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Has the patent system reached a pivotal turning point?

By **Gene Quinn** on February 25, 2016

Patent law has always swung like a pendulum. Swinging between more restrictive regimes where patent owners have few meaningful rights and back to a place where patent owners enjoy strong property rights.

Generally these pendulum swings occur slowly over a generation. But over the past 10 years the pendulum has been swinging very wildly, with increasing speed, and in a decidedly anti-patent direction. A Supreme Court that has been uncharacteristically interested in patents has caused much of the disorder found in the patent system over the past decade.

The near constant disintegration of patent rights in modern times (see here, here, here, here and here) may be about to come to an end, or at least a pivotal turning point reached. The United States Supreme Court heard oral arguments on February 23, 2016, in two patent cases consolidated by the Court for consideration: *Halo Electronics, Inc. v. Pulse Electronics, Inc*. (14-1513) and *Stryker Corporation v.*

Zimmer, Inc. (14-1520). These cases will force the Court to dive head first into one of the most thorny political patent issues of our time – the issue of enhanced damages for willful patent infringement. The outcome could give district court judges broad discretion to enhance damages, which would be a significant win for patent owners. *See* *Will the Supreme Court bring balance back to the patent market?*

Also on the docket for the Supreme Court this term is consideration of *inter partes* review in *Cuozzo Speed Technologies, Inc. v. Lee*. This case will require the Court to consider whether post grant challenges to patents should employ the same claim construction standards as a district court would. It is conceivable also that the Supreme Court could take this opportunity to more broadly discuss certain procedural aspects of *inter partes* review, and even discuss the presumption of validity, although that issue is not squarely before the Court. A reversal of the Federal Circuit in this case, which is anticipated whenever the Supreme Court takes a Federal Circuit case for review, would also be viewed as a significant win for patent owners.

Years of the Supreme Court chipping away at patent rights may come to an end in 2016. The Federal Circuit is the only Court of Appeals to handle patent appeals, which means there is no risk of a split among the Circuits. A split among the Circuits and differing law being applied in different parts of the country is one of the primary reasons the Supreme Court will take a case. That not being the case with patent appeals the Supreme Court historically has taken patent appeals from the Federal Circuit for the purpose of reversing the ruling below. *See* *eBay v. MercExchange*, *KSR v. Teleflex*, *AMP v. Myriad*, *Teva v. Sandoz*, *Nautilis Inc. v. Biosig Instruments, Inc.*, *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, to name but a few. Even when the Supreme Court has agreed with the outcome reached by the Federal Circuit the reasoning and holdings have been significantly modified. *See Bilski v. Kappos*, for example.

Meanwhile, according 2015 statistics, patent litigation is again on the increase. Although the number of cases filed in 2015 was greater than the number of cases filed in 2014 (5,830 vs. 5,070), the number of patent cases filed in 2015 was lower still than the number of cases filed in 2013 (5,830 vs. 6,114). The Eastern District of Texas continues to lead the way with 2,540 cases filed in 2015, which represents 43.6% of all patent infringement case filings.

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there is more optimism for a recovering patent market. Is this a turning point? Join Gene Quinn, Rudy Telscher and Bob Rauker on Tuesday, Mar. 1, 2016 at 12pm ET
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One can hypothesize why patent litigation is increasing again, but the short answer may be as simple as this: patent owners have weathered the worst of the patent storm. We are approaching the second anniversary of the monumental Supreme Court decision in *Alice v. CLS Bank*, which means that those patents that remain viable today are not so easily challenged, or have been found to pass muster.

We are also three and a half years since the dawn of the post grant challenge era. While the most recent data shows that the PTAB is instituting 80% of *inter partes* review petitions, there is some anecdotal evidence that the most recent months (for which data is difficult to collectively come by) the institution rate my have slipped into the 65% range. Finjan Holdings, for example, has scored a series of impressive wins at the institution stage, which may be because their patents are quite strong, the challenges were quite weak, or perhaps the PTAB is finally starting to do a more judicious job in anticipation of what will likely be a rebuke on some level from the Supreme Court.

There is also a sense of optimism in the patent market that has been missing for the last several years. At the end of 2014 people on the business side of the industry, involved with buying, selling and licensing patents were starting to whisper about the possibility that things would start to look up. No one was predicting a turn around, but the whispers in private were hopeful. By the end of 2015 the private whispers had turned into public discussions, panels seriously discussing whether a bottom had been reached or was in sight. Indeed, in November 2015, Eric Spangenberg wrote that the patent market may not quite have hit bottom, "but it feels close." While no one seemed ready to declare a bottom had been reached, whether a bottom had been (or has been) reached is largely irrelevant. It is time to start buying again, at least selectively. After all, you can never actually time a market bottom.

Against this backdrop, on Tuesday, March 1, 2016, at 12pm ET, I will host a webinar to discuss whether we are close to an inflection point. The webinar is titled: I will be joined by Rudolph Telscher, a partner with Harness Dickey & Pierce who represented Octane Fitness at the Supreme Court, and Robert Rauker, CEO of Medicinus IP and former Senior Vice President of Acacia Research.

In addition to taking audience questions, we will discuss:

- What impact, if any, Justice Scalia's absence will have on the Court
- The Supreme Court oral argument in *Halo Electronics*
- Predictions in *Halo* and *Cuozzo*
- Patent litigation trends and why patent litigation is again increasing
- Will the pendulum really start to swing toward the patent owner?
- Implications for the patent market and patent pricing