Chicago-Kent Journal of Intellectual Property

Volume 17 | Issue 2 Article 2

3-19-2018

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There has been considerable angst in the patent community regarding the Supreme Court's patent holdings. In a recent article I authored,[1] I noted that "the Supreme Court's review of Federal Circuit patent decisions," which has increased meaningfully in recent years, "has been detrimental to the performance of the Federal Circuit's mission: it has created uncertainty and a lack of predictability in corporate boardrooms, the very conditions that led to the Federal Circuit's formation."

In another article soon to be published,[2] I noted further that of a number of reasons given by commentators for the Supreme Court's significant interest by the Supreme Court in Federal Circuit patent decisions, one of the most likely was that the Court has an aversion to the bright line rules that the Federal Circuit has often employed.

Now, Seth Waxman, a former Solicitor General and an astute Supreme Court advocate and observer, has added his clear voice to the dialogue in a well-crafted article titled *May You Live in Interesting Times: Patent Law in the Supreme Court*.[3] That article agrees that the Supreme Court's aversion to bright line or rigid rules has contributed to the Court's increased interest in reviewing Federal Circuit patent decisions.[4] The article has, however, added many more logically contributing factors, to wit:[5] (1) the rising importance of intellectual property in society;[6] (2) the economic importance of intellectual property has created a litigation environment in which companies are willing to make the investment required to take a case all the way to the Supreme Court;[7] (3) every doctrinal change the Supreme Court makes creates ripples that produce new questions that need to be answered;[8] (4)

1. *See* Donald R. Dunner, *Response to Judge Timothy B. Dyk*, 16 CHI.-KENT J. INTELL. PROP. 326, 326 (2017).
2. Donald R. Dunner, *The Supreme Court: A Help or a Hindrance to the Federal Circuit's Mission?*, 17 J. MARSHALL REV. INTELL. PROP. L. (forthcoming 2018).
3. *See Generally* Seth P. Waxman, *May You Live in Interesting Times: Patent Law in the Supreme Court*, 17 CHI.-KENT J. INTELL. PROP. 214 (2017).
4. *See id.* at 220–222.
5. *See generally id.* at 216–217.
6. *Id.* at 216.
7. *Id.*
8. *Id.* at 217.

legislative change naturally produces its own interpretative questions, which tend to reach the Court after a lag of five to ten years;[9] and (5) a narrative seems to have taken hold at the Supreme Court that the work of the Federal Circuit requires close scrutiny.[10]

Whatever the reasons for the increased attention, most knowledgeable patent practitioners will agree with Mr. Waxman's concerns about the impact of the Supreme Court's review of Federal Circuit holdings and his suggestions, as a Supreme Court insider, as to what might be done about it: "This new mindset has, in some ways, transformed the Federal Circuit's national jurisdiction from an asset into a liability."[11]

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> I hope that, going forward, the Court will take stock of the substantial changes it has already wrought and their effect as it considers further adjustments. At heart, patent law is about achieving balance. The various doctrines should work together to encourage an optimal level of innovation and disclosure without suppressing competition more than necessary. It can be hard enough to maintain that balance when discrete changes are made one at a time. But when you are changing five, ten, or fifteen things in a short time, the risk of confusion and miscalculation greatly increases.[12]

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> One solution would be for the Court to pause for a time and let the changes it has already made sink in. I am not optimistic we will see such a pause, but it would give time for the system to adjust and provide space for the reflection needed to prevent mistakes.[13]

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> To be clear, I am not calling for the Supreme Court to abjure consideration of long-settled doctrine. I am

9. *Id.*
10. *Id.*
11. *Id.* at 219.
12. *Id.*
13. *Id.* at 220.

> suggesting that given the Supreme Court's control over the cases it hears and the frequency with which Congress has made adjustments to patent law, the Court should heed its own admonition that "courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community." Otherwise, the Court may find that the uncertainty engendered by the impression that seemingly any doctrine can be undone at any time outweighs the benefit from any specific changes the Court might make.[14]

Public commentary such as this by respected and knowledgeable insiders such as Mr. Waxman cannot but contribute to the ultimate improvement of the situation. While it may be overly optimistic to hope that the Supreme Court Justices and, or, their law clerks will take heed of the concerns expressed, at the very least such commentary will reinforce the rising chorus of voices calling for a legislative fix to a serious national problem.

14. *Id.* at 225.