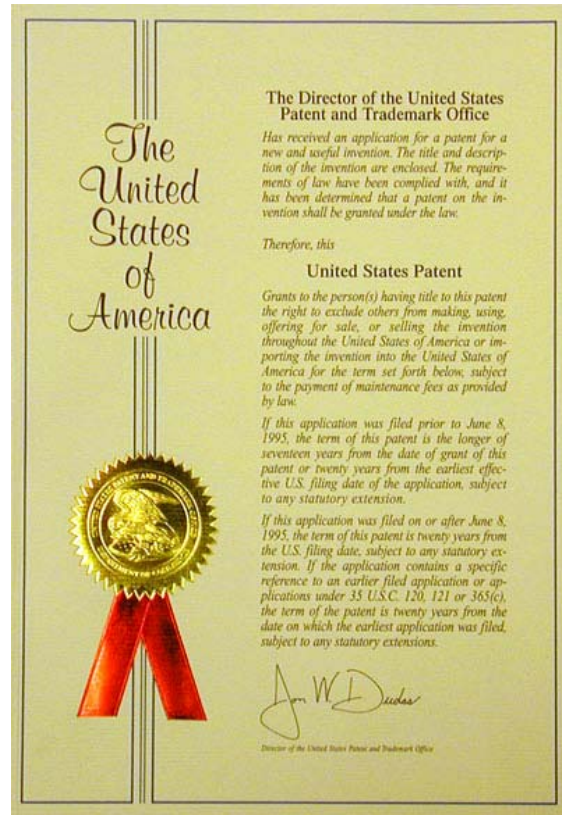


Judge, Juror, and Arbitrator Perceptions In Patent Infringement Cases



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*“If necessity is the mother of invention,
discontent is the father of progress.”*



David Rockefeller (1915 -)

Intellectual property cases offer many challenges to trial attorneys. The stakes are usually high for their clients and there is a great deal of pressure to win the case. Business people are at the heart of the internal decision-making process and they tend to be risk averse. Faced with high stakes, risk averse clients, and decisions that may ultimately be made by a disinterested judge, jury or arbitration panel, intellectual property attorneys are constantly looking for ways to outperform the opposition and gain the most powerful advantage in the courtroom.

Intellectual Property Trials Generally

Experienced intellectual property trial lawyers have learned that the trial team must work its way through the mountain of complexities in the case only to find themselves faced with ways to simplify the case and persuade a judge and jury. An example is the relatively simple case of a copyright infringement claim brought against the Baltimore Ravens by a fan, who was a security guard named Bouchat. Bouchat had designed a suggested logo with a raven holding a shield and faxed it to the team's home office. Shortly thereafter, the team

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revealed its new logo which looked “strikingly similar” to the one that Bouchat had sent in. However, the Ravens disputed that they had used his design idea.

The case proceeded to a jury trial after the trial judge ruled that there was sufficient evidence to raise a fact issue. Many months of intense legal research and technical study ensued in which the opposing trial teams fought over every legal and technical detail they discovered. In the end, however, a jury decided that the case was simple. After looking at the timing of events and the similarity of the design, the jury decided that someone with the Ravens’ organization had, indeed, copied Bouchat’s design.

Whether a case involves unauthorized disclosure of trade secrets, antitrust violations, copyright or patent infringement, unlawful use of trademarks, or any other type of intellectual property claim, most jurors work hard to try to understand the details. However, jurors’ greatest interest lies in the simple human story that is at the center of every controversy. They want to know and understand the meaning that is at the core of the case. As has often been stated, “Inside every complex case is a simple story struggling to get out.”

Patent Infringement Trials

Patent cases offer particular challenges. The details of patent cases are often so complex and technical that we even require most patent lawyers to have academic degrees in a field of science or technology to supplement their legal training.

According to statistics provided by the federal courts, jurors find for patent plaintiffs about 66% of the time compared to judges who find for plaintiffs about 51% of the time.

However, judges, jurors and arbitrators generally decide that at the heart

of most patent cases is a simple dispute. They believe that the plaintiff needs to prove that the defendant is using his or her idea (invention) and the defendant needs to prove that the ideas (mechanisms) being used are not the same as those owned by the plaintiff.

In making their decisions, jurors have been proven to be equally capable as most trial judges in understanding the important details of a case and rendering a well reasoned decision. Jurors have little self-interest in most patent disputes and, therefore, they scrutinize each party and their expert witnesses closely.

Jurors tend to respect decisions of the United States Patent Office and will disregard a governmental decision only when there is clear evidence that the patent examiner “got it wrong.” One such case occurred in 1999 when a federal court jury decided that the “hash-and-sign” digital time-stamping used in encryption technology predated Surety.com’s patent establishment. The trial lasted for only 6 days, but consisted of grueling testimony with mind-boggling details that would challenge the most sophisticated audience. In the end, the jury decided that the invention was not new, based primarily upon the chronology of events as well as the pervasiveness of the technology.

Most jurors are concerned about protecting inventors’ rights, but not in a way that stifles other inventors or causes obstacles for the evolution of new products to enhance our standard of living. Jurors are interested in fairness and want to make decisions that they think are just.

Simplifying the Case

Perhaps the greatest challenge for any intellectual property lawyer is to find a way to simplify the case for the judge, jury or arbitration panel. All courtroom decision makers, no matter how educated and sophisticated they are, believe that at the

heart of every complex situation is a simple story waiting to be discovered. In addition, they all need your help in understanding the details and the story of the case.

They believe that the meaning of the case, its essence, lies in the human story at the core of the case. They are willing to undergo the mental gyrations necessary to learn the technical details, but they are focused on the core of truth in the case, rather than the facts.

Your chances of success will be enhanced when you utilize simple persuasive tools to help judges, jurors and arbitrators learn the necessary details more easily, while at the same time not losing sight of the essential themes and story of the case.

There are many visual tools and storytelling techniques that will make learning about the case easier for the fact finders and, yet, also promote a persuasive story presentation.



About the Authors

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

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The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The **trial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, [*Courtroom Psychology and Trial Advocacy*](#), published by American Lawyer Media.

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