

The Presumption of Patent Validity: An Experimental Study

David L. Schwartz, Chicago-Kent College of Law
Christopher B. Seaman, Chicago-Kent College of Law

In this project, we are experimentally testing the importance of burdens of proof in determining the validity of a patent in litigation. The genesis of these experiments is the Supreme Court decision in Microsoft Corp. v. i4i Limited P'ship, 131 S. Ct. 2238 (2011). In i4i, the Court rejected Microsoft's claim that a jury need only be persuaded by a preponderance of the evidence to find a patent invalid, at least when the evidence before the factfinder regarding invalidity was not before the PTO during the examination process. Instead, it reaffirmed that an invalidity defense must be proven by clear and convincing evidence. But the Court also concluded that if the party challenging the patent's validity relied on evidence not previously considered by the PTO, then the jury should be instructed that this burden "may be easier to sustain." Id. at 2251.

Currently, there is a dearth of evidence about whether modifying or eliminating the clear and convincing evidence presumption would result in different outcomes regarding patent validity in litigation. We are conducting a series of experiments to empirically examine this issue. In our experiments, each subject receives short fact pattern simulating the information considered by a juror in a patent infringement lawsuit. The fact pattern is loosely based upon a real case involving relatively simple technology—golf ball design. See Callaway Golf Co. v. Acushnet Co., 576 F.3d 1331 (Fed. Cir. 2009). After reading the fact pattern and a summary of the parties' arguments regarding invalidity, subjects receive one of three jury instructions that instructs the subjects on the burden of proof: (1) a control version (clear and convincing evidence), (2) a first treatment version with the language based on the Court's decision in i4i (clear and convincing evidence, but this burden is easier to satisfy if the invalidity claim relies on evidence not previously considered by the PTO), and (3) a second treatment version (preponderance of the evidence). The survey reached a surprising result, which we will present at the conference. We will also discuss planned future iterations of our experiment.