Profiles in IP Law

An Interview with
Chief Judge Randall R. Rader
By S. Lloyd Smith

Randall R. Rader was appointed to the U.S. Court of Appeals for the Federal Circuit by President George H. W. Bush in 1990 and assumed the duties of chief judge on June 1, 2010. He was appointed to the U.S. Claims Court (now the U.S. Court of Federal Claims) by President Ronald W. Reagan in 1988.

Chief Judge Rader's most prized title may well be "Professor Rader." As professor, Chief Judge Rader has taught courses on patent law and other advanced intellectual property courses at George Washington University Law School, University of Virginia School of Law, Georgetown University Law Center, the Munich Intellectual Property Law Center, and other university programs in Tokyo, Taipei, New Delhi, and Beijing. Due to the size and diversity of his classes, Chief Judge Rader may have taught patent law to more students than anyone else. Chief Judge Rader has also co-authored several texts, including the most widely used textbook on U.S. patent law, Cases and Materials on Patent Law, *(St. Paul, Minn., Thomson/West 3d ed. 2009), and* Patent Law in a Nutshell *(St. Paul, Minn., Thomson/West 2007) (translated into Chinese and Japanese). Chief Judge Rader has won acclaim for leading dozens of government and educational delegations to every continent (except Antarctica), teaching rule of law and intellectual property law principles.*

Chief Judge Rader has received many awards, including the Sedona Lifetime Achievement Award for Intellectual Property Law, 2009; Distinguished Teaching Awards from George Washington University Law School, 2003 and 2008 (by election of the students); the Jefferson Medal from the New Jersey Intellectual Property Law Association, 2003; the Distinguished Service Award from the Berkeley Center for Law and Technology, 2003; the J. William Fulbright Award for Distinguished Public Service from George Washington University Law School, 2000; and the Younger Federal Lawyer Award from the Federal Bar Association, 1983. Before appointment to the Court of Federal Claims, Chief Judge Rader served as minority and majority chief counsel to subcommittees of the U.S. Senate Committee on the Judiciary. From 1975 to 1980, he served as counsel in the House of Representatives for representatives serving on the Interior, Appropriations, and Ways and Means Committees. He received a B.A. in English from Brigham Young University in 1974 and a J.D. from George Washington University Law School in 1978.

Good morning, Judge Rader. Do you have any specific goals for the court during your tenure as chief judge?

The court ought to continue its marvelous record of resolving disputes in a fair and just manner. I also have some goals that supplement and enhance the work of the court.

Could you tell me what some of these goals are, please?

I think one of them would be to help the court understand its role in the international marketplace and help improve the cooperation among international judiciaries towards a legal system worldwide that's more friendly to an international market. I foresee doing that simply by communication. The Court of Appeals for the Federal Circuit is going to go to Tokyo this May and hold a joint judicial conference with the IP High Court of Japan. Thereafter, we'll go to China, Korea, Russia, and beyond. The hope is to create an atmosphere where the judges of the world can communicate and recognize the import of their opinions and also perhaps have an eye to minimizing conflicts to the extent possible. That's one goal. A second one will be to reduce the cost of litigation in the United States primarily through reducing the cost of e-discovery. The Federal Circuit Advisory Council of the court has put together a committee of some magnificent district judges on it led by the chairman of that committee, Ed Reines, and we are all working to find ways to limit that discovery expense.

Looking back on your tenure at the court prior to becoming chief judge, are there any specific opinions that you regard as memorable for their impact or for personal reasons?

Oh, there are many opinions that probably others would point to as significant. The ones that drew some kind of response from the Supreme Court are probably the more important ones—*Bilski*, *Festo*, *Microsoft*, and *AT&T*. These cases get an awful lot of attention, but those are not necessarily on top of my list.

Do you have any that are on the top of your personal list?

Some of those are district court opinions where I sat as a district judge and I think had some impact on the system from that perspective. I held *Markman* hearings in which I gave some guidance as to what role experts ought to play in that process. I had trials recently in the Northern District of New York and the Eastern District of Texas where I used the *Daubert* procedure to limit what I perceived as economically unsound damages testimony. Some of those strike me as opinions where I had to put a lot more of myself into them.

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You sat by designation, as you just referred to, on several district courts. How has this informed you as an appellate judge, and do you feel like that has had a positive impact on your duties as an appellate judge?

Most important thing I've done. No, the second most important I've done. The most important thing I've done is teach patent law. You just can't teach the law without acquiring some feel for how enablement affects obviousness, how obviousness affects enablement, and how the whole system fits together. But the trial judge perspective is critical to my work as an appellate judge. Just understanding the difficulty of putting together a clean record gives you a good deal of perspective as to how to read a record. Some of my colleagues read the record with harshness and are very critical of the record. It's a little harder from the other side to put together an absolutely clean record, and so you read it with a little bit more compassionate eye after you've tried to do it yourself.

Do you think there is anything you've learned from sitting by designation with respect to the Markman *process that might be beneficial in bringing down the number of reversals on claim construction rulings?*

Well, what your question is really going to, there, is the difficulty of claim construction. The philosophical difficulty of conveying new technology and language terms is very elusive and very difficult. Yes, I have some things that I think are important to the process, but I'm not sure they are rules that would apply in every case. The bottom line is you just have to immerse yourself in the technology and listen to the experts and learn as much as you can about the advance made by the invention. I never am confident I've completely captured the definition of the invention in my *Markman* recitation of what the claims mean, but I think you can get close if you apply yourself to that immersion process.

Do you have a view of whether specialized district courts for patent cases would be helpful overall?

I think it would be a good step. But I don't think it's a feasible step. I don't see district judges being willing to admit that some are more competent than others in any area of the law. They also worry that if we carve out a special area for patents, then there will be a move to carve out a special area for antitrust and other complex areas of civil litigation. So I'm sure it will be resisted by the district courts and probably by Congress. While I think there would be some value to the patent system, I think there is a general concern that it would disturb the balance of our overall jurisprudential system. So, I don't think it's likely to happen.

Do you think there is any role for the Federal Circuit to play as an exclusive appellate court for copyright or Lanham Act cases?

Should have been done from the outset, absolutely. There is great wisdom in it. Those cases often fit together anyway—at least the copyright—and software areas overlap with the patent areas, and the trademarks are parts of the same commercial dispute that often feature trade secrets and business torts and everything else in a patent suit. It would just be logical to have them all together and probably prevent a lot of jurisdictional difficulties.

If Congress saw fit to bestow this exclusive appellate jurisdiction on the Federal Circuit, would you be concerned about the workload of the court?

No, because a lot of those would be the same suit in the same area. We have expertise in this intellectual property area that I think outdistances any other court, maybe anywhere in the world. We'd handle this area with proficiency.

Looking back at your career and your experience, maybe your early experience, is there any particular experience that stands out to you as beneficial now in giving you some specific insight in your role as chief judge?

The early experiences that most helped me are those when I was a trial judge. I had the difficulty of dealing with witnesses and resolving issues of fact that at times caused me to wonder if I had the right profession.

Petitions for rehearing en banc are often filed but rarely successful. Do you have any advice for the parties coming before the court regarding the filing of such a petition?

Yes, the parties need to help us identify the cases in the areas of law that genuinely need en banc review. There is, of course, a standard procedure that says you ask for en banc review after you lose a case at the Federal Circuit. We get a lot of en banc requests for that reason, but the bar needs to figure out a way of telling us that there are certain areas of the law that are different from just someone filing an en banc request after losing a case. I think you do that with some kind of concerted effort where all of the IP organizations and corporations would somehow band together on important issues, where you get a pronounced effort to come to the court on that issue. We saw that a bit with inequitable conduct. You've seen it a couple of times at the Supreme Court where you get 50 professors asking for review of some federal circuit case. That should all happen at the Federal Circuit level. They are more likely to get a better IP result if they come to the court with expertise in the IP field. I understand that it's glitzier and more career building for a professor to take a case to the Supreme Court, but in terms of actually effecting a better outcome for the law, you should refocus that effort on the Federal Circuit and its en banc process.

Even prior to the en banc process, just on the initial appeal, do you find amicus briefs helpful?

Yes, I like amicus briefs.

In what way are they particularly helpful?

Well, the best amicus briefs don't just repeat the arguments made by one of the parties. The best amicus briefs try to help us see the implications of our cases long term, how this would affect a particular segment of the IP community or a particular part of the marketplace, how it would inhibit investment, and whether it would spur investment and cause more dedication to proper IP principles. That's the kind of thinking we need. We need something that looks long term and tries to predict with statistics and insights into how the court's cases would have some impact downstream in the marketplace.

It sounds like, beyond the legal impact of your rulings, the court is also concerned with the economic or potential social impact of some of these rulings as well. Is that a fair assessment and is that how you look at the cases?

Our first job, of course, is to decide the matter between the two parties according to the law. But we recognize and must recognize that our cases have an impact beyond just the parties before us and again that's where the amicus process can inform us and help us to give a better decision. We can resolve the case before us in a responsible manner according to the law and at the same time ameliorate any unintended consequences if we understand them in advance. We can write the case in a way that narrowly decides the issue before the parties without having any impact beyond that case, or we can resolve it in a way that gives guidance for future cases and makes the law more predictable and more amenable to facilitate business decisions. But we need information before we can do that well.

A lot of us think of the Federal Circuit as a patent court, but obviously you have other substantive duties as well. Do you feel like those other areas have helped inform some of the patent decisions?

Yes, very much so. Of course there is an overlap. The trade issues help us understand the international implications of all our decisions. The tax and contract cases help us understand the difficulties of drafting and enforcing contractual language and licenses. There is a very nice overlap of federal jurisdiction in most respects.

You've participated in many foreign delegations. Are there any substantive or other aspects of foreign patent systems that you feel would be of particular value to implement here in the United States?

Yes, our system is in many ways the quixotic one. We're the one that's out of step with most of the systems in the world, and I'm not just talking about the first to file, first to invent dichotomy, which isn't too significant except that it affects the definition of prior art, which then extends on to other areas of the law, although those differences are smaller than you might expect. There's the best mode requirement, which just kind of wreaks havoc on specifications coming in via the Patent Cooperation Treaty to our system that were drafted without understanding some of these unique American requirements, so there is a lot we could do to make our law serve U.S. inventors and foreign inventors equally.

Are there any others that come to mind?

Many; we could spend a lot of time. There are differences in the way the obviousness requirement is implemented, and we have some superior aspects of our law too. I've always thought that our use of secondary considerations is a strong point in U.S. jurisprudence that I make an effort to export.

The Supreme Court seems to have taken an increased interest in Federal Circuit decisions. Do you have a view as to a reason for that increased interest?

The importance of our jurisprudence. The Federal Circuit is having a great impact in the world marketplace, and the Supreme Court recognizes what we are doing.

Do you have any views as to why any particular cases might have been of interest to the Supreme Court?

I think it's again what I said before: it's just a tribute to the importance to this area of the law and its vast impact, not just on our own market, but worldwide, and their recognition that this is important. Remember, they take cases because they are important, and they feel a need to be involved in resolving issues that have a vast scope.

What is your view looking back at the Federal Circuit's patent jurisprudence over the last 30 years, of its success or failure?

I think the Federal Circuit has been very successful. We've got some areas where we might have done better. We are a human institution, and human institutions are never perfect. I think the Federal Circuit's carried out the goal its creators had in mind for it. We have made the patent system uniform across the country. We have given it a power to incentivize investment and make ours the most innovative economy in the world. Innovation drives the international marketplace. I think the Federal Circuit has a role in all of those and has helped facilitate.

Is there anywhere you would like to see the court do better?

I'm pretty proud of the court. We are timely with our decisions; our decisions are usually well reasoned and understandable. I don't have any areas in which I see the court needs to vastly improve. I think it needs to just keep up the record that it has established.

Is there a historical judge or other figure that you consider to be a significant role model for you as chief judge here at the Federal Circuit?

I haven't really thought about that before. There are several people that come to mind. I think of the dynamism of Howard Markey [the first chief judge of the Federal Circuit]; I think of the solid day-to-day performance of Glenn Archer and [Federal Circuit chief judge from 1994–97] and Bob Mayer [Federal Circuit chief judge from 1997–2004]; I think of the innovativeness of Helen Nies [Federal Circuit chief judge from 1990–94]. So, there are several that I look to as models.

Is there any particular advice you would give to litigants who are appearing before the Federal Circuit?

Prepare well, know your record, and, I say this often and it will sound repetitive, but know the role of an American appellate court. We are not rehearing the entire case; we are looking for a single error that warrants a new trial or a different result. So, you're best advised to focus your efforts on what that single most reversible error is and bring all of your wisdom to the court on that single error and its need for correction to a court of error correction.

Can you give some insight as to the role that oral argument plays as compared to the written submission of the parties? And also, do you believe that the time constraints are overbearing and that there needs to be some flexibility, in certain cases, to have longer oral arguments?

The shorter oral argument serves well the purpose of the court, which is to focus the parties on that single issue that

requires a new trial or reversal. So the brief time period can actually serve the court's purpose. There are cases that simply require more time, and the court is quite flexible. Presiding judges tend to give more time when it's needed; when the debate or the conversation between the bench and the counsel is intense and informative, the presiding judges do give additional time. I would note as well that where parties can perceive the need for more time at the outset, they can always make motions to request it, and the court would, I think, deal with those quite favorably.

Thank you, Judge Rader. We appreciate your time. ■