Ninth Circuit Nursery

Patent Litigation and Industrial Development
On the Pacific Coast, 1891-1925

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Federal Circuit Courts of Appeal Created March 1891

- Republican Congress, routed in November 1890 off-year elections by Democrats and Populists from West and South

- Business-friendly Republicans, sympathetic to corporations operating on national scale, look to steer threatened economic regulation into federal jurisdiction

  - Interstate Commerce Act and Commission (1886/7)
  - Sherman Antitrust Act (1890)
Patent Problems

• **Agrarians attack patent system** as emblematic of Republican policies
  • Like tariffs, administered federally and favoring industrial Northeast
  • Exploited by national corporations (Singer, Pullman, Westinghouse, Bell) to secure monopoly, extract rents, and restrict access
  • Contrasts with publicly funded agricultural research, made freely available

• **Major Cases overwhelm U.S. Supreme Court**
  • Controversial Bell opinion (1888) one-fifth of output, exhausts C.J. Waite
  • Many more patents cases on docket with deep-pocketed litigants
Circuit Courts of Appeal as **Regional Patent Forums**

- Push patent appeals down and out to circuits, at a time when regulation and antitrust were being pulled up into federal courts

- Appeals courts would operate with considerable autonomy
  - Local technologies operating in local conditions
  - Interpretive flexibility of patent law (e.g. “combinations” v. “aggregations”)
  - Not bound by other circuits (or, initially, by D.C. Circuit interference rulings)
Why the Ninth Circuit?

- **Sources**: Transcripts, briefs, and evidentiary materials forward from district courts on appeal ([9CHRIS.org](http://9CHRIS.org))
  - Thanks to Professor Eric Nystrom of Arizona State University

- A *dynamic regional economy* combining elements of the agrarian Plains and the industrial Northeast, yet distinct from both

- Diversity and continuity of **three appeals judges**, active throughout period:
  - William Gilbert (Nineteenth-Century Republican)
  - William W. Morrow (Progressive Republican)
  - Erskine Ross (Jacksonian libertarian Democrat)
Why 1925?

- Ross and Morrow step aside and many new district judges join


- A number of significant patent cases wrapped up that year

- That said, 1930 might have been better; this is a work in progress
Aerial View, 1891-1925

- 148 Patent Appeals Cases with an Opinion Issued
Patent Workload

• Percentage of District Court Materials Devoted to Patents

Percentage of Volumes Devoted to Patents

Lesson One: Appeals Court Hard on Patent Holders

- 76/148 (51.4%) of patents strengthened at district
- 56/148 (37.8%) of patents strengthened after appeal

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Table 1. Appeals Input--Output
Odds of Success on Appeal

- **Infringers** succeed in having patent weakened 37/76 *(fifty-fifty)*

- **Patent holders** succeed in having rights restored 17/72 *(one-in-four)*
Lesson Two: Outside Litigants Severely Disadvantaged

Table 2. Appeals Outcome by Location of Litigants

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Outsider Odds

• Outsiders lose 55 of 75 appeals cases (73%)
  • 42 times by affirmation; 13 times by reversal

• Outsiders won reversals just 5 times in 47 chances (11%)
Lesson Three: Balanced Treatment of Locals

- Inventors prevail 28 times, alleged infringers 26, split decision 19
- 15/73 reversals, 8 for inventor, 7 for alleged infringer
- 34/73 judgements reversed or modified (47%)

Courts acting as arbitrator among local parties
Lesson Four: Protection of Small Proprietors

Overall tendency to weaken patents
+ Harsh treatment of outside patent holders
+ Balanced arbitration of disputes among local patent holders =

1) Incentives for innovative West Coast Manufacturing Start-Ups

2) Buffer from infringement suits for growers, small ag. processors, loggers, drillers, and building contractors
Variations

• Over Time

• Across Districts

• Among Judges
1891-1900/06: Marking Territory

• Almost exclusively a Bay Area story, with general purpose machinery builders and users protected from outside litigants looking to enforce old patent rights

• Shaping role of experienced attorneys (Milton Wheaton and John Miller) who participated in 44/60 patent appeal cases; 19 head-to-head; 25 against other attorneys (who lost to Miller and Wheaton 20/25 times)

• SCOTUS affirms the West Coast patent regime until 1903-1906, when it intervenes to weaken some West Coast patents and to strengthen those of outsiders (Singer, American Can, the Raisin Trust).
1900/06 to 1911/17: Parallel Regimes

• **Southern District of California**
  • Light manufacturing of equipment used in construction, oil drilling, and agricultural processing
  • Ross/Morrow and district judges (like Ross, all Democrats) **weaken rights in effort to promote competition among suppliers** while insulating growers, etc.

• **Northern District of California**
  • Heavy manufacturing of producers goods, plus light manufacturing of consumer durables and of products used in commerce
  • **Strong patent rights granted to locals** by District Judge Van Fleet (appointed 1907) and affirmed by Gilbert on appeal
1914/17-1925: Toward an Administrative Patent Regime

• Appeals Judge William H. Hunt, Jr., a Taft protégé, returns from ill-fated Commerce Court and displaces Gilbert as dominant force, first in Los Angeles agricultural and oil equipment cases, then more generally, especially in cases involving outsiders
  • SCOTUS affirms Hunt

• Spurt of Cases from outside California, with extraordinarily high reverse rates, including 8/8 reversals of district rulings that had strengthened patents
  • some prompt reversals from SCOTUS, at Gilbert’s expense
Administrative Regime Takes Hold, 1923-1925

• **SD/ND split grows increasingly untenable**, as significant disputes involving agricultural equipment and hydraulic pumps make clear

• With changes in court personnel at districts and appeals, a **rapid convergence occurs around a common approach** that:
  • avoids granting pioneer rights
  • treats outsiders with equanimity, and
  • generally works to manage ongoing disputes among supply firms, often by leaning heavily upon court-appointed masters who curtail damages.
Thank You.

Questions?

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