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Categories:
[Publications](#)

Sometimes, Cases Just have to be Tried

“The only thing that keeps us alive is our brilliance. The only thing protecting our brilliance is our patents.”

– Edwin Land

I just finished reading *A Triumph of Genius* by Ronald Fierstein. As a practicing lawyer and a camera buff, I was fascinated with the story of the development of instant photography which – at least for a short time – disrupted the entire photo business.

I was also intrigued by the epic litigation between Polaroid, the relatively small innovative company that developed the instantaneous technology, and the corporate giant, Kodak, who Polaroid argued tried to steal it.

As a litigator, I had two significant takeaways. The first is a “how to” – how to try a complex, sophisticated case in a way that people deciding it (in this case, a judge) can understand and latch on to.

The second more philosophical takeaway really is a question: Considering the huge outlay of resources and legal costs generated by trials, are they still a significant and reasonable method of resolving disputes?

“Why can’t I see these pictures right now? I don’t want to wait.”

– Jennifer Land 1943

Some background: Polaroid was founded by Edwin Land, whose innovative genius and intellectual abilities cannot be understated. The fact that Steve Jobs considered Land a role model and “a national treasure” certainly attests to his brilliance.

Ever since his 3-year old daughter, Jennifer, asked Land on a New Mexico morning in 1943 why she could not see her pictures immediately, it was Land's dream to create a camera and film that would produce instantaneous photos. Today, the ability to immediately see a digital photo is taken for granted.

But before Land and Polaroid, a photo would have to be taken and stored on film. The film was removed from the camera and sent elsewhere for development. Only sometime later – days or even weeks – could the photo actually be seen for the first time. If the picture turned out badly, there was no do-over. There was no means of turning back the clock.

What Land did was to revolutionize and jumpstart the photography business with a camera that would immediately spit out physical photos. (Yes, that's exactly what the Polaroid cameras ultimately did.) It took Polaroid engineers years of painstaking technical research and plain hard work to develop the necessary and complicated technology to do this.

Kodak, at the time the largest film and camera company in the world, decided that after the Polaroid work was completed it would create its own instant camera. To get to market quickly, Kodak used the patented technology of Polaroid arguing that the Polaroid patents for the technology should never have been granted to begin with. This set the stage for the epic legal battle between Polaroid, the industry's David, and Kodak, the Goliath of the photography business.

Armageddon

The resulting litigation went on for 15 years. Polaroid filed its initial complaint on April 26, 1976; discovery lasted well over five years. The liability trial lasted 71 days, the damage trial carried on almost six months, and the appellate process lasted well over five years.

In the end, the result was a victory for Polaroid and the protection of its technology and patents. The company was awarded almost \$1 billion in damages and an injunction against Kodak, preventing the continued sale by Kodak of its instantaneous camera – a remedy which was virtually unheard of at the time.

The methods used by the two contestants to try the case could not have been more different. Polaroid's lawyers recognized that like most patent infringement disputes this case would force the Judge to look back to the time of invention and innovation. The Polaroid lawyers understood that what was new and revolutionary at the time of invention had by the time of trial become standard and accepted. The lawyers knew that it would thus be tempting to conclude with the benefit of hindsight that Polaroid's technology wasn't really all that revolutionary of a development.

To combat this, the Polaroid lawyers successfully took the Court back to the time when the technology was created and to what was really happening at that time. They told a compelling story about the creation of the technology: what was occurring in the world at the time, the personalities of the key players, what they were trying to achieve, and why. The Polaroid lawyers took the judge all the way back to the summer day when Land's daughter asked him why she had to wait so long to see a picture and then brought the story forward.

Classic story-telling techniques and good lawyering: as the Polaroid lead lawyer put it, it was his goal to develop a story behind the technology so that the making of inventions could be assessed in a real life context."

The Kodak argument was that the Polaroid patents that made instantaneous photography possible were really based on prior art, that is, what technically already existed. Kodak argued that the technology was created only through incremental progress in patents that had already expired. According to Kodak, Polaroid's technology was, in somewhat convoluted terms of the intellectual property world, not "non obvious," making the use by Kodak of this technology acceptable. Thus, even though the Polaroid camera and the Kodak camera looked and worked almost exactly the same, Kodak argued that it really wasn't infringing on the Polaroid patents at all.

To establish these points, Kodak engaged in what can only be described as a scorched earth approach. Kodak embraced the complicated and tried to pound both the Judge and Polaroid into

submission with repetition and vigorously fighting every battle whether worth it or not. Kodak emphasized, examined and repeated in excruciating detail every fact whether important or not. The result predictably was that the Judge got lost and couldn't tell what Kodak thought was important and what the Kodak story truly was.

Separating wheat from chafe is indeed one of the hardest things a trial lawyer must do. It's so hard because we want the fact finder to see and hear all the good stuff we have. But the most talented lawyers are able to take the facts – whether they be few, or in the Polaroid case, vast and confusing, and tell an interesting, understandable and compelling story.

“Mama Don't Take My Kodachrome Away” – Paul Simon

The broader and more important question is whether the case – or indeed any complicated and significant case – should be tried at all. It shouldn't escape anyone's notice that both Polaroid and Kodak are long gone, having disappeared into the musty world of irrelevance, obsolescence and bankruptcy. Indeed, digital photography first appeared on the horizon at about the same time the trial commenced.

Would someone as astute and creative as Land have recognized the disruption digital photography would bring, had he and his company not been so preoccupied with litigation over what would prove to be a dinosaur? Kodak also failed to evolve and lost out to the digital world – despite the ubiquitous “Kodachrome Sold Here” signs you would see (and still see) hanging off of buildings around the world. Without doubt as it became increasingly personal and adversarial over time, the lawsuit drained the resources and vitality of both companies.

The case was litigated at a time in American jurisprudence when there were no holds barred in litigation. Long-winded objections to discovery questions (which often were designed to suggest the answer to the witness), and frequent and inappropriate instructions not to answer questions in the discovery process, led to protracted trips to the courthouse. Depositions were only limited by the

lawyers' imaginative ability to formulate questions, with no time or subject limits. A lack of Court imposed time limits on direct and cross examination at trial fueled the Kodak strategy. Thankfully, while our system is far from perfect, we have eliminated much of this gamesmanship.

Given all this, it's tempting to say that Kodak and Polaroid, in particular, should never have fought so long and so hard. They should have settled and moved on. My initial reaction was indeed that the 15-year fight was not worth it. But Fierstein would say that I'm missing the point, and upon reflection, I am inclined to agree.

So then what is the point? The real lesson is that the system actually benefited from the fact that someone was willing to take on the battle and fight hard for its intellectual property.

Because no one before Land and Polaroid had been willing to engage in such an epic battle with a giant like Kodak, the Kodak team never even considered that they would lose. Or that the Court would look at the Polaroid patents with anything other than a literal and narrow view. Kodak also never considered the risk that its sale of cameras that infringed on the Polaroid patents would be enjoined. Kodak also never seriously considered settling with Polaroid on terms that approached what it knew would be acceptable and which were commensurate with the risks.

But Kodak was not necessarily being Pollyannaish. At the time, and going back to the 1930s and 40s, patents were not vigorously embraced and upheld by the judiciary and the use of injunctions in patent litigation—a standard remedy employed today—was unheard of. Thus, Kodak was emboldened by what it considered a limited risk, and simply could not see the outer limits of the true exposure.

By trying—and winning—the case, Polaroid succeeded in establishing the outer limit of possible risk in patent litigation and a more accurate means for both plaintiffs and defendants to evaluate future cases. This inevitability led to better and fairer future settlements. American Intellectual Law Association Executive Director Michael Bloomer put it this way: "A district court put Kodak out of the instant camera business in one day...That's something chief executives understand."

And, by establishing the risk and exposure, the trial also helped usher in a more liberal view of what is valid when adding to an older patents and technology. By his stubbornness, Land helped keep the system honest.

The result of the trial demonstrated that the value of new innovation built on previous technology, resulting in a new and better product, was certainly more than the Kodaks of that time realized. Patents became important in the protection of intellectual property and technology. In fact, according to Fierstein, the verdict ushered in one of the greatest periods of innovation the world has ever seen.

Wither the Trial?

One lesson from this is that sometimes cases just have to be tried in order for the right and fair to prevail. Personally, I am proud to say that at least twice, I have been involved in such watershed cases that changed future risk assessment for the better. In both situations, it took brave and resolute lawyers and clients to bring about the result.

Sometimes cases have to be tried, but with so few cases actually being tried today, I wonder if such resolute clients and lawyers still exist. It's easy and tempting to resolve matters based on immediate monetary evaluations and not principal. And given the reduced number of trials, the legal skill set which makes lawyers comfortable and confident in the courtroom is also eroding enhancing the reluctance to go to trial.

Would the Polaroid case be tried today? It's hard to say. But without trials everything becomes analyzed based on "settlement values" that may have little basis in courtroom risk and a jury's potential decision. For the Polaroids of the world, and in an indirect way the rest of us, that's a problem.

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