Judge Gilstrap, Parity, the Future

October 11, 2019 SKELJ Uncategorized 0

Judge Gilstrap's recent Texas District Court opinion denying a motion to dismiss has caused some waves. Specifically, the motion asserted that the plaintiff failed to adequately plead willful infringement as well as knowledge for purposes of 271b ("inducing" infringement). In denying the motion, the court said:

> *"Since Motiva has alleged that HTC has such a specific policy—**a policy prohibiting review of patents** —Motiva has plausibly alleged that HTC was willfully blind." (emphasis added, Page 18)*
>
> *"In sum, the Court concludes that the requirements of Twombly are met when a plaintiff identifies the existence of **a specific policy of willful blindness** or specific acts of willfully blind conduct." (emphasis added, Page 19)*

(*Twombly* was a Supreme Court case stating the evidentiary requirements at the pleading stage – that's important, as this decision addresses only the motion to dismiss and pleading rather than a situation of full-blown discovery and factual determinations [I'm also not entirely convinced yet that some of the precedent characterizations are entirely faithful] – still it's a rather strong statement about "willful blindness" and internal patent policies if it holds up)

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Now, this concerns folks because many large corporations have *exactly* that policy. In my (too long and too mathy) parity paper the risk of willful infringement was one of the reasons I noted that folks may be reluctant to engage in a full-blown parity analysis (N.b., this opinion discusses BOTH 271b inducement state of mind and the willfulness analysis, but there's some overlap). Carefully reviewing competitor portfolios and adjusting the design space based upon internal and external holdings may risk exposing the analyst to charges of 271b inducement / willful infringement.

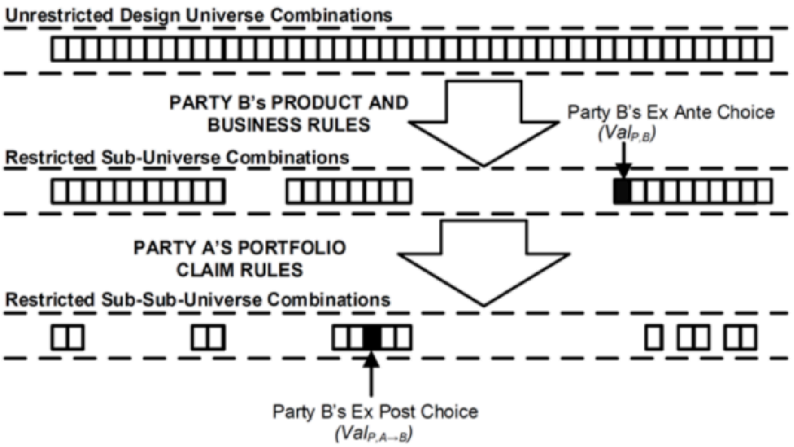

FIG. 10: Schematic Depiction of Calculator Operation

However, if the position in Judge Gilstrap's reasoning regarding internal policies becomes the standard (for 271b and/or willfulness), companies may need to abandon policies "prohibiting review of patents" in any event. Once they've done that, there would then be little reason not to pursue a full-blown parity-style analysis.

Of course, in prosecuting your own portfolio you often encounter competitor assets anyway when the Examiner reviews the prior art. Consequently, while ignorance may be bliss, it may not be particularly long-lived.

(Some corrections to the above made after the original post for clarity)

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