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Federal Circuit in Facebook Case Does Not 'Like' Appeal

In a patent infringement lawsuit involving Facebook's "like" and "share" functions, the Federal Circuit Court of Appeals has turned down a request by both parties that it accept an interlocutory appeal of the district court's decision to exclude the plaintiff's damages expert.

Even though the case has yet to go to trial, both sides asked the Circuit Court to review the ruling. The plaintiff, Rembrandt Social Media, argued that, if the court reversed the exclusion order, it could promote settlement by providing a basis to value its claims. Defendant Facebook asserted that, if the order were sustained, Rembrandt would be left with no meaningful claim for relief.

But the Federal Circuit said that the appeal could turn out to be a waste of time and resources and that it would be better to let the matter proceed to conclusion. If Facebook is ultimately found not liable, then the exclusion of the damages expert would be moot, the circuit reasoned.

Certified for Appeal

In its lawsuit, filed in the Eastern District of Virginia, Rembrandt claims that part of the technology that underlies Facebook's ability to identify the audience with whom a user shares "likes" and other content is based on two patents it owns for creating and sharing a personal "Web Page Diary."

In June 2013, U.S. District Judge T.S. Ellis III granted Facebook's motion to dismiss Rembrandt's claim for willful infringement, but refused to dismiss most of Rembrandt's other claims for direct and indirect infringement.

However, in December, Judge Ellis granted Facebook's request to exclude Rembrandt's damages expert. He concluded that the expert's calculation of a "reasonable royalty" was inadmissible because the expert had used both a royalty base and a royalty rate that were flawed.

At the request of both parties, Judge Ellis certified his order for an interlocutory appeal. While the expert ruling would not normally be appealable until a final judgment, a judge can certify an issue for appeal if it "involves a controlling question of law as to which

there is substantial ground for difference of opinion" and if the appeal could "materially advance the ultimate termination of the litigation."

Liability v. Damages

Even when an interlocutory appeal is certified by the district court, however, the circuit court still has discretion to deny the appeal, as it did here.

In certifying the appeal, the district court reasoned that it would not be able to reach a judgment on liability without evidence of damages. In support of this reasoning, it cited a Federal Circuit case that said "a patentee that has proved infringement has also proved the existence of damages."

But the Federal Circuit said that this does not provide a basis for an interlocutory appeal, because there is a difference between deciding whether a party is entitled to damages and deciding the quantity of those damages.

"Thus, liability may be tried and established here even if the district court's pre-trial *Daubert* ruling is not reconsidered before or at trial and even if that ruling leaves Rembrandt with no proof of damages," the court explained.

The Federal Circuit also noted that there was no reason for it to believe an appeal would shorten the litigation or save resources. Neither the district court's order nor the parties' submissions suggested that a ruling affirming the expert's exclusion would prevent the case from going to trial.

"Accordingly, we have no firm basis for predicting that immediate review here would produce a saving of the court's or litigants' resources or shorten the time to complete resolution of the case," the court said.

No Savings of Time or Resources

Before granting an interlocutory review, the court said, it must "consider the possible systemic effects." One such effect here is that the appeal could turn out to have been unnecessary. "After the appellate decision, proceedings on liability could result in a determination of no liability, mooting any issue of damages."

Further, the appeal could end up saving no resources or shortening the time until final outcome of the case. The court noted the irony in the fact that Judge Ellis denied Rembrandt's expert an opportunity to revise his proposed testimony because the trial was scheduled to begin in two days.

But an appeal, which would necessarily postpone the trial, "would seem to undermine the stated premise of the refusal to allow modification of the proposed damages presentation."

With the appeal denied, the case will be on track to go to trial on the question of Facebook's liability to Rembrandt. Of course, the parties could also reach a settlement that would preclude a trial. For now, we'll have to simply stay tuned for further developments.

The case is *Rembrandt Social Media v. Facebook*, No. 2014-111 (Federal Circuit, April 7, 2014).

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