Appellate Litigation Update

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The Supreme Court's Patent Law Docket: The Supreme Court has granted review in three cases involving patent law this Term: *Global-Tech Appliances, Inc. v. SEB S.A., Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, and *Microsoft Corp. v. i4i Limited Partnership*. This is consistent with the Court's dramatic revival of interest in the patent field in recent Terms. After reviewing many famous patent cases in the nineteenth century, the Court ceded virtually all patent appeals to the circuit courts for most of the twentieth century and then to the Federal Circuit once that specialized court was formed in 1982. After reviewing only one patent case a year from 1950 through 1982, and a mere twelve patent cases over the next two decades, the Court has greatly picked up its patent pace, granting *certiorari* in 12 patent cases since 2002. (For historical and statistical analysis, see John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 Geo. Wash. L. Rev. 518, 522 (2010), and Timothy B. Dyk, *Foreword: Does the Supreme Court Still Matter?*, 57 Am. U. L. Rev. 763, 764-65 (2008).

It is no surprise that the Supreme Court's interest in patent cases has increased. Intellectual property now accounts for as much as 80% of the value of American corporations, and Congress has considered but failed to pass patent reform legislation in each of the last five congressional sessions. But increasing its patent docket has required the Court to depart from its usual criteria for granting *certiorari*. Because the Federal Circuit has virtually exclusive jurisdiction over patent cases, patent law does not give rise to circuit conflicts—the usual ground for Supreme Court grants of review. Thus, the Court has taken patent cases solely because they present matters of significant national importance, and has leaned heavily on the Solicitor General's advice, with more than 10 percent of the Supreme Court's calls for the views of the Solicitor General over the last 10 years arising in patent cases. *See* Duffy, *supra*, at 530.

Some of the Court's more prominent recent patent decisions have seemed to reflect a strong view that the Federal Circuit, in creating a uniform body of patent law, has leaned too far in the direction of protecting patent rights, perhaps stifling future innovation. For example, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), held that permanent injunctions would no longer be issued automatically in cases of patent infringement, and *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), made it easier to prove a claimed patent obvious and thus not entitled to statutory protection. Such decisions also seemed to issue sharp rebukes to the Federal Circuit.

Supreme Court patent decisions less reflect an anti-patent trend and frequently have been unanimous—a sure sign on a frequently divided Court that they have been made on narrow grounds. Last Term's closely watched decision in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), for example, while deeming invalid a particular business method patent, declined to decide that business methods are inherently unpatentable as a concurrence by Justice Stevens urged, instead leaving it to the Federal Circuit to hold under a broad standard when business method patents are too abstract. A third of the last two decades' patent decisions have involved procedural or jurisdictional issues where, as in *eBay*, the Court has simply required patent law to conform with generally applicable rules. Another third involved either specialized patent statutes or the application of other laws in cases involving patents. And in a final third of the decisions, concerning substantive areas under the Patent Act such as patentability, implied licenses and the doctrine of equivalents, the Court has not made sweeping rulings, but often has simply required the Federal Circuit to follow older Supreme Court precedent. *See* Dyk, *supra*, at 769.

The cases granted by the Supreme Court this Term fall into each of these three categories. *Microsoft Corp. v. i4i Limited Partnership* involves a procedural issue that may be outcome determinative in many cases: namely, whether the defense of invalidity must be proven by clear and convincing evidence rather than by a preponderance of the evidence. *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.* (in which Quinn Emanuel is co-counsel for respondent) concerns who can own inventions arising out of federally-funded research under a specialized statutory scheme, the Bayh-Dole Act, 35 U.S.C. §§ 200-212. *Global-Tech Appliances, Inc. v. SEB S.A.* concerns a substantive patent issue on which the Federal Circuit purported to be following general legal principles—namely, whether deliberate indifference is a sufficiently culpable state of mind to establish liability for inducing infringement.

The patent cases taken by the Supreme Court also are consistent with the Court's developing criteria for reviewing patent cases. In *Stanford University v. Roche*, the Supreme Court asked for the views of the Solicitor General's Office and followed its recommendation in taking the case. In *Microsoft v. i4i*, the national importance of the case was signaled by nearly a dozen amicus briefs filed in support of petitioners by 22 high-tech companies and public interest groups, and by three dozen law,

business, and economics professors. And in *Global-Tech*, the Federal Circuit adopted a standard for intent in inducement cases that appeared to conflict with its own earlier cases, creating an intracircuit conflict of a kind that has led to review in such cases as *Bilski*, *Festo*, and *Warner-Jenkinson*.

Whatever the outcome of these cases, the Court has signaled that it is not content to leave the nation's patent law entirely in the hands of the Federal Circuit, and that it is likely to have a firm hand on the direction of patent law unless and until Congress steps into the breach.