

## Focus: Patent Law

## Evidence ruling may hurt suppliers

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CRAIN'S DETROIT BUSINESS

Automotive suppliers could be heading for a riskier legal landscape or a possible loss in value for their patents if the U.S. Supreme Court expands on its past ruling in a court case from Detroit.

The high court heard arguments in April and should reach a decision by next month in **Microsoft Corp. v. i4i Inc.**, a patent infringement case stemming from a software feature in Microsoft Word that allows document editing of a Web program language code.

That outcome could lower the standard of evidence for rebutting a claim of infringement based on patent invalidity — an issue the court last visited in its 2007 ruling on auto supplier dispute **KSR International Co. v. Teleflex Inc.**

In that case, the Supreme Court sided with Ontario-based KSR In-

ternational and Judge Lawrence Katzoff of the U.S. District Court in Detroit and found KSR could not infringe Teleflex's patent for an adjustable foot pedal assembly with electronic throttle controls. The court found that Pennsylvania-based Teleflex's patent was an "obvious" design step from previous inventions in the field and was therefore invalid.

The justices found that when a previous invention exists that wasn't considered when a patent was issued then "the rationale underlying the presumption ... (that a patent is valid) seems much diminished."

That suggested the court may lower the legal standard for proving a patent invalid from "clear and convincing" evidence to the lesser "preponderance of evidence," a kind of more-likely-than-not standard. Microsoft is asking the court to change that standard.

Rodger Young, partner at Southfield-based **Young & Susser PC** who represented Teleflex in the lawsuit, said the court seems likely to side with Microsoft this time, and an ill wind could blow toward some auto suppliers.

"I think the court is very receptive to lowering the standards," Young said. "And to the degree suppliers have patents, in a perverse way the OEMs might embrace that kind of open field in the courts. Because then they would be able to exert more pressure on the supplier who claims an exclusive intellectual property — and then dual-source the technology."

In other words, a supplier that learns its customer or another OEM is sourcing production of its patented product elsewhere may want to think twice before suing.

The defendant against an infringement claim, or a plaintiff challenging the validity of another company's patent in court, can have an easier time proving the entire patent invalid and opening up the technology to anyone.

"Overall, it would have a chilling effect on litigation because it's usually the patent owner that starts the lawsuit," said James Stevens, partner and management committee member at

Troy-based **Reising Ethington PC** and president of the **Michigan Intellectual Property Law Association**. "It's more of a risk to start that process if you put your whole patent out there for review."

But Stevens also said a pro-Microsoft ruling could leave suppliers and other manufacturers in a better position to defend against patent "trolls," or those who seek

patents mainly for the sake of licensing deals or litigation with no intention of producing the invented product.

It could also change patent litigation itself, as attorneys sometimes look into a company's previous inventions as a tool to leverage a settlement.

"You often have that weapon to use in litigation — you can look into assets in your own (client) portfolio and tell the plaintiff, 'Look here, you're infringing one of our patents too,' and that's a tool to leverage a settlement. It's almost a strategic

tool to get something else," he said. "This might change the degree to which attorneys want to do that."

Will Cosnowski Jr., division and litigation counsel handling intellectual property matters at Troy-based **Delphi Automotive LLP**, said a ruling for Redmond, Wash.-based Microsoft and against Toronto-based i4i Inc. could arguably mean some marginal patents in a supplier's portfolio would be worth less — if the risk that they could be voided in court gets factored into their value.

But on the whole, he said, most patents for Delphi and other major auto suppliers are well-vetted and would not be affected. He thinks a ruling for Microsoft would mostly bring a sense of balance into patent litigation.

"It really just evens out the playing field in terms of eliminating a difference between the legal standard used (for a patent's validity) at the (U.S.) Patent and Trademark Office and the legal standard that's used in the courts," he said.

Delphi in March won the dismissal of two consolidated lawsuits on behalf of North Carolina-based **Automotive Technologies International Inc.**, based in part on the Teleflex decision. U.S. District Judge Robert Cleland agreed with Delphi's claim that Automotive Technologies' patents were invalid due to obviousness.

Jeffrey Sadowski, head of the IP practice department at Royal Oak-based **Howard & Howard Attorneys PLLC**, said that law firm handled the original Teleflex patent application and that the new case might "eliminate the duality of standards" in some patent litigation.

But if a patent infringement case goes to trial, he said, the Microsoft ruling might be less of a factor, since juries often don't differentiate between various standards of evidence.

"If you're a defendant, you'd be agreeable to a lower standard, and in front of a jury, there's so much else going on that I don't know if a change in the standard makes that much difference," he said. "But, at least in the short term, (until the case is decided) there's a lot of uncertainty."

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