Ethics and Implications of Infringement Allegations

Kevin Kudlac

University of Texas
Advanced Patent Law Institute
November 7, 2022

The Premise

- o **You Believe a Competitor is Selling Dozens of Infringing Products. Now What?**
    - o **Pre-filing Investigation**
    - o **Complaint**
    - o **Infringement Contentions**
    - o **Discovery**
    - o **Trial**

The Premise – a hypothetical

o **Many cell phone models**

o **All have a screen**

o **Screens are a commodity (many manufacturers)**

o **You have screen patents (and licensees)**

o **Can't just look at screen and determine infringement**

Pre-Filing Investigation:
What, and how much, do you need to do?

Pre-Filing Investigation– Options

1. **Internet Research only**
2. **Buy and analyze one product**
   - Product A
3. **Buy and analyze one of each product**
   - Products A to Z
4. **Buy and analyze every "version" of every product**
   - Product A, versions 1-10; Product B, versions 1-5, and so on

PRO TIP: #4 costs a LOT of money

QUESTION: How much "analysis" is required?

5

Pre-Filing Investigation– Be Reasonable

- By presenting [a paper]. . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after **an inquiry reasonable under the circumstances** [ ] the factual contentions **have evidentiary support** or, if specifically so identified, will **likely have evidentiary support** after a reasonable opportunity for further investigation or discovery.
  - ***Fed. R. Civ. P. 11(b)(3) (emphasis added)***
- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer **reasonably believes** that there is a basis for doing so that is not frivolous.
  - ***Tex. Disciplinary R. Prof. Conduct 3.01***

Question: So, what is "reasonable"?

6

Title search: Ethics and Implications of Infringement Allegations

First appeared as part of the conference materials for the
29th Annual Advanced Patent Law Institute session
"Patent Infringement and Products"