

Forensic Testing Provides Key in Infringement Case

AS PATENT SUITS GO, the case of Aptix Corp. v. QuickTurn Design Systems Inc. in the U.S. District Court for the Northern District of California certainly is unusual.

It began with discrepancies between two sets of engineering notebooks produced by lawyers for Aptix Corp. Aptix had sued QuickTurn for allegedly infringing hardware emulation technology, a system for determining if silicon chips function properly.

Along the way, the notebooks disappeared in a reported theft the day before they were to be turned over for forensic ink testing. Then, the notebooks were returned under mysterious circumstances, and Aptix's founder, chairman and chief executive officer, Amr Mohsen, took the Fifth Amendment.

The case ultimately ended Sept. 8 with a blunt court opinion that Aptix, San Jose, Calif., committed fraud and perjury, and must pay \$ 4.2 million in attorneys' fees and costs. The district court's findings, damning as they may appear, have not dissuaded Aptix from preparing an appeal to the U.S. Court of Appeals for the Federal Circuit.

R.L. Smith McKeithen, senior vice president and general counsel for Cadence Design Systems Inc., QuickTurn's San Jose-based parent company, says the case is unique.

"I've been doing what I've been doing since 1971, and I've never seen conduct like this, and I've never seen a case like this," McKeithen says. "We believed that what had begun as a commercial dispute was one that was really contaminated—at a minimum unethical, if not unlawful, conduct—and suggestions certainly were made to the other side that all the parties would be better served if this lawsuit were dropped, because everybody was spending a lot of money."

Aptix forwarded a request for an interview to Raphael V. Lupo, a partner with the Washington, D.C., office of McDermott, Will & Emery. Lupo, who is handling the appeal phase for Aptix, declines to answer questions about the case.

"Because we haven't mapped out all the issues for appeal, I'm not at liberty to comment on each of the issues individually at this time," Lupo explains. "We take issue with the district court's decision in all respects, and we're in the process of evaluating the appeal at this time."

Mentor and Meta had engaged in previous clashes with QuickTurn, having lost a patent dispute to QuickTurn over hardware-logic-emulation patents in the U.S. District Court for the District of Oregon and the U.S. International Trade Commission. QuickTurn obtained injunctions prohibiting Mentor and Meta from selling infringing systems in the United States and filed patent infringement suits against those companies in Europe. Mentor, in turn, sued QuickTurn in Delaware for alleged infringement and failed in an attempted hostile takeover of QuickTurn, which Cadence later acquired.

McKeithen says Mentor had sold its emulation-technology patents to QuickTurn, and that it later tried to get back into the emulation business and infringed the patents it sold to QuickTurn, which led to the original Mentor-QuickTurn disputes.

During the discovery phase of the lawsuit, the issue of Aptix's dueling notebooks arose. McKeithen says his company not only requested documentation from Aptix but from the firm that had prosecuted the patent in the late 1980s.

"Upon examination of the materials that were produced, our team found that the copies of the notebooks produced by Aptix's litigating attorneys contained entries on a number of pages that were not contained in the notebooks produced by patent prosecution attorneys," McKeithen says. "The entries that were contained in notebooks produced by litigating attorneys just coincidentally supported claims made in the lawsuit against QuickTurn. The notebooks without those entries meant the patent was much less applicable to any technology QuickTurn had."

The notebooks produced by the patent prosecutors were dated August 1989. These notebooks were less detailed than the notebooks produced by Aptix, which served as the basis for a claimed invention date of July 31, 1988. After the discrepancies came to light, QuickTurn's legal team decided to ask for forensic testing.

"Something smelled really funny," says Jeffrey A. Miller, a partner with Los Angeles-based Lyon & Lyon, the law firm that represented QuickTurn in the case. "I don't want to accuse someone of committing fraud unless he really did it. We weren't going to start making allegations like these unless we really believed them."

Quickturn filed a motion to compel Aptix to turn over the notebooks for testing on Nov. 24, 1998, but on Dec. 14, before the Court could rule on the motion, Mohsen reported the notebooks had been stolen from his parked car in the Aptix parking lot. The Court, noting he had returned to his car later in the day, called his explanation weak, and also noted that nobody at Aptix had reported hearing Mohsen's car alarm go off. QuickTurn's attorneys also were

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the ink used in the documents to back up the claimed 1988 invention date had not even been made at that time.

"It's a relative ink-age test, and it's designed to determine how long the ink has been on the paper," Speckin says. "It takes about 312 years to dry completely. It's like a stain. The longer it's been in, the harder it is to get out."

Speckin says he also did infrared light testing that showed different inks had been used on various pages, and that paper-indentation testing revealed work reputed to have been done sequentially had been done out of sequence.

"An electrostatic detection apparatus picks up impressions in paper, and we were able to see that certain documents were on top of one another when written, and some documents were used as a model to copy others," Speckin says. "In some cases, the front side of a page was filled in after the back side had been filled out."

Also, in a number of places where the year 1988 appeared, Speckin determined the author mistakenly had written 1998 and then altered it.

"It's the only patent case I've ever seen where the writer of the notebooks took the Fifth," Speckin says.

In view of the evidence, U.S. District Judge William Alsup ruled that the patent was unenforceable and Meta, under the law of inequitable conduct, could not invoke the patent even though it may be a victim. Alsup also ruled that Aptix had acted fraudulently and in bad faith before the Court, and invoked the case of Chambers v. NASCO Inc. to order that Aptix pay all of QuickTurn's reasonable attorneys' fees and costs.

McKeithen says the forensic evidence turned up much important information, but also believes QuickTurn had a good strategy to win the case without it.

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