

Latham Whittles Long-Running Patent Case Down to Zero Damages

After nine years of litigation, U.S. District Judge Liam O’Grady says there was no evidence to support a jury award of \$1.75 million against Adobe Systems.

BY SCOTT GRAHAM

It’s taken nine years, two judges, multiple law firms, a jury trial and a couple of detours to the U.S. Court of Appeals for the Federal Circuit. But Adobe Systems Inc. is finally out of a lawsuit over encryption patents, with zero damages.

TecSec Inc., a company founded by a former director of the CIA’s Cryptographic Center, has been pursuing Adobe and several other technology giants in the Eastern District of Virginia since 2010, accusing them of infringing its patents on multilayered encryption. TecSec argued at trial that Boeing had paid \$10 million for a license and Microsoft paid \$16.5 million to settle previous litigation, but that Adobe had been trying to “wait out” TecSec’s three founders, who are in their 70s and 80s.

TecSec was seeking as much as \$41 million in the lead-up to trial, which with trebling could have made the case worth well over \$100 million.

A Latham & Watkins team led by partners Tara Elliott, Max Grant and Michael Morin persuaded U.S. District Judge Liam O’Grady of the Eastern District of Virginia to limit the damages period on the ground that TecSec hadn’t provided notice of infringement before suing. Jurors awarded \$1.75 million in December for Adobe’s direct infringement but absolved the company of trying to induce its customers to infringe.



Latham & Watkins partner Tara Elliott.

O’Grady then ruled Tuesday that there was no evidence to support that \$1.75 million award. “At trial, TecSec pursued a damages theory tied solely to Adobe’s sales of Adobe Acrobat to customers,” he wrote. “The testimony of a reasonable royalty based on sales to customers alone cannot support any award of direct infringement damages.”

“We are grateful that the court rightfully vacated the jury’s trial damages award ... as there was no evidence to support any award of damages once the jury correctly found that Adobe was not liable for induced infringement,” Latham’s Elliott said in a written statement.

TecSec sued Adobe, IBM Corp., Cisco Systems Inc., Oracle Corp., SAP SE and others in 2010. U.S. District Judge Leonie Brinkema granted IBM summary judgment of non-infringement in 2011. Since then the litigation has focused on Adobe, with TecSec twice winning rulings from the Federal Circuit reversing Brinkema's claim construction orders.

The second time around TecSec asked for reassignment to a new trial judge. The Federal Circuit refused, though it did say that "the extended pendency of this litigation raises questions as to the efficiency of the district court's one-defendant-at-a-time approach."

On remand, Brinkema announced she was voluntarily recusing herself. "Although I have no ill feelings towards TecSec, I must say in this particular case, I really do have a very strong belief that despite the Federal Circuit seeing it differently, that my constructions were appropriate," she explained at a November 2016 hearing.

The case was assigned to O'Grady, who turned away Adobe's argument that the patents are ineligible for protection under

Section 101. Adobe then brought in Latham last summer as the case was approaching trial.

In opening statements, Hunton Andrews Kurth partner Michael Oakes told jurors that Adobe was "at the top of the list" of technology giants using TecSec's technology without authorization.

Although Adobe had admitted infringing the patent only once, Adobe executive John Landwehr had explained to Adobe customers on a company blog how to encrypt PDFs on multiple levels, Oakes said. "Adobe can be held responsible for the infringement of its customers if Adobe knew about TecSec's patents and instructed them to use the technology in a way that infringed the patents," he told jurors.

Latham partner Grant said in openings that Landwehr had simply "demonstrated the obvious"—that users could put an encrypted or a non-encrypted file in an envelope and then encrypt the envelope.

"If multi-level encryption mattered, you'd see evidence that Adobe provided instructions about how to do it in our user manuals. You won't," he told jurors. "If multi-level

encryption mattered, you would hear evidence that our customers were demanding it. They weren't."

Jurors ultimately found that all six of the asserted patent claims are valid and directly infringed by Adobe. But they found no indirect infringement by Adobe customers.

That was fatal to TecSec's damage award, O'Grady ruled Tuesday. "Now that the court has had the opportunity to review the record and the more thorough arguments of counsel," he wrote, "the court finds that the damages experts' testimony could not have served as a basis for an award of direct infringement damages as a matter of law."

Latham's team also included counsel Rachel Weiner Cohen and associates Dale Chang, Brett Sandford and Will Orlady. Adobe's senior director for intellectual property, Karen Robinson, and legal counsel Andy Nguyen headed Adobe's in-house team.

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