LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Fish & Richardson's Michael McKeon

Law360, New York (March 12, 2013, 3:44 PM ET) -- Michael J. McKeon is a principal in Fish & Richardson PC's Washington, D.C. office and a member of the firm's management committee. His practice focuses on matters before the U.S. International Trade Commission. McKeon is an adjunct professor at the George Washington University Law School, where he co-teaches with ITC Judge Theodore Essex the first-ever class on Section 337 cases at George Washington University Law School.

Q: What is the most challenging case you have worked on and what made it challenging?

A: The most challenging are cases where we have competitors going at it for legitimate business reasons. These cases routinely involve multiple fronts covering a wide cross-section of products and technology and always require developing interesting claims and defenses. The disputes I handle usually involve both sides filing cases against each other at the U.S. International Trade Commission, so you have that exclusion order threat hanging over your head too. For example, I recently represented LG Electronics in a dispute against Sony and we had four separate ITC cases running simultaneously and seven active district court cases in five different districts, and that was just the cases going on in the United States. Each side had asserted dozens of patents and I think each side covered just about every product the other side had on the market.

I also recently defended Apple in an ITC case brought by HTC, which was part of a global litigation between the companies. These types of disputes always have enormous stakes and you are constantly examining your next move and thinking about how it might impact your decisions 10 steps later in the broader dispute. It is a major undertaking to coordinate the issues presented across these cases and to leverage your resources to maximize the pain to the other side.

I always keep a copy of Sun Tzu's "Art of War" handy, although I think I have violated all of his maxims at one point or another. It is a war of sorts, though, and I really do think about it that way.

Q: What aspects of your practice area are in need of reform and why?

A: I think people talk about "reform" and immediately think of the Congress as our knight in shining armor to save the day. I am always reminded of Ronald Reagan's quip that the most terrifying words in the English language are: "I'm from the government and I'm here to help." So looking at reform from a legislative perspective, I think the patent and ITC statutes are fine the way they are now. The courts are doing a great job handling the issues of our day, and the flexibility of the statutes as written is good.

For example, I recall the proposals in Congress for amending the patent statute to deal with perceived excesses in patent damages. Some of these were just nutty. The Federal Circuit has been chipping away at this on a case-by-case basis, and things are moving in a good direction. I think cases like Uniloc and Laser Dynamics that drive the damages base to the component level are addressing the issues, and we should let the case law continue to percolate without legislative involvement. But I admit, as a litigator, I am quite biased. I always err on the side of refining the law with real cases and real facts in a measured way through litigation in the courts instead of the brute force approach where special interests drive reform in the Congress.

Q: What is an important issue or case relevant to your practice area and why?

A: I am very much involved in the debate over enforcement of standard essential patents. The question is whether there should be any limitations on seeking injunctive relief with respect to patents that have been declared essential to a standard by an owner that has committed to license under fair, reasonable and nondiscriminatory or FRAND terms. Standard-setting organizations or SSOs are special under our law. Normally, when competitors get together and make decisions about the market, people go to jail. But SSOs are a special exception because technology standardization has an overall benefit to competition and consumers.

So under what circumstances can a patent owner seek an injunction with respect to standard essential patents that are under a FRAND commitment? This is a question that is being tested by courts and competition authorities and is reaching a crescendo in light of the global mobile device wars. It is particularly problematic with respect to the question of ITC exclusion orders in light of the unique statutory framework under Section 337. The various cases involving Apple, Samsung, LG, Nokia, InterDigital and Ericsson are ones to watch. Since I am actively representing clients in all of this, I probably shouldn't say much more about where I see things going. But it is very fascinating and the outcome will ultimately impact many technology companies.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: This one is easy. Judge William Bryson at the Federal Circuit. He just took senior status but it is good that he still will be active at the court. I was privileged to be among one of his early set of clerks after he was appointed to the bench in 1994. The guy is brilliant. He certainly didn't need us clerks milling around his chambers. He reads every brief and the entire record to prepare for each case. Before being

appointed to the court, he had a long and very distinguished career at the U.S. Department of Justice, where he argued a gazillion cases before the U.S. Supreme Court. If you ask anyone that follows the court, Judge Bryson is always regarded as an intellectual giant.

Q: What is a mistake you made early in your career and what did you learn from it?

A: I wish I could say that I was like Chuck Norris and never made any mistakes. I think one of the things I learned early on is that you need to have strong filters for the arguments that you are prepared to make in court. Before I have a jury trial, I always do mock jury studies so I have a good understanding of what works and what doesn't work. But even before you get to that point, your credibility before the court is so important and you must be vigilant in protecting that. A really weak argument or, even worse, a plain stupid assertion can destroy your credibility.

I had a case early on where I moved to dismiss based on a failure of the other side to meet a deadline even though it was really just a technicality. The judge hammered me for making the argument. While there are strategic reasons for keeping certain issues and arguments going, you need to focus on the important points and shed what is truly just chaff that will not get you anywhere and only serves to undermine your credibility. However, it can be a challenge to get clients to agree to drop issues sometimes.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2013, Portfolio Media, Inc.