Litigating Patent Infringement Cases in the "Rocket Docket"

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The US District Court for the Eastern District of Virginia (EDVA) is regularly among the country's most active venues for patent litigation. Although high-damages awards are not routine, and EDVA judges and juries are not known for favoring patentees or accused infringers, the EDVA remains a popular patent litigation venue because of its unwaveringly speedy docket. As the original "rocket docket," the EDVA averages just over five months from filing to disposition, and eleven months from filing to trial for all civil cases.

The EDVA does not have patent local rules or uniform patent procedures. Instead, the EDVA judges manage patent cases through judge-specific (and division-specific) procedures. This lack of uniformity, combined with the rapid EDVA schedule and the EDVA's district-wide random assignment of patent cases, creates many pitfalls and traps for the unwary. This article addresses these issues, as well as other EDVA-specific patent practices and procedures.

Preliminary Motions

From the outset of a case, EDVA defendants should consider filing a preliminary motion, such as a venue motion or motion to dismiss, for at least two reasons: (1) because EDVA judges will not hesitate to grant meritorious motions, and (2) because such a motion can delay the scheduling process, giving the defendant more time before discovery begins in earnest.

Venue Motions

Under the Supreme Court's recent decision in *TC Heartland v. Kraft Foods Group Brands LLC*, 137 S.Ct. 1514 (2017), 28 U.S.C. 1400(b) governs venue in patent cases, and venue over a corporate defendant is proper only where the defendant is incorporated or where it has committed acts of infringement and has a regular and established place of business. While many corporations have a presence in the EDVA, defense counsel should always consider whether that presence satisfies §1400(b) and move to dismiss if it does not.

Motions to transfer venue under 28 U.S.C. 1404(a) are frequently filed in EDVA patent cases, and so there is a wealth of available EDVA authority.[1] The threshold issue is whether the plaintiff has any ties to the EDVA. If the EDVA is not the plaintiff's home forum, minimal deference will be given to the plaintiff's choice of forum.[2] In that case, transfer is likely unless there is some other tie to the EDVA, such as a connection between Virginia and the defendant or the claims. A defendant should also emphasize the presence of particular witnesses, especially third-party witnesses, in the transferee forum and likely must show some particularized reason that

the transferee forum is more convenient than the EDVA.[3]

Motions to Dismiss Based on *Twombly/Iqbal*

Now that patent complaints must meet the *Twombly/Iqbal* pleading requirements, complaints should identify the claims that are infringed, specify the accused devices, and provide sufficiently detailed infringement theories to demonstrate entitlement to relief.[4] Similarly, claims for contributory or induced infringement must include more than a "formulaic recitation" of the elements of the cause of action.[5]

An accused infringer's counterclaims of non-infringement or invalidity must also satisfy *Twombly/Iqbal*.[6] Further, at least one EDVA judge has held that affirmative defenses of invalidity which merely list code sections without any factual support are insufficient.[7] Thus, defendants should consider challenging any complaint that lacks sufficient detail to enable defendants to adequately plead such counterclaims.

Motions to Dismiss for Lack of Patentable Subject Matter

Since *Alice Corp. Pty. v. CLS Bank Int'l.*, 134 S.Ct. 2347 (2014), EDVA judges have addressed subject matter eligibility under 35 U.S.C. § 101,[8] including on a motion to dismiss or for judgment on the pleadings.[9] In many cases, though, it is "ordinarily desirable — and often necessary — to resolve claim construction disputes prior to a § 101 analysis."[10]

Motions to Stay Pending *Inter Partes* Review

As accused infringers have increasingly filed *inter partes* review (IPR) petitions, the EDVA, like many other courts, has been "nearly uniform" in staying litigation once IPR proceedings are instituted.[11] Several EDVA judges have even stayed proceedings before an institution decision based on "the pace of discovery" and the pretrial schedule in the EDVA.[12] Notably, these pre-institution stays have been granted where the plaintiff was a nonpracticing entity,[13] the patent has expired,[14] or the plaintiff delayed in bringing suit.[15] By contrast, stays have been denied where the parties are competitors and the prejudice may have "outsized consequences to the party asserting infringement."[16] Defendants seeking a stay must file their IPR petition within a short time of the filing of suit.[17] Parties should also be sure to inform the court of any developments in related IPRs, as at least one EDVA judge strongly admonished parties for failing to do so.[18]

Pretrial Scheduling

Once any preliminary motions are resolved, the court will issue its initial scheduling order. The court's scheduling procedure, however, varies significantly among the three divisions and even among individual judges.

In Alexandria, the court will issue a standard one-page pretrial order that sets a close of discovery deadline and provides the date of the Rule 16(b) conference and the final pretrial conference at which the trial date will be set (approximately eight weeks later). Most Alexandria judges do not have patent-specific pretrial requirements, and so parties typically include patent-specific events in the discovery plan submitted before the Rule 16(b) conference.

In Norfolk, the initial pretrial conference is held before a scheduling clerk, who will set pretrial deadlines and a trial date according to a standard schedule that does not address patent-specific deadlines. Some Norfolk judges include patent-specific events in a subsequent order, but otherwise the parties typically have no opportunity to submit a patent-specific pretrial schedule.

In Richmond, the judges issue their own detailed initial pretrial order, which includes a comprehensive list of deadlines and sets an initial pretrial conference before the district judge. At that conference, the judge sets the case for trial and usually addresses patent-specific requirements in a supplemental order.

Regardless of the division or judge, the primary purpose of the initial pretrial conference is to set a pretrial timetable that results in a trial within seven to nine months. Even judges who tailor their pretrial orders to patent cases often simply add those provisions within the ordinary timeframe.

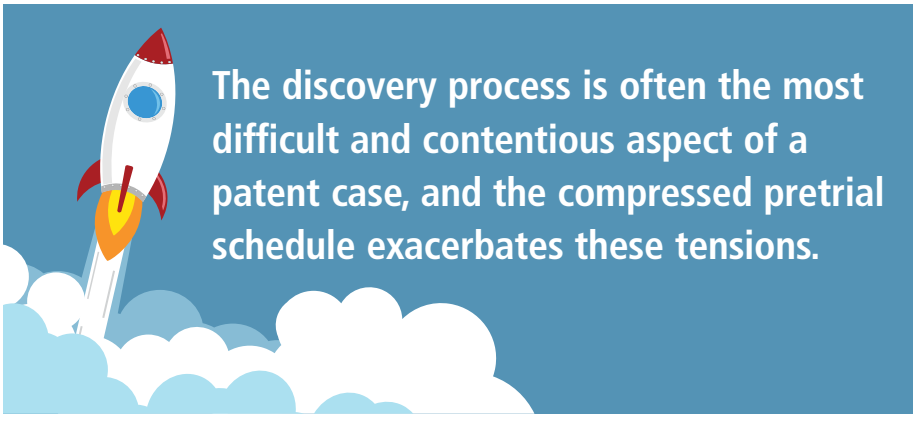
Discovery

The discovery process is often the most difficult and contentious aspect of a patent case, and the compressed pretrial schedule exacerbates these tensions. In the EDVA, parties generally have four to six months to complete all fact and expert discovery. This short schedule generally favors plaintiffs, who can investigate their cases and retain expert witnesses before filing suit, whereas defendants must identify possible defenses and locate helpful infor-

mation in only a few months. To overcome this disadvantage, defendants should devote the resources necessary to quickly gather, review and produce relevant documents. By starting early, a defendant can buy time to address shortcomings without having to litigate discovery motions, thus avoiding any loss of credibility or substantive damage to its defenses.

Whether representing the plaintiff or the defendant, counsel should form a plan at the outset that includes issuing litigation hold letters, identifying relevant document custodians, and preserving electronically stored information. An early and well-thought-out document collection plan not only makes the production process more efficient, it is more defensible and can preclude claims of prejudice. In addition, counsel needs to remain involved in discovery and not rely on the client, as one EDVA judge recently sanctioned a party and its counsel for failing to sufficiently follow up with key employees or adequately search for relevant e-mails.[19]

The abbreviated discovery period and the typical breadth of discovery requests in patent cases often give rise to aggressive (perhaps exploitative) discovery motions by plaintiff-patentees in an effort to gain a tactical advantage through motions practice. Local Rule 37(E) requires that the parties meet and confer before filing a discovery motion, and the EDVA judges take this requirement seriously. The audience for discovery motions, however, varies by division. In Alexandria, magistrate judges handle all discovery motions on an accelerated one-week schedule. In Richmond, discovery disputes are typically handled by the assigned district judge, but each judge handles them differently (and usually quite promptly). In Norfolk, magistrate judges hear discovery motions under the standard briefing schedule, which can cause some delay. Given these differences, both parties are well served to reach agreement on discovery issues.



Markman Hearing

Most EDVA judges incorporate a *Markman* hearing into their pretrial schedule. Given the abbreviated schedule, however, *Markman* hearings may occur with or after expert reports, forcing experts to take alternative positions and sometimes requiring supplemental reports. For these reasons, the parties are wise to request an early *Markman* hearing.

Dispositive Motions

EDVA judges will not hesitate to grant summary judgment in appropriate cases. That said, it is difficult to present summary judgment motions in a complex patent case early enough for careful consideration by the court. The EDVA employs an economical briefing regimen, limiting parties to one summary judgment motion of up to thirty pages that is fully briefed in approximately three weeks, and judges very rarely grant leave for more motions or longer briefs.

Given other scheduling demands, summary judgment motions are typically filed near the close of discovery and are not fully briefed until shortly before trial. This forces a busy judge to absorb and understand often voluminous materials and complex issues in just a few weeks. Moreover, the parties are often simultaneously litigating evidentiary motions and other pretrial matters. These factors limit the usefulness of summary judgment in a patent case, and parties are well served to focus on discrete legal issues that cannot be characterized as factually disputed.

Pretrial Preparation and Trial

In the EDVA, parties must file lists of witness, exhibits, jury instructions, and proposed *voir dire*, and litigate multiple issues in the final weeks before trial. This confluence of multiple pretrial filings and decisions in the midst of final preparation creates significant pressures, often resulting in the most frenzied and chaotic portion of a case.

No stage of litigation in the EDVA moves more swiftly or places as much pressure on litigants as the trial. Trial itself will usually be measured in days, and rarely more than a week, and the court strongly, sometimes forcefully, encourages tight, condensed presentations. Jury *voir dire* is comprised mostly of generic judge-posed questions and jury selection typically takes less than two hours. Opening statements, usually less than an hour per side, follow soon thereafter.

EDVA judges also strongly encourage brief and pointed examinations and cross-examinations, and will interrupt examinations that they feel are repetitive. Redirect examination is very brief and will be cut off at the first hint of repetition. Parties are limited to only one expert in any discipline, encouraging parties to use fewer witnesses who can cover more issues and who are skilled at explaining technical matters to a lay jury.

Conclusion

The EDVA's speedy docket attracts patent infringement lawsuits. While the pressures of the "rocket docket" provide plaintiff-patentees with some advantages, defendants enjoy the EDVA's willingness to grant dispositive motions and its strict trial procedures. As a result, the EDVA should remain a popular forum for patent lawsuits.

Endnotes:

1 *See Phillips v. Uber Techs., Inc.*, 2016 U.S. Dist. LEXIS 4590 (E.D.Va. Jan. 13, 2016) (Gibney, J.) (citing cases).

2 *See e.g.*, *Lycos, Inc. v. TiVo, Inc.*, 499 F.Supp.2d 685, 692 (E.D.Va. 2007) ("[P]laintiff's choice of forum is not entitled to substantial weight if the chosen forum is not the plaintiff's 'home forum' and the cause of action bears little or no relation to the chosen forum.")

3 *See Phillips*, 2016 U.S. Dist. LEXIS 4590 at *5 ("[The EDVA] draws a distinction between party-witnesses and non-party witnesses and affords greater weight to the convenience of non-party witnesses.") (citations omitted); *Certusview Techs., LLC v. S & N Locating Servs., LLC*, 2013 U.S. Dist. LEXIS 175339 at *14-*16 (E.D. Va. Dec. 12, 2013) (that transferee forum more convenient is not sufficient to establish that the EDVA is an inconvenient forum).

4 *Orbcomm Inc. v. Calamp Corp.*, 2016 U.S. Dist. LEXIS 96264 at *21-*23 (E.D.Va. July 22, 2016) (Hudson, J.); *see also Jenkins v. LogicMark, LLC*, 2017 U.S. Dist. LEXIS 10975 at *6-*7 (E.D. Va. Jan. 25, 2017) (Hudson, J.); *Audio MPEG, Inc. v. H.P. Inc.*, 2016 U.S. Dist. LEXIS 181710 at *33 (E.D.Va. June 29, 2016) (Morgan, J.) (holding that *Twombly* applied to patent infringement complaints since abrogation of Form 18)..

5 *Jenkins*, 2017 U.S. Dist. LEXIS 10975 at *9-*11; *see also Audio MPEG*, 2016 U.S. Dist. LEXIS 181710 at *51-*54.

6 *Info. Planning & Mgmt. Serv. v. Dollar Gen. Corp.*, 2016 U.S. Dist. LEXIS 883 at *8-*9 (E.D. Va. Jan. 5, 2016) (Jackson, J.); *see also TecSec, Inc. v. Protegrity, Inc.*, 2001 U.S. Dist. LEXIS 26740 (E.D. Va. June 27, 2001).

7 *Info. Planning*, 2016 U.S. Dist. LEXIS 883 at *10-*13.

8 *See e.g.*, *Virginia Innovation Sciences, Inc. v. Amazon.com, Inc.*, 2017 U.S. Dist. LEXIS 1917 (E.D.Va. Jan. 5, 2017) (O'Grady, J.); *Orbcomm*, 2016 U.S. Dist. LEXIS 96264 at *4-*20; *Peschke Map Tech's. LLC v. Rouse Props. Inc.*, 168 F.Supp.3d 881 (E.D.Va. 2016) (O'Grady, J.); *MicroStrategy Inc. v. Apttus Corp.*, 118 F.Supp.3d 888 (E.D.Va. 2015) (Gibney, J.); *CertusView Techs., LLC v. S&N Locating Servs., LLC*, 111 F. Supp. 3d 688 (E.D. Va. 2015) (Davis, J.); *In re TLI LLC Patent Litigation*, 87 F.Supp.3d 773 (E.D. Va. 2015) (Ellis, J.), *aff'd* 823 F.3d 607 (Fed. Cir. 2016); *Amdocs (Isr.) Ltd. v. Openet Telecom, Inc.*, 56 F.Supp.3d 813 (E.D.Va. 2014) (Brinkema, J.), *rev'd* 841 F.3d 1288 (Fed. Cir. 2016)

9 *Virginia Innov. Sci's.*, 2017 U.S. Dist. LEXIS 1917 at *10; *see also Audio MPEG*, 2016 U.S. Dist. LEXIS 181710 at *33 (denying motion to dismiss based on § 101); *Orbcomm*, 2016 U.S. Dist. LEXIS 96264 at *4 (appropriate to decide motion challenging patent ineligibility at the Rule 12(b)(6) stage); *Asghari-Kamrani v. United Servs. Auto. Ass'n*, 2016 U.S. Dist. LEXIS 87065, at *3 (E.D. Va. July 5, 2016) (Doumar, J.); *CertusView Techs.*, 111 F. Supp. 3d at 704 (deciding patent eligibility on Rule 12(c) motion for judgment on the pleadings).

10 *Peschke Map Tech's. LLC v. Rouse Props. Inc.*, 168 F.Supp.3d 881, 884 (E.D.Va. 2016) (O'Grady, J.) (quoting *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1273 (Fed. Cir. 2012)).

11 *NFC Tech. LLC v. HTC America, Inc.*, 2015 U.S. Dist. LEXIS 29573 at *18-*19 (E.D. Tex. March 11, 2015) (citing cases)

12 *See e.g., In re TLI LLC Patent Litigation*, 2014 U.S. Dist. LEXIS 182206 at *8; *Health Diagnostic Laboratory, Inc.*, Civil Action No. 3:14CV796-HEH, slip op. at 2-4 (E.D. Va. Feb. 4, 2015).

13 *In re TLI LLC Patent Litigation*, 2014 U.S. Dist. LEXIS 182206 at *8; *Virginia Innovation Sci's. v. Samsung Elec's. Co., Ltd.*, Case No. 2:14CV217, slip op. at 5-6 (E.D. Va. Nov. 18, 2014); *see also University of Va. Patent Fdn. v. Hamilton Co.*, 2014 U.S. Dist. LEXIS 135202 at *7 (W. D. Va. Sept. 25, 2014) (collecting cases).

14 *Audio MPEG, Inc. v. Hewlett-Packard Com.*, 2015 U.S. Dist. LEXIS 126014 at *12 (E.D. Va. Sept. 21, 2015).

15 *Id.*

16 *Segin Sys. v. Stewart Title Guar. Co.*, 30 F. Supp. 3d 476, 484 (E.D. Va. 2014).

17 *See e.g., Cobalt Boats*, 2015 U.S. Dist. LEXIS 67258 at *7.

18 *Virginia Innov. Sci's. v. Samsung Elec's. Co., Ltd.*, 983 F.Supp.2d 713, 760 (E.D. Va. 2014)

19 *Vir2us, Inc. v. Invincea, Inc.*, 2017 U.S. Dist. LEXIS 11720 (E.D.Va. Jan. 25, 2017) (Morgan, J.).

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