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Litigators of the (Past) Week: Wilmer Wipes Out a Half Billion Patent Verdict for Apple

By Ross Todd
April 12, 2023

For more than a decade, VirnetX Inc. and Apple Inc. have locked horns over claims certain features on Apple devices infringe VirnetX patents for securing private data across networks. The saga has involved Apple cutting a check for more than $450 million after the U.S. Supreme Court declined to take up its appeal of a 2016 jury verdict.

But in a follow-on case involving newer devices, Apple's appellate lawyers at **Wilmer Cutler Pickering Hale and Dorr** led by **Bill Lee**, **Mark Fleming** and **Lauren Fletcher** late last month convinced the Federal Circuit to knock out an even bigger award. On Thursday, March 30, the appellate court upheld a ruling from the Patent Trial and Appeal Board invalidating the last two remaining patents VirnetX was asserting against Apple. The following day the same Federal Circuit panel knocked out the $576 million judgment Apple faced after an East Texas jury in 2020 had awarded VirnetX $502 million in damages for infringing the two patents.

Litigation Daily: So, when someone asks you to tell the whole *VirnetX v. Apple* saga, where do you start? How do you begin to summarize everything that has happened in this litigation?

Lauren Fletcher: In 2010, VirnetX sued several companies for allegedly infringing various patent claims directed to basic internet security—claims that, the Federal Circuit has now ruled, should never have issued at all. Some companies settled, some fought back. Apple fought back over a 10-year period involving multiple trials, proceedings before the Patent Office, and seven appeals to the Federal Circuit. In the cases at issue in the most recent appeals, VirnetX obtained a district court judgment of more than $575 million against Apple products. But the Patent Office had held that VirnetX's asserted claims were unpatentable. The appeal from the PTAB decisions and the appeal from the district court judgment reached the Federal Circuit and were heard on the same day by the same panel. The Federal Circuit affirmed the Patent Office's rulings and vacated the district court judgment, making clear that VirnetX is not entitled to more than half a billion dollars.

Courtesy photos

(L-R)William Lee, Mark Fleming and Lauren Fletcher, partner of Wilmer Cutler Pickering Hale and Dorr.

What pieces of this dispute have you and your firm handled for Apple?

Mark Fleming: We have been lead counsel for Apple in the Federal Circuit in the seven appeals from the district court and Patent Office decisions. Throughout, we have worked closely with Apple's trial counsel at **Kirkland & Ellis** and **Potter Minton** and Patent Office counsel at **Sidley**. We also have been guided throughout this appeal by the Apple lawyers, including **Kate Adams**, **Jeff Myers** and **Colette Mayer**.

Who has been involved in that effort and what were their roles?

Fleming: This case has been going on so long that many of the terrific attorneys who worked on it have moved on to other opportunities in government, academia, or other private sector opportunities. The latest appellate effort was led by **Brittany Amadi**, **Tom Sprankling**, **Steven Horn**, **Alison Burton** and **Patrick Montgomery** from WilmerHale, as well as the three of us.

A team at Kirkland & Ellis has been taking the lead in the litigation at the district court, right? Is that a complicating factor? Or are there some benefits to having pieces of a multi-pronged dispute like this one divided among firms?

Bill Lee: The working relationship among the Apple in-house team and the teams from Kirkland, Sidley, Potter Minton, and WilmerHale was critical to our eventual success. While the different firms, of course, had different primary areas of focus, we worked together on overall strategy and discussed and reached consensus on all critical issues. The open exchange of ideas not only contributed to the end result but, quite honestly, made it more engaging and rewarding. The Kirkland and Sidley teams mooted every single Federal Circuit argument and always made the WilmerHale team work hard.

In the IPR below, your petition was joined to one filed previously by hedge fund Mangrove Partners Master Fund. How did that affect the dynamics of the proceedings?

Fletcher: It had no real impact.

What can other patent defendants take from the eventual outcome you achieved here and the effort it took to achieve it?

Lee: There are two conclusions others might take from the outcome. First, plaintiffs and defendants can recognize the complementary nature of PTAB and district court proceedings. Prosecuting or defending patent claims requires that any strategy have in mind both and, obviously, requires ensuring that what is done in one forum is not compromising the other. Second, achieving successful outcomes requires the long-term commitment of clients to litigate to a conclusion. This is particularly true where new procedures and protocols are in issue.

Here we had multiple district court trials, multiple proceedings before the PTAB, and half a dozen appellate decisions. Is this the system at work, evidence of dysfunction, or some combination of the two?

Lee: The answer is, as it so often is, a combination of the two. For more than 230 years, we have had a patent law regime that attempts to balance the promotion of innovation with the need to ensure that we are not constraining fair and important competition. The America Invents Act was an important legislative effort designed to address that balance. The AIA recognized the reality that, in a complicated district court litigation, an invalidity defense might get two hours of trial time in a one-week trial; asking a jury to decide that issue of invalidity while also learning unfamiliar technology, deciding infringement, and addressing enormous and economically complicated damages claims is asking much of the jurors, and perhaps too much. The AIA and IPRs allow for a fuller, more informed, and more nuanced consideration of validity issues and have made an important contribution to striking the right balance. But the implementation of the AIA necessarily took time and careful consideration by the PTAB, the district courts, and the Federal Circuit. That is what happened here. The many cases and decisions are the result of that implementation process—a process that is at times slow—and, hopefully, the manner in which these cases were finally resolved will offer a template that allows for the more expeditious and efficient resolution of the next case.

Do you have any idea why the Federal Circuit issued two opinions on back-to-back days? Couldn't the court have tied this up in one opinion? Or at least all at one time?

Fletcher: The Federal Circuit issued two opinions because this was all briefed and argued as two separate appeals—one from the Patent Office, and the other from the district court. We don't know why the Federal Circuit issued the two opinions on back-to-back days. In the end, the precise timing did not matter. What did matter was that the Federal Circuit heard the cases on the same day, which allowed it to address the invalidity issues in a coherent and consistent manner. Hopefully, this will occur in the future in similar contexts.

What will you remember most about this matter?

Lee: I am the senior citizen of our group and, over more than 40 years, have had the opportunity to observe our patent system addressing new technologies such as genetic engineering, new concepts such as standard essential patents, and new legal principles and procedures such as those embodied in the AIA. I will most remember these cases as a reminder of the manner in which our patent system addresses (and at times struggles to address) an ever-changing landscape and the importance of litigants such as Apple being willing to pursue these issues to the end. The decade of litigation brought peaks and valleys but ultimately resulted in judgments that were good for Apple in this case and for cases which will follow.

Fletcher: During the 10 years these cases were pending, I had the opportunity to work with many different lawyers at WilmerHale. What I will remember most is the deep dedication of each of them to a case and a client. There were ups and downs, but the people with whom we worked were always wonderful colleagues and team members.

Fleming: The terrific working relationships between Apple and its lawyers, dating back to when I showed up for the first trial in 2012. It has been a long road, but we have been walking it with absolutely wonderful people.