and other papers. What the inventor had done or thought had no direct relevance to the classic four-step structured approach to obviousness. Such disclosure should not normally be ordered.

But the other two judges disagreed. They felt that a proper application of the concepts of proportionality and of standard disclosure was required. The parties had produced no evidence on the difficulties or undesirability of disclosure on the particular facts of this case. A blanket ban on disclosure of this type would give dishonest or cavalier litigants an unmerited advantage, and would send out the wrong signals. Litigants and advisers had to take on board the full implications of proportionality and of standard disclosure.

So where does this leave patent litigation and the need to control unnecessary and undesirable expense? Jacob LJ's solution of a blanket ban was rejected in favour of a rigorous application of the rationale of standard disclosure.

An early understanding by each party of the scope and extent of the disclosure task in front of them, within the metes and bounds of standard disclosure, will do much to get rid of unnecessary disclosure of the type lambasted by all three Court of Appeal judges. It should now take an exceptional case for patent judges to be prepared to order extensive disclosure of inventors' papers.

The upshot is that English patent litigation should by rights become cheaper and more attractive. The English patent litigation system has many virtues, speed not being the least of them (I recently acted in a patent case that went from beginning to judgment in the Court of Appeal in eight months). The Court of Appeal has done the world a huge favour by handing down a judgment that can be firmly wielded to eliminate not just unnecessary disclosure, but unnecessary steps in patent litigation.

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