

Keeping Pace with Ever-Evolving Intellectual Property Disputes

► **Betty Chen, principal with Fish & Richardson, talks about the potential impact of widespread 5G rollouts on global patent litigation, how clients are addressing SEP and FRAND issues, and where she sees these trends going in the future.**

CCBJ: The next major wave of global patent litigation is expected to focus on 5G. How do you think that will affect the rollout of 5G technologies, and which industry sectors are most likely to be impacted?

Betty Chen: There is a substantial threat of prolific 5G patent litigation, but I don't believe that will stop the rollout of actual technologies at all. Nobody is going to take a

wait-and-see approach (nor should they) before trying to gain a market foothold. Instead, I think we'll see prominent players engaging in an arms race to build their own Standard Essential Patent (SEP) portfolios so that they have assets of their own to deploy should they be drawn into a 5G patent dispute. One trend that could soon reveal itself, however, may involve companies and products that are not immediately associated with the telecom industry being drawn into SEP and fair, reasonable and non-discriminatory (FRAND) litigation as easier initial targets. For instance, startup companies developing autonomous vehicles or home products may find themselves at the center of standards-based patent litigation to the extent their products/services may be alleged to depend upon evolving



5G technology, especially if the company itself lacks a portfolio of patents sufficient to serve as a counterweight against entities that have played in the telecom space for a longer period of time.

You do quite a bit of work for major telecommunications and consumer electronics companies. What common concerns do you see among these clients regarding SEP and FRAND issues, and how do you address them?

An ongoing concern for companies who do business globally is to develop FRAND strategies that are consistent and workable across international borders. Although there are certain areas of intellectual property law that have

been subject to significant efforts to achieve harmonization across international jurisdictions, legal precedents concerning FRAND royalty rates have developed differently and – from some perspectives – discordantly. This divergence can make it difficult to develop consistent and coherent licensing and negotiating strategies that work across borders.

Another concern that seems to persist, regardless of jurisdiction, is that the framework for pricing FRAND licenses has not yet reached the level of stability or predictability that companies would prefer. Some of the more seismic shifts in patent law that I have seen over the years are those affecting the nature and scope of a patent holder's



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available remedies. This goes for patent litigation in many technology areas, but it is acutely true for litigation based on SEP portfolios.

Fish is one of the top firms for handling complex, high-stakes technology disputes. How is the firm innovating in this space, particularly regarding SEP and FRAND disputes?

I can think of several examples. From a purely practical perspective, Fish has spent the last decade developing new pricing models aimed at creating better client-firm alignment, increased value and superior overall outcomes. Given the sheer volume of cases Fish handles, we now have significant data that we can use in patent cases, with pricing informed by a wide array of factors, including the nature of the technology (SEP, for example), venue, parties and, of course, client objectives.

We are also always looking to turn our firmwide thought leadership on FRAND jurisprudence into actionable strategies, even if that means taking a shot at making new law. When you see Fish attorneys offering commentary on new directions SEP and FRAND disputes might take, it's not just an academic exercise. You can bet they are already thinking about how to shape the evolving landscape and help our clients navigate it.

What other major trends do you see on the horizon for 2021 and beyond?

I foresee a few major trends, one of which is driven by the 5G rollout itself and another that is wholly powered by externalities.

The first is that if the U.S. 5G rollout proceeds fast enough to make litigation worthwhile, we may well see an increase in active litigation or arbitration of 5G patent portfolios. The current coronavirus pandemic has not necessarily depressed revenues or profits across the telecom industry, as numerous companies are still seeing solid demand for their products. For those companies whose market share may have suffered, however, there will be a temptation to utilize patent litigation as a means to gain that share back or even to improve their existing position against rivals. SEP patent owners in particular may be encouraged to file damages-oriented suits in the U.S. due to the continually evolving law surrounding FRAND, particularly more recent developments casting FRAND as a jury issue rather than an antitrust problem.

The second is that although we are also in the midst of a national COVID-19 vaccine rollout, no one yet knows exactly how fast that effort will proceed or when we will get back to "normal." Courts that have had to curtail operations due to health concerns will likely face a jury trial deluge in the latter part of 2021, and civil trials concerning patent disputes likely will be of lower priority than other cases, especially criminal matters, that are backlogged on court dockets. Two types of cases that may get fast-tracked



to trial during this interim period are matters pending before the International Trade Commission, as well as cases brought under the Hatch-Waxman Act, since bench trials are logistically far easier to conduct than jury trials.

You are one of the youngest leaders at Fish, and you were the first minority woman to serve as the firm’s global hiring principal. How does your unique perspective influence the way you approach your work and serve your clients?

Fish has a very strong culture of camaraderie and mentorship, and the firmwide mentality is appropriately described by the credo “nothing will work unless we do.” That’s a motto that I personally endeavor to live by as well.

In that spirit, the firm has certainly given me opportunities

to succeed. It’s therefore incumbent upon me to lead by example and to help position my colleagues and mentees to achieve their own success. I often think back on ways I was trusted and supported by my mentors, and I try to support our more junior attorneys in those same ways, specifically by ensuring that litigation teams are diverse and that major standup opportunities are given to diverse associates. ■



Betty Chen is a principal at Fish & Richardson P.C. in Silicon Valley, CA, where she regularly handles high-stakes and high-profile patent, trade secret, antitrust, breach of contract, and fraud lawsuits, among other matters. Reach her at bchen@fr.com.