

The Battle for Patent Law: Federal Circuit Looks to Hold the Line As Supreme Court Eyes IP

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When the Supreme Court ruled in June 2014 that induced infringement can be found only when one party performs every step of a patent, the high court didn't just overturn a Federal Circuit decision expanding liability for induced infringement to include companies that perform only some steps, it cast into doubt the Federal Circuit's overall approach to patent infringement.

"The Federal Circuit's analysis fundamentally misunderstands what it means to infringe a method patent," Justice Samuel Alito wrote for a unanimous court in *Limelight Networks Inc. v. Akamai Technologies Inc.* "The Federal Circuit's contrary view would ... require the courts to develop two parallel bodies of infringement law."

The sharp criticism was all the more awkward coming from a court made up of mostly generalists and directed at the appeals court that was formed more than three decades ago with the mission to unify patent law. But it wasn't the first time the Supreme Court came down hard on the Federal Circuit, and in all likelihood, it won't be the last.

The Supreme Court has taken a greater interest in patent cases over the past 15 years and is showing no hesitation in reversing the Federal Circuit.

In response, the appeals court has been handing down decisions that show some obstinance in bending to the high court, signaling a tussle between the two courts

over who should have the final say on patent law.

More recently, the Federal Circuit has shown signs that it is laying low by issuing fewer dissents, relying on nonprecedential decisions and taking more cases en banc. These actions, some suggest, are attempts to stay under the radar of the Supreme Court and skirt further review.

But however the tension manifests, experts say, the ongoing struggle between the two courts is clouding the implementation and practice of patent law and leaving the patent bar and business community lost at sea without a compass.

Federal Circuit, Interrupted

The Federal Circuit was created by an act of Congress in 1982 in part to take discordant patent rulings across regional circuits and develop one uniform body of patent law.

"Congress was particularly concerned about inconsistency in how appellate courts upheld or overturned the validity of patents," said Robin Feldman, director of the Institute for Innovation Law at the University of California, Hastings College of the Law. "The hope was that a specialized court could bring rationality and coherence to the body [of patent law]."

Before the Federal Circuit, the applicable patent law varied across the country, making it difficult for companies with

a national scope to operate with certainty, and the Federal Circuit was viewed as a way to create a predictable playing field that would help U.S. businesses succeed, according to John Murphy, a partner at BakerHostetler.

"Also, and perhaps more importantly, at the time, patent law was not favorable for patent owners," he said. "There was a thought that the Federal Circuit could help strengthen patent rights, which could in turn help strengthen U.S. businesses and encourage them to invest in and grow new markets."

Over the years, the Federal Circuit has constructed a number of tests to address repeat issues in patent cases that have bedeviled regional courts, including tests for obviousness, claim construction and indefiniteness. These tests were crafted with its audience in mind: the patent bar, an exacting group of attorneys who appreciate when the Federal Circuit uses jargon that has precise meaning, and their clients, who demand rules that are applicable and that can give them some predictability as they go about their business operations.

Unlike the Supreme Court's tendency to focus on the big picture in cases with broad policy ramifications, Federal Circuit panels generally concentrate on trying to understand limiting principles or getting clarification of the specific facts of the case or patents in front of them.

“The Federal Circuit is much more interested in the technical merits of a case as a general matter,” said James Barney, a partner at Finnegan Henderson Farabow Garrett & Dunner LLP.

Many judges on the Federal Circuit bench have a deep familiarity with patent law as well as technical backgrounds. For instance, Judge Pauline Newman served as director of FMC Corp.’s patent, trademark and licensing department, Judge Raymond Chen worked as deputy general counsel for intellectual property law and solicitor at the U.S. Patent and Trademark Office and has an electrical engineering degree, Judge Kara Farnandez Stoll was a patent litigator at Finnegan Henderson and a former patent examiner, and Judge Kimberly Moore was an IP professor and previously an electrical engineer at the Naval Surface Warfare Center.

The Federal Circuit was able to lay down the patent law relatively uninterrupted for nearly two decades of its existence, but that started to change in the 2000s, when the tests the Federal Circuit created began to face greater attention in a series of hard cases that went all the way up to the Supreme Court, which criticized them as overly rigid, according to Barney.

The Supreme Court decided 11 patent cases from the 1982 to 2000 terms, but over the next 15 terms, that number tripled to 33 cases, of which 21 were issued from the 2010 to 2015 terms, according to data by University of

Akron School of Law professor Ryan Vacca. So far for its 2016 term, the court has already agreed to take up three patent cases.

The high court also has not been shy about reversing Federal Circuit rulings. Of the 10 patent opinions it issued from its 2013 to 2015 terms that came from the Federal Circuit, the Supreme Court overturned the Federal Circuit eight times, and all but two of the 10 opinions were unanimous holdings, according to *Law360* data.

“The Supreme Court looked at obviousness, Section 101 [of the Patent Act] and enhanced damages and attorneys’ fees and pushed back on [the Federal Circuit’s] bright-line tests,” Barney said. “The Supreme Court said the Federal Circuit has to look at the totality of the circumstances. It can’t simply apply a bright-line rule.”

According to Feldman, the Supreme Court is turning to more patent cases not so much from a concern about bright-line rules as it is about making sure the Federal Circuit’s rulings are grounded in the statute and logically consistent.

“An isolated court, speaking its own scientific jargon, can easily lose its way,” she said. “Judges wrap themselves in the technical aspects of a case, providing camouflage for the failure to resolve issues in a coherent manner.”

The Supreme Court earlier this month discarded the Federal Circuit’s test for awarding enhanced damages in patent cases in the consolidated

case of *Halo Electronics Inc. v. Pulse Electronics Inc.* and *Stryker Corp. v. Zimmer Inc.* The high court also sided with the Federal Circuit last month when it ruled the Patent Trial and Appeal Board can continue to use a claim construction standard to review patents in America Invents Act reviews that is different from the one used in district court in *Cuozzo Speed Technologies LLC v. Lee*.

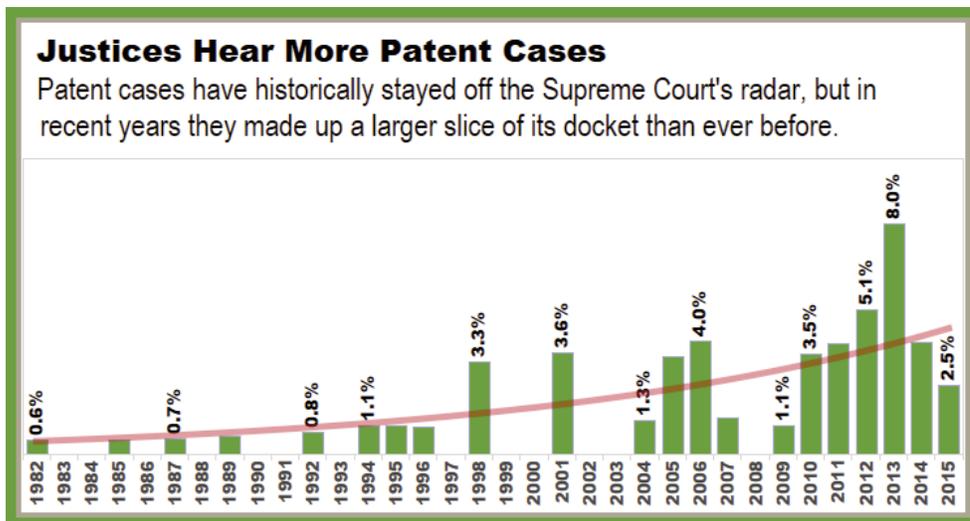
For the 2016 term, the high court has already taken up *Samsung Electronics Co. Ltd. v. Apple Inc.*, regarding damages in design patent cases, *SCA Hygiene Products Aktiebolag v. First Quality Baby Products LLC*, over whether laches should remain a defense in patent suits, and *Life Technologies Corp. v. Prometheus Corp.*, on the overseas reach of patent infringement law.

After nearly 20 years of the Federal Circuit rolling out a system of rules that applied to patent cases, it appears the Supreme Court decided it was time to take a look as that system matured and as patent owners and accused infringers began coming up with new ways to challenge the framework, according to Murphy.

In addition, the growth of the information economy and globalization likely fueled more patent lawsuits that started to catch the Supreme Court’s eye in the 2000s, Murphy said. With the emergence of the internet, many information technology inventions led to more complex patent issues, such as extraterritoriality and divided infringement.

“The Federal Circuit’s mature base of rules being ripe for review and the fact that the economy changed and created more litigation and more challenges for patent law may be why Supreme Court reviews have gone up in the last 10 to 15 years,” he said.

Patents also have drawn increased congressional and public attention in light of high damages awards, front-page litigation battles between technology titans, the rise in so-called patent trolls and a concern that the USPTO has been issuing subpar patents, according to Barney.



“The Supreme Court is responding to a perception that there is a problem in the patent field with too many low-quality patents that are causing unnecessary litigation and litigation costs,” he said.

Signs of Tension

The strained relationship between the Supreme Court and the Federal Circuit and the tug of war over how to properly interpret and apply patent law are evident in opinions from both courts.

In addition to its decision in *Akamai*, the Supreme Court’s ruling in *Bilski v. Kappos* in 2010 chided the Federal Circuit for adopting the machine-or-transformation test as the sole test for determining whether a process was patentable, and at one point, the majority’s opinion stated: “Nothing in today’s opinion should be read as endorsing interpretations of Section 101 that the Court of Appeals for the Federal Circuit has used in the past.”

The remark was an especially strong rebuke of Federal Circuit jurisprudence, according to Feldman.

“It says to the Federal Circuit, ‘We don’t trust you to get it right,’” she said.

The Federal Circuit has not been shy to express itself on occasion either.

In a ruling that gave powerful ammunition to companies seeking to invalidate patents for being overly vague, the Supreme Court ruled that a patent was indefinite if it failed to inform a person skilled in the art about the scope of the invention “with reasonable certainty” in *Nautilus Inc. v. Biosig Instruments Inc.* in June 2014. The high court cast aside the Federal Circuit’s standard that a patent was only invalid if it was “insolubly ambiguous,” saying the test did not ensure patents were definite.

On remand, the Federal Circuit concluded in April 2015 that the revised test did not change the outcome of the case and that Biosig’s heart rate monitor patent was still not indefinite.

Federal Circuit Judge Evan Wallach noted in the opinion, “We may now steer by the bright

star of ‘reasonable certainty,’ rather than the unreliable compass of ‘insoluble ambiguity’” — a reference to the high court’s remark that the latter standard “can leave courts and the patent bar at sea without a reliable compass.”

Such snarkiness from the lower court has not gone unnoticed by court watchers.

“One does not normally see a Federal Circuit judge thumbing his nose to the Supreme Court in an opinion,” Feldman said. “The Federal Circuit response [to increased Supreme Court activity in patent cases] ... is sometimes just shy of being downright disrespectful.”

After the high court held in April 2014 that judges can award attorneys’ fees in a case that merely “stands out from others,” rejecting the Federal Circuit’s rule that sanctions were appropriate only when a case was “objectively baseless” and “brought in subjective bad faith,” the Federal Circuit in August 2014 remanded the case — *Octane Fitness LLC v. Icon Health & Fitness Inc.* — but it could not resist giving additional instructions to lower courts that they didn’t have to award fees in exceptional cases.

“The Supreme Court ... did not, however, revoke the discretion of a district court to deny fee awards even in exceptional cases,” the Federal Circuit panel stated. “Long before *Brooks Furniture*, we held that ‘an exceptional case does not require in all circumstances the award of attorneys’ fees.’”

“Although the Supreme Court had told the Federal Circuit to get out of the game [in *Octane*], the Federal Circuit used a bullhorn on remand to tell trial courts what to do,” Feldman said.

Ducking the Supreme Court’s Radar

Looking at the Federal Circuit opinions over the past several years, former Federal Circuit Chief Judge Paul Michel said his impression was that the Federal Circuit was very anxious to avoid being reversed or criticized.

“The Supreme Court’s harshness has been extreme, the reversals have been many, and

the castigation of the Federal Circuit’s approaches has been so repeated and vehement,” he said. “Now that the Federal Circuit has been scolded so many times, how could it not affect their thinking?”

He pointed to the long-running *Ultramercial Inc.* case as an example. A district court in 2010 held that *Ultramercial*’s online advertising patent asserted against *WildTangent Inc.* was abstract and dismissed the case, but the Federal Circuit reversed in 2011, holding the patent did not claim the simple idea of showing ads using a computer but rather laid out “intricate and complex computer programming” for online ads.

The Supreme Court ordered the Federal Circuit to revisit the case after the justices decided *Mayo v. Prometheus*, another case dealing with subject-matter eligibility, and on remand, the Federal Circuit again found the patent valid. However, after the Supreme Court ruled in yet another eligibility case, *Alice Corp. v. CLS Bank International*, it again ordered the Federal Circuit to take a look at the *Ultramercial* patent. In November 2014, the Federal Circuit found the patent to be directed to an abstract idea — a method of using advertising as an exchange or currency.

“The Federal Circuit flip-flopped after the case took multiple trips up to the Supreme Court,” Michel said. “No facts had changed and there was nothing plainly wrong about the earlier decision, but when it was sent back on remand a second time, the Federal Circuit judges felt they had to come out the other way.”

Whether a decision will withstand Supreme Court review appears to be at the forefront of Federal Circuit judges’ minds, according to Matthew Dowd, a partner at Andrews Kurth LLP.

“I’ve heard a couple of instances where Federal Circuit judges will expressly ask attorneys what the Supreme Court would do in a particular case,” he said. “That’s a significant shift in thinking over the past 10 to 15 years. Before that, the Federal Circuit was left alone to take care of the law. Now that the Supreme Court has been stepping in and giving more

guidance on what the law should be, that's really one noticeable difference in terms of the thinking and focus and questions at oral arguments and the type of analysis at the Federal Circuit bench."

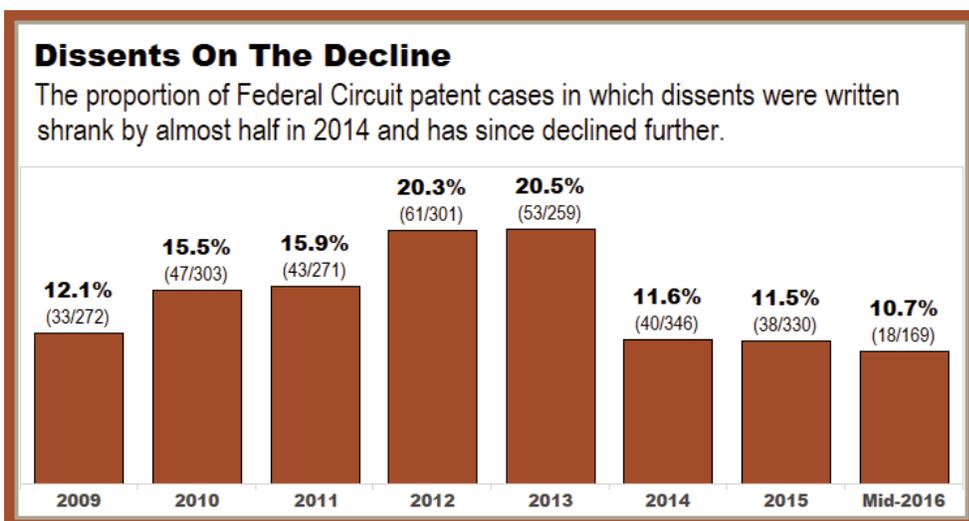
The Federal Circuit's response to heightened Supreme Court interest in patent cases is mixed, according to Feldman, showing reluctance to fall in line on some occasions and an effort to follow Supreme Court dictates at other times.

"I think the Federal Circuit seems to feel like: 'We know what we're doing. The Supreme Court doesn't. So leave us alone,'" she said. "The Supreme Court is not interested in that approach."

Signs that the appeals court may be increasingly deciding cases in a way that helps to avoid continued high court intervention include penning fewer dissents, developing the case law slowly through nonprecedential decisions, deciding more cases en banc and issuing more pointed concurrences.

Dissents per written patent opinion at the Federal Circuit went from 12.1 percent in 2009 to about 16 percent in 2010 and 2011 and then peaked at 20.3 percent in 2012 and 20.5 percent in 2013, according to data by Christopher Cotropia, director of University of Richmond School of Law's IP Institute in Virginia. The dissents then took a dive to about 12 percent in 2014 and 2015, and so far this year, they are hovering around 11 percent. The data includes appeals from both district courts and the USPTO.

Some attribute the lower percentage of dissents to the fact that the Federal Circuit is in a state of transition, with seven of the 12 active judges coming on board since 2010 and Chief Judge Sharon Prost assuming the top post just two years ago. Others point out that the Federal Circuit is crunched for time with the influx of appeals from the Patent Trial and Appeal Board, a popular venue created by the America Invents Act in 2012 for hearing patent validity challenges. Some say because the Supreme Court is deciding more patent issues in dispute, there is less room for debate once the high court has spoken.



But dissents also are the Federal Circuit's way to signal what warrants further review by the Supreme Court. And many experts say that the lower rate of dissents at the Federal Circuit may be the court's attempt to keep the Supreme Court at bay.

The mini-boomlet of patent cases at the Supreme Court could indeed be making Federal Circuit judges more careful before issuing a dissent, according to Gabriel Bell, counsel at Latham & Watkins LLP.

"If the Federal Circuit is applying what it considers settled precedent, and the Supreme Court weighs in with a different or changed view, that couldn't help but have a ripple-down effect," he said. "If Federal Circuit judges know that the Supreme Court is more interested [in patent cases], it might naturally cause them to take a more cautious approach [to dissents]."

Considering that high court review tends to lead to an upending of the Federal Circuit's approach to patent law, the declining percentage of dissents at the Federal Circuit could well be a response to the Supreme Court's growing scrutiny, Cotropia said.

"The fact that there are fewer dissents might be the Federal Circuit keeping its head down," he said. "It may not be so quick to make it look like there is fracturing on an issue and is opting to handle it internally as opposed to letting the Supreme Court handle it externally."

When the judges do wish to speak their mind, they might be doing so under the cover of concurrences rather than dissents, experts say. Some concurrences seem to show a certain frustration from the Federal Circuit judges and reflect how Federal Circuit judges may feel duty-bound to apply Supreme Court law — but not duty-bound to like it.

A strongly worded concurrence was found in a ruling in December, when the Federal Circuit denied a request to rehear en banc a decision that Sequenom Inc.'s patent for a fetal DNA test was patent-ineligible because it was directed to a natural phenomenon, based on the framework established by the Supreme Court's *Association for Molecular Pathology v. Myriad Genetics Inc.* and *Mayo Collaborative Services v. Prometheus Laboratories Inc.* decisions on patentable subject matter.

Judge Timothy Dyk wrote in a concurring opinion that a too-restrictive test for patent eligibility under Section 101 of the Patent Act regarding laws of nature — reflected in some of the Mayo opinion — could discourage development and disclosure of new diagnostic and therapeutic methods in the life sciences, which he said were often driven by the discovery of new natural laws and phenomena.

"This leads me to think that some further illumination as to the scope of Mayo would be beneficial in one limited aspect," Judge Dyk wrote. "At the same time I think that we are bound by the language of Mayo, and any

further guidance must come from the Supreme Court, not this court.”

In another concurring opinion in the same case penned by Judge Alan Lourie, joined by Judge Kimberly Moore, the judge wrote that while he agreed the panel did not err in its conclusion that it had to affirm the district court’s ruling under Supreme Court precedent, it was “unsound” to have a rule that took inventions of this kind out of the realm of patent-eligibility on the basis that they only claimed a natural phenomenon plus conventional steps or that they claimed abstract concepts.

Sequenom appealed to the Supreme Court, but the high court refused to hear the case this month.

“Everybody recognized that the patent for a method for detecting a baby’s prenatal condition by taking a pregnant woman’s blood sample instead of having to [do more invasive tests] was a breakthrough technique,” Barney said. “Judge Dyk said, ‘Our hands are tied, and we have to follow precedent,’ even though it didn’t seem like an outcome that most people would have expected with that type of patent.”

Another way the Federal Circuit might be trying to steer clear of high court interference is through an increase in nonprecedential decisions, which can be appealed just like precedential opinions but tend to carry less weight and are less likely to be reviewed.

After the Supreme Court handed down its 2014 decision in *Alice Corp. v. CLS Bank International*, which held that abstract ideas implemented with a computer cannot be patented under Section 101 of the Patent Act, the Federal Circuit was expected to start applying the decision in precedential opinions and developing the area of subject matter eligibility, and while it has to some extent, it has also issued a series of nonprecedential opinions applying the case, according to Cotropia.

Since the Alice decision, the Federal Circuit has issued five nonprecedential decisions, including *I/P Engine Inc. v. AOL* and

Planet Bingo LLC v. VKGS LLC, and 10 precedential Alice applications — amounting to one nonprecedential decision for every two precedential decisions — he said.

It seems odd that after a new statement of law like the Alice decision, so many opinions applying the case would be nonprecedential, according to Cotropia, who added that theoretically new doctrine needs precedential opinions to help better shape and define it.

“For a new Supreme Court case, the pattern appears cautious,” he said. “The number of nonprecedential opinions shows the Federal Circuit is being a lot slower in stepping out the contours of Alice, maybe in reaction to not wanting another Supreme Court review.”

The Federal Circuit also has decided a greater number of cases en banc over the past several years. The court decided 19 cases en banc during the eight-year period from 2008 to 2015, more than double the previous eight-year period from 2000 to 2007, when it decided eight cases en banc, according to data by Vacca at the University of Akron.

In light of increased involvement by the Supreme Court, the Federal Circuit may be opting to take cases en banc in an effort to sort out certain disagreements in-house where it can, according to Bell.

Ongoing Tension Fuels Uncertainty

The continued wrangling between the Supreme Court and Federal Circuit over the interpretation of patent law — and the Federal Circuit’s potential attempts to escape scrutiny — aren’t helping to paint a clearer picture for lawyers and businesses, sources say.

The Federal Circuit is in an unusually difficult spot as a specialized court being reviewed by a generalist court, according to Mark Davies, a partner at Orrick Herrington & Sutcliffe LLP.

“The Federal Circuit wants its opinions to be accessible at a common-sense level, but that is hard to do when operating in a technically complex environment,” he said. “Navigating

the pull for decisions to be accessible, reflect common sense and read in plain English like the Supreme Court encourages while at the same time responding to the concrete needs of the practicing bar and IP community is a hard balancing act.”

In decisions like *EBay Inc. v. MercExchange LLC*, which is related to injunctions, Octane, over attorneys’ fees, and *Halo v. Pulse*, involving enhanced damages, the dominant message out of the Supreme Court is it wants multifactor tests and flexible rules to reach a common-sense outcome, but those principles aren’t necessarily what a large part of the patent bar is clamoring for, he said.

“It can be hard to give advice to clients on how a multifactor test will come out in the real world,” Davies said. “There is pressure on the Federal Circuit to have crisp rules from the bar yet pressure not to have rigid rules from the Supreme Court. It’s a tension the Federal Circuit keeps having to navigate.”

The Supreme Court’s continued intervention in patent cases likely disrupts the Federal Circuit’s development of patent law dramatically, according to Cotropia.

“It’s like you’re building a house of Legos and somebody takes the Legos and throws them up in the air,” he said. “The Alice case is a perfect example of when the Supreme Court came into a structured area of law and reset everything. If you believe the Federal Circuit is trying to set out the patent doctrine, it’s really tough when someone comes in and pushes the reset button. You would rather slowly develop it as opposed to being reset on terms you don’t set.”

The Supreme Court’s aggressive involvement in patent law and its issuance of many unclear decisions — ranging from *EBay* to the obviousness case *KSR International Co. v. Teleflex Inc.* to the various eligibility rulings in *Bilski*, *Mayo*, *Myriad* and *Alice* — are only making it harder for the Federal Circuit to speak with one voice, according to Michel.

“In *KSR*, *EBay*, *Mayo*, and on and on, the Supreme Court has immediately cast aside the

Federal Circuit's thinking to insert its own thinking, which may be based on less-extensive experience and less familiarity with all the interplay with patent law doctrines," he said. "Is a patent obvious or not? Can [an infringing product] be enjoined or not? Is a patent eligible or not? The Supreme Court has sown extensive confusion in the law, partly by being unclear and particularly by being eager to knock down Federal Circuit-created standards as unduly rigid."

And the high court's many "unadministratable" patent decisions also create problems for the implementers of those rulings — the over 8,000 patent examiners, 270 PTAB judges and 650 full-time active trial judges — as well as the tens of thousands of lawyers advising business leaders, Michel said.

Some attorneys also note that the Federal Circuit issuing fewer dissents isn't necessarily a positive step. Because the appeals court is the primary court to handle nearly all patent appeals, a dissent is a critical tool to show when there is conflict in the patent law.

"Unlike other areas of law where differences of opinion among circuits will lead to the development of the law, the Federal Circuit doesn't have that opportunity with patent cases," said Garrard Beeney, co-head of Sullivan & Cromwell LLP's intellectual property and technology group. "Dissents are important to get a sense of what the judges are thinking about, and they play an important role in developing the law."

Dissents give judges an opportunity to highlight what they think is wrong with a decision, but they also provide boundaries for the majority decision, according to Miranda Jones, a partner at Heim Payne & Chorush LLP and a former law clerk for Judge Newman.

"When there is a back-and-forth between the majority and dissenting judges, it can help both sides crystallize what the holding is and isn't ... and that process helps define what the holding is for us practitioners," Jones said.

Fraught Relationship To Continue

With IP, and patents in particular, becoming a larger driver of the U.S. economy and Congress making new law in the IP area, the Supreme Court is expected to stay active in patent cases, experts say.

"I see the Supreme Court continuing to take patent cases because of their importance to the economy and because there have been significant congressional enactments in the IP area," said John O'Quinn, a Kirkland & Ellis LLP partner and former law clerk to late Supreme Court Justice Antonin Scalia.

He also said in light of the Defend Trade Secrets Act, which was signed into law in May and will allow companies for the first time to file federal civil lawsuits for trade secrets theft, it could lead to an uptick in splits between the Federal Circuit and other appeals courts that may need to be resolved by the Supreme Court.

"While a trade secret case brought with patent claims will go to the Federal Circuit, if the case only involves trade secrets, it will go to a regional circuit, so we could see more circuit splits as well," he said.

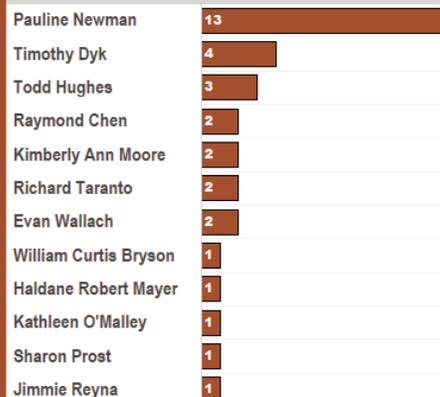
The interests of the Federal Circuit to provide predictability and the interests of the Supreme Court to curtail rigid, bright-line tests are going to continue to clash, according to Vacca.

"The Federal Circuit has seen itself as charged by Congress to enhance predictability," he said. "But the court has changed its personnel over the last several years and maybe the new judges recognize the need to fall in line with what the Supreme Court has continually repeated over the last decade or so. For now, its default may be to enhance predictability until the Supreme Court tells it otherwise."

The Federal Circuit bench is still relatively new and in the process of building a united front, but the Supreme Court's continued interest in patent cases could present significant roadblocks for the Federal Circuit to provide

The Federal Circuit's Great Dissenter

Judge Pauline Newman wrote more dissents in patent cases last year than any other judge.



decision makers and the business community with clarity in the patent law going forward, according to Michel.

"The real problem for the Federal Circuit is whether the Supreme Court keeps intervening in very aggressive ways and upending Federal Circuit case law left and right," he said. "Even if the Federal Circuit bench starts to jell better, that could be substantially undercut if the Supreme Court keeps taking a lot of cases and turning the apple cart upside down."

The tension between the Federal Circuit and the Supreme Court is likely turning into the "new normal," according to Murphy.

"The Federal Circuit will always be influenced by the technocratic nature of patent law — it's rules-focused, detail-oriented, structural and formalistic," he said. "Maybe that's part of the reason the Supreme Court feels the need to be there modifying patent law. Maybe they feel they are the backstop. No other court gets to be the countervoice to the Federal Circuit. If they don't do it, nobody will."



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