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The Constitutionality of *Inter Partes* Review: Considering the Outcomes of the Supreme Court's *Oil States* Decision



Inter partes review has, in a very short time, become a core part of patent litigation practice in the United States. In many cases it has replaced district-court litigation. But IPRs may soon disappear: the Supreme Court recently heard oral arguments in the highly-publicized *Oil States* case, in which the petitioners argued that IPRs are unconstitutional precisely because they can and do replace district-court suits. And as unlikely as it seemed before the Court granted *certiorari* in *Oil States*, the Court may agree.

Since the founding of our republic, the right to trial before an independent judge and an impartial jury has been fundamental. According to Article III of the U.S. Constitution, judicial matters are to be heard by judges having life tenure:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

And, according to the Seventh Amendment, common law court trials bring with them the right to a jury for fact-finding:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Founding Fathers believed it essential that the judiciary not be subordinated to the political branches of government. See, e.g., Alexander Hamilton, Federalist No. 78 (“There is no liberty if the power of judging be not separated from the legislative and executive powers.”). And, more recently, the Supreme Court has observed that Article III “serves a structural purpose, barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts.”¹

In *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, the Supreme Court granted *certiorari* to determine whether the IPR procedure established by the America Invents Act of 2011 is exactly that type of congressional attempt to transfer jurisdiction away from Article III courts. In particular, the court granted *certiorari* on the following question:

Whether *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

¹ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) (internal quotation and citation omitted).

No one disputes that there has been a slow creep of formerly judicial power handed to the PTO by Congress with respect to already-issued patents. Since 1980, Congress has provided the PTO with the tools of *ex parte* reexamination (1980), *inter partes* reexamination (1999), and now IPRs and other AIA post-grant proceedings (2011). Each successive tool provided for ever more third-party input,² decreasing time frames,³ and/or decreased ability of the patent owner to amend its claims.⁴ It is no wonder then, that the procedures have become both ever more successful at killing claims and, accordingly, ever more popular.⁵

In 2012, patent owner Oil States filed an infringement suit against Greene's Energy in the Eastern District of Texas. The district court, applying the principles of *Phillips v. AWH Corp.*,⁶ construed the asserted claims to be distinct from one of the inventor's own prior-art published applications.⁷ After this ruling, the defendant filed an IPR petition arguing that the published application anticipated the asserted claims under the "broadest reasonable construction" standard applied by the PTO.⁸ The Patent Trial and Appeal Board granted the petition, and instituted the IPR.⁹ The PTAB, in its final written decision, denied Oil States' motion to amend the claims and found the challenged claims unpatentable.¹⁰ Oil States appealed the PTAB's decision to the United States Court of Appeals for the Federal Circuit. The court of appeals affirmed without opinion¹¹ and denied requests for panel rehearing and rehearing *en banc*. The Supreme Court granted in part Oil States' petition for a writ of *certiorari* on June 12, 2017, limited to the question recited above.¹²

² Compare 35 U.S.C. § 302 *et seq.* (1994) (limiting third-party participation in *ex parte* reexamination to requesting reexamination and submitting a reply to the patent owner's response to a reexamination order) with 35 U.S.C. §§ 314(b), 315(b) (2000) (permitting requester in *inter partes* reexamination to submit comments on any patent owner submission, to appeal an unfavorable decision, and to participate in patent owner's appeal) and 35 U.S.C. §§ 316, 319 (2012) (permitting petitioner in *inter partes* review to submit written comments in addition to petition, to take discovery, and to appeal and participate in patent owner's appeal).

³ Compare 35 U.S.C. § 305 (1994) and 35 U.S.C. § 314(c) (2000) (providing that *ex parte* reexamination and *inter partes* reexamination, respectively, be conducted with "special dispatch") with 35 U.S.C. § 316(a)(11) (2012) (providing that a final determination in *inter partes* review should issue within 1 year after institution); see also U.S. Patent & Trademark Office, *Inter Partes Reexamination Filing Data – September 30, 2017* ("IPX Data"), available at https://www.uspto.gov/sites/default/files/documents/inter_parte_historical_stats_roll_up.pdf (median pendency of 39.6 months for *inter partes* reexamination).

⁴ Compare 35 U.S.C. § 305 (1994) and 35 U.S.C. § 314(a) (2000) (permitting amendments in *ex parte* reexamination and *inter partes* reexamination, respectively) with 35 U.S.C. § 316(a)(9) (2012) (permitting patent owner to *move* to amend, and limiting amendments to cancellation of claims or "propos[ing] a reasonable number of substitute claims").

⁵ Between November 29, 1999 and September 16, 2012, a total of 1,919 requests for *inter partes* reexamination were filed. IPX Data, *supra*. In these, 1,462 reexamination certificates were issued, with 6% resulting in all claims confirmed, 34% resulting in all claims canceled or disclaimed, and 60% resulting in claim changes. By contrast, between September 16, 2012 and November 30, 2017 (less than half the time frame during which *inter partes* reexamination was available), a total of 7,182 IPR petitions were filed. When post-grant review and covered business method patent review are included, 65% of final decisions have resulted in all claims being held unpatentable, 16% resulted in some claims being held unpatentable, and 19% resulted in no claims being held unpatentable.

⁶ 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

⁷ See *Oil States Energy Servs., LLC v. Trojan Wellhead Protection, Inc.*, No. 6:12-cv-611, 2014 WL 12360946 (E.D. Tex. June 23, 2014).

⁸ Petition for *Inter Partes* Review Under 35 U.S.C. §§ 311–319 and 37 C.F.R. § 42.100 *et seq.*, Case No. IPR2014-00216, Paper No. 1 (P.T.A.B. Dec. 3, 2013); see 37 C.F.R. § 42.100(b).

⁹ Decision – Institution of *Inter Partes* Review – 37 C.F.R. § 42.108, Case No. IPR2014-00216, Paper No. 12 (P.T.A.B. June 10, 2014).

¹⁰ Final Written Decision – 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, Case No. IPR2014-00216, Paper No. 53 (P.T.A.B. May 1, 2015).

¹¹ *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, 639 F. App'x 639 (Fed. Cir. 2016) (per curiam).

¹² See *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, 137 S. Ct. 2239 (2017).

Petitioner's Arguments

Before the Supreme Court, Oil States argues that IPRs are agency substitutes for Article III litigation that effectively resolve the patent owner's private claim of patent infringement by preempting an Article III jury trial. Oil States points to the similarities between district court litigation and IPRs: motion practice, discovery, depositions, cross-examination, introduction of evidence, adversarial hearing, settlements, and final judgment.¹³ The PTO itself calls the IPR hearing a "trial" before "judges."¹⁴ And, Congress' directions were clear: It wanted IPRs to "serve as an effective and efficient alternative to often costly and protracted district court litigation."¹⁵

Oil States argues that, contrary to the Founders' intent, the enforceability of issued patents has become subject to the shifts in regulatory policies common with changes in administrations.¹⁶ The political influence arguably can be seen in PTO changes to panel size/composition.¹⁷ Indeed, the PTO has admitted that this practice is used to achieve desired results:

JUDGE TARANTO: You've engaged the power to reconfigure the panel so as to get the result you want.

PTO ATTORNEY: Yes, your Honor. . . .

JUDGE TARANTO: And you don't see a problem with that?

PTO ATTORNEY: Your Honor, the Director is trying to ensure that her policy position is being enforced by the panel.¹⁸

Oil States also asserts that patent infringement cases, as well as challenges to a patent's validity, historically (both in the U.S. and England) were decided in actions at common law, with disputed questions of fact resolved by juries.¹⁹

Respondent's Arguments

Greene's Energy argues that an exception to Article III and the Seventh Amendment applies to IPRs: that patents may be adjudicated in non-Article III courts because patents are public, not private, rights. Specifically, they argue that (i) patent rights are not creations of common law and do not exist apart from government; (ii) patent rights arise by Congressional statute; and (iii) patents are imbued with a public interest.²⁰

¹³ Brief for Petitioner at 20–21, *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, No. 16-712, 2017 WL 3713059 (U.S. Aug. 24, 2017).

¹⁴ Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,758 (Aug. 14, 2012).

¹⁵ H.R. Rep. No. 112–98, at 45.

¹⁶ See Brief for Petitioner, *supra*, at 41–47.

¹⁷ See *id.* at 45–46 (citing *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1020 (Fed. Cir. 2017) (Dyk, J., concurring) (questioning "whether the practice of expanding panels where the PTO is dissatisfied with a panel's earlier decision is the appropriate mechanism of achieving the desired uniformity" in PTO decisions)).

¹⁸ Oral Argument at 47:20–48:25, *Yissum Research Dev. Co. v. Sony Corp.*, No. 15-1343 (Fed. Cir. Dec. 7, 2015).

¹⁹ Brief for Petitioner, *supra*, at 22–26, 50–58.

²⁰ See, e.g., Brief for Respondent Greene's Energy Group, LLC at 29–39, *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, No. 16-712, 2017 WL 4805231 (U.S. Oct. 23, 2017).

Greene's Energy points out that, consistent with this view, the PTO has been allowed for years to review issued patents for validity. Federal Circuit precedent holds that *ex parte* reexaminations are constitutional.²¹ And, the Supreme Court recently observed that, "[f]or several decades, the [PTO] has also possessed the authority to reexamine—and perhaps cancel—a patent claim that it had previously allowed."²² Greene's Energy argues that IPRs are just an administrative re-check that the patents were properly issued in the first place, *i.e.*, an opportunity for the PTO to correct its own mistake; therefore, they are no more an agency alternative to a district court "trial" than *ex parte* reexaminations, interferences, reissues, and other agency proceedings.²³

The "public rights" doctrine relied upon by Greene's Energy has expanded over time to allow administrative tribunals to decide more. Originally, it provided that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."²⁴ But by the 1980s, the doctrine had extended to matters (i) arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments (ii) that historically could have been determined exclusively by those departments.²⁵ And, recently, the limitation that the government must be a party has since been removed.²⁶ But not everyone agrees with this view. Justice Scalia wrote that "[t]he notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine."²⁷

Greene's Energy also points to examples of permissible administrative adjudication in lieu of an Article III court and cites cases approving them.²⁸ For example, under existing precedent, Congress may set up an administrative scheme for determining maritime employee compensation plans.²⁹ Congress may require agency arbitration to resolve disputes about compensation for the use of data sharing between pesticide manufacturers under an EPA-regulated federal chemical regulatory scheme.³⁰ Congress may also require customers of commodity brokers to seek reparations in a non-Article III forum for violation of the Commodity Exchange Act.³¹

²¹ *Joy Techs., Inc. v. Manbeck*, 959 F.2d 226, 228–29 (Fed. Cir. 1992); *Patlex Corp. v. Massinghoff*, 758 F.2d 594, 603–05 (Fed. Cir. 1985), *modified on other grounds on reh'g*, 771 F.2d 480 (Fed. Cir. 1985).

²² *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016).

²³ Brief for Respondent Greene's, *supra*, at 18–22; *see Cuozzo*, 136 S. Ct. at 2143–44 (calling IPR a "specialized agency proceeding" that "offers a second look at an earlier administrative grant of a patent.")

²⁴ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (distinguishing suits involving private rights from those "matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . [b]ut which congress may or may not bring within the cognizance of the courts . . . as it may deem proper.")

²⁵ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982).

²⁶ *Stern v. Marshall*, 564 U.S. 462, 490–91 (2011) ("[W]hat makes a right 'public' rather than private is that the right is integrally related to particular federal government action."). Note, however, that the non-Article III tribunal in *Stern* was a bankruptcy court, which operates as an adjunct to the district court and not as an executive agency.

²⁷ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55–56 (1989) (Scalia, J., concurring).

²⁸ *See* Brief for Respondent Greene's, *supra*, at 37 n.12.

²⁹ *See Crowell v. Benson*, 285 U.S. 22 (1932).

³⁰ *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

³¹ *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

Analysis

In our view, the outcome of this case turns largely on whether the Court views patents as vested property rights of the inventor, or as privileges conferred by the federal government. But the American view on the “property” nature of patents is decidedly mixed.

One question is whether patent rights pre-exist governments, such that governments *secure* those rights for their citizens rather than *create* those rights. There is plenty of evidence that the answer is “Yes.” The Constitution itself states that “The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by *securing* for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”³² Many American jurists have agreed with this view:

- Chief Justice John Marshall wrote that an inventor possesses an “inchoate property which [is] *vested by* the discovery” and “*perfected by* the patent.”³³
- Charles Nott, the long-tenured Chief Justice of the Court of Claims, wrote that Congress is not “empowered to grant to inventors a favor, but *to secure to them a right*.”³⁴
- Justice Joseph Bradley wrote, “The government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent *the grantee is entitled to it as a matter of right*, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.”³⁵
- Justice David Brewer wrote that a patentee is not a “quasi trustee for the public” because a patent is an inventor’s “absolute property.” “[T]he patent for an invention is *not a conveyance of something which the government owns*.”³⁶
- Justice John Clarke wrote that “the patentee receives nothing from the law *which he did not have before*.”³⁷

But there is also ample evidence to the contrary. Thomas Jefferson wrote that “the exclusive right to invention [w]as given *not of natural right*, but for the *benefit of society*. . . .”³⁸ And Mr. Jefferson has sporadic—but recent—Supreme Court support for this view, including one currently sitting Justice:

- “The [patent] monopoly” was “*created by the act of Congress*, and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes.”³⁹

³² U.S. Constitution, Article I, Section 8, Clause 8 (1787); see also John Locke, *Two Treatises of Government* § 139 (1690) (The government and laws exist not to create property but so “that men might have and *secure their properties*.” (emphasis added)).

³³ *Evans v. Jordan*, 8 F. Cas. 872, 873–74 (C.C.D.Va. 1813) (emphasis added), *aff’d*, 13 U.S. (9 Cranch) 199 (1815).

³⁴ *McKeever v. United States (McKeever’s Case)*, 14 Ct. Cl. 396, 421 (1878) (emphasis added).

³⁵ *James v. Campbell*, 104 U.S. 356, 358 (1881) (emphasis added).

³⁶ *United States v. Am. Bell Tel. Co.*, 167 U.S. 224, 238–39, 250 (1897) (emphasis added).

³⁷ *Motion Picture Patent Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510 (1917) (emphasis added).

³⁸ Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) in 13 *The Writings of Thomas Jefferson* 333 (Andrew A. Lipscomb & Albert E. Bergh, eds. 1905) (emphasis added).

³⁹ *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1850) (emphasis added).

- "Patent rights exist only by virtue of statute."⁴⁰
- Per Justice Thomas (in dissent), "public authorities ha[ve] *created [patents] purely for reasons of public policy* and which ha[ve] *no counterpart in the Lockean state of nature.*"⁴¹

On the related question as to whether patents are private property, like land or personal property, rather than a public privilege, there is again plenty of evidence that the answer is "Yes."

According to early American statesman Daniel Webster: "[T]he right of the inventor is a high property; it is the fruit of his mind—*it belongs to him more than any other property*—he does not inherit it—he takes it by no man's gift—it peculiarly belongs to him"⁴²

And, Representative Webster's view resonated with the Supreme Court for much of the time since:

- "[A]n invention [secured by a valid letter-patent] is property in the holder of the patent, and . . . [i]s as much *entitled to protection as any other property.*"⁴³
- "A patent for an invention *is as much property as a patent for land.* The right rests on the same foundation, and is surrounded and protected by the same sanctions."⁴⁴
- "The power . . . to issue a patent for an invention, and the authority to issue such an instrument for a grant of land, emanate from the same source; and . . . *[a]re of the same nature, character, and validity*"⁴⁵
- "It has been settled by repeated decisions of this court that when a patent has . . . had affixed to it the seal of the patent office, it has passed beyond the control and jurisdiction of that office, and is *not subject to be revoked or cancelled by the president, or any other officer of the government.* It has become the property of the patentee, and as such is entitled to the same legal protection as other property. *The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States,* and not in the department which issued the patent."⁴⁶
- "[T]itle is exclusive, and so clearly within the constitutional provisions in respect of *private property* that [the inventor] is neither bound to use the discovery himself, nor permit others to use it."⁴⁷
- "Our precedents confirm the general rule that rights in an invention belong to the inventor. . . . [The] invention [an inventor] may thus conceive and perfect is *his individual property.*"⁴⁸

⁴⁰ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964).

⁴¹ *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 n.2 (2015) (Thomas, J., dissenting).

⁴² Rep. Daniel Webster, 41 Annals of Cong. 934 (1824) (emphasis added).

⁴³ *Cammeyer v. Newton*, 94 U.S. 225, at 234–35 (1876) (emphasis added).

⁴⁴ *Consol. Fruit Jar Co. v. Wright*, 94 U.S. 92, 96 (1876) (emphasis added).

⁴⁵ *U.S. v. Am. Bell. Tel. Co.*, 128 U.S. 315, 358–59 (1888).

⁴⁶ *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 608–09 (1898) (emphasis added) (citations omitted). This rule mirrored the one applicable to land patents. See *Moore v. Robbins*, 96 U.S. 530, 532–33 (1877) ("[W]hen *the [land] patent* has been awarded . . . , and has been issued, delivered, and accepted, *all right to control* the title or to decide on the right to the title has passed from the land-office," and "*from the Executive Department* of the government. . . . *If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy.*" (emphasis added)).

⁴⁷ *E. Bement & Sons v. Nat'l Harrow Co.*, 180 U.S. 70, 90 (1902) (emphasis added).

- "A patent confers . . . an *exclusive property in the patented invention* which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate . . . *land*."⁴⁹

Even the Patent Act states that "patents shall have the *attributes of personal property*."⁵⁰

But, again, Mr. Jefferson would disagree: "[T]he exclusive right to invention[']s . . . peculiar character . . . is that no one possesses the less, because *every other possesses the whole of it* . . . *Inventions then cannot, in nature, be a subject of property*"⁵¹ And, the modern Supreme Court appears to share his view, including (again) Justice Thomas:

- "Letters patent are not to be regarded as monopolies . . . but as *public franchises*"⁵²
- "The patent is a *privilege* . . . which is conditioned by a *public purpose*."⁵³
- *Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 816 (1945) (describing patents as "*special privilege[s]*" that "serve the *public purpose* of promoting the 'Progress of Science and useful Arts.'").
- In Justice Thomas's (dissenting) view, patents are not "core private rights" but "*privileges*" or "*franchises*."⁵⁴
- "[I]nter partes review helps protect *the public's paramount interest* in seeing their patent monopolies . . . [a]re kept within their legitimate scope."⁵⁵

Heading into oral argument, legal commentators generally considered affirmance to be the most likely outcome.⁵⁶

Based on the Justices' questions and comments, however, the outcome is not so certain. Chief Justice Roberts and newly commissioned Justice Gorsuch are often viewed as skeptics of the administrative state, and their comments reflected skepticism of the IPR procedure. On the other hand, the most liberal justices (Ginsberg, Sotomayor, and Kagan) are likely to find the procedure constitutional. The other conservative justices (Alito, Kennedy, and Thomas) said little and so are difficult to predict. An interesting wild card, however, is Justice Breyer, generally viewed as a liberal (pro-administrative) justice, who suggested that IPRs might be constitutional for patents issued after the AIA, but not for patents issued beforehand.

⁴⁸ *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 785–86 (2011) (emphasis added).

⁴⁹ *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015).

⁵⁰ 35 U.S.C. § 261 (since 1952).

⁵¹ Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) in 13 *The Writings of Thomas Jefferson* 333 (Andrew A. Lipscomb & Albert E. Bergh, eds. 1905) (emphasis added).

⁵² *Seymour v. Osborne*, 78 U.S. 516, 533 (1870) (emphasis added).

⁵³ *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944).

⁵⁴ *Teva*, 135 S. Ct. at 848 n.2 (Thomas, J., dissenting).

⁵⁵ *Cuozzo*, 136 S. Ct. at 2144 (emphasis added).

⁵⁶ See, e.g., Gene Quinn, *Predicting Oil States in Advance of SCOTUS Oral Arguments*, available at <http://www.ipwatchdog.com/2017/11/12/predicting-oil-states-advance-scotus-oral-arguments/> (Nov. 12, 2017) (compiling views of industry attorneys).

We believe that it is more likely than not that IPRs will be found unconstitutional. First, the *McCormick* case (quoted above) seems to support Oil States' position. Second, the conservative majority generally favors a limited role for the administrative state, with Justice Gorsuch as suspicious of the administrative state as his predecessor, Justice Scalia (perhaps more so). However, tempering our view somewhat is that one of the Court's conservatives, Justice Thomas, appears to be anti-patent in a Jeffersonian manner, as shown by the quotations above.

Still, even if IPRs are not entirely unconstitutional, it is likely they will not continue exactly as they are after the Court renders its decision. Supreme Court precedents suggests that they cannot fairly be applied to pre-AIA patents. For example, in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, the Court noted that patent rights constitute "the legitimate expectations of inventors in their property" and that "courts must be cautious before adopting changes that disrupt the settled expectations."⁵⁷ And, in an earlier decision, *McClurg v. Kingsland*, the Court observed that statutory enactments or repeals after patent issuance "can have no effect to impair the right of property then existing in a patentee."⁵⁸

If we are correct, and IPRs (as well as other AIA post-grant proceedings, and possibly even *ex parte* reexamination) are found unconstitutional, there will be a tsunami of patent litigation. First, many patent owners were delaying suits because of IPRs, and those owners will move forward. Second, many patent litigations are currently stayed pending IPR, and that flood would be immediately released. Third, it is unclear what effect a Supreme Court reversal would have on already-complete IPRs—will invalidated claims be revived? At least one federal judge has predicted "no."⁵⁹ And, if the claims are revived, what will happen to invalidated claims of now-expired patents? Takings actions against the government? Hypothetical infringement cases against long-gone products and companies?

In addition, the cost of defending patent litigation will increase. IPRs had been depressing settlement values and had put downward pressure on the fees of patent prosecutors and litigators. Plus, patent assets are currently at low valuations. We predict there would be an uptick in both prosecution and litigation if accused infringers' threat of an IPR disappeared.

Conclusion

By creating IPRs and applying them to all issued patents, the AIA worked a revolution in patent litigation. IPRs have been reasonably successful in Congress' goal of decreasing the costs of invalidating weak patents, and petitioners' success rates have been (perhaps unexpectedly) high. IPR petitions are now routinely considered by parties accused of infringement as an essential defense tool, together with motions to stay litigation pending their outcome. The Supreme Court now threatens to upset the new order and force defendants to make their invalidity cases to district courts. Based on the weight of precedent, we believe this will happen—but, either way, look for a split decision.

⁵⁷ 535 U.S. 722, 739 (2002).

⁵⁸ 42 U.S. (1 How.) 202, 206 (1843).

⁵⁹ See *Leak Surveys, Inc. v. FLIR Systems, Inc.*, No. 3:13-cv-02897-M, 2017 WL 5569196, at *2 (N.D. Tex. Nov. 13, 2017).

CAFC Reverses Course on Reviewing IPR Timeliness



On January 8, 2018, in *Wi-Fi One, LLC v. Broadcom Corp.*, the Federal Circuit rendered an *en banc* decision holding that the PTAB's determination that a petition for *inter partes* review was timely filed is subject to judicial review.

The AIA provides that an *inter partes* review of a patent “may not be instituted” if the petition requesting it was filed more than one year after the petitioner (or a real party in interest or privy of the petitioner) was served with a complaint alleging infringement of the same patent.¹ The statute also provides that the PTO's decision on whether to institute IPR is “final and nonappealable.”² The Federal Circuit had previously ruled in a panel decision that whether a petition was filed within the one-year bar is part of the institution decision and not subject to judicial review, even on appeal from the final judgment in the IPR.³

Subsequently, the Supreme Court decided *Cuozzo Speed Technologies, LLC v. Lee*, in which the Court addressed the availability of judicial review of the PTO's determination that a petition for IPR had stated its grounds “with particularity” as required by statute.⁴ The Court held that this determination was part of the decision to institute the IPR and, therefore, unreviewable. The Court did *not* hold that every portion of an institution decision was unreviewable; rather, it held that unreviewability applies “where the grounds for attacking the decision to institute *inter partes* review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate *inter partes* review.”⁵

After the Supreme Court issued this limited holding, the Federal Circuit granted *en banc* reconsideration of its precedent, and ultimately held that the PTO's determination that a petition was filed within the one-year time limit is subject to judicial review.⁶ The court recognized the “strong presumption” in favor of judicial review and distinguished decisions closely related to the PTO's preliminary evaluation of the petition itself (including whether the petition demonstrates a reasonable likelihood that the petitioner will prevail), from the one-year time bar, which (per the Court) represents a statutory limit on the PTO's authority to act.⁷

This holding introduces a greater degree of risk for petitioners when the one-year time bar is not clearly satisfied—for example, when an arguable real-party-in-interest was served outside the time limit. Now, it is possible that, even after a thorough and successful *inter partes* review proceeding, the PTO's final decision will be “unwound” due to a “minor statutory technicality related to [the PTO's] decision to institute *inter partes* review.”⁸ Parties should account for this risk when considering whether to file a petition in the first place.

¹ 35 U.S.C. § 315(b).

² 35 U.S.C. § 314(d).

³ *Achates Reference Publ'g, Inc. v. Apple Inc.*, 803 F.3d 652, 658 (Fed. Cir. 2015).

⁴ 136 S. Ct. 2131, 2139 (2016) (citing 35 U.S.C. § 312(a)(3)).

⁵ *Id.* at 2141.

⁶ *Wi-Fi One, LLC v. Broadcom Corp.*, No. 2015-1944, slip op. at 6 (Fed. Cir. Jan. 8, 2018) (*en banc*).

⁷ *See id.* at 15–17.

⁸ *Id.*, dissenting slip op. at 11–12 (citing *Cuozzo*, 136 S. Ct. at 2139–40).

PTAB Holds That It May Decline Institution of an IPR Request Regardless of the Merits of the Request; Designates Decision as Precedential



On October 18, 2017, the PTAB, which had previously declined to institute the IPR requested by the petitioner in *General Plastic Industrial Co. v. Canon Kabushiki Kaisha*, denied the Petitioner's request for rehearing of the non-institution decision.¹

General Plastic had previously filed a first set of petitions seeking *inter partes* review of two patents. For each of these petitions, institution of trial was denied on the merits. Nine months after filing the first set of petitions, General Plastic filed multiple follow-on petitions against each of the same patents that were the subject of its first set of denied petitions. For each of those follow-on petitions, the Board denied institution, citing 35 U.S.C. § 314(a) and 37 C.F.R. § 42.108(a) for the proposition that the decision of whether to institute was entirely within its discretion.²

General Plastic then requested rehearing, arguing that trials on the follow-on petitions should have been instituted, and that neither Section 314(a) nor Section 325(d) limits a petitioner to only one petition per challenged patent. General Plastic also argued that the Board misapplied the factors set forth in its decision in *NVIDIA Corp. v. Samsung Electronics Co.*,³ which are set out below:

1. Whether the same petitioner previously filed a petition directed to the same claims of the same patent;
2. Whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it;
3. Whether at the time of filing of the second petition the petitioner already received the patent owner's preliminary response to the first petition or received the Board's decision on whether to institute review in the first petition;
4. The length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition;
5. Whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent;
6. The finite resources of the Board; and
7. The requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review.⁴

¹ Case No. IPR2016-01357, Paper 19 (P.T.A.B. Sept. 6, 2017) ("Rehearing Decision").

² *Id.* at 8–11. Section 314(a) provides: "The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." The PTO has read this permissive language to confer near-absolute discretion on whether to institute IPR, provided the threshold is met.

³ Case No. IPR2016-00134, Paper 9 (P.T.A.B. May 4, 2016).

⁴ Rehearing Decision at 16.

An expanded Board panel (seven judges) heard General Plastic's rehearing request.⁵

General Plastic argued that the original panel abused its discretion under factor two because it applied a standard based on whether the new prior art discovered by a petitioner "should have been known" earlier. General Plastic argued that such an interpretation of factor two "would be self-defining to be adverse to Petitioners in every instance" since any prior art citable in a second petition "necessarily could have been found by a reasonable prior art search performed prior to filing the first petition."⁶ General Plastic also argued that Section 314(a) should not be applied because its application "improperly conflicts with 35 U.S.C. § 325(d)."⁷

The Board rejected General Plastic's arguments and reaffirmed its position that the *NVIDIA* factors balance the goals of the AIA—namely, to improve patent quality and make the patent system more efficient—with the potential for abuse of the review process by repeated attacks on patents. The Board noted that "[m]ultiple, staggered petitions challenging the same patent and the same claims raise the potential for abuse."⁸ The Board also rejected General Plastic's argument that the Board's discretion under Section 314(a) is "subordinate to or encompassed by § 325(d)," which by its own words focuses entirely on the similarity of the presented prior art and arguments to earlier petitions. Rather, the Board held that the factor outlined in Section 325(d) was one of several that the Board could consider when exercising its discretion under Section 314(a).⁹

Although the Board recognized that "there *may* be circumstances where multiple petitions by the same petitioner against the same claims of a patent should be permitted,"¹⁰ as a practical matter, the Board's decision all but forecloses follow-on petitions by a petitioner after a patent owner files its preliminary response. As General Plastic argued, there are few imaginable situations where a petitioner files a second set of petitions using prior art that could not have been identified earlier. Unless the petitioner has a believable excuse as to why it waited to file the second round of petitions (unrelated to addressing the patent owner's positions or the Board's determinations), it is likely that the Board will simply deny institution per its "discretion" under Section 314(a).

⁵ The Board's opinion asserts that the Chief Judge has discretion to expand a panel to include more than three judges upon a "suggestion" from a judge, panel, or party. In this case, General Plastic had made the request.

⁶ Rehearing Decision at 13–14.

⁷ *Id.* 35 U.S.C. § 325(d) states in relevant part: "In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office."

⁸ Rehearing Decision at 17.

⁹ *See id.* at 18–19.

¹⁰ *Id.* at 18 (emphasis added).

IPR Settlement Remains Difficult



Although their name would suggest that *inter partes* reviews are proceedings between two private adversaries, the Patent Trial and Appeal Board does have the power to revoke patents even if the requester and the patent owner have settled their dispute and the requester no longer seeks revocation.

35 U.S.C. § 317(a) provides that “[a]n inter partes review instituted under this chapter shall be terminated with respect to any petitioner upon the joint request of the petitioner and the patent owner, unless the Office has decided the merits of the proceeding before the request for termination is filed If no petitioner remains in the inter partes review, the Office may terminate the review or proceed to a final written decision under section 318(a).”

Late last year, in *Rubicon Communications, LP v. Lego A/S*,¹ petitioner Rubicon and patent owner Lego jointly moved the Board to terminate an IPR. The parties made their joint motion before the Board had issued its final written decision, but only a week before the deadline for the decision to be issued. The Board denied the motion.

The Board reasoned that preventing the settlement was in the public interest because, “the public’s interest in the status of the challenged claims of each patent is at its peak” shortly before a written decision is entered. The Board also noted that although it had not yet issued its formal final written decision, it had in fact already “decided the merits of the proceeding” before the parties requested termination.

The PTAB has historically been generally more hostile to proposed settlements than one might have expected, and this decision is consistent with that policy. It is another in a chain of opinions illustrating that, the longer the parties wait to seek termination, the less likely the PTAB will terminate the proceeding—even if, as in this case, the request is made before the PTAB issues a final written decision. Paradoxically, such decisions may make IPR settlements less likely; there is less incentive to settle if the patent owner cannot be assured that settling will safeguard its patent claims from a PTAB decision.

¹ Case No. IPR2016-01187.

Protective Orders Are Not Always *Pro Forma*



The PTAB rules include a default protective order that provides a single-level confidentiality designation, allowing access to any filed confidential documents by the parties, as well as their in-house counsel, outside counsel of record, and experts. A party to an IPR proceeding may move, for good cause, to modify the default protective order to reflect the kinds of individualized provisions often found in district-court protective orders, but historically the PTAB has been reluctant to grant such motions, so practitioners have come to expect that the default protective order will generally govern.

However, last month, in *Campbell Soup Co. v. Gamon Plus, Inc.*,¹ the PTAB granted a motion for a modified protective order proposed by a requester.

The dispute began after the patent owner successfully moved to compel production of certain studies performed by the requester. The patent owner argued that the studies would support its position on secondary considerations of non-obviousness.

In response to the grant of the motion to compel, the requester asked the Board to modify the protective order. The standard protective order already in place would have allowed the patent owner's CEO, who was also designated as an expert witness, to review the studies. The requester argued that the studies included valuable proprietary consumer research that its competitor's CEO should not be allowed to see.

The patent owner countered that it was necessary for the CEO to see the studies in order to respond to them, that in any event it was not truly a competitor, and moreover that the documents in question were nearly two decades old.

The PTAB granted the motion and modified the protective order. It agreed with the requester's arguments about the potential for competitive advantage to the patent owner. Despite its previous grant of the motion to compel, it also found that the patent owner unreasonably delayed in seeking production of the studies. Moreover, the PTAB found, the problem was entirely of patent owner's making—it could have prevented this situation by retaining an expert instead of relying on its CEO.

This decision illustrates that, although one presumed advantage of IPRs is reduced costs, parties would nonetheless be well advised to invest in outside experts when possible, rather than relying on the expertise of their own employees. It also suggests the PTAB may be more willing now to consider customizing its procedures in individual IPRs, and practitioners should accordingly be more optimistic about their chances of obtaining such customization.

¹ Case Nos. IPR2017-00087, IPR2017-00091, IPR2017-00094.

The Lanham Act in the Entertainment Industry – 2017 Highlights



Last year saw two major Lanham Act cases in the entertainment industry: *Incarcerated Entm't, LLC v. Warner Bros. Pictures*, 261 F. Supp. 3d 1220 (M.D. Fla. 2017) and *Twentieth Century Fox Television v. Empire Distribution, Inc.*, 875 F.3d 1192 (9th Cir. 2017). Both of these cases involved alleged violations of the Lanham Act: *Incarcerated Entertainment* dealing with a false advertising claim and *Twentieth Century Fox Television* dealing with a trademark infringement claim. Both also dealt with the First Amendment implications of Lanham Act liability in the industry. We summarize and review each case in turn.

Incarcerated Entertainment

According to the complaint in *Incarcerated Entertainment*, in 2011, Efraim Diveroli agreed to allow Guy Lawson, a well-known journalist and author, to publish an article about his true story of having engaged in, and been imprisoned for, illegal arms trafficking. Lawson later expanded the article into a book and optioned the movie rights for the article to Warner Brothers (hereinafter "Warner"). In 2014, Diveroli decided to market the movie rights to his own memoir through his company, Incarcerated Entertainment. He pitched the story to Warner, but Warner declined and instead hired Lawson as producer and David Packouz (a former associate of Diveroli's) as a consultant, with the intention of cinematizing Lawson's book.¹ Warner made the movie, titled *War Dogs*, and released it in 2016.

Incarcerated Entertainment sued Warner in the Middle District of Florida, alleging false advertising in violation of the Lanham Act and unfair competition in violation of Florida state law. The complaint challenged a number of promotional statements in trailers, social media, and interviews that implied *War Dogs* was Diveroli's "true story." Warner moved to dismiss the complaint for failure to state a claim,² claiming that the First Amendment protected the statements at issue and, more generally, that the complaint failed to allege sufficient facts to support a plausible claim for relief.³

The court denied the motion, with limited exceptions. The case turned on two questions: (1) whether the statements were "commercial speech" and (2) whether the statements constituted false advertising.

Commercial Speech

Warner argued that the statements at issue were not "commercial speech." If this were true, then (i) the First Amendment would likely protect the statements,⁴ and (ii) the Lanham Act would not reach them.⁵ Applying Supreme Court precedent, the court disagreed with Warner and ruled that the challenged statements could plausibly be commercial because (1) the

¹ *Incarcerated Entm't*, 261 F. Supp. at 1225–26.

² See Fed. R. Civ. P. 12(b)(6).

³ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007).

⁴ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

⁵ See 15 U.S.C. § 1125(a)(1)(B) (limiting scope of false advertising to "commercial advertising or promotion"); *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 950 (11th Cir. 2017) (holding that "commercial speech" is an element of "commercial advertising or promotion").

complaint alleged that the statements were used for promotional purposes, (2) the statements referred to a specific product, and (3) Warner had an economic motivation for making the statements.⁶

Warner argued that the statements deserve blanket protection because they relate to a movie, which is a protected expressive work. However, the court held that, even though movies themselves are protected expressive works, they are also products sold in the commercial marketplace and, therefore, advertisements for movies do not deserve the same First Amendment protection as the movies themselves.⁷

Warner also argued that the statements should not be treated as commercial speech because they were intertwined with non-commercial speech, including political and artistic commentary. But the court held that, in these circumstances (which the court saw as analogous to challenging the title of an artistic work), the outcome depends on balancing the public interest in avoiding consumer confusion against the public interest in free expression—a balancing test not suitable for resolution on a motion to dismiss. Because Warner did not contend that the statements were themselves artistic works, and the complaint plausibly alleged that they were separate promotions for the movie, the court denied the motion on this ground.⁸ This is likely to be a major point of contention as the litigation progresses.

False Advertising

In the Eleventh Circuit, to succeed on a claim for false advertising, the plaintiff must show that “(1) the advertisements of the opposing party were false or misleading; (2) the advertisements deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented product or service affects interstate commerce; and (5) the movant has been—or is likely to be—injured as a result of the false advertising.”⁹

The first question for the court was whether the challenged statements were plausibly alleged to be either false or, although true, misleading, when viewed in context. Each challenged advertisement must be evaluated separately.¹⁰

The court declined to dismiss the complaint as to most of the challenged statements. The most notable statements to survive the motion to dismiss were the phrase “based on a true story” in the trailers and various interviews with cast members, the director, Lawson, and Packouz that implied *War Dogs* is a true story. These statements survived because the court found that the question of whether the statements read in full context falsely or misleadingly portrayed the movie as a true story was too *in depth* for a motion to dismiss. Warner also argued that some statements by Lawson and Packouz were mere opinion, but the court ruled that this issue also needed to be decided at trial, as a reasonable person could infer that there was a factual basis for their opinions.¹¹

Warner also challenged the elements of deception and materiality. The court disagreed with Warner, finding that factual evidence of consumer deception was not required at the pleading stage. As to materiality, Incarcerated Entertainment’s

⁶ *Incarcerated Entm’t*, 261 F. Supp. 3d at 1227–28 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983)).

⁷ *Id.* at 1228–29 (citing, *inter alia*, *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989) and *Charles v. City of Los Angeles*, 697 F.3d 1146, 1152 (9th Cir. 2012)).

⁸ *Id.* at 1229 (citing *Rogers*, 875 F.2d at 999).

⁹ *Id.* at 1230 (quoting *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004)).

¹⁰ *Id.* at 1229–30.

¹¹ *Id.* at 1230–32.

assertion that consumers are drawn to true stories was enough to support an inference that the movie's truthfulness was an "inherent quality or characteristic" of the product, which is sufficient at the pleading stage.

Last, Warner challenged the causation element. The Court held that *Incarcerated Entertainment's* allegation that it lost sales because consumers are more likely to buy a heavily marketed movie ticket than a book was enough to support an inference of damages and causation.

This decision may cause a stir in the filmmaking industry. Movies that are "based on" true stories but partially fictionalized are common, and the *Incarcerated Entertainment* decision makes such movies potentially subject to Lanham Act liability and, with it, the potential for disgorgement of profits, enhanced damages, and attorney fees. Look for similar suits to be filed in the future.

Twentieth Century Fox Television

Empire Distribution is a well-known record label that distributes albums in the "urban music genre." *Empire* is a television show aired by Twentieth Century Fox Television (hereinafter "Fox"), about a fictional hip hop record label named Empire Enterprises, which is based in New York. The show features songs in every episode, including some original music. The music from the show is released through Columbia Records after each episode airs. Fox promoted the show and the associated music through live musical performances, radio play, and consumer goods such as t-shirts emblazoned with the *Empire* brand.¹²

Empire Distribution sent a letter to Fox claiming trademark infringement, and Fox responded by suing for a declaratory judgment in the Central District of California. Empire Distribution asserted that Fox was violating its trademark by using the *Empire* brand as an umbrella to promote and sell music and other commercial products, thus extending the use of the "Empire" mark well beyond the title and body of the original expressive work. Empire Distribution also asserted claims for trademark dilution, unfair competition, and false advertising under both the Lanham Act and California state law. Fox sought and received summary judgment, and Empire Distribution appealed.¹³

The Ninth Circuit affirmed the district court's grant of summary judgment. The court first determined that the "*Rogers* test," originally developed by the Second Circuit, should apply to the dispute: "[T]he title of an expressive work does not violate the Lanham Act 'unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.'"¹⁴

Empire passed the *Rogers* test because the title was relevant to the work: the setting was New York (the Empire State), and the fictional music conglomerate was not only called "Empire Enterprises" but also is itself a kind of "empire." Moreover, applying the second prong of the *Rogers* test, the mark made no overt claims or explicit references to Empire Distribution and was not clearly misleading as to the source of the content of the show. Further, the court ruled that *Empire* is not a pretextual expressive work created to disguise Fox looking to profit from Empire Distribution's trademark, as the promotional activities were secondary to the show and the music themselves.

¹² *Twentieth Century Fox*, 875 F.3d at 1195.

¹³ *Id.* at 1195–96.

¹⁴ *Id.* at 1196 (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (quoting *Rogers*, 875 F.3d at 999)).

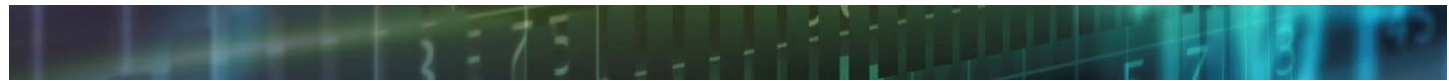
Importantly, the court extended the *Rogers* rule to hold that works whose titles are protected by the *Rogers* test can be advertised and marketed by name, even though “promotional efforts technically fall outside the title or body of an expressive work.”¹⁵ This gives *Rogers* protection additional teeth, as it gives content creators an affirmative right to make use of their titles—even if they are likely to confuse consumers.








Conclusion

These two cases both involve situations in which the policies underlying the Lanham Act come into conflict with First Amendment freedom of expression. Under the facts of *Twentieth Century Fox*, it is not inconceivable that viewers of the show *Empire* would be confused and believe that the music on the show (at least the original music) was affiliated with Empire Distribution. But the court found that freedom of expression should prevail. On the other hand, in *Incarcerated Entertainment*, the court found that statements of fact about a work, made in the course of promoting it, were not entitled to First Amendment protection and could give rise to liability for false advertising. Thus, in promoting an expressive work, the entertainment industry should be wary of false advertising but can be more lax about respecting trademark rights.

¹⁵ *Id.* at 1196–97.

Key Contacts



<p>Mark Hannemann Partner</p> <p>New York T: +1 212 848 7696 mark.hannemann@shearman.com</p>		<p>Thomas Makin Partner</p> <p>New York T: +1 212 848 7698 thomas.makin@shearman.com</p>		<p>Matthew Berkowitz Partner</p> <p>New York / Menlo Park T: +1 212 848 7701 matt.berkowitz@shearman.com</p>	
<p>Patrick Colsher Associate</p> <p>New York T: +1 212 848 7708 patrick.colsher@shearman.com</p>		<p>Joseph Purcell Associate</p> <p>New York T: +1 212 848 4074 joseph.purcell@shearman.com</p>		<p>Eric Lucas Associate</p> <p>New York T: +1 212 848 4955 eric.lucas@shearman.com</p>	
<p>Sonal Patel Associate</p> <p>Menlo Park T: +1 650 838 3739 sonal.patel@shearman.com</p>					

ABU DHABI | BEIJING | BRUSSELS | DUBAI | FRANKFURT | HONG KONG | LONDON | MENLO PARK | MILAN | NEW YORK
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SAUDI ARABIA* | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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