The Changing World of Patent Litigation
Past, Present and Future

Jerry A. Riedinger
Road Map

- **Past to Present**
  - Patent Hostility
  - Patent Value
  - Patent Breadth
  - Paper patents & NPEs
  - Patent Quality
  - Trifurcation

- **The Future**
  - Reasonable Royalties
  - Claim Construction
  - IPRs
  - NPEs
  - Venue
  - New FRCPs
Past to the Present
Why do we have a patent system?
To “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries....”
“Many commentators view the patent system as a hindrance rather than a stimulus to innovation”

“Patents have become more complex and controversial in recent years; critics say they are sometimes used to preserve market power by big companies and thwart competition.”
Underlying Question:

Is patent litigation encouraging innovation?
Hostility to Patents
Four hostility topics:

- **Evolution of the “invention” standard**
- **Section 101**
- **The doctrine of equivalents**
- **Claim construction & Injunctions**
Changes in Hostility to Patents
1950 to 2015

- 1952 Patent Act
- Graham v. John Deere
- Benson
- Sakraida
- Anderson
- Federal Circuit Creation
- Markman
- Mayo
- KSR
- eBay
- Alice
- Cuno

Great A&P

“Invention” Standard
Cuno: “Flash of Genius”

“the new device . . . must reveal the flash of creative genius not merely the skill of the calling”

_Cuno Eng’n Corp. v. Automatic Devices Corp._, 314 U.S. 84 (1941)
A&P: Combination Patents

“Courts should scrutinize combination patents with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements.”

“we find no change in the general strictness with which the overall test is to be applied.”

Validity, 1961 to 1973:

- 10th Circuit – 70%
- 7th Circuit – 49%
- 9th Circuit – 26%
- 2d Circuit – 18%
- 8th Circuit – 11%
- Overall – 35%

Anderson: “synergism”

“A combination of elements may result in an effect greater than the sum of the several effects taken together. No such synergistic effect is argued here.”

Sakraida: more synergism

“this patent simply arranges old elements with each performing the same function it had been known to perform.”

The Federal Circuit

One of many business press articles in the 1980’s describing the increased value of patents resulting from the Federal Circuit’s decisions.
“a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.”

Cited A&P, Sakraida and Anderson with approval.
Section 101
Benson: § 101 & computers

• a process claim directed to a mathematical formula that improved computer operation was not patentable

“Here, the process is so abstract and sweeping as to cover both known and unknown uses…."

Benson’s Progeny

Benson’s Progeny

- **Parker v. Flook (1978)**
  - Unpatentable algorithm
- **Diamond v. Diehr (1981)**
  - Patentable by ringing bell
- **Bilski v. Kappos (2010)**
  - Abstract ideas not process
- **Alice (2014)**
  - Expansion of “abstract” exception
§101 for Drugs

- Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948)
- Ass’n for Molecular Pathology v. Myriad Genetids, Inc., 133 S.Ct. 2107 (2013)
- Ariosa Diagnostics, Inc. v. Sequenon, Inc., 788 F. 3d 1371 (Fed. Cir. 2015)
§101 for Drugs

• Funk Brothers (1948)
  • Discovery of natural phenomenon

• Mayo v. Prometheus (2012)
  • Relationship of cell constituent concentration to dosage

• Myriad (2013)
  • Isolated DNA

• Ariosa (Fed. Cir. 2015)
  • Diagnostic method
The DOE
Death of the DOE

- Pennwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931 (Fed. Cir. 1987)
- Valmont Indus., Inc. v. Reinke Mfg. Co., 983 F.2d 1039 (Fed. Cir. 1993)
- Sage Products, Inc. v. Devon Indus., Inc., 126 F.3d 1420 (Fed. Cir. 1997)
- Cooper Cameron Corp. v. Kvaerner Oilfield Prod., 291 F.3d 1317 (Fed. Cir. 2002)
Death of the DOE

- **Pennwalt** – 1987 – *(claims as a whole)*
- **Valmont** – 1993 – *(insubstantial)*
- **Sage** – 1997 – *(foreseeable)*
- **Johnson & Johnston** – 2002 – *(dedication to public)*
- **Cooper** – 2002 – *(vitiation)*
Claim Construction and Injunctions
Markman

- Removed pro-patent juries from the claim interpretation process
- Changed patent interpretation from a search for the invention to a battle over semantics.

eBay: Death of Injunctions

Eliminated the “general rule” that injunctions will issue after a finding of infringement.

*eBay Inc. v. Mercexchange, LLC, 547 U.S. 388 (2006)*
Changes in Patent Value
Changes in Patent Value


'82  '95  '06  '15
PricewaterhouseCoopers
2015 Damages Study

Median Damages 1995 to 2014

<table>
<thead>
<tr>
<th>Period</th>
<th>Damage</th>
</tr>
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<tbody>
<tr>
<td>1995-1999</td>
<td>$5.6M</td>
</tr>
<tr>
<td>2000-2004</td>
<td>$7.6M</td>
</tr>
<tr>
<td>2005-2009</td>
<td>$5.3M</td>
</tr>
<tr>
<td>2010-2014</td>
<td>$2.9M</td>
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Patent Breadth
Narrow Claim Constructions

- **Athletic Alternatives, Inc. v. Prince Mfg., Inc.,** 73 F.3d 1573 (Fed. Cir. 1996)
  - Narrow constructions are preferred
- **Sage Products, Inc. v. Devon Indus., Inc.,** 126 F.3d 1420 (Fed. Cir. 1997)
  - Patentee must bear the cost of a failure to seek protection for “foreseeable alteration of claimed structure”
Narrow Claim Constructions

• It depends on the Federal Circuit panel.

• “Specification” versus “plain meaning”
Nonsensical Constructions

- *Chef America, Inc. v. Lamb-Weston, Inc.*, 358 F.3d 1371 (Fed. Cir. 2004)
  - Nonsensical construction adopted despite contrary understanding of persons of ordinary skill

  - Nonsensical construction adopted that then required the patent to be found indefinite
Narrowing Infringement

- **Muniauction (2008)**
  - Single party must perform all steps
- **Global Tech. v. SEB (2011)**
  - Must intend contributory infringement
- **Limelight v. Akamai (2014)**
  - No induced infringement when one entity does not carry out all steps
Paper Patents & NPEs
Paper Patents
Discussions of the “Paper Patent” Doctrine in Federal Appellate Cases per Decade

NPEs and Counterclaims
Recent NPE Case Growth
NPE District Court Filings, 2010 -- 2015

Source: RPX 2015 NPE Activity Report
NPE District Court Defendants, 2010 -- 2015

Source: RPX 2015 NPE Activity Report
Number of NPE District Court “Campaign” Defendants 2010 - 2015

Source: RPX 2015 NPE Activity Report
Number of Competitor Lawsuits
2010 - 2015

Source: RPX 2015 NPE Activity Report
Number of Competitor Defendants
2010 - 2015

Source: RPX 2015 NPE Activity Report

Ave: 2561
Number of Competitor “Campaign” Defendants 2010 - 2015

Source: RPX 2015 NPE Activity Report
Patent Quality
Obviousness Standard

- Obvious
- Nonobvious
- PTO thinks nonobvious
- Courts’ View
IBM’s Toilet Queue Patent

(12) United States Patent
Boies et al.

(10) Patent No.: US 6,329,919 B1
(45) Date of Patent: Dec. 11, 2001

(54) SYSTEM AND METHOD FOR PROVIDING RESERVATIONS FOR RESTROOM USE

(75) Inventors: Stephen J. Boies, Mahopac, NY (US);
Samuel Dinkin, Austin, TX (US); Paul
Andrew Moskowitz, Yorktown Heights;
Phillip Shi-Lung Yu, Chappaqua, both of NY (US)

(73) Assignee: International Business Machines Corporation, Armonk, NY (US)

(56) References Cited
U.S. PATENT DOCUMENTS

5,272,474 * 12/1993 Hill ........................................ 340/825.29
5,864,818 * 1/1999 Feldman ............................... 395/205
5,948,040 * 9/1999 DeLormet et al. ....................... 701/201
5,963,948 * 10/1999 Shilcrat ............................... 707/100
5,978,770 * 11/1999 Waytina et al. ......................... 705/5

* cited by examiner

Primary Examiner—Benjamin C. Lee
Attorney, Agent, or Firm—Morgan & Finnegan, L.L.P.
IBM’s Toilet Queue Patent

What is claimed is:

1. A method of providing reservations for restroom use, comprising:

   receiving a reservation request from a user; and notifying the user when the restroom is available for his or her use.

2001
1. A bar of soap which is embossed with religious markings.
Alice Observation

• Many decisions involve patents with severe § 103 problems
  • (But with no § 103 analysis)
• The District Courts have little respect for patents.
Trifurcated System
Three Patent Litigation Systems

- Competitor suits
- Suits by Patent Assertion Entities
- Pharmaceutical suits
Competitor versus NPE Suits

- NPEs get different damages
  - RR only; no lost profits
- NPEs get no injunctions
- NPEs have greater venue problems
- NPE cases have separate “bars”
- NPEs get less judicial respect
Pharmaceutical Cases

- **Patent “Safe Harbor”**
  - 35 U.S.C. §271(e)

- **Hatch-Waxman Act**
  - 21 U.S.C. § 355(j)

- **BPCIA**
  - “Biologics Price Competition and Innovation Act”
  - “Biosimilar” disputes
Pharmaceutical Cases

• Separate body of substantive law
• Separate procedures
• Distinct “bar”
Quadrification?

- **Design patents allow profit “disgorgement” on the entire infringing product**
  - Huge benefit

- **Separate infringement test**
  - “ordinary observer” test
The Future
Reasonable Royalties
Past: Reasonable Royalty Decline

- Apportionment, EMVR and the SSPPU
- End of the “25% rule-of-thumb”
- Limitations on “convoyed sales”
- Fewer “comparable” licenses
- Daubert enforcement
End of Federal Circuit Activism

- The Federal Circuit seems to believe it has reasonable royalties under control.

![Graph showing the decrease of RR Damages over time.](image)
Expanded Apportionment

- **Summit 6, LLC v. Samsung Elec. Co., 802 F. 3d 1283 (Fed. Cir. 2015)**
  - Survey showed 21% of defendant’s users used the infringing features.
  - Expert concluded 21% of the defendant’s revenue resulted from the infringing features.
The Future of Claim Construction
Claim Construction

1. Fall-out from Teva
2. Federal Circuit tug-of-war
3. Role of the Jury
4. Alice interpretations
1. Teva


- Fact-findings underlying claim construction are reviewed under the “clear error” standard.
Teva fall-out

• Federal Circuit clinging to de novo review
  • Most cases just state the Teva standard, but don’t say if it’s applied.
• “internal coherence and context assessment” (Teva on remand)
• Only one case applied “clear error”
Teva fall-out

• Most cases represent district court claim constructions under the pre-Teva standard

• Over time, district courts will change
  • Express findings of fact under Rule 52
  • More credibility determinations of expert testimony
  • But “internal coherence and context” will still dominate
Post-\textit{Teva} strategy

- Any party wanting to rely on facts to support their construction should submit proposed findings of fact to the judge.
2. Tug-of-war

- Federal Circuit is split between two factions
  - “plain meaning”
  - specification dominates
- No resolution from the FC or Supreme Court
- No predictability
- Uncertainty favors plaintiffs
3. Role of the Jury

• Jury interpretations of claims will continue to increase
  • “plain meaning”
  • limited Markman rulings

• Increased risk at trial
4. Alice

- Courts are “construing” claims when they rule on Alice motions
  - Describing the gist of the invention
- Most do not apply any CC rules
  - E.D. Tex. is the exception
- Creates law-of-the-case problems
- Practice will continue among anti-patent judges
- Federal Circuit will eventually limit the practice
The Changing Impact of IPRs
Quarterly IPR Filings

(Lex Machina Data)

2012                2013                          2014                          2015
Quarterly CBM Filings

(Lex Machina Data)
**IPRs Less Deadly**

- **88%** of all petitions with final decisions resulted in at least one claim invalidated.
  - Law 360, Sept. 2015

- **78%** of all final written PTAB decisions resulted in one or more claims unpatentable.
  - Docket Navigator 2015 Patent Year in Review
IPRs

• 2014: 29% of IPRs decided in 2015 “killed” all claims

• 2015: 15%
  • Law 360, January 2016
PTO Data as of 1/31/16

- 39,346 claims challenged
- 17,066 claims instituted
- 1,850 claims cancelled or disclaimed
- 8,488 claims unpatentable
- 26.3% unpatentable, cancelled or disclaimed
**PTO Data**
**As of 1/31/16**

<table>
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<tr>
<th>Claims unpatentable, cancelled or disclaimed</th>
<th>% of Claims Challenged</th>
</tr>
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<tr>
<td></td>
<td>26.3%</td>
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</table>
IPRs

How many patents asserted in litigation have at least one claim patentable at the end of the IPR?
IPRs – Predictions

I think the number will exceed 50%.
IPRs – In the Future

Remember: without a prior art defense, plaintiffs will seek very broad claim interpretations.
IPRs – Predictions

• Most IPRs with surviving litigation claims will produce settlement

• IPR “litigations” are dominated by patent prosecution attorneys

• IPR procedures:
  • No live evidence
  • No cross examinations
  • No credibility proofs
IPRs – Predictions

• Plaintiffs will assert more patents against each defendant.
  • If IPR’s mean only 10% of claims will survive to return to litigation, plaintiff will assert 10 times as many patents.
The Future of NPEs
Number of NPE District Court “Campaign” Defendants 2010 - 2015

Source: RPX 2015 NPE Activity Report
NPE Case Predictions

• Internet and ecommerce suits will decline
  • At least until *Alice* obstacles are resolved
• Small NPEs will continue focusing on retailers
• Sophisticated NPEs will probe assertion of patents in previously neglected industries.
NPEs Case Bifurcation

- A few sophisticated PAEs
  - With sophisticated counsel
- Many “ankle biters”
Evolving Venues
45.5% of all 2015 patent infringement suits were filed in East Texas.
## Venue

<table>
<thead>
<tr>
<th>Per cent change in infringement case filings, 2014 to 2015</th>
<th>E.D. Texas</th>
<th>D. Delaware</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>+77%</td>
<td>-74%</td>
</tr>
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Venue

• Broad venue is being challenged.
  • Federal Circuit
    • *TC Heartland*, Misc. No. 16-105, argued 3/11/16
  • Congressional proposals
If venue changes:

• **Defendants will be sued in their residence or PPB**
  
  • Delaware
  
  • New Jersey
  
  • Northern, Southern and Central Cal.
  
  • Rest spread over the country
  
  • W.D. Wa?
Venue Prediction

• Venue will change
• But plaintiffs *might* be able to sue in their “home court” when infringements occur in that district.
Changes in
The FRCPs
FRCPs

• Changes became effective on December 1, 2015.
FRCPs

- Form 18 is gone
- Discovery must be “proportional”
- Sanctions limited for ESI violations
- District Courts can expedite discovery disputes
- Litigation start cannot be delayed
FRCPs Predictions

• Result of more detailed complaints:
  • Plaintiffs will do more homework before suing
    • Experts consulted
    • Claim charts prepared
    • Arguments analyzed
  • The best plaintiff’s will use detailed complaints to pressure defendants
FRCPs Predictions

- ESI “extortion” of large companies will end
- Discovery revisions will have limited impact on patent litigation
  - Proportionality will mostly affect the largest cases
    - Judge dependent
  - Streamlined discovery disputes will have limited effect
    - Litigants will still fight over infringement and invalidity contentions
FRCPs Predictions

• Fewer judges will delay issuing a scheduling order
  • E.g., D. Del.
  • Slow judges will delay other proceedings
    • *Alice* rulings under Rule 12
    • *Markman*
FRCPs Predictions

• Litigation costs will not change
  • Other factors might impact litigation costs, such as the amount in controversy
Underlying Question:

Is patent litigation encouraging innovation?
Alternative Question:

Will patent litigation encourage innovation in the future?

- Yes for pharma
- Yes for start-ups owning patents
- Yes for most competitors
- For everyone else?
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