

Skilled in the Art: Google's Non-Banc at the Federal Circuit + A Dive into the FRANDly Patent Pool

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Google Doesn't Get an En Banc Nibble

It looks as if Google's original instinct in 2014 was correct. That was the year the Federal Circuit first [ruled for Oracle](#) in the parties' epic copyright brawl over Java application program interfaces. Google elected to bypass a petition for en banc review on the issue of copyrightability and proceeded directly to the U.S. Supreme Court, where it [got some interest](#) but cert ultimately was denied.

After [a second Federal Circuit loss](#) last March, Google asked the 12 active members of the Federal Circuit for en banc review of both the 2014 copyrightability ruling and this year's decision toppling a jury verdict that Google's Android operating system was a fair use of the APIs.

I'm not surprised that the Federal Circuit turned down Google in [today's order](#)—en banc review is always a long shot. But Oracle has to be feeling good that not a single judge dissented from denial or voiced any sort of critique of either ruling. That doesn't exactly put the wind at Google's back as it girds for [one more push at the Supreme Court](#). (Then again, it's not as if the Federal Circuit carries a lot of influence with the Supreme Court.)

With briefing unlikely to begin until November, any Supreme Court review on the merits will likely have to wait for the 2019 term. If the Supreme Court demurs, then we should get the mother of all damages trials before Judge William Alsup.

Google's en banc petition, signed by King & Spalding partner Daryl Joseffer, argued that the rulings represent "a devastating one-two punch at the computer software industry." Oracle's team, led by Orrick, Herrington & Sutcliffe partner Josh Rosenkranz, argued that Google made "the same dire warning to the Supreme Court four years ago ... yet offers not a shred of proof that its doomsday scenario has transpired."

Oracle's main argument was that it would make no sense for the Federal Circuit to go en banc to interpret a regional circuit's copyright law. Michael Barclay of the Electronic Frontier Foundation, who co-wrote an amicus curiae brief in support of Google, said it was unfortunate that at least one of Federal Circuit judges didn't clarify the impact of that argument on the denial.

In the meantime, software makers are without guidance, he said. The [latest suit](#) by SAS Institute against World Programming Ltd. is one example of the litigation that's been unleashed by the Federal Circuit rulings, he said.

Unified Seeks to Illuminate HEVC Landscape

If you're a broadcaster or streamer of video content, licensing the patents that are essential for state-of-the-art high efficiency video coding (HEVC) [can be complicated](#).

Three different patent pools license standard-essential patents owned by dozens of different companies: MPEG LA, HEVC Advance and Velos Media. Each pool has its [own licensing strategy](#) and transparency levels. Many additional SEPs are held by individual companies, some of whom haven't signed on with any of the pools.

Now Unified Patents—which bills itself as the “Anti-Troll”—has launched a new tool that it says will provide more transparency in the HEVC licensing arena.

Using artificial intelligence, Unified’s Opal project has [analyzed about 2 million patents](#) relevant to video compression technology, then [scored each](#) for similarity with the patents that HEVC and MPEG LA have publicly declared essential. (Velos has not published a similar list.)

Though Unified put a lot of work into tuning its algorithm, COO Shawn Ambwani admits it isn’t perfect. But neither is the traditional process when a patent owner asserts a large portfolio of patents that it declares essential. Typically, he says, marginally qualified experts perform a cursory analysis of a subset of the patents, and then extrapolate their findings to the entire portfolio.

“I’m not saying that these patents [that scored high on Unified’s algorithm] are essential. I’m just saying that they’re similar to the ones deemed essential,” Ambwani said. “In the end, our goal is a little more subtle—to force the other side to explain how they came up with their number.”

Licensees must make good faith offers or risk losing the opportunity to pay a fair, reasonable and non-discriminatory (FRAND) royalty. “In order to make FRAND offers to people, you have to understand the FRAND landscape,” Ambwani says. “Up till now, all of the landscapes have been pretty subjective. If you don’t think [ours] is good, that’s perfectly fine. Then show me something that’s better.”

McKool Smith Snags \$10.6 Million SEP Win

A FRAND negotiation gone bad has led to a sweeping \$10.6 million jury verdict for a McKool Smith team led by partner Ted Stevenson.

McKool and Stevenson represent Optis Wireless Technology and PanOptis Management, which hold patents originally assigned to Panasonic and Ericsson. The companies have spent years in FRAND negotiations with Huawei Technologies. Optis sued in the Eastern District of Texas after the talks broke down.

A jury found Monday that Huawei infringed all six asserted claims from five different patents, and did so willfully, opening the door to treble damages. The jury further turned away Huawei’s validity attacks on all six claims.

Four of the infringed patents are essential to practicing the 4G LTE wireless standard. The fifth patent relates to the implementation of the H. 264 video coding standard, a forerunner of HEVC.

Of course, validity is never over until the PTAB lady sings. Huawei petitioned for IPR earlier this year on three of the six patent claims at issue in the trial. They include claim 1 of [U.S. Patent 7,769,238](#), the video coding patent, which accounts for \$7.7 million of the \$10.6 million jury award. The PTAB appears poised to decide whether to institute proceedings on those IPRs in the coming weeks.

Covington & Burling is representing Huawei at trial and before the PTAB. Senior counsel Robert Haslam led the trial team while former PTAB APJ Peter Chen is acting as lead counsel in the PTAB proceedings.

McKool Smith’s trial team also included partners Sam Baxter, Kevin Burgess, Lindsay Martin Leavitt and Jennifer Truelove and associates Christine Woodin, Kevin Hess and Marcus Rabinowitz.

Brent Bumgardner of Nelson Bumgardner Allbritton is repping Optis Wireless at the PTAB.