The Federal Circuit's "Choice-Of-Law" Policy As Substantive Patent Lawmaking

Jennifer E. Sturiale[*]

Scholars and commentators have criticized the Federal Circuit for its "patent exceptionalism" jurisprudence that treats patents and patent law as exceptions to otherwise generally applicable legal principles and doctrines. For example, the Federal Circuit's jurisprudence with respect to issues of standing, remedies, and review of administrative agencies relating to patent law is out of line with the jurisprudence related to those issues in other substantive bodies of law.

Yet these critics have all but ignored a truly exceptional practice of the Federal Circuit in which it engages in a "choice-of-law" analysis in patent cases pursuant to what it has described as a "choice-of-law" policy. That policy considers not which of two or more states' or nations' laws it should apply, but rather which court of appeals' law to apply—its own law or the law of the regional circuit court from which the case originated.

The Federal Circuit's jurisdiction is unique. Unlike all other U.S. courts of appeals, the Federal Circuit's jurisdiction is defined not by its geographical location, but rather by the subject matter of the original claim. The Federal Circuit has appellate jurisdiction over final decisions from all U.S. district courts if the plaintiff's claims or a party's counterclaims arise under the patent laws. From this unusual jurisdictional grant, the Federal Circuit has concluded that, as a policy matter, it should apply and develop its own law only if the legal issue pertains to patent law. For all other legal issues, the Federal Circuit defers to the law of the court of appeals from which the case originated—i.e., it applies the procedural law and the non-patent substantive law of the other courts of appeals.

In this article, I argue that the Federal Circuit should abandon this practice with respect to issues of procedural law and do what all other courts of appeals do—independently develop and apply its own law. Neither the enabling statute that created the Federal Circuit nor the court's jurisdictional statute support the court's choice-of-law policy. In addition, no other U.S. court engages in an analogous practice. More importantly, by drawing a line between "procedural" and "substantive" legal issues and deferring to the law of the regional circuit court on those issues that are arguably procedural, the court is failing to fulfill its mandate to develop patent law in a uniform manner and is overstepping its substantive lawmaking authority.

[*] Climenko Fellow and Lecturer on Law, Harvard Law School