

Patent Litigation

EXECUTIVE SUMMARY

Patents are the lifeblood of Silicon Valley and the biotechnology industry. And with more patent cases than ever before landing in the U.S. Supreme Court, companies and their counsel may be facing major shifts in intellectual property law. This month our panel of patent litigators discuss the Court's recent decision on patent obviousness in *KSR v. Teleflex* and the Federal Circuit's decision on declaratory judgment jurisdiction in *SanDisk v. STMicroelectronics*, which came nearly three months after the Court decided *MedImmune v. Genentech*, a ruling that overturned a previous Federal Circuit decision on declaratory judgment jurisdiction. They also talk about the possible implications of the Patent Reform Act of 2007.

The panelists are Darryl Woo of Fenwick & West; John Gartman and Kathi Lutton of Fish & Richardson; David Makous of Lewis Brisbois Bisgaard & Smith; Daniel Johnson of Morgan, Lewis & Bockius; David Doyle of Morrison & Foerster; and Jared Bobrow of Weil, Gotshal & Manges. The roundtable was moderated by Custom Publishing Editor Chuleenan Svetvilas and reported by Krishanna DeRita for Barkley Court Reporters.

MODERATOR: What is the impact of the Supreme Court's decision in *KSR v. Teleflex* [127 S. Ct. 1727 (2007)]?

BOBROW: The impact of this decision is staggering. I can't remember reading a decision in the past 20 years that will have a bigger impact on patent litigation and the patent system. I was struck by the Court's language that distinguished as a policy matter between "ordinary" innovation and "real" innovation. That's something we haven't seen in the jurisprudence very much, and that will be an important message to the Patent Office and to the courts.

Certainly, *KSR* is going to significantly increase summary judgment practice. We've already seen that. Another fascinating part about *KSR* is that the teaching suggestion motivation [TSM] test seems to be dead as a test. The Court rejected it in favor of a flexible approach. Right after *KSR* came down, the Patent Office issued a guideline saying that examiners still need to find a

reason to combine, they have to find a reason to take known elements and throw them together. But I don't think that's the right way to read *KSR*.

KSR says that if two elements are known and their functions are known and there's a predictable outcome when you put the two things together, then the invention is obvious. Whether there was a reason to combine the elements or not doesn't seem to matter in that situation. Now, the Court did say that often there are times when you will look at market forces, at motivations, and at suggestions, and there will be a class of combinations in that realm. But I think the Court is saying that not all combinations will require a reason.

MAKOUS: The Supreme Court and the Federal Circuit are clearly at odds. Once again the Supreme Court is squashing the Federal Circuit. I have never seen an opinion that repeatedly said, "This is not the law." Usually once is enough for most of us. [Justice] Kennedy is making it pretty clear.

A couple of troubling things I noted are [Patent and Trademark Office Director] Jon Dudas's published statement talking about the patent examiners who are the first battleground for this test, where he said, "The decision gives our examiners more flexibility to use their considerable technical skills to reject obvious changes to existing technology." That's pretty much *carte blanche*. Here is the boss saying, "Run with this." I can see every closing argument saying, "Use your common sense." My question is: isn't it then the common sense of one having ordinary skill in the art? I'm deeply concerned about this new measuring stick for the patent examiners.

JOHNSON: I'm going to sound like a bit of a naysayer. My reaction to *KSR* was it's a classic example of bad facts make bad law. It's very easy to conclude that it is common sense to say that if I put the sensor here, it ought to work in a variety of different applications. You are going to see numerous decisions coming out of the Federal

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Circuit that hold “Yes, there is a common sense approach but the *KSR* case had very different facts and while common sense is important the Supreme Court did not throw out what we have said for years and years about the necessity of innovation.”

Certainly there’s language that supports the notion that whatever innovation means, it may have changed after *KSR*. My best guess is we aren’t going to know what innovation truly means until after we’ve seen a number of cases, particularly cases where small changes to existing technology result in a patent being issued. At the end of the day I do not believe we are going to see the kind of fundamental change that would limit patents being issued to those that are truly pioneering.

The *KSR* language about common sense will be used by everybody in this room and I absolutely intend to argue common sense. But I think *KSR* has not radically reformed anything other than situations where there have been minor changes in the art where you will find courts saying, okay, that’s obvious.

WOO: It’s too early to tell what the differences will be between the Supreme Court and the Federal Circuit after *KSR*. The Federal Circuit is on the front line and has to come up with practical guidelines to implement some of these ideas. Until we actually hear from the Federal Circuit, we are not going to know exactly how far-reaching *KSR* will be. All the Supreme Court has done so far is give us a number of examples that may suggest obviousness in some cases.

But if you think back to the light bulb when Edison was playing around with tungsten filaments and evacuated glass bulbs, he was trying various different filaments until he fell upon the right combination. If somebody argues against the validity of the patent saying that it was obvi-

ous to try all these different filaments, then you take away one of the greatest inventions of the 20th century. And what about the airplane? All the elements were already known at the time—internal combustion engines, wooden frames, and fabric—and combined together they made an airplane. So if you rigidly apply some of the language in *KSR*, you would think that the airplane is obvious, too.

DOYLE: I don’t see the overall impact as being a dramatic shift because obviousness is still an invalidity defense. It’s an improved invalidity defense; it’s more potent, but it’s still not at the level of anticipation where you have the benefit of simplicity. Simplicity is always so important in the trial aspect of what we do. I see *KSR* as taking obviousness out of its status as a second-class defense that was not particularly useful, and placing it almost on a par with obviousness.

MAKOUS: Are you saying that because you don’t think jurors will think differently about anything?

DOYLE: I do think the jury instructions are secondary in terms of outcomes. One of the first things I did was to go back and look at the AIPLA [American Intellectual Property Law Association] instructions on obviousness. They go on for about 15 pages. They have all the *John Deere Graham* factors [*Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966)] in there. So I don’t think the change in jury instructions will have that much to do with what happens in the jury room.

But the *KSR* opinion is chock full of powerful thematic material. As trial lawyers, most of us start with our theme—how we will characterize this entire situation in a way that will resonate with jurors—and the idea that bad patents stifle progress, that’s a great theme. And then there’s the theme of “real” innovation as opposed to “ordinary” innovation. On page 12 of the slip opinion, the Court said a combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. So you have a useful formula. Another great theme is predictability equals obviousness. You have one word that you can use working with jurors and courts—predictability.

LUTTON: I don’t think we know the import of this case yet. It’s going to take quite a while for the



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Federal Circuit to interpret the ruling. We had a poll internally within our firm and some attorneys say this decision doesn't change anything; other attorneys read the case as a whole-scale revision of obviousness laws. The decision can go in many directions. In some respect, it is signaling to the Federal Circuit that they need to go back and stop applying rigid tests—that by applying so many rigid tests, common sense has fallen by the wayside. That sentiment concerns me on a couple of levels.

David [Makous] mentioned the PTO. We are now going to vest the patent examiners with applying a "common sense" test, which doesn't provide the guidance that we previously had from the Federal Circuit. We can't be sure how the ruling is going to play out at the PTO. Even the guidelines provided by the PTO don't really provide much guidance to examiners.

GARTMAN: *KSR* will not only have a big impact in litigation, but also in the Patent Office. Over the last 20 years, to promote certainty, the Federal Circuit has put the hypothetical person of ordinary skill in a bit of a straightjacket, saying "You'd better find strong support for obviousness and combinations in a written document." Now, the straightjacket is loosened, if not off altogether. The hypothetical person can look at anything and everything, and make inferences not written down explicitly in documents. They can say, "That's in the brain of a person of ordinary skill."

Yet, it will take the PTO some time to get this right, and by their own writings they are not there yet. Once they get there, I think it will give examiners a lot more freedom to use their gut in assessing obviousness.

LUTTON: The statement made by the Patent Office is pretty conservative. It doesn't give a whole lot of guidance. It does say that the Supreme Court rejected the rigid application of the TSM test. To determine the impact, one needs to consider how prosecution plays out. Examiners often reject claims as being obvious in light of multiple references.

Pre-*KSR*, an applicant could respond successfully by arguing that there's no express suggestion to combine. Though the TSM test didn't require an express suggestion, the applicant would have likely had a winning argument based on the TSM test. Now that the TSM test is not to be applied rigidly, all the examiner has to do to justify an obviousness rejection is come up with some reason to

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combine that can be articulated. I believe we'll likely see many more rejections on obviousness grounds sustained.

JOHNSON: What we will start seeing is slightly modified but substantially similar rules to the ones that existed before, so it's not a pure straightjacket. But the Patent Office and the Federal Circuit are not going to throw guidelines and predictability out the door, no matter what the Supreme Court stays. Depending on which side of the aisle you are sitting, you are going to be saying, "TSM still applies, your honor, we understand it's not rigid, but we are not rigid in this case."

MODERATOR: What are the implications of the Supreme Court's January decision in *MedImmune v. Genentech* [127 S. Ct. 764 (2007)] and the Federal Circuit Court's subsequent decision nearly three months later in *SanDisk v. STMicroelectronics* [480 F.3d 1372 (2007)]?

LUTTON: The combination of the two decisions really does lower the standard for declaratory judgment jurisdiction in one important way—offers to license. Interestingly, there's been a lot of activity in patent reform related to the willfulness standard. The tech industry doesn't think it is fair that companies can send license letters that trigger willful infringement while not rising to the level of creating DJ jurisdiction. All that may have changed.

While the *MedImmune* case doesn't address the fact scenario of offer-to-license letters, *SanDisk* does. If you look at Judge Bryson's concurrence, it appears that the decision could be extended such that any offer to license rises to the level of DJ jurisdiction. This may have a widespread effect for the tech industry and at a

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minimum provides some parallelism between willfulness law and DJ jurisdiction. Licensees also need to think carefully before sending letters if they aren't prepared to be drawn into litigation under DJ jurisdiction.

MAKOUS: But what does this really mean? How does this play out in the world we live in? We've got the mere letter test for jurisdiction floating around also. We are going to have to routinely ask for an all-inclusive stand-down agreement where both sides expressly agree. That's something that occurred to me. What bothers me greatly is we can't just have discussions anymore.

When *SanDisk* said we are never going to sue you, why are we negotiating a license then? I think that really just meant for the next 30 days. So let's get real on that one.

BOBROW: Your point is well taken that a stand-down will be something that people may try, but what is the licensee going to say in response? In other words, all the cards seem to be in the potential licensee's hands. When a licensor asks for a stand-down, the licensee can simply say no, you need to put your cards on the table and identify the patents you want to license and the products you want to license under those patents, and then "boom"—all of a sudden you have DJ jurisdiction. It was just incredible to me that 25 years of Federal Circuit jurisprudence is gone, with a footnote [in *MedImmune*] and then with *SanDisk*, just in the blink of an eye.

JOHNSON: The real world right now is very different than it was a few months ago. I currently have two situations where the client asked, "Can I write a demand letter and not get sued?" and "What can we do to protect ourselves if we decide to send the letter?" The answer is, "No, you cannot write a demand letter because it may trigger a suit."

In the old days, you could write a series of letters for a number of years, and it would never rise to the level of controversy. Now a well-funded defendant can say, "Okay Mr. Start-up, you just sent me a letter. Do you have \$5 million or \$10 million to spend? If not, I'm going to make sure you go out of business. And how am I going to do it? The minute you send me a letter, I'm going to sue you."

MAKOUS: A lynchpin to this whole analysis in my view is: where can you sue? You are going to have

to go to the other guy's house. You haven't created any jurisdictional basis to bring that other party into California from New York. You are going to have to go to New York and take on the other guy, so that in itself will have a chilling effect. Most people don't want to go elsewhere if they don't have to.

WOO: I think *SanDisk* affects the little guy the most because they can no longer have a serious licensing negotiation with an established company without risking a declaratory judgment action. The *SanDisk* rule is almost like that line from the *Star Wars* character Yoda: "Do or do not, there is no try." How can you have a conversation about your patent and why you think the other side needs it without getting sued somewhere? What do you do if you are the small player? You have to sue in the jurisdiction of your own choosing and then try to negotiate. Try to negotiate first, and you can get sued somewhere else.

DOYLE: But it has equal impact on the big guy, because one of the most important considerations in filing a case is where you file it. So if you start by initiating licensing discussions, you have just thrown the option to your opponent to pick the forum for the battle. Whether your perspective is from a big or a small company, there's just no way you can advise a client to send a demand letter unless the client is prepared to take on the immediate risk of a DJ action. We have a patent case we are going to file shortly. We wanted to do some licensing in advance of filing, but we just cannot do it now. It's off the table.

JOHNSON: The new strategy will be to ask, "When is your licensing meeting?" And the week before the meeting, you file a lawsuit so when you go into the meeting, you say, "We really don't want to litigate, however, we have no choice." That's absurd, but it is, in fact, the option we are left with.

WOO: If you are the licensing target, though, and you don't want a lawsuit out there in the public record, you might agree to a stand-down agreement. A licensor can say, "I have a patent portfolio. I'm not going to tell you what it's all about, but because of this case I need you to agree that if we enter into discussions about my portfolio and why I think you need it, you have to agree not to file a declaratory judgment action." If you need financing, you might say yes.



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GARTMAN: This decision could change patent litigation, especially if Congress authorizes interlocutory appeals of *Markman* rulings [*Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)]—something now pending in legislation. If that passes, and I'm a company that gets a letter from someone creating a dispute even in a round-about way, I've got jurisdiction and a much cheaper avenue to get a definitive *Markman* ruling from the Federal Circuit that may well decide the dispute for all practical purposes. That's a low-cost dispute-resolution strategy, compared to two to five years of district court litigation with a 40 percent reversal rate on *Markman*, which is what we have now.

JOHNSON: I can also gain a tactical advantage if I go to a District where I can get an early *Markman*.

DOYLE: There still has to be some relationship between the notice letter, and what the Federal Circuit referred to as some existing or planned conduct of the party receiving the letter. This relationship test will be delineated for us over the next three years because we'll have Federal Circuit opinions with different factual scenarios reaching different results, just as we had with the reasonable apprehension test. We will know then how far we can go. But it's darn clear now that "how far" is not nearly as far as under the old reasonable apprehension test.

GARTMAN: As a plaintiff, before you sue somebody you like to have a paper trail showing you acted like a reasonable business person in trying to resolve the dispute without litigation. Most jurors don't think it's reasonable for you to haul off and sue somebody without having tried to negotiate a compromise. This opinion may make that more difficult.

LUTTON: I wouldn't advise my tech clients to enter into any stand-down agreement. If they hold their ground, they will likely see many fewer letters. The licensing entities are going to have to go after specific targets and will have to be willing to litigate every time they approach someone.

MODERATOR: What sections of the Patent Reform Act 2007 are your clients most concerned about?

DOYLE: My clients, which tend to come from San Diego, a smaller company environment, do not tend to be as focused as larger companies on these systemic reform issues. They are cynical

about patent reform until they see something actually happen. There have been quite a few bills that have been put forward. None of them have gone anywhere yet.

From my trial lawyer's perspective, the damages provision, the claim construction provision, the venue provision, and the post-grant review are the ones that mean the most to me. What I was struck by looking from an overall perspective is that the latest proposed legislation does tie in to some of the themes that we've been discussing today—and that is a shift away from the district courts in the patent enforcement system. The post-grant review process is all about that—moving patent invalidity disputes out of the district courts and back into the Patent Office. The same with claim construction—out of the district court quickly, up to the Federal Circuit and then back so we get an interlocutory appeal on claim construction.

BOBROW: That's an interesting point about the Act shifting away from the district courts to the Patent Office, but the Act also shifts away from the district courts to the Federal Circuit. I don't know what the current case load is at the Federal Circuit in terms of numbers, but if you have about 3,000 patent cases filed each year and you figure that two-thirds of those are going to have a *Markman* hearing, then you are talking about a couple of thousand cases a year where interlocutory appeal is available. This has the potential to absolutely overwhelm the Federal Circuit. I can't imagine that they have the resources to be able to take all of those matters up, even if they wanted to. How will the court deal with that many thousands of appeals?

WOO: A judge has already come out against this idea. He says that it'll be overwhelming, and it will be. People are going to take up *Markman* rulings every time. And what's most troubling is the attempted limitation on damages. The Act proposes limiting damages to the economic value of the specific contribution over the prior art. We already have enough protection with the *Georgia-Pacific* factors [*Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (1970)]. I don't know what it quite means to limit damages to specific contributions.

What will happen in practice is similar to what we discussed in our first topic; people will overly emphasize the added element and then focus on

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that, and lose track entirely of the invention as a whole. Many times you have combinations of known things that resulted in real inventions. If you focus too much on the specific contribution of any particular piece over the prior art, whatever that is, you are going to underemphasize the value of the whole combination.

JOHNSON: I look at the Patent Reform Act as, we are going to get the trolls at long last. What it really focuses on is the rights of the large corporations to the detriment of inventors. Calling all inventors trolls is the wrong way to look at it. This act diminishes the inventive contribution in favor of the manufacturing contribution.

Whether you call it a good result or a bad result, it is the reality. If you look at the other aspects of the proposal, you find that the balance is being shifted to the side of the enterprise. You see that across the board, because start-ups can't afford to suspend discovery while they appeal *Markman*. And yet, that's going to happen here. This first-to-file rule will dramatically change the name of the game, both in prosecuting patents as well as in litigation.

Prior-use rights is a very interesting position. Litigating over the prior use and what rights you've got will be much more expensive if you are the plaintiff. We are striking a balance pretty far in favor of corporate enterprise, and I'm not sure that's a good thing. It certainly will be a huge change.

MAKOUS: The empire is striking back for sure. This is clearly a technology-driven high-tech Silicon Valley document. And while I embrace the need for reform, this has a lot of things in it that are a bit peculiar. We talked about the claim-construction appeals. We've also moved to an absolute novelty standard now, which isn't necessarily a bad thing. Now we are going to be using public use nonsale evidence overseas. With the very limited accessibility of such overseas evidence, how do we prove that?

The first-to-file system will bog down our wonderful Patent Office. It will accelerate new filing. There will be a massive increase in filings because it has to be filed first unless it's a derivation of some kind. I don't like this. In essence a bunch of little bitty innovations will drive filings. I like the prior use defense, which expands on what's already in place. That's a sensible kind of a balance on first-to-file.

Apparently we've got first and second window [post-grant review]. We don't really ever get to

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achieve any finality. The second window is open for 20 years, as I read it. The first window is just for a year, and it can be filed by anyone, even a California Business & Profession Code 17200 plaintiff, which we know most people didn't like very much unless you were a class action lawyer.

BOBROW: A second window for post-grant review will be seriously debated in the committees as legislation moves through Congress because biotech and pharma are vehemently against the second window. They said a first window is fine; let's get finality so we can go forward. The second window is a real problem.

On the other hand, the tech industry is saying we must have a second window because the products we are dealing with are made up of thousands and thousands of inventions. We can't know when a patent issues whether it will have any impact on what we are doing. It will be very, very interesting to see how this plays out because both sides have good arguments and both sides are equipped to fight this out.

GARTMAN: The tech industry is too optimistic. The Patent Office will not change its fundamental job, which is to issue patents. What I fear happening is that I'll have a winning prior-art-litigation defense, based upon prior art that the Patent Office simply didn't know about, and some third party will now blow my case by submitting that art to the Patent Office. The result will be the same—the patent will still issue and I'll still be in court fighting the patent—but it will be a harder patent to fight because I'll be telling the jury that the examiner knew about my art and yet made the wrong decision. That's a lot harder fight than telling the jury the PTO just didn't know about my prior art.

Maybe the tech industry is right, and maybe it will result in stronger patents. My view is that patents will be granted just the same as before, with a longer list of cited references.

BOBROW: The statistics based on about the first 30 inter partes reexams show that in more than half the cases, all the claims being reexamined were cancelled or rejected in a final office action. I thought that was astounding. Of course, if an opponent presents a weak invalidity challenge to the Patent Office, a lot of claims are going to survive. But the fact that the Patent Office has such a high rejection rate in inter partes proceedings suggests that post-grant review may knock out a lot of bad patents.

LUTTON: Post-grant opposition is one of the hottest topics. In terms of positions, I see this as a divide between would-be defendants and would-be plaintiffs. Generally the larger high-tech companies are would-be defendants who support the second window, which is a form of litigation reform. It's an opportunity to challenge a patent short of litigation. And that's very important to the tech companies, especially the ones that are receiving hundreds of licensing letters. They want a mechanism short of litigation to be able to challenge weak patents.

The tech industry is fighting very hard for the second window. Unlike bio/pharma, where the claims are more specific and there are fewer patents that can arguably cover a product, the tech industry can't possibly monitor every patent that issues. Given the realities of the technology, they can't use the first window to challenge questionable patents. If you look at the language for post-grant opposition in the newest bills, it's more favorable to the tech industry than it has been in any of the prior bills. Overall, the newer bills are extremely tech (and generic pharma) friendly, or would-be defendant friendly.

WOO: A lot of trolls have offices in Marshall, Texas, so the venue reforms won't much affect them. It seems to me that a lot of what we've discussed today is a reflexive reaction to what I'll call the outraged engineer. A patent issues, and the engineering community says, “That's got to be invalid! We were doing this X number of years ago and how can this possibly be?” All these things we talked about were designed to take away power from the patentee. ■