

Should the Federal Circuit Defer to Findings of Fact by Tribunals Below it?

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The Federal Circuit celebrates its 25th birthday in October 2007. Now is a good time to assess how the new court has adapted to the federal appellate scheme for reviewing district court decisions. Every other Circuit Court in the country is limited to a particular region, separate from all other circuits. The Federal Circuit is the only one that has nationwide jurisdiction over limited subject matter. Like regional circuit courts, the Federal Circuit must abide by the same rules applied to all circuits by Congress and by the Supreme Court for reviewing decisions of lower tribunals.

The topic here is deference to be paid to triers of fact. Congress and the Supreme Court have long instructed courts of appeal to defer to the trier of fact, whether a jury, a judge sitting without a jury, or an

administrative agency. It is perhaps human nature that appellate judges have a tendency to believe that they are omniscient and can second-guess the tribunals below (See, C.A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957)). The law, however, is clear that deference to findings below must be paid, which, in the case of the Federal Circuit, includes the findings of the Patent and Trademark Office (PTO).

Congress has certainly required deference to the PTO as the administrative agency responsible for the socially important task of issuing presumptively valid patents (35 U.S.C. §282) because of its expertise. In 35 U.S.C. §6(a), Congress required that the Board of Patent Appeals and Interferences (BPAI) be staffed by examiners-in-chief who are "persons of

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