Leveling the Playing Field: Amazon.com, Facebook, Microsoft, and Others Back Netflix, Inc.'s Bid for Consideration of "Exceptional" Patent Case Standard Under 35 U.S.C. ? 285

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A number of retailers and technology giants – including Amazon.com, Facebook, and Microsoft – have filed amicus briefs with the Federal Circuit in support of Netflix, Inc.'s petition for rehearing *en banc* in *Media Queue, LLC v. Netflix, Inc. et al.* Netflix successfully parried Media Queue's patent infringement charges in California district court, but was denied attorneys' fees under 35 U.S.C. § 256, because the court concluded that the case failed to qualify as "exceptional" under the statute. Netflix has requested *en banc* consideration of the Federal Circuit's standard, which Amici claim is to blame for "an unchecked epidemic of overreaching patent assertions." Absent a requirement that patentees demonstrate "an objectively reasonable basis" for bringing infringement suits, the Amici assert, many arguably frivolous suits will continue to be brought.

Previously, prevailing plaintiffs and defendants played on a level field when seeking fees. As the Federal Circuit Court held in *Eltech Sys. Corp.* v. *PPG Indus., Inc.,* "there is and should be no difference in the standards applicable to patentees and infringers who engage in bad faith litigation" when determining attorneys' fee motions. 903 F.2d 805,811 (Fed. Cir. 1990). This party-neutral application of section 285 looked to the objective unreasonableness of a party's position - whether a defendant's denial of liability or a patentee's assertion of infringement. Evidence that a party proceeded in reckless disregard of the objective unreasonableness of its position sufficed to establish bad faith and an exceptional case under Section 285. Under the current standard applied in the Federal Circuit, however, a case is "exceptional" for defendants when the conduct related to the litigation is materially inappropriate, such as "willful infringement, fraud or inequitable conduct in procuring the patent, unjustified litigation, or a violation of Federal Rule of Civil Procedure 11." Thus, if there is no misconduct, a case is

exceptional only if the litigation is brought in subjective bad faith and the litigation is objectively baseless. *See, e.g., Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.,* 393 F.3d 1378, 1381 (Fed. Cir. 2005). Further, even if the case is found to be exceptional, the court has discretion to deny fees. Netflix and the Amici argue that this gives plaintiffs a "free pass," permitting them to make bad faith allegations of infringement and unreasonable demands for injunctions or damages based on patents directed to trivial features.

Netflix has taken the position that the previous standard for awarding attorneys' fees to prevailing defendants is proper and consistent with the standards for awarding fees in other intellectual property cases. Netflix cites the Supreme Court case of *Fogerty v. Fantasy*, Inc., 510 U.S. 517 (1994), where the Court applied a party-neutral reading to copyright claims, stating "the federal fee-shifting statutes in the patent and trademark fields support a party-neutral approach." Netflix has argued that the Federal Circuit's higher standard for prevailing defendants in patent cases runs counter to the *Fogerty* decision and is inconsistent with the interpretation of similar statutes such as the trademark fee-shifting statute, 15 U.S.C. § 117, which is interpreted much more broadly than the current standard used for patents.

The Amici are interested in a clarification of the standard as to what constitutes an "exceptional case," and focus their briefing on the "epidemic" of unreasonable patentee litigation, and the financial and administrative burdens placed on companies by "non-practicing entities." The Federal Circuit's decision will have far-reaching effects on patent cases and the ability of defendants to recover when they successfully argue that plaintiff's cases were without merit.

Related People

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