

Most Admired Attorneys: Durie Tangri's Mark Lemley

By **Melissa Lipman**

Law360, New York (August 24, 2010) -- Combining a prolific academic career at Stanford Law School with a bustling practice at Durie Tangri LLP, Mark Lemley has earned a reputation among his colleagues as an encyclopedia of intellectual property law as well as a place on Law360's list of the 10 Most Admired Intellectual Property Attorneys.

For Lemley, the law is both a practical and an intellectual pursuit, a fact reflected as much in the cases he handles as in his time split between litigating and teaching and publishing.

In one of his current cases, Lemley and his firm are representing T3 Technologies Inc. against IBM Corp. before the U.S. Court of Appeals for the Second Circuit in a case that treads the line between antitrust and IP law.

Before it went out of business, T3 made computer mainframe server systems that allowed customers to run IBM's operating systems on cheaper hardware made by other companies. T3 and others in the industry have accused the technology giant of trying to block competitors by suing them for copyright infringement.

"I like the complexity of the interaction between these two already complex bodies of law," Lemley said. "We want to make sure that we encourage innovation by encouraging intellectual property [protections], but at the same time we also want competition, not just because we think it gives us lower prices but also because sometimes competition ends up encouraging innovation."

For Jay Monahan, deputy general counsel at Zynga Game Network Inc., who has known Lemley since they were associates together at Brown & Bain, Lemley is "one of the definitive thinkers on IP law."

Monahan counts Lemley as one of the few attorneys he'd call when faced with difficult questions of law in the technology arena for which there's no precedent, in large part because of his ability to combine his academic knowledge with the practical approach needed to solve problems for companies on a daily basis.

"The real value for me with Mark is when I get to that point where there's no litigation but there's a sort of impossibly difficult copyright analysis ... I know he will always understand and have a thoughtful point of view," Monahan said. "He's the guy that writes articles talking about what the future of copyright regime should look like. He's the guy that gets quoted by the courts of appeals and the Supreme Court."

Daralyn Durie, one of Durie Tangri's founding partners along with Lemley, pointed out that Lemley's work as a scholar helped make him an effective advocate for clients.

"Part of what's so great about working with Mark is it's like having a walking research library," Durie said. "When you ask him, 'Mark, what's the answer to this question?' he'll give it to you with case citations."

"When he tells you, this is what the law is, people tend to believe him," Durie added.

Beyond his work in the technology sector, Lemley also helped establish the precedent that regulatory gaming in the pharmaceutical industry could run afoul of antitrust laws. He represented Teva Pharmaceuticals USA Inc. in a case accusing Abbott Laboratories of product-hopping, a strategy to prevent generics from entering the market by pulling one drug off the shelves and releasing a slightly different version of the medicine.

Part of Lemley's interest in IP stems from the differences in the ways companies in various industries interact with the patent system.

"The pharmaceutical industry depends very heavily on strong and certain patent protection, while in information technology it's viewed as the cost of doing business, and most engineers in those industries feel they'd be better off if they didn't have to deal with it," Lemley said. "The intersection between IP and antitrust also has to take that into account."

Lemley's attraction to that intersection dates back to his time in law school. His undergraduate degree in economics and existing interest in antitrust law led him to IP when he wrote about the patent misuse doctrine while working as a research assistant to an antitrust professor, and his passion for the intellectual side of the law has continued unabated.

"I went to law school, as I think many people do, because I didn't really know what I wanted to do with my life, and found to my surprise that I really loved it," Lemley said.

For Durie, who has known Lemley since the two were debating partners in college, his legal aptitude came as no surprise.

"Even back then, Mark was just faster than anyone else, and incredibly quick at breaking things down and figuring out where the pressure points are in a particular argument," Durie said.

Even when he worked full time in private practice — first at Brown & Bain and then at Fish & Richardson PC — Lemley did some academic writing.

When teaching as an adjunct professor at University of California, Berkeley, School of Law showed Lemley that it would be impossible to focus on teaching and writing while practicing full time, he joined the faculty at the University of Texas at Austin, remaining counsel at Fish.

"I never regretted the move to teaching, but I still wanted to stay connected to the world of practice," Lemley said. "I do think it's useful to think about the system as a whole, and it's easy if you're only participating in one part of that system to see that as the important bit and neglect the rest."

During his time in academia, Lemley has written seven books and 109 articles on antitrust, IP and Internet law, including the two-volume "IP and Antitrust" that he co-authored with Herbert Hovenkamp and Mark D. Janis.

Choate Hall & Stewart LLP partner Karen Copenhaver has turned to Lemley for advice a number of times over the years, always finding conversations with him "to be an inflection point in my thinking."

"Anyone who has ever read an article written by Mark, or seen Mark give a presentation or had a dinner conversation with Mark will be struck by at least three things: his passion, the depth of his understanding and analysis, and what a gifted communicator he is," Copenhaver said. "He is such a great teacher, advocate and counselor, in part because he is a great listener, and listening is somewhat a lost art in the profession."

Lemley's work reaches across the board in the IP field, including copyright issues like a 2000 case that MasterCard Inc. filed against then-presidential candidate Ralph Nader over a campaign ad that spoofed the credit card company's "Priceless" campaign.

"Grilled tenderloin for fundraiser: \$1,000 a plate. Campaign ads filled with half-truths: \$10 million. Promises to special interest groups: Over \$10 billion. Finding out the truth: Priceless. There are some things money can't buy. Without Ralph Nader in the presidential debates, truth will come in last," the ad said.

Lemley defended Nader, winning a summary judgment ruling that the ad was a legal parody and unlikely to confuse consumers or voters.

"We managed to persuade the court ... that as a copyright matter it was not just an effort to capture people's attention by using MasterCard, but also a comment on MasterCard's advertising about what's for sale and not for sale in the modern world," Lemley said. "It was interesting to me in part because some of my academic work has been about the risks that overly expansive copyright and trademark protection pose to free speech."

Lemley has served as "a walking treatise of IP law" and a "trusted adviser" to Joseph Gratz since the two met while Gratz was an associate at Kecker & Van Nest LLP.

The two now work together on a variety of copyright and patent cases, including a suit representing a small software company sued over its efforts to make a game played by the same rules as Tetris without using any of the same graphics or music.

"That case, unlike some, is really deeply about what the right rule is and whether the traditional contours of copyright law continue to apply when you take them from board games and apply them to video games," Gratz said. "His ability to understand, assimilate and apply the theory and the history in a very practical way has been really valuable in that case."

Lemley's expertise has also proved invaluable beyond the courthouse and the classroom.

A few years ago, digital rights group Electronic Frontier Foundation began sponsoring an Internet law pub quiz. At the first one, teams competed from Google, Yahoo, Stanford, Berkeley and Lemley's firm at the time, Kecker, Gratz said.

"Google had a tenured professor on their team and we had Mark on our team, and it was a hard-fought battle, but we ended up in first place at the end of the night," Gratz said.

"The next year they instituted a new rule, which was no tenured law professors on your team," Gratz said. "He's a game changer in more ways than one."

Methodology: From May 25 through June 11, Law360 invited readers to nominate attorneys they admire to be profiled for the "Most Admired" series. Readers were asked: "Is there an attorney you've argued against in court who you respect — or whose briefs you fear? What about a lawyer whose views on the latest hot-button issues you eagerly seek out? Or a former classmate who is practicing the law in novel ways?" Survey participants were not permitted to nominate attorneys from their own firms and submissions from public relations and marketing professionals were not considered.

Separately, Law360 sought out nominations from practice group heads at the 100 largest law firms in the United States. In total, 1,016 nominations were received.

Nominations were reviewed by a board comprising experienced lawyers and Law360 editorial staff. Sixty-five attorneys covering seven practice areas of the law were then selected to be profiled for the "Most Admired" series.

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