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IP Practice: Holland & Knight

By **Ryan Davis**

Law360, New York (August 19, 2008) -- After many years of court decisions that strengthened patent protections for business, the opposite may be happening as courts weaken patent protections, according to Joshua Krumholz, a partner in Holland & Knight LLP's Boston office and leader of the firm's intellectual property practice group.

The 1980s atmosphere in which patents were given little weight gave way to more recent case law that strengthens patents "to a level where it's inappropriate," Krumholz said. And that led to the phenomenon of patent trolls — but all that is beginning to change.

"There's a general consensus that the pendulum is swinging back," he said.

Like many intellectual property attorneys, Krumholz is keeping a close eye on the *Bilski* case that was argued before the Federal Circuit earlier this year. That case has the potential to deliver another blow to patent protection, Krumholz said.

The *Bilski* case has to do with patents on business methods, which critics say have little connection to physical invention. The case could banish such patents altogether.

"Now we're at a point where the perceived weaker patents are becoming weaker still," Krumholz said. "The bigger picture is that this is another case that weakens patents."

Other recent decisions have also provided support for the theory that the pendulum is swinging back, he said.

"It has been an extremely active last two years with the Supreme Court and the Federal Circuit, with a lot of precedent-setting cases that impact what we do," Krumholz said.

Krumholz pointed to the U.S. Supreme Court's decisions in *KSR International Co. v. Teleflex Inc.*, which made it easier to invalidate patents for obviousness, and in *eBay Inc.*

v. MercExchange LLC, which determined that an injunction should not be issued automatically when patent infringement is found.

“In combination, those decisions have changed the balance of power,” Krumholz said. “Valid patents are still going to prevail, but it eats away at the cases on the edges.”

Holland & Knight has a full-service IP practice that handles cases in all areas of intellectual property, but patent litigation is the most steady, Krumholz said.

He added that the importance of patents to businesses has prompted clients to become more sophisticated about protecting their patents. Many clients have educated themselves about the patent troll phenomenon and have been coming up with strategies to deal with such entities, he said.

“They’re also less willing to settle with trolls, which they see as ‘feeding the monster,’” Krumholz said.

Even with the shaky economy, the changing nature of the case law hasn’t had much impact on the amount of work done by Holland & Knight, Krumholz said.

“There’s a common belief that IP is relatively recession-proof, and our experience thus far has been consistent with that,” he said. “We’re as busy as we’ve ever been, probably busier.”

To that end, the firm has been growing — a mandate Krumholz was given when he took over as the leader of the intellectual property practice group three years ago.

The IP group added eight attorneys between 2006 and 2007, and earlier this year a team of five lawyers joined the practice from Seyfarth Shaw LLP. That group deals primarily with foreign clients, including Korea’s LG Electronics Inc. and Korean rock star Rain.

The most recent addition is something of an exception, Krumholz said, since the firm “decided not to grow in big groups, since we want to control the people we’re bringing in.”

-- Additional reporting by Jocelyn Allison and Erin Coe