

# The Web: Alito a blank slate on technology

January 18 2006

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Judge Samuel Alito seems destined to be confirmed by the U.S. Senate to the Supreme Court of the United States in the coming weeks and will likely be faced with an assortment of major technology cases as a new justice, but legal experts tell UPI's The Web that as an appeals-court judge for the last 15 years his experience with technology cases has been quite limited.

Alito has been an appeals-court judge on the Third Circuit Court of Appeals in New Jersey and has heard one major copyright case and a number of contract cases involving technology companies like Nextel, but he has had no experience with patent cases, experts said.

That's because patent appeals cases are automatically routed to the Federal Circuit in Washington, and there are not a lot of major Internet companies in New Jersey whose cases have wended their way through the legal system.

How Alito would rule on a case like the controversy involving Grokster, the free MP3 site on the Internet, remains something of a mystery, even after the extensive confirmation hearings in the Senate, legal experts said.

"In some sense, he is a tabula rasa on these things," Edward Lazarus, an appeals attorney with the Los Angeles office of Akin Gump and former Supreme Court law clerk for the late Justice Harry Blackmun, the primary author of the divisive Roe vs. Wade decision, told The Web.

A review for The Web of more than 200 cases that Alito has been involved in as an appeals-court judge by intellectual-property attorney Jonathan Osha, a partner with the firm of Osha Liang LLP, which has offices at Houston, Paris and Silicon Valley, demonstrated that Judge Alito handled just one major copyright case during his tenure: Southco vs. Kanebridge Corp.

The case involved the question of whether a numbering system for screws and fasteners could be copyrighted. Alito wrote that there was not enough creativity in the creation of the list, Osha said in an interview with The Web.

"Judge Alito is willing to rein in intellectual-property claims," said Osha. "This is reasonable. This is a good outcome for business. Some IP claims in the past have been quite expansive."

In contract cases, Alito appeared to take a pro-business stance, generally holding parties to a contract to the terms of their contract, according to the review by Osha. "That's refreshing," said Osha. "He doesn't appear to be a judicial activist in contracts."

Alito has had two occasions to review cases involving wireless carrier Nextel Corp. as an appeals-court judge. The cases involved zoning variances requested to install cellular towers. "One outcome was for them (Nextel), and another was against them," said Osha. "Both cases were decided on the facts of the case. There was no overriding doctrine. What's more, Judge Alito seems to give a modicum of respect for the rulings of lower courts."

In the U.S. legal system, lower courts determine the facts of a case, while appeals courts examine the law of the case to see if the lower-court judge rightly decided the case based on precedent.

Deference to the lower courts -- a sense of humility about the work of other judges -- is often absent in federal appeals courts. "In the Federal Circuit there is something like a 50-percent reversal rate," said Osha. "You like to see when a judge has respect for the lower courts. That leads to more predictable outcomes."

The record demonstrates that Alito is someone who is "judicially conservative and has a high regard for the written word," said Osha.

The appeals attorney, Lazarus, said this makes Alito an "old-fashioned kind of guy."

Lazarus noted that the Senate confirmation hearings focused mostly on *Roe vs. Wade* and national security and wiretapping issues. "Most of the cases they work on are boring from a layman's point of view, but important, and ferocious, from an economic point of view," said Lazarus.

That being said, there are some technology experts who wish that Alito had more experience in high-tech cases, since the U.S. and global economies are so dependant upon the Internet, networks and wireless systems.

"I have worked on 22 cases as an expert witness because of my background in technology," Art Gillis, president of Dallas-based Computer Based Solutions Inc., told *The Web*. "The conclusion I have drawn from my experience is that cases relating to technology usually fall into one category: who screwed whom. As an appeals-court justice, it seems to me that Judge Alito would be faced with more global issues than just *Screwed vs. Screwed*, and that's why he wouldn't have much experience in technology issues."

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