



2022 IP Outlook Report

THE DEVELOPMENTS SHAPING PATENT LAW

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AUTHORS



AMOL PARIKH
PARTNER

amparikh@mwe.com
Tel +1 312 984 6477



THOMAS DAMARIO
ASSOCIATE

tdamario@mwe.com
Tel +1 312 984 7527



TIMOTHY M. DUNKER
ASSOCIATE

tdunker@mwe.com
Tel +1 202 756 8537



COLIN J. STALTER
ASSOCIATE

cstalter@mwe.com
Tel +1 312 984 2718



JIAXIAO ZHANG
ASSOCIATE

jjazhang@mwe.com
Tel +1 949 757 6398

For more information, please contact your regular McDermott lawyer or [click here to have someone contact you.](#)

KEY TAKEAWAYS AND OUTLOOK FOR 2022

Author: *Amol Parikh*

Tracking with this era's continuation and uncertainty trends—global supply chain disruption, innovation outpacing legislation, the unstoppable internet of [all the] things (IoT)—2022 is expected to be another busy year in the world of patent litigation. We fully expect persistence in these spaces:

STANDARD-ESSENTIAL PATENT (SEP) LICENSING AND THE GROWING DEMAND FROM TECH COMPANIES FOR INDUSTRY STANDARDS

After the number of disputes involving SEPs increased in the United States and around the world in 2021, SEP owners and implementers alike are cautiously hopeful that some clarity is brought to SEP licensing issues this year. On the other hand, the outlook for any certainty relating to SEP in Europe remains murky, as no landmark decisions are expected from the European Court of Justice. The US Court of Appeals for the Fifth Circuit will likely issue a decision in *Continental Automotive Systems Inc. v. Avanci LLC et al.* this year.

Additionally, the US Department of Justice (DOJ) and US Patent and Trademark Office (PTO) offered a draft policy statement addressing the scope of remedies available to patent owners who have agreed to license. The departments have requested comments on the draft policy, practically ensuring that SEP policy will remain on the forefront in 2022.

UNCERTAINTY IN PATENT SUBJECT MATTER ELIGIBILITY DISPUTES

2022 is also shaping up to contain significant activity in the subject matter eligibility space.

On December 1, 2021, the plaintiff in *Yu v. Apple Inc.* petitioned for *certiorari* at the Supreme Court of the United States in an attempt to overturn the US Court of Appeals for the Federal Circuit's ruling on 35 U.S.C. § 101. In that split decision, the dissent best summarized the current state of § 101 jurisprudence, stating “inconsistency and unpredictability of adjudication have destabilized technologic developments in important fields of commerce.”

Since *Alice v. Mayo* was decided in 2014, the Supreme Court has denied numerous petitions seeking to clarify § 101 jurisprudence. Now, the Supreme Court requests the view of the US solicitor general on whether it should grant *certiorari* in *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*, which involved a patent directed to a mechanical invention.

US Congress has also—and again—taken notice of judicial activity surrounding § 101, although it seems unlikely any progress will be made outside the judiciary.

VENUE CHALLENGES AS THEY PAY IT FORWARD TO 2022

Supreme Court Chief Justice John Roberts issued a 2021 year-end report in which he acknowledged concerns that patent plaintiffs were funneling cases

into the US District Court for the Western District of Texas and directed the Judicial Conference of the United States to address how venue is chosen for patent cases. In the meantime, plaintiffs will continue filing cases in the Western District and defendants will move to transfer, likely setting several more showdowns at the Federal Circuit.

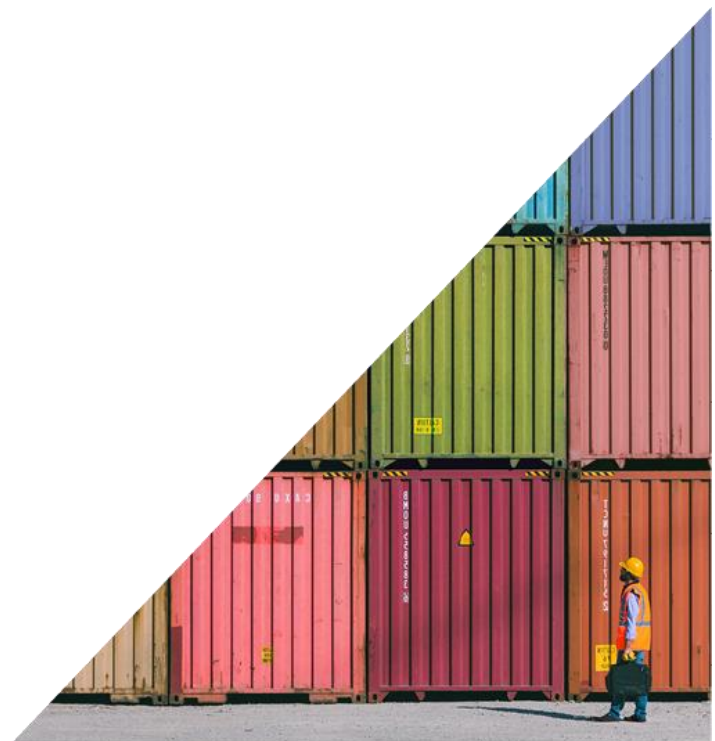
In terms of internet-related companies, venue issues may also arise in light of the ruling by the US District Court for the Eastern District of Texas in *CA Inc. v. Netflix, Inc.* finding venue was proper based on Netflix's control over servers stored in the district. While the decision was vacated by the Federal Circuit in January 2022 for other reasons, it did not specifically address whether the location of servers could be used to support venue. These decisions could impact other internet companies that exhibit control of servers located within a particular district.

In the pharmaceutical space and in view of *Celgene Corp. v. Mylan Pharmaceuticals Inc.* and *Valeant Pharmaceuticals North American LLC v. Mylan Pharmaceuticals Inc.*, companies will need to navigate issues limiting where cases against generic drug companies can be filed. This could now provoke multidistrict litigation if multiple generic drug companies file abbreviated new drug application (ANDA) applications on the same drug.

PROCEDURAL AND SUBSTANTIVE QUESTIONS AT THE US PATENT TRIAL AND APPEAL BOARD

Practitioners before the Patent Trial and Appeal Board (PTAB) also experienced a busy year,

particularly in the area of America Invents Act (AIA) proceedings, such as *inter partes* reviews (IPRs). At the beginning of the year, the PTO instructed administrative patent judges (APJs) to align the PTAB's approach to indefiniteness issues in AIA proceedings with the approach taken by district court judges. Federal courts rejected several constitutional challenges to IPR proceedings, including the Supreme Court's long anticipated decision in *United States v. Arthrex*, finding that appointment of APJs was unconstitutional, but the proper remedy was to vest the PTO director with discretion to overturn PTAB decisions. The Federal Circuit also issued decisions addressing, among other things, discretionary denials, standing, due process and estoppel.



DEVELOPMENTS SHAPING PATENT LAW

PATENTS/SEP FRAND LICENSING

Authors: Timothy M. Dunker (with contributions from Hon.-Prof. Dr. Henrik Holzapfel and Dr. Maximilian Kiemle, LL.M.)

Until recently, SEP licensing disputes have been traditionally associated with consumer electronic devices. However, as IoT and 5G continue to incorporate standard-essential communications technologies into numerous industries and standardized technologies continue to proliferate in the marketplace, licensing demands for SEPs—and related disputes—will likewise expand to these industries.

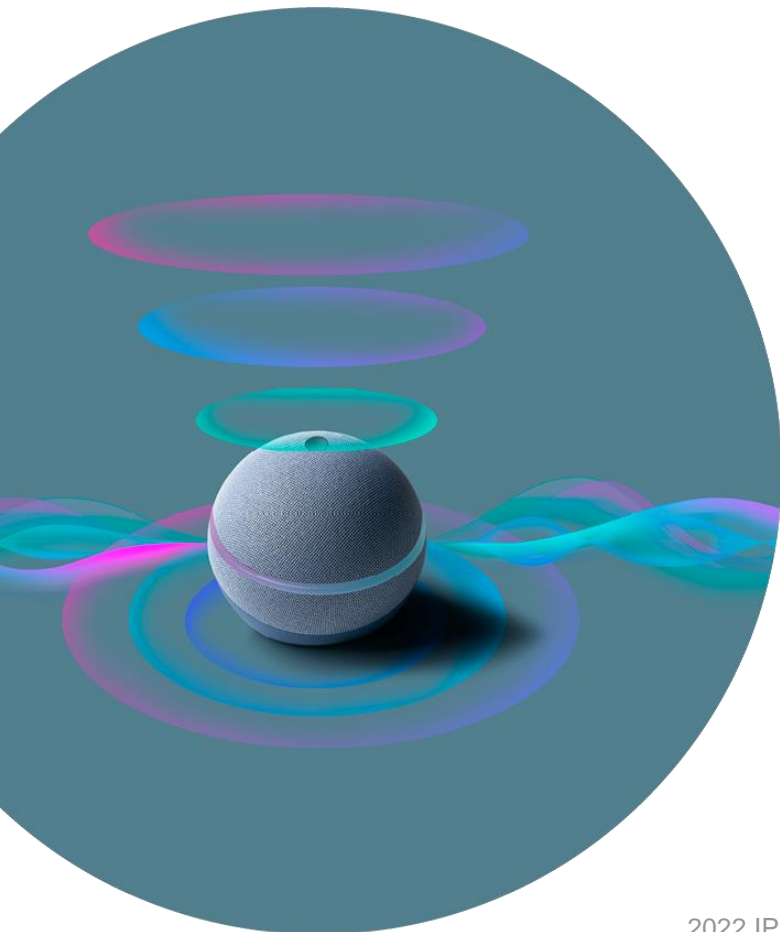
The Biden administration recently released a draft update to their fair, reasonable and non-discriminatory (FRAND) licensing policies, while the DOJ, the National Institute of Standards and Technology (NIST) and the PTO issued a joint policy statement, which notes:

“[s]trategies by either SEP holders or implementers to gain undue leverage in licensing negotiations can cause multiple harms, including non-FRAND patent royalties, increased costs, and delayed introduction of standardized products and services.”

As such, supply chain manufacturers of components relying on SEP technology need to be wary of tactics used by SEP holders and recognize potential non-FRAND warning signs.

Click [here](#) to access the US Department of Justice (DOJ), the National Institute of Standards and Technology (NIST) and the PTO’s joint policy statement, which is open for public comment.

A developing theme with SEP licensors in the United States and abroad—those in 3G, 4G and 5G spaces, in particular—has been to limit licenses solely to end-product manufacturers and to not offer licenses to sub-component manufacturers and other entities within the supply chain. (*See L2 Mobile Techs. LLC v. Ford Motor Company*, C.A. No. 21-cv-1409-CFC (D. Del.); *L2 Mobile Techs. LLC v. Google LLC*, C.A. No. 21-cv-00358-ADA (W.D. Tex.)) In the European Union, on June 1, 2021, Daimler and Nokia [announced the settlement](#) of their German SEP infringement litigation including a FRAND defense. This settlement deprived the European Court of Justice of an opportunity to issue guidance on SEP licensing to supply chains. The growing trend to only



license end-product manufacturers conflicts with the basic principles of FRAND licensing: that the license will be fair, reasonable and—most importantly—non-discriminatory.

Building off of what the PTO notes above, there are many issues that arise from SEP holders discriminating in license offerings, either by offering licenses only to certain entities in a supply chain or by offering different licensing rates for the same technology at different levels of the supply chain. For one, as the most common developers of technology relying on one or more SEPs, sub-component manufacturers are often in a better position to evaluate patent assertions of SEP holders. When SEP holders limit license offerings to end-product manufacturers and seek compensation exceeding the value added by the SEP component, they reduce the attractiveness of standardized technology to the end-product manufacturer. This, in turn, may reduce the adoption of a given standard and harm the consumer, who will not receive the benefit of the standardized technology.

Supply chain participants need to be aware of all licenses and sub-licenses within their supply chain to avoid and defend against [double dipping and] similar SEP holder tactics.

One example of seeking excessive royalty payments for use of standardized technology can be found in the L2 Mobile Technologies cases noted above, where the

defense asserted that the “patent pool” at issue contains sublicenses and covenants not to sue certain sub-component manufacturers. The defense claims that requiring another license for use by end-product manufacturers would result in improper double-dipping by SEP holders. Supply chain participants need to be aware of all licenses and sub-licenses within their supply chains to avoid and defend against similar tactics by SEP holders.

VENUE DEVELOPMENTS

Author: Colin J. Stalter

The aftereffects of the Supreme Court’s 2017 *TC Heartland* decision relating to venue are still being felt. While the Western District of Texas continues to remain one of the top districts for patent litigation, an increased number of venue-transfer motions were filed, including 17 decisions from the Federal Circuit involving *mandamus* petitions. There were also significant decisions involving venue in Hatch-Waxman cases, which essentially permits ANDA defendants to control venue for litigation.

Clarification for Hatch-Waxman Actions

As discussed in our [2020 IP Law Year in Review](#), the Federal Circuit ruled in *Valeant v. Mylan* that in Hatch-Waxman cases, venue is proper only in districts that are sufficiently related to the ANDA submission (which are districts where acts occurred that would suffice to categorize the actor as a submitter of the ANDA).

In November 2021, the Federal Circuit issued its decision in *Celgene Corp. v. Mylan Pharmaceuticals Inc.* explaining what actions are “sufficiently related” to the ANDA submission for purposes of establishing venue. Mylan submitted ANDAs in an effort to bring a generic version of Celgene’s patented Pomalyst drug

to market. In connection with the application, Mylan sent a Paragraph IV notice letter to Celgene in New Jersey but did not submit the ANDA from New Jersey. Celgene filed suit in New Jersey against Mylan and its related companies. While Celgene is headquartered in New Jersey, Mylan is based in West Virginia, and the other related entities are based in Pennsylvania and the Netherlands.

Citing to its holding in *Valeant v. Mylan*, the Federal Circuit reiterated that “it is the submission of the ANDA, and only the submission, that constitutes an act of infringement in this context.” Celgene argued that Mylan’s act of sending the (mandatory) Paragraph IV notice to Celgene in New Jersey constituted an act of infringement that was an “essential part” of the ANDA submission. The Federal Circuit disagreed, relying primarily on the timing language in the relevant statutes. Specifically, the Court noted that the notice letter is required to state that an ANDA “has been submitted,” implying that the notice letter is an event occurring *after* the infringing submission.

Trouble in Texas

Outside of Hatch-Waxman cases, the Federal Circuit issued 17 separate *mandamus* decisions in 2021, ordering Judge Alan D. Albright of the Western District of Texas to transfer cases to other courts. The Federal Circuit routinely found an abuse of discretion in the district court’s application of the public- and private-interest factors for transfer determinations under Fifth Circuit law. As described in the Federal Circuit’s September 2021 order in *In re: Juniper Networks*, it explained that the “single most important factor” in venue transfer analysis is the relative convenience and cost of attendance for witnesses, and that a witness’s status as a third party should not discount the convenience factor. Despite this analysis being repeatedly laid out in the Federal Circuit’s

reversals, Judge Albright continued to deny parties’ motions to transfer under largely similar fact patterns. In one case in which Judge Albright *did* grant a motion to transfer in view of the *Juniper* decision, he stated that the Federal Circuit had “reprimanded [him] for reliance on decades of similar jurisprudence in the Fifth Circuit and elsewhere.”

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Judge Albright and the Federal Circuit appear poised to continue the tug-of-war on the application of the interest factors for venue-transfer motions, and Judge Albright has demonstrated that he is willing to continue to deny motions despite the slew of reversals from the higher court. Looking to 2022, if the Federal Circuit continues to overrule Judge Albright at such a record rate, it may be the patent owners who ultimately decide it is not worth filing in the Western District of Texas.

SUBJECT MATTER ELIGIBILITY ROUNDUP IN 2021

Author: Thomas DaMario

As courts and legislators noted in 2021, the current state of 35 U.S.C. § 101 jurisprudence relating to patent subject matter eligibility is rife with uncertainty. This

uncertainty impacts multiple industries, including, in recent years, biological and computer-implemented technologies. Congress has also taken note of the recent judicial activity surrounding § 101. House Bill (H.B.) 5874 was introduced by Representative Thomas Massie (R-KY) on November 4, 2021. While the bill has gained notoriety for its proposed overhaul of the AIA by dismantling the PTAB and returning to a first-to-invent system, the bill also attempts to remedy some of the confusion surrounding subject matter eligibility in § 101. The bill specifically abrogates the Supreme Court jurisprudence surrounding subject matter edibility in *Alice Corp. v. CLS Bank, Int’l, Bilski v. Kappos, Ass’n for Molecular Pathology v. Myriad Genetics* and *Mayo Collaborative Services v. Prometheus Labs* to ensure “life sciences discoveries, computer software, and similar inventions and discoveries are patentable, and that those patents are enforceable.” Whether or not H.B. 5874 is ultimately signed into law, subject matter eligibility will be a topic to watch in 2022—both in the courts and legislature.

As described below, the Federal Circuit issued several decisions that seemingly expand the scope of subject matter ineligibility under § 101 and provides some commentary on what may lie ahead in 2022.

INVALIDATED PATENTS

The Federal Circuit issued decisions invalidating patents directed to:

- Targeted advertising
- Digital cameras
- Scientific methods applied to genes
- Communications systems
- Content-based identifiers

Free Stream Media Corp. v. Alphonso (May 2021)

In *Free Stream Media Corp. v. Alphonso Inc.*, the Federal Circuit reversed a district court decision that a patent directed to a system for providing a mobile phone user with targeted information (*i.e.*, advertisements) based on data gathered from the user’s television was not invalid under 35 U.S.C. § 101. (Case Nos. 2019-1506, -2133 (May 11, 2021) (Reyna, J.)) To accomplish the stated goal, the claims in question recite three main components: (1) a networked device (*e.g.*, a smart TV), (2) a client device (*e.g.*, a mobile device) and (3) a relevancy matching server. The claims also indicate that the client device includes a “security sandbox.” The specification indicates that a security sandbox commonly constrains what each of the applications running on the client device are permitted to do. This makes it difficult for the client device to find the networked device of the user and obtain information directly from the networked device.

Based on this information, the district court applied the two step *Mayo/Alice* framework and found that the claims are not directed to an abstract idea. The district court characterized the claims as “describ[ing] systems and methods for addressing barriers to certain types of information exchange between various technological devices, *e.g.*, a television and a smartphone or tablet being used in the same place at the same time.” The Federal Circuit disagreed and found that the claims are directed to the abstract idea of (1) gathering information about television users’ viewing habits, (2) matching the information with other content (*i.e.*, targeted advertisements) and (3) sending that content to a second device. During the second step, the Court additionally found that nothing in the claims transforms this abstract idea into an inventive concept. Specifically, despite recitation of

specific equipment (*i.e.*, a networked device, a client device and a relevancy matching server) as part of the claimed system, the Court nonetheless opined that the claims “simply recite that the abstract idea will be implemented using conventional components and functions generic to the technology.”

Yu v. Apple (June 2021)

In *Yu v. Apple Inc.*, the Federal Circuit affirmed a district court decision that a patent directed to digital camera technology is invalid under 35 U.S.C. § 101. (Case Nos. 2020-1760, -1803 (Jun. 11, 2021) (Prost, J.) (Newman, J. dissenting).) In particular, the patent claim in question recites “[a]n improved digital camera comprising: a first and second image sensor [and] two lenses[,] said first image sensor producing a first image and said second image sensor producing a second image[,] analog-to-digital converting circuitry[,] an image memory[,] and a digital image processor [for] producing a resultant digital image from said first digital image enhanced with said second digital image.” The majority focused on the result of the claim and agreed with the district court

that the claim is directed to the abstract idea of “taking two pictures (which may be at different exposures) and using one picture to enhance the other in some way.” After determining that the claim is directed to an abstract idea, the majority next turned to part two of the *Mayo/Alice* framework. Similar to the Court’s analysis in *Free Stream Media*, the Court affirmed the district court’s decision that “[t]he claimed configuration does not add sufficient substance to the underlying abstract idea of enhancement—the generic hardware limitations of [the claim] merely serve as a conduit for the abstract idea.”

In her dissent, Judge Pauline Newman focused on the structure recited in the claim, noting that the claim is directed to a camera, which “is a mechanical and electronic device of defined structure and mechanism; it is not an abstract idea.” Judge Newman went on to delineate the differences between § 101, which sets forth the requirements for patentable subject matter, and § 102, which sets forth requirements for novelty. That the claims may not be novel does not impact whether they are drawn to patentable subject matter.



The impact of the majority’s decision is best summarized in Judge Newman’s dissent: “In the current state of Section 101 jurisprudence, inconsistency and unpredictability of adjudication have destabilized technologic developments in important fields of commerce. Although today’s Section 101 uncertainties have arisen primarily in the biological and computer-implemented technologies, all fields are affected. [This case] enlarges this instability in all fields, for the [majority] holds that the question of whether the components of a new device are well-known and conventional affects Section 101 eligibility, without reaching the patentability criteria of novelty and nonobviousness.”

“In the current state of Section 101 jurisprudence, inconsistency and unpredictability of adjudication have destabilized technologic developments in important fields of commerce.”

CosmoKey Solutions v. Duo Security (October 2021)

In contrast with what seems to be a potential expansion of subject matter ineligibility into claims that contain concrete structure, as discussed in *Free Stream Media* and *Yu*, the Federal Circuit also provided acknowledgement that eligible subject matter is not limited only to the tangible. In *CosmoKey Solutions GmbH v. Duo Security LLC*, the Federal Circuit

reversed a district court’s finding that claims directed to an authentication technique are ineligible under § 101. (Case No. 2020-2043 (Oct. 4, 2021) (Stoll, J.) (Reyna, J. concurring).) The claims recite a method for authenticating a user to a transaction by transmitting a user’s identification via a first communication channel (e.g., a purchase terminal and an authentication device) and activating a normally inactive authentication function through a second communication channel (e.g., a user’s mobile device and an authentication device) for a set period of time surrounding the transaction after which the authentication function is again inactivated. The patent specification explains that this method is both low in complexity and high in security because all that is required from the authentication function is to permit the authentication device to detect whether this function is active, and the only activity required from the user is to activate the function within a suitable timing.

Despite the lack of reliance on any specific hardware, the majority found that the claims are patent eligible because the focus of the claims is the advance over prior art authentication systems, which constitutes the necessary inventive concept under step two of the *Mayo/Alice* framework. The specification acknowledges the benefits, which include user authentication with fewer resources, less user interaction and allowing for simpler devices to be used in the authentication process. While Judge Jimmie V. Reyna’s concurrence came to the same ultimate conclusion by citing to similar evidence, he stressed that the analysis should have been conducted under step one of the *Mayo/Alice* framework.

PTAB IPRS, CBMS AND OTHER PROCEEDINGS

Author: *Jiaxiao Zhang*

2021 was a busy year for the PTAB and PTAB practitioners, especially in the area of AIA proceedings such as IPRs.

In January, PTO leadership issued a [memorandum to PTAB judges to align the PTAB’s approach when deciding indefiniteness issues under 35 USC § 112](#) in AIA post-grant proceedings more closely with district court proceedings. Similar to changes in claim construction, the memorandum was issued under the PTO director’s authority to set forth binding agency guidance to govern the PTAB’s interpretation of statutory provisions and to “promote consistency and efficient decision making among coordinate branches of government that decide similar issues in co-pending proceedings.” The *Nautilus* approach applies to district court, post-grant review (PGR) and IPR proceedings but not to indefiniteness (or claim construction) issues decided outside the context of AIA reviews.

Despite repeated attempts, the structure and functions of the PTAB have survived constitutional challenge, including as to the [PTAB’s fee and compensation structure, lack of director review over institution decisions and applicability of the Takings Clause](#). (*Mobility WorkX, LLC v. Unified Patents LLC*, Case No. 20-1441 (Fed. Cir.) (Dyk, J.) (Newman, J., dissenting).) The impact of the Supreme Court *Arthrex* decision (*United States v. Arthrex, Inc.*, Case Nos. 19-1434; -1452; -1458 (June 21, 2021)), finding appointment of PTAB APJs as violating the Constitution’s appointments clause but addressable by providing the PTO director authority to review a PTAB final decision in an IPR by rehearing, is still

being felt as cases are considered for rehearing. This includes *de novo* (fresh) review of issues of fact and issues of law, either by the request of the parties or *sua sponte* (director-initiated) with notice to the parties and potential opportunity for briefing.

Practically speaking, not all rehearing requests have been granted, and in many rehearing requests the results have been the same, although time will tell as the PTAB works through rehearing requests it had stayed in May 2020 (and lifted in late October 2021) pending the Supreme Court’s review of *Arthrex*. Still, the Federal Circuit found waiting to raise an *Arthrex* challenge until an appellate opening brief could be allowable [if the argument were not available earlier](#). (*New Vision Gaming v. SG Gaming, Inc.*, Case Nos. 20-1399, -1400 (Fed. Cir. May 13, 2021) (Moore, J.) (Newman, J. *concurring in part, dissenting in part*.) The Court found that consistent with it and other circuits’ precedents regarding executive agency fee collection, little connection existed between institution decisions and the agency’s overall financial health, or that any APJ incentives to render a certain number of decisions would call APJs’ decisions into question. The PTAB continues to update its *Arthrex* guidance, including through periodic updates to its [Arthrex Q&As](#) in response to questions from stakeholders, which are a worthwhile read for anyone considering or facing an *Arthrex* challenge.

Post-*Fintiv*, pre-institution stays of litigation appear to have reduced the likelihood of a discretionary denial, and petitioners have increased motivation to stipulate that they will not pursue any ground raised, or that could have been reasonably raised in the IPR, to get to institution of an IPR proceeding. However, in one case, the PTAB was found to have acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA) by ordering reexamination of or refusing to terminate a reexamination upon request

when the same challenger had repeatedly tried and failed to raise the same arguments for the same patent in prior IPR proceedings. (*In re: Vivint, Inc.*, Case No. 20-1992 (Fed. Cir. Sept. 29, 2021) (Moore, C.J.).)

Standing remained an important issue for IPR appeals to avoid the Federal Circuit dismissing appeals as moot. An appellant must demonstrate it suffered an injury in fact that is fairly traceable to the challenged conduct of the appellee. (*ModernaTX, Inc. v. Arbutus Biopharma Corporation*, Case No. 20-2329 (Fed. Cir. Dec 2, 2021) (Lourie, J.)). The standing must be imminent and non-speculative and dismissing underlying district court proceedings with prejudice after reaching settlement and licensing agreements was insufficient. (*Apple Inc. v. Qualcomm Inc.*, Case Nos. 20-1683; -1763; -1764; -1827 (Fed. Cir. Nov. 10, 2021) (Prost, J.) (Newman, J., dissenting).) Thus, the patent owner deciding not to appeal the final judgment of noninfringement failed to meet muster. (*ABS Global, Inc. v. Cytonome/ST, LLC*, Case No. 19-2051 (Fed. Cir., Jan. 6, 2021) (Stoll, J.) (Prost, C.J., dissenting in part).)

Still, the Federal Circuit in a precedential opinion vacated several PTAB final written decisions as violating due process and the APA, citing the inability of the parties to respond to the PTAB on its *sua sponte* construction of a term the parties had agreed to but not had notice of or an adequate opportunity to respond to. (*Qualcomm Inc. v. Intel Corp.*, Case Nos. 20-1589–1594 (Fed. Cir. July 27, 2021) (Moore, C.J.)). Similarly, the Court also found that the PTAB cannot *sua sponte* invalidate a claim as anticipated under § 102 unless that specific statutory ground had previously been noticed. (*M & K Holdings, Inc. v. Samsung Electronics Co., Ltd.*, Case No. 20-1160 (Fed. Cir. Feb. 1, 2021) (Bryson, J.)).

And, although practitioners have learned to be careful of estoppel arising from IPR proceedings, the Court has carefully considered the facts and timing in cases, including one where 35 USC § 314(d) did not bar Federal Circuit review of a PTAB determination that a petitioner was not estopped from maintaining IPR proceedings since the alleged estoppel-triggering event occurred post-institution. (*Uniloc 2017 LLC v. Facebook Inc.*, Case Nos. 19-1688, -1689 (Fed. Cir. Mar. 9, 2021) (Chen, J.)).



Yet, in other ways the PTAB has maintained its broad reach. In February 2021, the Court reinforced *Thryv* by reiterating that the PTAB's threshold determination as to whether an AIA proceeding will be instituted, whether IPR or CBM, is closely tied to the institution decision and not appealable. (*cxLoyalty, Inc. v. Maritz Holdings Inc.*, Case Nos. 20-1307, -1309 (Fed. Cir. Feb. 8, 2021) (Prost, C.J.)). In November 2021, several technology companies that challenged the PTAB's *NHK-Fintiv* rule as "vague factors [that] lead to speculative, unpredictable, and unfair outcomes" lost their case in district court after US District Court for the Northern District of California Judge Edward Davila granted a motion by the PTO to dismiss the suit for being precluded by an AIA rule that decisions on whether to institute IPR are "final and nonappealable." Despite the Supreme Court's ruling

in *Cuozzo* that constitutional challenges or jurisdictional violations related to institution decisions may still be appealable, Judge Davila did not find the companies' suit to "fit within the categories of non-precluded review" such that he could hear it under *Cuozzo*. (*Apple Inc. et al. v. Hirshfeld*, No. 5:20-cv-06128 (N.D. Cal. Nov. 10, 2021).) The companies have appealed to the Federal Circuit, which will likely hear the case this year. Practitioners may hope that the Federal Circuit will consider an approach similar to that taken in *Mylan* this past March, where the Court concluded that while it did not have jurisdiction to consider the direct appeal of a PTAB decision denying institution, it could review the decision under its *mandamus* jurisdiction. (*Mylan Laboratories Ltd. v. Janssen Pharmaceutica, N.V.*, Case No. 20-1071 (Fed. Cir. Mar. 12, 2021) (Moore, J.)).

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