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Fed. Circ. Mulls Densify's Bid To Revive $236M Patent Suit Win

By **Khorri Atkinson**

Law360 (September 3, 2021, 9:07 PM EDT) -- A Federal Circuit panel on Friday seemed hesitant to reinstate a $236 million jury verdict against VMware for infringing Densify cloud infrastructure patents, scrapped at the trial level for lack of standing, with one judge suggesting that Densify's view of Article III standing appeared "too broad."

The three-judge panel examined Densify's petition for a writ of mandamus challenging a Delaware federal judge's decision last December that Cirba Inc. — a cloud infrastructure company doing business as Densify that directly competes with VMware — lacked standing and that only Densify's related patent licensing business, Cirba IP Inc., could level infringement claims against VMware.

Kirkland & Ellis LLP partner Paul Clement argued in court Friday that U.S. District Judge Leonard P. Stark got it wrong in ruling that Cirba Inc. lacked constitutional standing to join its patent licensing affiliate in the suit, and maintained that though Cirba Inc. was a licensee of the patents in dispute, it can still sue.

The former U.S. solicitor general said the trial judge not only conflated statutory and Article III standing in holding that the entity allegedly harmed by infringement suffered no injury, but went against Federal Circuit precedent in holding that exclusionary rights in a patent are necessary for constitutional standing.

To have standing to bring claims under Article III of the U.S. Constitution, the plaintiff must show it has suffered an injury traceable to the challenged conduct of the defendant and that a ruling in its favor is likely to redress the harm.

But while the panel parsed case law as it examined the appeal, U.S. Circuit Judge Richard G. Taranto seemed to agree with the trial judge that Cirba Inc.'s corporate relationship to Cirba IP does not automatically grant it constitutional standing because Cirba Inc. had not shown it was harmed. The trial judge had said Article III standing hinges on exclusionary rights to a patent.

Clement said the trial judge's order flies in the face of judicial precedent on the standing of patent licensing companies in infringement cases. He repeatedly explained that Cirba Inc. was granted an exclusive license from its own subsidiary and Federal Circuit case law suggest that the entity satisfies the jurisdictional requirement to bring the case.

Judges Taranto and Todd M. Hughes didn't see it that way.

"The standard for having a statutory right to sue is not described as having an exclusive license but rather having an exclusionary right — meaning a right to exclude others by going after them," Judge Taranto reasoned. "That's what I took from Judge Stark's view of this license."

Clement called that assertion "baffling" and maintained that Cirba Inc. has an exclusive, transferable worldwide license to use the patents-in-suit.

Unmoved by that argument, Judge Taranto said that still does not mean Cirba Inc. has proprietary rights and the authority to exclude others, unlike Cirba IP.

Judge Hughes, echoing similar sentiments, asserted that a reading of the license suggests Cirba Inc. merely has a right to use the patents.

Circuit Judge Kara Farnandez Stoll also appeared dubious of the lawyers' argument.

The judge explained at one point that if an entity has exclusionary rights to a patent and someone competing against the entity is using said rights, that would provide a basis to sue. However, any harm that comes from not having an exclusionary right to a patent, but someone is competing against the entity nonetheless, wouldn't create an Article III injury to sue, Judge Stoll added.

"Your view of injury is very broad," the judge told Clement.

VMware attorney and Morrison & Foerster LLP partner Deanne E. Maynard urged the panel to affirm the trial judge's ruling. She doubled down that Cirba Inc. has no exclusionary rights and therefore lacked legally protected interest and Article III standing.

Maynard also stated that VMware's legal team sought to resolve the standing issue during pretrial. But the two plaintiffs had argued that standing needed not to be tried and asked the trial judge to address the issue post-trial, she said.

"And significantly, they agreed with us that if they're a bare licensee they'd lack standing," Maynard told the panel. "So they knew, whether it was constitutional or statutory, that they had to prove they were more than a bare licensee to prove their claims."

The underlying case involves 11 patents — the two Densify patents that were at issue in the January 2020 blockbuster jury trial along with four patents VMware asserted in counterclaims, four additional VMware patents and one additional Densify patent asserted in a Virginia federal court case that were later consolidated with the current litigation.

The suit, filed in April 2019, claimed that, following VMware's failed efforts to buy Densify, VMware infringed two of Densify's patents by copying features of its predictive analytics software and incorporating them into the latest versions of VMware's flagship product, which it sells under the brand name vRealize Operations.

Densify alleged that VMware sought to crush the Toronto-based tech startup after an investment banking firm valued Densify at $500 million and VMware's efforts to acquire it fell apart. A jury awarded Densify $235.72 million for VMware's infringement of one patent, and $1.11 million for VMware's infringement of another.

Densify months later asked Judge Stark to double the verdict, arguing that VMware's infringement was willful and with "the stated intent of destroying Densify."

But the judge ruled instead that Cirba Inc. lacked standing to join its patent licensing affiliate in the suit in the first place. The order left Cirba IP as the only party that could sue VMware over allegedly infringing Densify's cloud technology**.** According to the appellate briefs, a new trial is scheduled for 2023.

U.S. Circuit Judges Richard G. Taranto, Todd M. Hughes and Kara Farnandez Stoll sat on the panel.

Densify is represented by Courtland L. Reichman, Ariel C. Green, Christine E. Lehman and Aisha Mahmood Haley of Reichman Jorgensen Lehman & Feldberg LLP, and Paul D. Clement and Julie M.K. Siegal of Kirkland & Ellis LLP.

VMware is represented by Deanne E. Maynard, Brian R. Matsui, Michael A. Jacobs and Richard S.J. Hung of Morrison & Foerster LLP, and Seth P. Waxman, Thomas G. Saunders and William F. Lee of Wilmer Cutler Pickering Hale & Dorr LLP

The case is In Re Cirba Inc., case number 21-154, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Andrew Karpan. Editing by Peter Rozovsky.

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