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IP MVP: Orrick's Chris R. Ottenweller

By **Ryan Davis**

Chris R. Ottenweller

Law360, New York (December 12, 2012, 10:24 PM ET) -- Chris R. Ottenweller of Orrick Herrington & Sutcliffe LLP successfully defended Apple Inc. at the U.S. International Trade Commission in one of the earliest smartphone patent cases to go to trial and secured a precedent-setting victory for EMC Corp. at the Federal Circuit that put an end to a favorite tactic of patent trolls, earning him a spot on Law360's list of IP MVPs.

At the ITC, Ottenweller represented Apple in a suit by S3 Graphics Co. Ltd. over image compression patents. S3, a subsidiary of HTC Corp., alleged infringement by numerous Apple devices, including the iPhone and iPad, and sought an order barring them from the U.S.
"S3 was attacking virtually every one of Apple's products. It was a direct assault on Apple's entire product line," Ottenweller said.

While an ITC administrative law judge initially found that Apple had infringed two of S3's patents, the full ITC reversed in November 2011, finding no infringement by Apple and dismissing the complaint.

In its ruling, the ITC adopted a new legal principle that a complainant must show that an accused product infringes at the time that it is imported into the U.S., not simply that it can be used in an infringing manner once it is in the country. That standard represented a significant shift in ITC law and changed 30 years of precedent at the ITC, Ottenweller said.

Allegations that imported products can be used in an infringing way in the U.S., even if they don't infringe at the point of importation, come up on a "not infrequent basis," so the ruling in the S3 case should have a widespread effect in future ITC cases, he said.

In the EMC case, the Federal Circuit set an important new rule that unrelated companies cannot be joined as defendants in the same patent action solely because they are alleged to infringe the same patent. The ruling has since been cited numerous times to break up multidefendant suits filed by nonpracticing entities.

"It was a tactic that trolls relied on quite a bit to force people to settle," Ottenweller said.

While the America Invents Act includes a provision that companies cannot be joined as defendants unless they are accused of making or using the same accused product or process, it did not apply to suits filed before the law was enacted until EMC asked the Federal Circuit to review the legal standard.

In May, the appeals court sided with EMC and ruled that the company had been wrongly joined in a suit by Oasis Research LLC. The court concluded that the judge in the Eastern District of Texas used the wrong legal standard to find that the defendants had been properly joined.

"EMC was willing to step forward and say this is not right. This is not the way the federal rules are supposed to work and it's highly prejudicial," Ottenweller said. "They decided to do something about it, and we were fortunate enough to be chosen to fight for them."

Krish Gupta, senior vice president and deputy general counsel of EMC, said that when EMC decided to challenge the lower court's interpretation of pre-AIA joinder rules, there was skepticism in the legal industry about whether the court would even be willing to address the issue, since the joinder in patent cases had been addressed by the AIA.

However, working with EMC's in-house counsel, Ottenweller was successful in explaining to the court why the rules needed to be clarified, he said.

"Our outside counsel needs to be tenacious, tactical and collaborative, and they need to think outside the box. These are strengths that Chris has," he said.

Also this year, Ottenweller defended Nvidia Corp. against a suit by nonpracticing entity Biax Corp., which alleged that Nvidia's graphical processing units infringed patents related to semiconductor technology.

In February, a judge in the District of Colorado granted summary judgment to Nvidia and its customer and co-defendant Sony Corp., ruling that they did not infringe the patents.

Ottenweller said that each of his three wins was a team effort and called on different litigation skills. The Apple case involved a full trial at the ITC, the Nvidia case was a victory in district court on motion practice and the EMC case was an appellate ruling on an important issue of procedure.

"I take pride in being a versatile litigator with skills in all the areas that make a good advocate," he said.

Ottenweller, who been an attorney for 34 years and has worked at Orrick since 1996, said that the keys to success are developing a strong strategy early in the case, getting the most out of a team and mastering the art of persuasion in the briefs and in the courtroom.

"I really enjoy the art of advocacy, both written and oral advocacy," he said. "A lawyer's job is to explain, persuade and motivate. Much of my practice involves cases with complex technology and a lot of money at stake. There is a premium on explaining complicated technology in simple terms and focusing the litigation on the issues that really matter."

--Editing by Jeremy Barker.
