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The Important Things Have Not Changed

Brad Lyerla – November 2, 2016

This issue of *Intellectual Property Litigation* is devoted to a discussion of the practice of IP litigation in the *current* environment. This is a worthy subject for our publication, and I expect to read many interesting things from the other authors contributing to this issue. Our focus on the current environment for IP litigation suggests that there are challenges now in our field that are new and different than those that existed before. Of course, that is true. In fact, there are many examples. But change is only part of the story. I want to write too about what remains the same.

My desire is not to minimize the significance of the changes that we have seen in our practice area. They affect our lives every day in ways that are fundamental. The biggest changes have occurred in two areas: (1) the substance of patent law and (2) the commercial side of law. If I may generalize, the changes in the substance of patent law have been mostly beneficial. On the other hand, the changes on the commercial side mostly have not.

Let me elaborate a bit first on the evolution of patent law. When I began litigating patent cases in the 1980s, patent law was a mess. Candidly, the messiness was one of the reasons why I was attracted to patent law. Problems are always more interesting than smooth running. And there were plenty of problems. First, the law surrounding willfulness was Kafkaesque. It you did not have an opinion or had one but did not waive the privilege, then the jury could be instructed to infer that any infringement was willful. But if you did waive, the waiver could be broad enough to open up discovery even from your own trial counsel. It was absurd. That has improved to the point now that opinions are far from mandatory and often are not needed at all today.

A second example is claim construction. In the 1980s, claim construction was handled very differently than it is today. It was controversial, but some judges allowed the jury to decide claim scope and would even instruct the jury on claim construction rules allowing the jury to apply the rules and decide the scope of the claims. Others would decide claim scope in the pretrial order after fact and expert discovery had closed. Some would decide it in the jury instructions. Some would not decide it at all, leaving it to the jury implicitly and with no guidance. Today, of course, claim construction is conducted in view of the enormous jurisprudence that followed *Markman v. Westview Instruments*. The current practice of applying the plain meaning, modified only by express disclaimer or lexicography, works in the majority of cases, but it leaves unresolved the tension between how persons of skill understand claim terms and their so-called plain meaning (a concept that may not always hold up under close scrutiny). Still, where we are today is much better than where we were a few decades ago.

A third example is section 112. Back then, mounting a defense based on a section 112 problem with the claims was generally hopeless. The trial judges had

little sympathy for section 112 defenses, and the cases interpreted section112 as if it was there to protect the claims drafter rather than the public—a way of thinking about the language of claims that now is turning 180 degrees. Paragraph 6 of section 112 is a good example of what I mean. Back then, means-plus claims were often argued to be broader than other claims. That never made sense, but it was not straightened out until the early 2000s.

I could go on, but you get the point.

The other way in which IP litigation has changed since my younger days is on the commercial side of the practice. The commerce of law has always had its tawdry side. After all, we benefit from our clients' legal problems. The more complicated and serious the problem, the more we benefit. That makes sense and is to be expected, even if it is not very noble-minded. The tension comes from the fact that we are a transactional cost to our clients. Transactional costs are a part of life. But they should be efficient. Lawyers are anything but efficient. Efficiency just doesn't fit well with what we do. We are thinkers. Scholars. We bring value by applying specialized knowledge to solve problems creatively. Often that cannot be hurried. Creativity requires time to gestate. I worry that today there is not enough time in the budget for the best creativity to happen. The time pressure to reduce transactional costs is too great.

The pressure to work faster, naturally, is tied to the high hourly rates that we charge today for our time. Yes, our rates are subject to markets and those markets limit to a large degree what we can charge. But on the cost side, we have changed our firms so that more of the profits from our rates are paid to a smaller and smaller pool of partners. The change that I regret the most is the decline of the "minders" in our law firm partnerships. We used to speak of "finders," "minders," and "grinders." If you are young and have not heard this locution before, I will not insult you by explaining what I mean. It is apparent with only a little reflection. But this way of talking has all but ceased to exist today. That is because there are no "minders" anymore. Everyone is a "grinder" and some are both "grinders" and "finders." No one (or very few) have the luxury of being thinkers. Thinking requires idleness. David Hume, one of the great thinkers in history, defined thinking as "walking, talking and napping." I do not know a single lawyer who regularly naps today. But I like to romanticize that it was once a routine practice among our colleagues in prior generations. Though I also have to remind myself that Hume failed as a would-be lawyer. So, who knows? The lawyers who got by without naps probably always made the most money.

And that brings me to what I really want to say. There is a lot about the practice of law that is the same today as it ever was. It is important for us to realize that those things that remain unchanged are the things that are the most fun for lawyers to do. We are compensated very generously to read, think, write, and argue. In IP law, we are reading, thinking, writing, and arguing about the interplay between science and law. This is fascinating stuff. As a few of you may have heard me say before, reading, thinking, writing, and arguing about smart things are hugely pleasurable activities. If we lived in Athens in the fifth century B.C., we would do this for our own amusement and consider it a life well-lived.

We can live well today too. Though the banal pressures of commerce require us to be stoic at times, the work that we do to find solutions for our clients' problems remains as joyful and rewarding as ever. May it ever be so.

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