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Don't Expect A Rash Of Patent 'Shootouts'

By **Matthew Bultman**

Law360, New York (August 14, 2017, 9:16 PM EDT) -- When companies start fighting over patents, the lawsuits can have a way of getting unwieldy, so one judge in California has begun using shootout-style hearings — a unique way to streamline cases that has caught the attention of attorneys but likely won't become widespread.

U.S. District Judge William Alsup ordered the hearing in a case between Comcast Cable Communications LLC and OpenTV Inc., giving both sides a chance to seek judgment on one claim in a single patent. Earlier this month, he ruled in favor of Comcast and allowed it to seek attorneys' fees based on the "wrongful assertion" of the claim.

The hearing, which Judge Alsup described as a pilot procedure to more efficiently reach the merits of the case, is something veteran patent attorneys said they haven't seen used much before, if ever. Some said they can see the value in the unorthodox procedure.

"It's an interesting notion and one that I think you'll see [Judge Alsup] applying in future cases," said Yar Chaikovsky, global co-chair of the intellectual property practice at Paul Hastings LLP. "It's giving the judge a sense of the value of the case, the strength of the allegations and the case."

Whether the idea spreads beyond Judge Alsup's San Francisco courtroom remains to be seen. But there are those who have expressed doubt, in part because there are questions about whether the procedure would lend itself to widespread use.

Without commenting on the specifics of the Comcast case, Michael Sandonato, a partner at Fitzpatrick Cella Harper & Scinto, said restricting a patent owner's case in this manner has the potential to raise some concerns about fairness.

"At least in the abstract, it does concern me that the patent owner would be limited, in essence, to asserting one claim out of its many patents and many claims," he said. "Maybe the merits, or lack of merit, warranted this approach here, but it does strike me as at least potentially problematic."

When patent battles break out, it's not uncommon for patent owners to accuse defendants of infringing numerous patents at the beginning of a case. In one extreme example, Blue Spike LLC sued Juniper Networks Inc. in a case that involved 26 patents and more than 100 allegedly infringing products. The suit, which was later trimmed, was said to be the largest infringement case in the U.S.

Accused infringers will sometimes complain that patent owners include in their lawsuit patents that they have no intention of taking to trial, using them instead as a tactic to drive up litigation costs and exert pressure on opponents. And courts can sometimes feel like cases are getting difficult to manage.

“Certainly, I appreciate that courts need to find a way to manage their docket,” said Paul Ainsworth, a director at Sterne Kessler Goldstein & Fox PLLC. “And when there are lots of patents in the case, they’re looking for creative ways to try and do that.”

For example, the Eastern District of Texas — which has long been a patent litigation hotbed — in 2014 implemented an alternative case management procedure designed to streamline cases by imposing early deadlines for litigants to hand over their damages estimates and other key information.

In Delaware, judges will often limit the number of hours available for trial in a case, which attorneys said forces both sides to make their best arguments. There is also a set of procedures that require parties to think early about potentially case-dispositive issues, like a “super early” claim construction hearing.

“Adjudicating only one claim doesn’t necessarily get rid of the entirety of the case,” Sandonato said. “That, to me, is the unusual and unique part of what Judge Alsup did here.”

Judge Alsup, who was appointed to the bench in 1999, is no stranger to complex IP disputes. He recently oversaw a $9 billion case involving Google Inc.’s use of Oracle’s copyrighted Java software code, and he is handling a dispute between Waymo and Uber Technologies Inc. over self-driving car technology.

The judge raised the prospect of a shootout hearing in the Comcast case earlier this year after telling the two sides they were “throwing patents around like they're candy.” It was suggested Comcast could pick OpenTV’s most frivolous claim, and OpenTV could present its most damning example of infringement. The parties eventually agreed to both argue a single claim in just one of the patents that were at issue.

Following an Aug. 3 hearing, Judge Alsup ruled that Comcast did not infringe the claim at issue. It’s not exactly clear what impact the ruling will have on the rest of the suit, but the judge did say the outcome “bodes poorly for the remainder” of OpenTV’s case.

The judge has suggested a similar shootout-style hearing could take place in an infringement case StraightPath IP has brought against Apple Inc. over the iPhone maker’s FaceTime technology.

To some, the procedure resembles the bellwether trials that are common in some other areas of the law, such as product liability. Bellwether trials are a handful of cases chosen from a larger set of lawsuits that can serve as a litmus test for how the rest of the litigation will play out.

“Depending on how this goes, I do think you’ll see [Judge Alsup] do it more often,” Chaikovsky said. “I do think you’ll see it reviewed. It’s probably one issue that [will be preserved] as an issue to have reviewed by the Federal Circuit, if the case ever gets that far.”

To date, it doesn’t appear that other judges have begun utilizing shootout hearings in patent cases.

While there are circumstances where it could work, several attorneys were skeptical the procedure could be deployed on a regular basis to decide cases. Some had concerns that hinging a suit involving multiple patents on a single claim could be an unfair restriction on patent owners.

“Unfortunately, sometimes I think patent cases can be a little more complicated than just a single issue,” Ainsworth said. “I think it’s a little troubling to have to try and pick one claim to go forward on because there can be multiple types of technologies involved in any patent case.”

Douglas Robinson, a principal at Harness Dickey & Pierce PLC, noted the procedures already in place in Delaware and some other courts with heavy patent dockets.

“You may see some courts doing this, but I don’t necessarily think it’s going to be something where there's going to be a wave of courts immediately adopting this sort of procedure,” he said. “A lot of these courts see a lot of these cases and are very experienced and comfortable with their own procedures.”

If nothing else, Judge Alsup’s procedure is one more factor for patent owners to consider when deciding where to file their lawsuit, assuming they have a choice. Ainsworth said this is the type of practice that attorneys would look at when doing their venue analysis.

“Sometimes, we don’t have much choice, particularly in light of TC Heartland, but we always are looking at ‘what are the local rules, what are the local practices,’ so that we can figure out the opportunities and challenges of any particular venue,” he said, referring to a recent U.S. Supreme Court decision that put limits on where patent lawsuits can be filed.

--Additional reporting by Cara Bayles. Editing by Christine Chun and Mark Lebetkin.
