Connecticut Law Tribune
OCTOBER 12, 2009
VOL. 35, NO. 41 • $10.00
An ALM Publication
CTLAWTRIBUNE.COM

Jury to Judge: Huh?

Complex IP cases highlight need for simple explanations

By DOUGLAS S. MALAN

Attorney Tucker Griffith brainstormed for months about how to best illustrate the inner-workings of his client's patented technology.

The result of the technology was simple enough—a machine that manufactured special gears used in heavy-duty transmissions for sports utility vehicles. But explaining the process was complex, involving linear algebra and mind-numbing mathematical formulas. Those equations revealed the multiple angles at which the teeth of the gears were cut to create the durability that made the product more marketable.

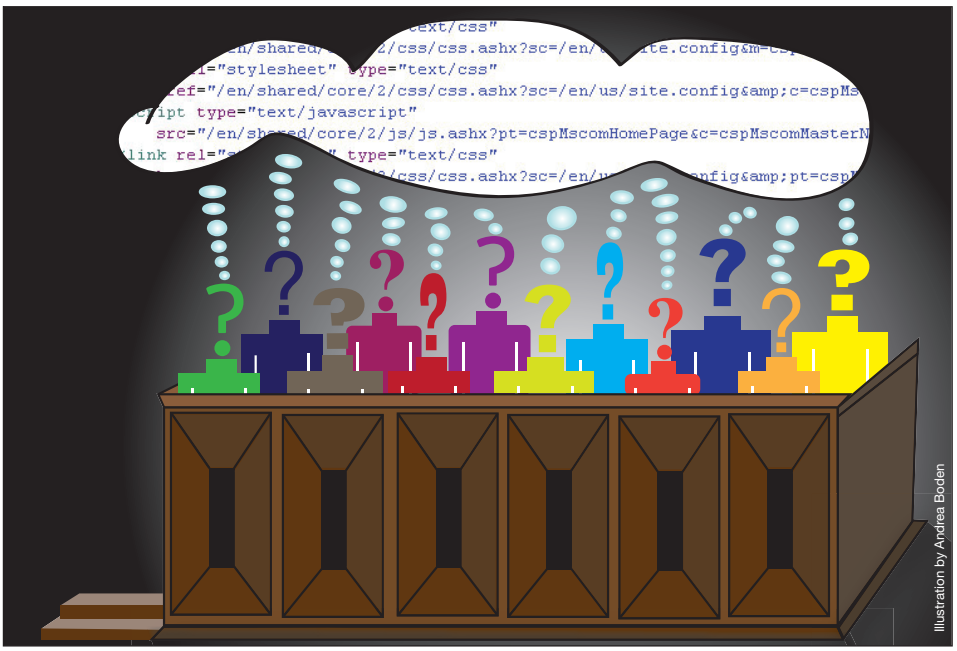
So rather than a math lecture, Griffith had a small-scale model of the machine built so that a judge and jury could actually see how it worked.

In an increasingly complex area of the law, the visual aid is one trick attorneys use to defend patents that sometimes cover the slightest technological improvement.

"If the jury isn't able to pick up the nuances, often they will assume your technology just violated the original patent," said Griffith, a partner at the Hartford intellectual property firm of McCormick, Paulding & Huber. "You worry they're not going to understand the nuance. Getting that across to the jury is not easy."

Software company Uniloc thought it had that covered when a jury returned a $388 million verdict in its favor. The jury determined that Microsoft Corp. infringed on one of Uniloc's patents that registered software in a manner that made it more difficult to copy and use illegally.

But in late September, a federal court judge in Rhode Island vacated that verdict because he believed the jury didn't understand the case.



A federal court judge recently tossed out a $388 million patent infringement verdict against Microsoft, saying that jurors didn't understand the case.

Judge William E. Smith wrote in his ruling in *Uniloc USA Inc. v. Microsoft Corp.* that he "reviewed the transcripts and evidence with painstaking detail in the light most favorable to Uniloc, careful not to act as the eleventh juror."

"What remains," he noted, "is a firm belief (indeed a certitude) that the jury lacked the grasp of the issues before it and reached a finding without a legally sufficient basis."

Though attorneys said it's rare for a judge to vacate a jury's verdict in an IP case, maybe it's no surprise that a judge determined that an IP dispute flew over the heads of jurors. Attorneys in the field said the primary concern when they're preparing for a legal battle over who owns a patent is to make sure they're able to explain in layman's terms what the case is all about.

So how often do the attorneys worry about their message getting through?

"That's most of my cases," quipped Stamford-based Fox Rothschild partner Eric C. Osterberg, who often represents Internet and telecommunications service providers in patent infringement litigation. "Judges will tell you that the jury is absorbing more than you think they are, but that doesn't help when you look over and juror number three is falling asleep."

Griffith of McCormick, Paulding & Huber noted that understanding IP disputes is "a challenge not only for the jury but also for the judge."

Hands-On Litigation

When a patent is disputed, one of the first steps is a hearing before the judge for what is known as a claims construction. That's where both sides argue over whose interpretation of the patent is correct. After hearing both sides' lawyers and experts, the judge determines the scope of the patent and what is protected before sending the case to a jury.

That makes an attorney's presentation to the judge vital in order to get a leg up on the other side when it comes to whose interpretation of the patent is favored.

Griffith said he had a recent case where he was protecting a patent for a laser guide on a miter saw that helped users make more precise cuts. He brought in a miter saw, minus the blade, and showed the judge how it worked.

"The judge said he helped frame houses in college so he was familiar with the saw," Griffith said. "If you happen to have the technology in hand, it's easier to get your point across."

More difficult is a patent case involving less tangible technology, such as chemicals or software, two of the areas that Cantor Colburn partner Steven M. Coyle litigates.

Certainly there are many complicated areas of the law, Coyle added, but "IP law is at or near the top in terms of how much education of both the judge and jury is needed."

Disputes over software advancements often involve algorithms and alphanumeric source code that must be distilled for everyday understanding. Zeroing in on one particular bit of code and comparing that string of data to another in an animated visual presentation is useful, as is showing how chemicals are created by linking certain compounds through animation, Coyle said.

The goal is to find the most efficient way to succinctly get to the point, which is not always easy. "Attorneys with technical backgrounds can get lost in the technology," Coyle said. "You always have to remind yourself that the group you're trying to convince hasn't been living with the case for two or three years like you have."

Contributed Photo

Steve Coyle

Thomas J. Menard, a partner of Alix, Yale & Ristas in Hartford, has witnessed the effect of presentations that fall short of providing the right information, especially during the hearings on claims construction.

"I've seen judges ask questions that show they're confused," said Menard, who works in areas of electromechanical technology such as hydraulics and pneumatics. "You have 48 minutes of hearings and the judge asks a question that shows they have no clue. Then the lawyers just look at each other and say, 'That was a waste of time.'"

'Hypothetical Person'

Menard said there are two levels of potential confusion for judges and juries. Not only is the technology a potential stumbling block, but the legal concepts in the IP field can confuse a jury.

For example, whether a patent is invalid or valid is determined by the obviousness/non-obviousness test. A jury can receive instructions from a judge to determine if the patented technology is something that normally would have been developed by a "hypothetical person of ordinary skill in the art," however that is defined by the judge. If a jury determines that the technology would have been developed by this hypothetical person, then the technology is deemed obvious and the patent is invalid.

Menard added that IP lawyers have to develop a narrative for their case rather than relying on science and math to sway jurors whose first exposure to the disputed technology may come when they are chosen for the trial.

"You have to focus on one part of your case and make that point really well," he said. "You have to simplify, simplify, simplify."

Even then, lawyers sometimes have to rely on their expert witnesses to bring home a victory in a case that stumps the jury, and the more those experts can explain abstract concepts in plain English, the better.

"The jury is left to decide between two experts talking about subjects that [the jury doesn't] really understand," Menard said. "It really comes down to who the jury finds most credible."

But that type of Hail Mary outcome isn't enough to convince Osterberg of Fox Rothschild that IP cases are growing too complex for juries.

"I don't think I would agree that our smartest humans have eclipsed the rest of us in terms of understanding what they're doing," Osterberg said. "I think almost every juror can understand almost every piece of technology if it's well-taught."

Osterberg acknowledged that the growing complexity of IP disputes can be a factor toward more cases settling, as are the high costs of litigation due to hiring knowledgeable experts with good communication skills.

But there's always a way to cut away the fat of a case to make it more easily digestible, he noted. "A lot of the tricky jargon is getting in the way of what we're really asking," Osterberg said, "and that is, 'Did this guy steal from that guy?'" ■