

Practice Tips



Press Your Advantage

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Patently Obvious?

A Supreme Court justice once remarked about pornography, "I know it when I see it."

This terse pronouncement appealed to many Americans as a statement of the obvious. The Court is at it again: Looking at yet another notion of what's "obvious" and what's not. This time the impact will be felt by more than purveyors of pornography.

The Supreme Court is looking at the basic foundation of the US patent system, and in an upcoming ruling, will examine the "obviousness" test that determines whether an invention is so simple and apparent that it invalidates the need for a patent. In *KSR v. Teleflex*, the Court is deliberating over a patent that covers a car's gas pedal design to control acceleration electronically rather than by mechanical cable. The question for the Court is whether this combined technology is too "obvious" to merit a patent.

More Filings, More Coverage

Whatever side you're on, lawyers, legal analysts and communications experts predict the ruling could open the door to patent challenges against the economy's most important sectors, especially pharmaceutical, software, and technology companies. No matter which side you come down on, one thing we can all agree on is the need to prepare clients for the potential outcome.

If your clients are in the innovation business, planning for the worst can't begin soon enough. Investigative and business reporters in newsrooms around the nation will look closely at companies whose patents are challenged, and those with existing patents run the risk of losing their perception as a leader in that space. With countless legal blogs, investigative reporters now have sources and leads from every direction.

Concern from consumers about their favorite products—read, BlackBerry—will ensure that the most sensational media will join the fray and force even more succinct messaging by company communicators and lawyers. Rather than getting caught up in the legal jargon and academics of patent law, lawyers can distinguish themselves and their clients by making common sense arguments about the need for the products consumers have grown to love.

From a communications standpoint, the Court's ruling may have a profound effect on corporate reputations if traffic increases in patent litigation filings, as experts predict. The result? With each mention of the challenged patent, IP attorneys and their clients will face a higher level of scrutiny in defending their position in court, and their products in the court of public opinion.

Robert Greene Sterne, an intellectual property attorney with Sterne, Kessler, Goldstein & Fox P.L.L.C. in Washington, DC, is co-counsel for *Teleflex*. Sterne observes, "The

pending decision in *Teleflex* is just one of several major factors affecting the US patent landscape. Factors include congressional patent reform on the horizon, recent Supreme Court decisions, and those still pending before the Court."

Sterne adds, "The impact of changes in the US patent system will cut across the invention landscape, having a ripple effect that may strain existing business relationships, strategic planning, and the value of a company's patent portfolio. Communications will play an increasingly vital role as patent-dependent industries are challenged. Businesses must plan to communicate the value of their innovation and the strength of their patent portfolios to multiple audiences, including analysts, shareholders, customers, employees and regulators."

Undoubtedly, US companies will have to fight to preserve their legal rights in the courtroom, and for their reputation over the airwaves, since patent cases are now high-profile and very public. Add a new congressional echo chamber to the mix, and you have a recipe for a publicity disaster.

Bill Atkinson, a partner in the intellectual property litigation group at Alston & Bird, underscores that the decision could strike a new balance between what is patentable and what is not, and as a result, some businesses may view the shift as sufficient to justify litigation rather than paying royalties. As for the media's and the public's interest in these types of matters, he says, "their interest is not so much in the academic aspects of what the law is, but in what effect any shift in the law has on business, stock prices, and the availability of products and services."

Weathering the Storm

A sweep of last year's media coverage and the current spotlight on *KSR v. Teleflex* affirms the heightened interest in patent cases by the media,

consumers, and the legal community. While not all the cases are as sexy as *eBay*, *Coca-Cola*, or *Microsoft*, the media is paying attention, and *Teleflex* may have the biggest impact of them all.

If your case sounds like it is next in line for a patent challenge, follow these communication TIPS to help protect your client's reputation among key audiences:

1. *Transform*: Transform the issue into an opportunity to gain favorable media attention and support from the public with consistent messages that clearly convey your position throughout the litigation.
2. *Innovate*: Reinforce the innovation message. Research and development allow companies to

continue to bring novel ideas and products to market for the good of the economy and consumers. Communicate that message to those paying attention to the bottom line, including consumers.

3. *Prepare*: Prepare for each phase of the litigation process to anticipate counter-attacks in the press. You wouldn't go before a judge without a full briefing on the law — prepare for the media in the same way.
4. *Strategize*: Safeguard your client's reputation by planning and creating a communications strategy that mirrors your litigation approach.

These TIPS are a sound place to start your communications efforts,

but to ensure success in the courtroom and in the headlines, companies must consider a coordinated public relations plan as part of the overall litigation strategy. With a well-timed, strategic public relations process, messaging can help define the issue and your company's position in a way that will resonate with key audiences and get the communications results that you need right from the start.

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