

# HAS THE SUPREME COURT FORGOTTEN THE PATENTEE? RECENT PATENT LICENSING DECISIONS CONTRADICT PATENT POLICY, HARM LICENSORS, AND ALTER NEGOTIATION

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## I. INTRODUCTION

Over the past century, the relative power to negotiate and enforce patent license agreements has shifted dramatically from licensor to licensee. In the early 1900s, licensors had tremendous power with respect to their licensees; however, beginning in the early 1930s the licensing landscape started to change. This evolution is continuing and it is eroding licensors' bargaining strength. While this change arguably solved many problems, the momentum has carried the policy beyond what was necessary and moved the playing field far out of balance in the opposite direction.

As a result, licensors now have to bear a much greater risk that a licensee will seek a claim of invalidity, even without repudiating the license. This scenario is strongly supported by the Supreme Court's recent trend favoring free challenge of patents, but this trend also diminishes the presumption that a patent is valid.<sup>1</sup> The Supreme Court's view that "the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas" furthers this policy but does little to encourage invention.<sup>2</sup> This single-sided policy swing is striving to open patents to the general public at the expense of the patent-holder's monopoly, which is the primary means an inventor has to recoup funds devoted to creating the invention, or the quid pro quo.<sup>3</sup> The ripples of this power shift will have far-

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<sup>1</sup> 35 U.S.C. § 282 (2000) (declaring that "[a] patent shall be presumed valid [and] [t]he burden of establishing invalidity . . . shall rest on the party asserting such invalidity").

<sup>2</sup> *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

<sup>3</sup> R. Hewitt Pate, Asst. Atty. Gen., Dept. of Justice, Speech, *Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits on Antitrust* (Florence, Italy, June 3, 2005) (available at <http://www.usdoj.gov/atr/public/speeches/209359.htm>) (noting that "[i]ntellectual property laws reward innovators with the exclusive rights that serve as an incentive to bring new . . . goods to market [leading to] increased consumer welfare in the long term [in exchange for] disclosure").

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