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Fed. Circ.'s Reign Over Patents Should End, Judge Says

By **Lance Duroni**

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Law360, Chicago (September 26, 2013, 9:35 PM ET) -- A Seventh Circuit judge Thursday proposed ending the Federal Circuit's exclusive jurisdiction over patent appeals, arguing that a little conflict between appellate courts would be a good thing for the patent system.

In a speech at the Chicago-Kent College of Law's U.S. Supreme Court Intellectual Property Review, Judge Diane P. Wood was careful to specify that she advocates sharing the patent load with the regional circuits, not abolishing the Federal Circuit outright.

"I think it would be a better system if there were not this exclusive jurisdiction," she said.

Established in 1982 under the Federal Courts Improvement Act, the Federal Circuit also has jurisdiction over cases involving international trade, government contracts and veterans' benefits. But appeals arising under the patent laws make up the biggest slice of its docket.

In 1982, Congress saw the law as a fix for the lack of uniformity in the patent system, according to Judge Wood, citing the issue of forum-shopping and difficulties in business planning due to the fact that a patent might be enforceable in one circuit but not in another.

"Uniformity is great, but what if it's uniformly bad?" the judge asked.

In achieving uniformity, the Federal Circuit's exclusive jurisdiction robs the U.S. Supreme Court of the circuit splits — conflicting decisions between different courts of appeal — that so often guide the high court's hand, according to Judge Wood.

"They benefit from letting issues percolate around in the courts of appeal and state supreme courts, so that they begin to get a multifaceted understanding of a particular issue," Judge Wood said.

This "intellectual ferment" from opposing viewpoints also helps the Supreme Court decide which petitions it will hear out of the many it receives, she added.

And the Federal Circuit's poor track record in certain areas of patent law calls into question its exclusive jurisdiction, according to Judge Wood. Specifically, the appeals court has had difficulty laying down a "unified, methodological" approach to claims construction, and it has also struggled with its jurisprudence on non-obviousness, she said.

Another impetus behind exclusive jurisdiction was to have complex patent cases heard by specialist judges, rather than the generalists that sit on the regional circuits. But Judge Wood questioned the argument that patent cases are really any more complicated than the thorny bankruptcy, environmental and financial industry cases, among others, that come before the rest of the federal appeals courts.

And while many of the Federal Circuit judges have technical backgrounds, that is by no means a requirement, she said.

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“Some of them are out to sea — there are English majors there,” she said.

The judge also noted that regional circuits hear a variety of other intellectual property disputes, and the once solid barriers between these disciplines have become “blurred lines,” she said, with a nod to Robin Thicke’s ubiquitous hit song.

Judge Wood’s proposed fix for the ills of exclusive patent jurisdiction would take a page from administrative appeals, like those involving the Federal Trade Commission or the National Labor Relations Board, where appellants can choose between the D.C. Circuit or the regional appeals court where the party does business.

If two appeals were filed in different jurisdictions involving the same patent, the Judicial Panel on Multidistrict Litigation could consolidate the appeals in one court, eliminating the problem of patents being valid in one region but not another, according to Judge Wood.

“I think this can be accomplished without re-embracing the evils of the old system,” she said.

--Editing by Melissa Tinklepaugh.

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