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Litigator of the Week: Mark Scarsi of Milbank, Tweed, Hadley & McCloy

Mark Scarsi

By Jan Wolfe
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Under the threat of litigation, more than 130 companies have agreed to license Wi-LAN Inc.'s earliest patents relating to wireless technology. But when Apple Inc. called Wi-LAN's bluff and put one of those patents on trial this week, it took jurors just a few minutes to hand Apple a total defense win. According to one juror, what sealed the verdict was a stellar closing argument delivered by Apple lawyer Mark Scarsi of Milbank, Tweed, Hadley & McCloy.

After less than an hour of deliberation, a federal jury in Marshall, Texas, returned a verdict on Wednesday that Apple doesn't infringe a Wi-LAN patent relating to high-speed wireless data transmission. The jury also found all 10 claims of the patent invalid. Wi-LAN's lawyers at McKool Smith, Samuel Baxter and Robert Cote, had sought a whopping $248 million in damages, arguing that the iPhone and iPad wouldn't have happened without Wi-LAN's patent. Wi-LAN's lawyers also sought enhanced damages for willfulness, alleging that Apple blatantly stole Wi-LAN's ideas from one of its cofounders.

Two inventors founded Wi-LAN in 1992 after obtaining patents on fundamental aspects of wireless networking. Through Wi-LAN, the inventors hoped to commercialize and develop their patented technology. But the company eventually morphed into a pure licensing company. It went on a patent shopping spree, built up a massive patent portfolio and began demanding fees from gadget-makers. According to Wi-LAN's website, it has struck deals with the likes of Nokia Corp. and Samsung Electronics Co.

In September 2011, as Wi-Lan's two earliest patents were nearing expiration, the company asserted one of them against Apple. Six other companies were also named in the complaint, including Alcatel-Lucent and Hewlett-Packard Company. As trial neared, all of Apple's codefendants opted to settle.

The jury trial kicked off on Oct. 15. Scarsi delivered Apple's openings and closings. For the damages phase of the case, Apple called on the help of Kirkland & Ellis partners Luke Dauchot, Jeanne Heffernan and Robert Appleby. Melissa Smith of the small Texas firm Gillam & Smith was also a key member of Apple's trial team, handling jury empanelment.

During the trial, Scarsi argued that Wi-LAN was getting too creative with its infringement claims. For most of its history, he noted, Wi-LAN was trying to commercialize "local area networks" (LANs), computer networks that span a relatively small area. When that failed, Wi-LAN tried to drum up money by brazenly claiming that the patent also covers cell phone technology, Scarsi said. "They named their company Wi-LAN because that's what they were going into, the LAN space," Scarsi said during his closing. "Now Wi-LAN won't even admit that, though. They tell you, well, our name, LAN, really had nothing to do with our products. … Is that credible testimony?"

Through an Internet search, Scarsi turned up what he said was clear evidence that Wi-LAN's expert witness had lifted his testimony from About.com, a user-generated online encyclopedia. When the witness was on the stand, Scarsi pointed out the similarities between his testimony and the About.com entry. In his closing, Scarsi argued that Apple's expert witness had actual experience in the cellphone industry, whereas Wi-LAN's expert "went to About.com on the Internet and pulled out a bunch of stuff to learn about the cell business."

Sheila Ashlock, a junior high school social studies teacher, sat on the jury. She told us that Scarsi did a "phenomenal" job pulling together the evidence during his closing argument. "The majority feeling was that Wi-LAN didn't prove to us that the patent was designed to be cellular," she said. "I searched for a way to fall for the plaintiff, but I just couldn't in the end."