Judge Paul Michel to Patent Masters Attendees: It's Time to Wake Up to Preserve Our Patent System

By **Eileen McDermott**
March 16, 2020

"The CAFC affirms the PTAB in approximately 90% of the cases, so, 'ironically, the PTAB is actually more powerful than its reviewing court in defining the reach of basic patent law doctrines,' Michel said."

Retired Chief Judge of the U.S. Court of Appeals for the Federal Circuit Paul Michel told registrants of IPWatchdog's Virtual Patent Masters program taking place today that the U.S. patent system has been "weakened to the point of being dysfunctional." This dysfunction has been especially harmful to small businesses and startups, as well as to innovation in the life sciences industry—which we need now more than ever.

Asked by IPWatchdog CEO and Founder Gene Quinn whether the coronavirus pandemic may be a wakeup call to those in power about the importance of incentivizing innovation in the life sciences area, Judge Michel noted that experts in the vaccine industry have indicated that China now dominates vaccine research and production. "The current circumstances may shift the thinking of policy makers quite suddenly and quite far," Michel said. "We definitely are crimping the human health efforts for prevention and cure of symptoms. Let's hope this really is a wakeup call for our leaders."

Michel laid out the trajectory of the U.S. patent system over the last decade, which he said has seen an overall drop in patent value of 60%. "According to the National Venture Capital Association's records, VC investment flows are going away from patent-dependent technologies like chips and toward entertainment and hospitality," Judge Michel said. Worse, those investments are flowing away from America to countries like China, where patents are more reliable.

This phenomenon was created by a series of shortsighted judicial, legislative and regulatory actions made independently of one another over the last decade that have had a crippling effect on patent rights. By the end of the decade, a series of "repeated, really radical interventions by the Supreme Court and Congress had left the system weakened and unreliable," explained Michel. The U.S. Patent and Trademark Office (USPTO), Patent Trial and Appeal Board (PTAB) and Federal Trade Commission (FTC) then "piled on," each acting "without coordination or awareness of the actions of the others" and without examining the economic downstream effects.

From *eBay* in 2006 to *KSR v. Telefex* in 2007, to *Alice* in 2014, the Supreme Court first undermined injunctions, which are necessary to vindicate the right to exclude that patents are meant to confer; made obviousness determinations more susceptible and less predictable; and muddled patent eligibility law. These three major lines of development were most harmful, Michel said, but they were further exacerbated by the America Invents Act's (AIA's) implementation of inter partes review (IPR), which has proven to be "excessively effective." While IPR was intended to be an alternative to litigation, it has become "a prelude to infringement suits in nearly all cases," Michel said, which has hit patent owners very hard—especially startups and small businesses. IPRs add several years of additional delay in reaching final judgments, increasing expense for patent owners and unpredictability for investors.

Worse, Congress has not returned to adjust AIA reviews and the Supreme Court has denied review since *Alice* in 50 cases involving Section 101.

Congress can only do two things now: over-correct or nothing, Michel said. “For now, it seems they’re doing nothing.” SCOTUS’ inattention span is even longer than Congress’. None of the cases has been revisited much less revised. In the view of many, the Federal Circuit has extended these harmful cases, and now—faced with an onslaught of appeals form the PTAB—has made the problem worse by deciding almost half of patent cases via Rule 36, meaning with no opinion at all. The CAFC affirms the PTAB in approximately 90% of the cases, so, “ironically, the PTAB is actually more powerful than its reviewing court in defining the reach of basic patent law doctrines,” Michel said.

All of this might not matter so much considered in isolation, but other countries have taken the cue to strengthen their own systems, filling the gap created by the U.S. situation. Michel explained that patent eligibility is broader and more certain now in Europe and Asia, including China. Injunctions are routine in Europe and Asia, including China. Obviousness determinations are more rigorous, scientific and predictable. Litigation costs overseas are only a small fraction of the USD 4 to 8 million it costs here to get to a final judgment. Judicial delays suffered here are multiples of the delays encountered overseas. “Patent justice is simply unaffordable for most firms [in the United States] today,” Michel said.

“Time to money is a key consideration for investment decisions. We are no longer secure as #1. Congress needs to wake up, stay informed, and pay attention. Our whole society needs to wake up and recognize the urgent need to restore the patent system.”