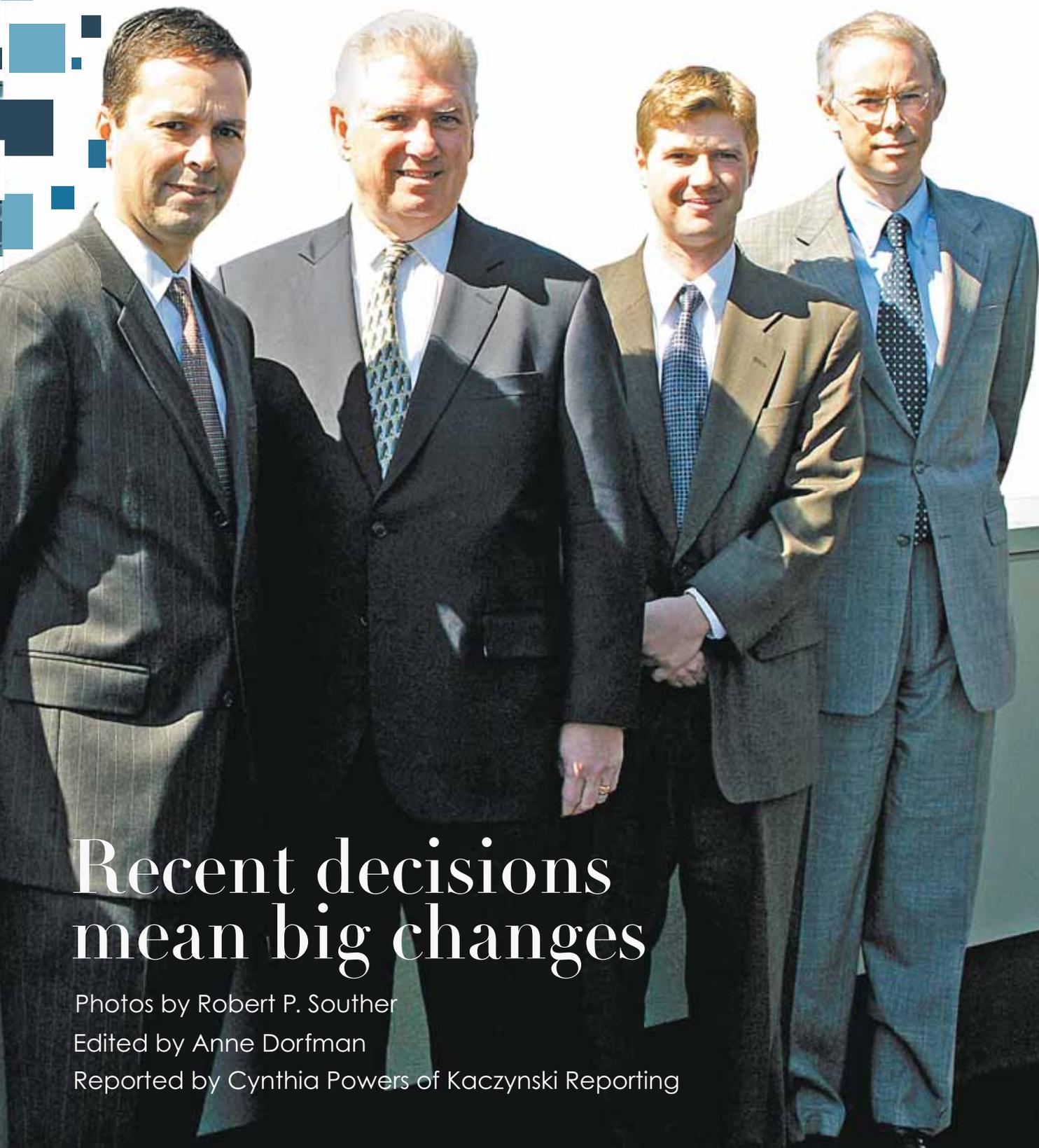


PATENT LITIGATION



NEW ENGLAND
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Recent decisions mean big changes

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We have seen a few cases involving complex chemical arts ... in which the courts have followed *KSR* right down the line and invalidated claims that might well have survived pre-*KSR*.

-Matt Becker



A number of recent decisions from the U.S. Supreme Court and Court of Appeals for the Federal Circuit have led to substantial changes in patent litigation. We've invited six noted practitioners to give us the lay of the land. Joining us are Matt Becker, partner in Axinn, Veltrop & Harkrider in Hartford; Tony Fitzpatrick, partner in Duane Morris in Boston; Tucker Griffith, partner in McCormick, Paulding & Huber in Hartford; Thomas C. O'Konski, partner in Cesari and McKenna in Boston; Michael Rye, partner in Cantor Colburn in Hartford; and Christopher P. Sullivan, partner in Robins, Kaplan, Miller & Ciresi in Boston.



MODERATOR: How did the Supreme Court's decision in *KSR v. Teleflex* change the standard for determining whether a claimed invention is "obvious" and therefore not patentable?

FITZPATRICK: In *KSR* the Supreme Court rejected the teaching-suggestion-motivation test that had previously been applied by the Federal Circuit. There are indications that the bar may now be somewhat lower for a defendant seeking to establish that a patent is obvious.

MODERATOR: What is the likely effect on patent litigation?

O'KONSKI: It clearly will raise the incidence of motions for summary judgment based on obviousness. We as patent litigators will all, at one point or another, argue that it is common sense to combine prior art references to show that a claimed invention is obvious.

RYE: Everyone is going to look a little more closely at the possibility of an obvious finding before deciding to file suit. There will certainly be defendants who feel much more confident about their ability to defend a suit, and they may engage in litigation rather than very quickly taking a license.

BECKER: The practical effect is to give challengers of patents many more options and arguments to establish obviousness. As a result, patentees may elect not to assert patents that reflect smaller advances over the prior art.

O'KONSKI: The commissioner of patents has already indicated that *KSR* gives broader rein to patent examiners to combine references in rejecting claims based on their own knowledge of the prior art and technology underlying an invention. I believe that it's definitely going to have some impact on patent litigation, too. Prior to *KSR*, accused infringers had to some extent disfavored obviousness as a defense to a patent compared to anticipation, because it was often difficult to convince a jury that it was obvious to combine two or more prior art references at the time the invention claimed in the patent was made. *KSR* will likely make obviousness defenses more popular.

SULLIVAN: There are a lot more cases post-*KSR* in which they are finding obviousness, both at the district court level and in the Federal Circuit. Under the prior law you had very few cases where the Federal Circuit reversed a jury verdict of nonobviousness, but now you're going to see that more and more.

RYE: We have a case that was decided pre-*KSR* where we obtained a summary judgment ruling of infringement and nonobviousness for our client. We had the pleasure of going forward with a trial only on damages and obtained a nice award. The validity issue was appealed to the Federal Circuit, which ruled post-*KSR* that there were questions of fact. They're now going back to trial purely on the issue of obviousness. There are probably plenty of cases out there where that kind of thing is happening.

GRIFFITH: You have pre-*KSR* patents and post-*KSR* patents, and the greatest effect of the Supreme Court's decision is going to be at the patent office level. You now have patents issuing after the examiners have reviewed them under the *KSR* standards, so arguments regarding obviousness have presumably already been raised under the broader test. For these patents, it remains difficult for the accused infringer to prove an obviousness defense when similar

arguments have already been presented during prosecution. You're still tasked with finding new art to say you've got familiar elements using known methods to achieve predictable results. Long term, when more post-*KSR* patents have been issued, we'll see how this plays out in the courts in view of the patent office's treatment of the applications. That being said, there is a tremendous short-term impact for pre-*KSR* patents that have not been scrutinized under the new test.

BECKER: Some commentators believe that, because *KSR* involved fairly simple technology, its holding may not have as big a practical effect in cases involving complex technology. We have seen a few cases involving complex chemical arts, however, in which the courts have followed *KSR* right down the line and invalidated claims that might well have survived pre-*KSR*.

FITZPATRICK: Part of the issue is how it's going to play out in litigation, because if a patentee can get past summary judgment to a jury, obviousness is a battle of the experts. As a defendant, at trial you're still going to be looking for a clearer defense, such as anticipation, lack of written description or enablement, or on-sale bar. Your best hope on obviousness with *KSR* is either at the summary judgment level or — perhaps even better — at the Federal Circuit.

SULLIVAN: It takes away the value of getting a judgment. You go to trial and a jury awards you a judgment on validity, and now you face the very real prospect that you're going to lose that on appeal.

GRIFFITH: As a patentee, you're still likely going forward with enforcing your patent, even in view of *KSR*. In the long run, because you're dealing with a battle of the experts, and because ultimately you're likely to end up at the Federal Circuit to resolve the key issues, you're going to rely on the presumption of validity for your patent and let the infringer prove invalidity.

O'KONSKI: It might have more of an effect on accused infringers, because the accused infringer is going to view it as opening up new room to argue that the patent is not valid.

RYE: Frankly, I think we may end up with more litigation over a lot of these issues, because the standard now allows you to rely on common sense. You don't have to look for anything explicit in the prior art. There's nothing I hear more from defendant clients at the beginning of a patent case than "this has been out there forever." So you start looking through the prior art and you don't find anything that explicitly teaches the patented claims, but there are things that are close enough. When you apply some common sense, you can make out a pretty good argument that there are only a finite number of options that could have been used to solve the problem. The client is often ready, at least in the early stages of litigation, to push that envelope.

GRIFFITH: You also may see, from accused infringers, an increase in the number of reexamination filings at the patent office, either *ex parte* or *inter partes* — certainly if an infringer has been sued in a jurisdiction that's more than likely to grant a stay of litigation if a reexamination is pending. Reexamination can cost significantly less than going through discovery. If you have good prior art and you want to save costs in the long run, especially for patents that issued before *KSR*, reexamination may be a viable option to see if you can get the scope of the claim narrowed, or even eliminated, without being beholden to the litigation process.

SULLIVAN: The downside to that, from a defendant's point of view, is that it delays the inevitable. The more patents you have, or the more claims you have, you're going to have a couple of claims that come through reexamination unscathed, and now the defendant has a longer damages period to deal with.

O'KONSKI: I understand that about 80 percent of patents that go through *ex parte* reexamination emerge with at least one claim from the original patent whose patentability is confirmed. From my perspective, *ex parte* reexamination is a totally unlevel playing field for the party challenging the patent. *Inter partes* reexam is better, but even that is unfair to the challenging party due to the absence of discovery, cross-examination, and the like.

BECKER: I'm also not sure that the patent office is the best forum in which to take advantage of the doors that *KSR* has opened. Accused infringers can now rely on evidence of market demand, design incentives, and a finite number of predictable solutions to a problem to establish obviousness in lieu of an explicit teaching, suggestion or motivation. Although a reexamination may be strategically wise in some circumstances, in most instances this evidence may be better presented in a district court.

GRIFFITH: It depends on the client. If you have a client who's concerned about costs —

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Can a company, in effect, afford to act more "recklessly" if it is not actively aware of the competitive landscape, without acting willfully under the *Seagate* standard?

-Tucker Griffith



especially if you can get a stay of the litigation — and you get the patent claims into a reexamination proceeding, you've basically bought your client a year and a half, minimum. Over that time they could work on a redesign or come to some type of agreement with the patentee. Clients' eyes brighten when they find prior art they can combine to establish obviousness under the *KSR* standard, but when you tell them the cost of even getting to a summary judgment, they sometimes prefer to go the cheaper route of reexamination — even with the negatives involved.

FITZPATRICK: For a defendant or accused infringer, the decision to litigate is going to be influenced not so much by *KSR* standing alone, but by a whole series of cases: *KSR*, *eBay v. MercExchange*, *MedImmune v. Genentech*, *In re Seagate Technology*. All of these cases have tilted the playing field somewhat toward the accused infringer and may make such a party say, "I don't even want to be a defendant. I want to be a plaintiff, and I'm going to file a declaratory judgment suit because I know that the worst that could happen is that I'm not going to get enjoined and instead I'll be able to continue selling my product in exchange for royalties. Perhaps I've even got a stronger obviousness defense than pre-*KSR*. I've got all kinds of things to play with that I couldn't play with before."

MODERATOR: *In re Seagate* changed the standard for determining whether an infringer acted willfully and can therefore be required to pay enhanced damages.

O'KONSKI: *Seagate* made a major change in the duty of care with respect to patents. *Underwater Devices v. Morrison-Knudsen*, a 1983 case, held that if a manufacturer of a product became aware of a patent, it had an affirmative duty to study the patent and make sure the product didn't infringe; this included the duty to obtain an opinion of competent counsel that the patent was not an impediment to the manufacture or sale of the product. This affirmative duty is overruled in *Seagate*, and the new standard, at least with respect to pre-litigation care, is now one of "objectively reckless." It's only in circumstances where the manufacturer of a product is objectively reckless in the face of a patent that willfulness can be found. *Seagate* also made it clear that if an accused infringer decides to rely on advice of counsel to avoid a finding of willfulness, waiver of the attorney-client privilege does not extend to trial counsel.

MODERATOR: Do we know yet what conduct might be deemed objectively reckless?

O'KONSKI: It's still pretty unclear. The Patent Reform Act seems to indicate that willfulness can still be found if you learn of a patent and don't obtain an opinion of counsel or change your product in some way.

BECKER: I read the *Seagate* test as having two prongs. First, the conduct has to be objectively reckless. Second, if the conduct is objectively reckless, the risk of infringing has to be known or obvious to the accused infringer. *Seagate* explicitly says that advice of counsel is not relevant to the determination of objective recklessness. It does not address whether advice of counsel is relevant to that second prong. My view is that it is relevant if a court reaches that second prong, which focuses on the knowledge of the accused infringer. Competent advice of counsel may still defeat a finding of willfulness by demonstrating that the accused infringer did not have knowledge of the infringement risk.

GRIFFITH: I agree. When the Federal Circuit went to an objective recklessness standard, it said that the state of mind of the accused infringer had been taken out of the analysis. When you assess that second layer, however, the state of mind needs to be brought back in. The opinion of counsel would still be relevant in that situation.

FITZPATRICK: I think advice of counsel may be relevant to both prongs of the test, because the question of whether or not somebody has objectively been reckless could well be measured by whether or not they got an opinion from competent and qualified counsel. It will have to play out over the next two to five years, but I certainly think that if you're representing an accused infringer or a party that's concerned about a patent, the gold standard is still to get an opinion.

BECKER: It is possible that whether one obtains an opinion could be relevant to whether the conduct was objectively reckless. Lawyers at my firm have discussed whether the fact of an opinion may be admissible with respect to that first prong, even if the content is not. Another interesting aspect of the objectively reckless prong is setting the standard against which that recklessness is measured.

RYE: Judge Newman, in her concurring opinion, said to look to the norms of the industry. Some very low-tech, non-patent-heavy industry isn't likely to engage counsel very often to look at

patents. On the other hand, with sophisticated clients who have large patent portfolios themselves and clearly work regularly with patent lawyers both in prosecution and in evaluating their competitors' products, there may be an absolute expectation that, when they introduce a product, they evaluate their competitors' patents as part of the process. Failure to do that may be reckless.

BECKER: Closeness of the case could be a factor in determining objective recklessness. As I interpret the standard, as a matter of law a very close case with substantial defenses should not be objectively reckless, whereas a case with only a weak defense is perhaps one in which there is a risk of a finding of objective recklessness.

SULLIVAN: I don't see any downside to obtaining an opinion, especially if you have one firm that's your opinion counsel and another that's your litigation counsel. It's just not that expensive, especially for corporate clients.

RYE: At the very least, a client may not be required to obtain an opinion that addresses every conceivable basis for invalidity and noninfringement, and can now get by with one that costs half as much as they used to.

BECKER: Given this higher bar, there may be cases in which opinions are not going to be required. But making that determination requires very careful assessment of a case's merits at the outset.

O'KONSKI: Where the technology is fairly straightforward, there's an in-house individual whose job it is to keep abreast of patents relating to the technology and who has experience analyzing patents, and he or she indicates that the patent is not an impediment to going forward with a product, I would think that there could not be a finding of objective recklessness, even in the absence of an opinion counsel.

GRIFFITH: I'd be interested to see the effect of such factors as who the infringer is, who the patent holder is, and what the technology is. Suppose you have a large corporation in a very competitive field; it's aware of who the competitors are and a patent of concern happens to be owned by one of its top competitors; it has a pretty substantial patent portfolio itself; and it's aggressive in the market. What steps does this corporation need to take to avoid being objectively reckless, and can it, in effect, be held to a higher standard of what is "reckless" for merely keeping up on the technology and on its competitors? Does the corporation need to get an opinion that's much more detailed and closer to six figures in cost than if you have a smaller company, dealing with more basic technology, where knowledge of the competitive patent landscape is less readily available? Can a company, in effect, afford to act more "recklessly" if it is not actively aware of the competitive landscape, without acting willfully under the *Seagate* standard? The one thing I haven't seen is the effect of *Seagate* on patentees' seeking preliminary injunctions — specifically, the influence the award of an injunction would have on increased damages. I haven't seen an increase in preliminary injunction filings. I would have thought, after *Seagate*, that companies would pursue preliminary injunctions more often if they're interested in seeking treble damages.

O'KONSKI: Not in Boston. Boston doesn't issue preliminary injunctions in patent cases very often.

SULLIVAN: That goes to *eBay v. MercExchange*, where I think it is going to be harder and harder to get injunctions (in that case permanent injunctions). If you marry *Seagate* and *eBay*, what do you do where you have a company like *eBay* that has been found to have infringed and gone through all the appeals, and now argues that no injunction should be issued against it because the plaintiff can't meet the four factors required for a permanent injunction? Does that become a willfulness case, and if not, why not? Here you have a defendant that knows it infringes, it's been adjudicated to have infringed, and now they are going to use the patent holder's valid, enforceable patents and pay only the royalty they would have paid if they had negotiated a license. To me, the flip side of *Seagate* and *eBay* is that, because of willfulness considerations, a much higher post-judgment royalty rate should be applied in a situation like *eBay v. MercExchange*.

FITZPATRICK: I think there are two pieces to it. One is a willfulness determination at trial and whether that impacts the injunction analysis. If an accused infringer has been found to have willfully infringed, should that weigh in favor of granting an injunction? And then, as Chris says, if there's no injunction, how do you measure the damages? So far the only guidance from the Federal Circuit is in *Paice v. Toyota*, where the judge *sua sponte* set a post-judgment royalty rate but didn't explain his rationale. The Federal Circuit said, "We're going to kick this back,

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-Michael Rye



but what we really think is that in this scenario, where you have post-verdict damages and no injunction, the matter should be sent back to the parties to negotiate a post-judgment royalty rate.”

O’KONSKI: Do we think that *eBay* was intended to address — I hate to use the term — the patent troll situation?

SULLIVAN: Absolutely.

FITZPATRICK: If you read Justice Kennedy’s concurring opinion in *eBay*, that’s clearly what he had in mind. He appears to indicate disfavor for granting injunctions to so-called patent trolls, and even refers to patents of “questionable validity.” But if a patent has gone through a trial and there’s been a verdict in favor of the patentee, how is there questionable validity?

O’KONSKI: Just so we understand what I mean by patent troll, I don’t necessarily mean the ogre under the bridge. Generally, I think a patent troll is an entity that doesn’t manufacture a product and, perhaps, never innovates or obtains patents itself. It acquires the rights to a patent, and its business is to then go out and attempt to license it and, failing that, to enforce it.

RYE: If you’re not practicing the patent, you are not as likely to obtain an injunction against the defendant. Another effect of the combination of *eBay* and *Seagate* is taking away the hammers that plaintiffs have over defendants — injunction and the threat of multiple damages for willfulness — making it less likely that a defendant is going to overpay to settle a case. Granting an injunction to a so-called patent troll arguably prevents the public from being able to use the technology. These issues underscore the age-old tension between giving the patentee the right to exclude others from utilizing a patented technology in exchange for ultimately giving that technology to the public. Underlying this tension is the idea that the public benefits from the patented technology.

SULLIVAN: In the debate about trolls and whether or not their patents help or hinder innovation, the area of greatest criticism has been the business method patent. In *In re Bilski* the Federal Circuit is going to take up whether or not *State Street Bank & Trust Company v. Signature Financial Group*, the 1998 decision in which it affirmed the issuance of business method patents, was rightly decided — and whether or not the patent office should be in the business of issuing business patents. I don’t think that it’s clear that they will overturn *State Street*. I don’t think it’s clear that they won’t. It’s pretty clear that they are at least going to modify some of the rules and articulate better standards for issuing business method patents. It will probably be the most significant case decided by the Federal Circuit this year.

BECKER: There are so-called pure business method patents, and then there are machine-implemented business method patents — the most obvious example being a computer-implemented business method where the computer system is part of the claim itself. It doesn’t appear that machine-implemented business methods are in jeopardy of being completely eliminated as patentable subject matter.

SULLIVAN: The Federal Circuit decided to review *Bilski en banc*. They don’t do that for no reason. Something big is going to come out of this.

RYE: They’re recognizing that the Supreme Court has changed a lot of the standards that the Federal Circuit set in the last few years. The Federal Circuit is now being a bit more proactive in looking at some of the standards they’ve set and considering whether they’re sound on their own, without Supreme Court intervention.

O’KONSKI: The motivation could also be the overwhelming backlog at the patent office. Many patent applications filed in ‘03, and even ‘02, are still pending. One way to reduce this backlog is to discourage people from filing for business method patents.

GRIFFITH: There is a cry for help from the patent office. I think the Federal Circuit heard it.

SULLIVAN: The issue of business patents is going to affect a lot of New England companies. Since 1998, when *State Street* came out, a lot of insurance companies in Connecticut and Massachusetts, as well as other financial companies, have spent a lot of time, energy, and resources building their business-method patent portfolios. The decision in *Bilski* is going to impact every one of them.

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MODERATOR: How does the decision in *SanDisk v. STMicroelectronics* change patent practice?

BECKER: *SanDisk* unquestionably relaxed the standard for declaratory judgment jurisdiction. By that we mean the standard for determining when a party accused of infringement can fire the first shot, and bring a lawsuit challenging the patent and for a declaration that it does not infringe. That can be advantageous because the accused party can, under certain circumstances, choose the venue and proceed on its home turf. This party can also remove a potential cloud over its product and avoid the uncertainty of possibly having to pay damages in the future.

FITZPATRICK: If you're a patent owner, all of a sudden you have to think very, very carefully about whether and how you put somebody else on notice of your patent. Because, at least depending on how you read *SanDisk*, just sending someone a letter saying, "You ought to know about my patent" could give rise to declaratory judgment jurisdiction.

RYE: Practically speaking, as a potential plaintiff, if you're going to send a letter, you had better be prepared to be involved in litigation. You have to consider litigation positions very carefully before you even send a letter. These days we seem to see more forum shopping than in the past. As a potential defendant receiving a letter, you have more power to decide when and where to file suit if you think litigation is inevitable.

BECKER: Where venue is an issue and a patent holder is concerned about having to litigate on the defendant's home turf, patent holders have increasingly employed the technique of filing lawsuits and then notifying the defendant — without necessarily serving the complaint. A plaintiff in a civil litigation has 120 days to serve the complaint; filing a lawsuit but not serving it immediately can be an effective way of telling the defendant, "We have four months to work this out. Let's talk."

O'KONSKI: Some judges don't like that practice. They think it's classic forum shopping.

SULLIVAN: But it is helpful in getting a case resolved, because both parties know that the clock is running and that they will either come to a license agreement or they're going to be litigating. If they're litigating, they know where and who the judge will be.

RYE: It shows that the plaintiff is very serious about this.

O'KONSKI: Another way to handle it is a so-called "stand-down agreement." You basically say, "We have this patent, we think it's of interest to your product line, and we want you to agree that while we're discussing it you will not file a DJ action." Whether you'd advise your client to sign such an agreement as the accused infringer is another question.

BECKER: Statements like that from the patent holder could, in and of themselves, give rise to DJ jurisdiction if the alleged infringer decides to file suit.

FITZPATRICK: The letter almost acknowledges that there's a justiciable controversy.

SULLIVAN: There's a unifying theme to a lot of these cases. In the last two years we've gone from everybody's knowing what the rules were to having a whole new set of rules enunciated. When a client comes to you and says, "How is this going to play out?" you have to say, "Who knows?" Filling out the details and having the test cases and the case law to support what these new rules mean is going to be two to five years out. I think we're in a very, very uncertain period.

MODERATOR: Why is this happening?

RYE: Partly it is because there is a bevy of recent high-profile, large judgments out there. Patent litigation has become very expensive to defend and more companies are faced with defending lawsuits. Sometimes the plaintiffs are so-called trolls and not companies that are practicing the technology themselves. It may well be that courts are, to some degree, looking at the effect on the U.S. economy in general.

FITZPATRICK: You're also seeing, 25-plus years into the existence of the Federal Circuit, an almost unique scenario. You have a court whose job it is to decide all appeals in a major area of law. Because so many cases are coming before this one court, with so many different issues, the development of patent law has been sped up. You have this combined with a Supreme Court that very clearly is a) much more willing to take business cases and b) much more pro-business. We're all trying to adjust accordingly. ■

They are at least going to ... articulate better standards for issuing business method patents. It will probably be the most significant case decided by the Federal Circuit this year.

-Christopher P. Sullivan





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