Patent Law and Litigation Abuse

Plano, Texas

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Chief Judge Randall R. Rader

Last night I enjoyed our evening of classic rock together. This morning, I received a request to do one more number. So here goes: "The stars at night are clear and bright … Deep in the heart of Texas; Reminds me of the DISTRICT I love, the Eastern District, Texas!"

Although all of us within the judicial community (from the very top to the trial courts) must improve the two areas of challenge that I will address today, I wish to start with an acknowledgement of the vast commitment of ED Tex to patent law and innovation policy in general. No district has undertaken more responsibility to enforce the law that drives our nation's economic growth and prosperity. At the outset, I wish to express heartfelt gratitude for your untiring service. Despite its tragically limited resources, this district still leads the nation in almost every category of patent adjudication. As we discuss ways to make that commitment more efficient, I wish to stress that no one can question the proven dedication of ED Tex -- a magnificent example of service!

Chief Judge Davis, you and your colleagues have my utmost respect. Before I address two avenues for continued improvement, I want to particularly note that the Federal Circuit and ED Tex have a close relationship in another way. With great pride, I can report that three Federal Circuit judges have undertaken to share to a small degree the commitment of ED Tex by serving on loan as trial judges. Judges Bryson and Dyk are on assignment now or in the very near future as ED Tex trial judges. In fact, Judge Bryson is returning a second time after disposing of 6 assigned cases last year. And it is my sincere hope that Chief Judge Davis will allow me the honor of serving again under him in the near future. If some of you see me assigned to one of your cases, please try to suppress your disappointment that you lost the chance to appear before some of the finest patent trial judges in the entire world.

Now if I may suggest that we still have ways to improve our efficiency in two important areas: administration of patent law itself and discouragement of litigation abuse in patent adjudication.

In recent months and years, patent law has come under acute criticism – to my eyes, misguided criticism. Our nation is experiencing a crisis of confidence in its proven innovation policy. May I just suggest one indicator of the success of our intellectual property rules: At the time of the Carter Administration before the creation of the Federal Circuit, 17% of the US economy was based on the high technologies of that era; today 78% of our economy involves the high technology of this era. Much of the credit for the transformation of our economy from manufacturing and production

to innovation and invention is due to the successes of the patent system. Nonetheless it has become quite popular to question the contributions of intellectual property doctrines to the health of the US economy.

We need to remind ourselves that the Patent Law has one and only one purpose: to incentivize invention and the conversion of theoretical science into useful technology. The Patent Law that saw its birth in 1790 even before the Bill of Rights is not a Health Care Fair Pricing Act. My favorite illustration of this point is to ask how many of the 300 drugs on the World Health Organization's essential pharmaceutical's list are currently under patent. The answer is 3! Patent law can hardly take the blame for the expense of treatments. More important, however, is the question, how many of those 300 were once under patent, meaning the system helped produce those cures and produce them quicker. Again the answer is 297! Patent cannot be blamed for health care expense, but it can take the credit for improving health worldwide through invention and innovation.

Again Patent Law is not a Fair Competition Act or a Manufacturers Protection Act or a Litigation Abuse Prevention Act. Other laws govern competition or protect manufacturers. And in a few minutes, I hope to discuss litigation abuse in its proper context. But to repeat, Patent law has one purpose: to incentivize the creation of new and useful technology. A document that is around two and a quarter centuries old said it best: CONGRESS SHALL HAVE POWER TO PROMOTE THE PROGRESS OF SCIENCE AND THE USEFUL ARTS BY SECURING FOR LIMITED TIMES TO

AUTHORS AND INVENTORS THE EXCLUSIVE RIGHT TO THEIR RESPECTIVE WRITINGS AND DISCOVERIES. US Constitution, Article I, Section 8, Clause 8. Patent Law promotes the progress of the useful arts, nothing more, nothing less. It has done its one task very well and does not deserve the blame missing targets it is not designed to hit.

As an illustration of the crisis of confidence in the benefits of Patent Law, I wished to just discuss one unsubstantiated charge against the merits of this system of Constitutional dimension. Academics often charge the Patent system with creating a so-called "tragedy of the anti-commons." This academic canard suggests that the administrative burdens of enforcing patents can multiply to actually inhibit innovation. Thus, the law of innovation supposedly works against itself. In an age of empirical research to verify every legal hypothesis, I would urge you and any policymaker to reject this academic supposition – whether it comes from a high court or any other source – until it is verified by empirical data. By the way, the only studies on this topic that I have seen could not verify this guess but generally confirmed the opposite – that patents spur innovation.

As a challenge to this academic hypothesis, I offer one well-known experiential piece of contrary evidence. [Hold up my smart phone] This smart phone resides in the technological space most occupied by patents, perhaps in the history of patent law dating back to 1624. With design patents as part of the equation, this device probably includes easily more than a thousand active patents. If you count expired patents in this technology back to the advent of the

computer age, this device would implicate tens of thousands of patents. If ever the administrative burdens of the patent system would inhibit innovation, this technology would be the place to observe that encumbrance. Now you tell me: is this an area of sluggish and encumbered innovation? I doubt that I could keep track of the pace of innovation in this technology if I devoted my full time to the project. The disclosure benefits of patents bring the entire world into the innovation circle that drives this technology forward faster than any of us can fathom. I am afraid the "tragedy of the anti-commons" has its own tragedy: it simply is academic nonsense. The patent system does not inhibit invention.

Permit me one more thought in favor of a rebirth of confidence in the merits of the intellectual property mechanisms that have energized our economy for years. These confidence naysayers are not a new development. I think of one of my friends and mentors: Giles Rich. In his day, he endured as well a cycle of waning confidence. He watched as judicial decisions like BENSON and FLOOK bought into the confidence crisis and undertook to undercut the statutory reach of the patent system. He watched as other decisions like A&P SUPERMARKET or BLACKROCK misconstrued the tenets he had helped fashion in the world's best standard to determine that an invention had advanced the useful arts enough to warrant a patent, the Section 103 nonobviousness rule. We respect Judge Rich to this day because he did not waver in his own confidence in the policy and law of patents. He held to the wisdom of the written law until the nation recovered its confidence which manifested itself in decisions like DIEHR, CHAKRABARTY, and the creation of the Federal Circuit. Giles may be gone but his example should live and counsel us to this day!

Now I wish to address the situation that has contributed most to the crisis of confidence in patent law: the litigation abuse problem. At the outset I would note that litigation abuse is not unique to patent law, but skeptics of the system use this as a weapon to erode confidence in the patent system. Often these skeptics are large corporations who wish to keep innovation in their market sector to themselves – an impossibility in the magnificent world innovation market created by open patent disclosures.

In any event, litigation abuse is a real problem. Although not unique to patent law, it does affect patent law and we need to address the problem in part to protect the benefits of a robust innovation policy and in part to simply correct injustice.

Litigation abuse sometimes invites an equally abusive strategy of correction. This misguided strategy attempts to define some patent-owning entities as the source of the problem. Regardless of whether you call them NPEs or PAEs or "trolls" or whatever pejorative term suits your fancy, this definition strategy is itself an abuse. American law does not enforce or condition enforcement of basic laws and policy on the characteristics of a party. American law treats big company and small company, foreign entity and domestic entity, different genders, races, and ethnicities alike. We do not make distinctions based on the characteristics of parties but on their actions proven in a court of law. The definition of a "troll" will always be over-inclusive or under-inclusive to the detriment of justice. Instead

of finger-pointing and name-calling, the law needs to focus on blameworthy conduct.

Frankly I am going to sound like I am advocating the merits of my own discipline, but I would prefer to see it as advocacy for the Constitutional system. The Article III branch of government has the best tools to delve deeply into the facts and law of each specific case. Where the Judiciary perceives an abuse of the enforcement system, for patents or torts or whatever, it has and should have the tools to redress that overreaching and provide genuine case-by-case justice, not imperfect justice by definition and characteristic.

Litigation abuse takes many forms and I will not attempt to label them because, as I suggest, that methodology of addressing the problem is folly anyway. I would like to mention, however, that litigants who assert a patent against multiple small retail outlets to extort a fee less than the expense of a defense fall at least in a highly suspect category of potential abusers.

In my few remaining minutes, I would like to specify three tools at the disposal of the Judiciary to prevent and discipline litigation abuse in the patent field. I will put these three tools in their order of importance as I perceive them.

First SUMMARY JUDGMENT. Liberal use of summary judgment procedures ensures that judges give proper priority to the cases that deserve the scarce judicial enforcement resource. Frankly with crowded dockets like those in ED Tex, judges do not enjoy the luxury of postponing every case for a trial. To ensure the time for the cases that really deserve a trial and to ensure enforcement for the intellectual property owners that deserve the full incentives of the system, judges need to use summary judgment to "weed out" the cases lacking true merit. And I trust experienced judges like those here in ED Tex to know the difference between the meritorious case and those without merit. Summary judgment is the key to making the entire system work efficiently. It is also the key to removing the abusers from the system before they can do their damage by imposing expense on the system, for example, when they seek nuisance settlements from many entities. An impotent summary judgment process encourages nuisance settlement strategies because the accused has to assume they will bear the full cost of trial to vindicate their position.

Second, FEE REVERSAL. Section 285 of the Patent Act permits the court to "reverse" fees and make a losing party pay the litigation expenses of a winner in "exceptional cases." When a judge perceives that a case exhibits litigation abuse, that case should be "exceptional" on that basis alone. The litigation abuse can take the form of asserting damages far beyond the value of the intellectual property. It can also take the form of litigation blackmail where the party asserting the patent seeks to extort a royalty less than the cost of defense from a great number of small retail outlets. The potential of shifting fees helps to balance the playing field so that the wrongly

accused at least of hope of recovering their fees if they do not pay a nuisance settlement.

Without going into detail, I will just suggest that the Federal Circuit is on course to give trial judges more discretion to reverse fees and make litigation abusers take responsibility for their culpable conduct.

Finally, LITIGATION EXPENSE REFORMS. Here I wish to give credit to many remarkable contributors who have attempted to reduce the unjustified cost of litigation. I begin by commending the Federal Circuit Advisory Council in conjunction with the Federal Circuit Bar Association. These entities – operating independent of the court – have promulgated model orders to reduce discovery costs and to narrow litigable issues at an early stage of the proceedings. In some form or another, the discovery order has been implemented in dozens of courts across the US with appreciable savings. These model orders can be found on the Federal Circuit Bar Association website.

These model orders – created often with the help of leaders from ED Tex, including Chief Judge Davis – have in turn inspired many districts including this one to put them into practice. These restraints on the cost of litigation strive to correct the largest single weakness in the US system of dispute resolution and the largest single cause of litigation abuse – its expense.

I have personally been told by friends in our corporate community that the ediscovery model order adopted by this Court has saved millions of dollars at a time. And the consequent reduction in needless paper exchanges has been embraced by parties across the patent litigation spectrum. The leadership role of this District – and Chief Judge Davis – is recognized nationally.

The claim reduction model order very recently introduced by this District is another admirable effort to reduce pointless expense so the parties can get to the heart of the matter. There are many patent disputes worthy of this District's attention. It only makes sense to actively require the parties to focus their cases so that the true issues can be timely resolved. Excess claims and excess prior art has clogged the system for too long.

Another tool to facilitate efficiency is a balanced transfer policy. When litigation occurs in the most convenient and natural forum, the parties can generally attain enhanced efficiency and speed. In this connection, I commend ED Tex for its openness to find the most appropriate and efficient forum for many patent disputes. From my perspective, we are all in this battle against litigation abuse together. From that vantage point, we should not view a dispute as an entitlement of one district or one party's choice, rather we should see the forum selection process as another global tool to achieve efficiency. In addition, given the strains on the resources of some district courts, like this one, increased transfers can even out the workload amongst other Patent Pilot districts and allows meritorious

cases to receive the attention they deserve amidst crushing docket numbers.

Finally, the public trust in the patent system has been corroded by mass customer litigation directed at unsophisticated companies who do not develop – or even know much – about the off-the-shelf technology that is the target of the suit. These cases sour attitudes about the patent system not just in Silicon Valley or Wall Street – but on Main Street. To address this harm, courts may allow, when appropriate, the manufacturer or other source of the accused to technology to litigate the cases rather than scores of customers. Courts already have mechanisms to address this via stays of customer suits, transfers, and intervention.

With the Patent Pilot Program in place, I hope to encourage each of the districts to invest some time in devising model orders and other tools to make adjudication more efficient and less expensive. No doubt the various districts will have some varying ideas. These districts can then communicate with each other to compare efficiency programs and ensure that the best ideas gain prominence.

In sum, the patent system faces a crisis of confidence engendered at least in part by the entirely separate problem of litigation abuse. Because I have confidence in the ability of the Judiciary to address these issues in a more flexible and thus just manner, I consequently encourage the Legislative Branch to proceed with great caution in attempting to solve specific and evolving

problems with sweeping definitions. By addressing litigation abuse, I have full confidence that the judiciary has the tools to restore confidence in the patent system.