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Federal Circuit Reverses Award of Attorney's Fees to Google

In *ILOR v. Google*, the Federal Circuit reversed a district court's finding that the case was exceptional and vacated the attorneys fees which Google had been awarded under 35 U.S.C. § 285.

The Federal Circuit affirmed the district court's granting of summary judgment of non-infringement. Following this disposition, the district court awarded Google attorneys fees, explaining that ILOR's claim construction arguments were "objectively baseless." The district court said that ILOR's proposed claim definition was "not close" on the merits.

In reversing the district court, the Federal Circuit explained that the standard for awarding enhanced damages under Section 285 is that there must be an assessment of both subjective and objective bad faith. This is the same standard used to determine whether attorneys fees are awardable in a case of willful infringement under 35 U.S.C. § 284. Applying this standard, the Federal Circuit concluded that the ILOR's proposed claim construction was not made objectively in bad faith. The Federal Circuit noted that being wrong about claim construction should not necessarily expose a party to paying attorneys fees.

Federal Circuit Throws Out 25% Rule For Baseline Royalty Rate

In *Uniloc USA, Inc. v. Microsoft Corporation*, the Federal Circuit reversed the district court's grant of JMOL of non-infringement; reversed the district court's alternative grant of a new trial on infringement as an abuse of discretion; affirmed the district court's grant of JMOL of no willfulness; affirmed the grant of a new trial on damages; and, affirmed the district court's denial of Microsoft's motion for JMOL of invalidity.

Of particular significance is that the Federal Circuit held as a matter of law that "the 25 percent rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation." The Federal Circuit held that evidence of damages which relies on the 25 percent rule of thumb is inadmissible under *Daubert* and the Federal Rules of Evidence, because it fails to tie a reasonable royalty base to the facts of the case at issue.

The Federal Circuit stated that "there must be a basis in fact to associate the royalty rates used in prior licenses to the particular hypothetical negotiation at issue in the case." The Court found that Uniloc's testimony was based on the 25% rule of thumb which was an arbitrary, general rule, unrelated to the facts of the case. Uniloc's expert did not testify that the parties had a practice

of beginning negotiations with a 25%/75% split, or that the contribution of the invention to the accused product justified such a split. The Court stated that Uniloc's expert's "starting point of a 25 percent royalty had no relation to the facts of the case, and as such, was arbitrary, unreliable, and irrelevant."

Federal Circuit Split on use of Specification in Claim Interpretation

In *Arlington Industries v. Bridgeport Fittings*, the Federal Circuit held that the district court erred in improperly importing a limitation from the specification into the asserted claim. Accordingly, the Federal Circuit reversed the district court's grant of summary judgment of non-infringement.

The district court construed the claim limitation "spring metal adaptor" to mean "split spring adaptor" - taking such a meaning from the specification, despite the fact that the claim itself did not recite a "split" limitation. The intrinsic evidence (including the prosecution history), the Federal Circuit explained, did not limit spring metal adaptors to those that were only split. The case has been remanded to the district court to be concluded in accordance with the Federal Circuits' instructions on claim construction.

On a more interesting note was Judge Lourie's dissenting opinion. Clearly upset with the position that the majority took on the claim meaning, Judge Lourie explained that the specification is what helps to define the limits of the invention. Judge Lourie stated that patents should be narrow, limited to that which the inventor contemplated. Judge Lourie further explained that "the bottom line of claim construction should be that the claims should not mean more than what the specification indicates, in one way or another, the inventors invented."

Lourie went on to state that "[A] patent is a teaching document. In almost all cases, the inventors, and their patent solicitors, knew what was invented and generally disclosed their invention in competent language. Unfortunately, the nature of our adversary system often causes those patents to be asserted against someone engaged in activity not contemplated by the inventors as part of their invention. So the patent is used as a business weapon against such parties..."

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