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Intellectual Property Outlook: Cases and Trends to Follow in 2020

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In this article, we take a look forward at the cases, legislation, and other trends that are likely to have an impact on intellectual property law and practice in the second half of 2020. In Part I, we provide a preview of intellectual property issues pending before the Supreme Court. In Part II, we consider the current hot topics related to *inter partes* review proceedings. In Part III, we review ongoing efforts to clarify the law of patent eligibility. Finally, in Part IV, we summarize proposed and pending legislation related to intellectual property.

Part 1: IP Issues Currently Pending Before the Supreme Court

The Supreme Court will address several interesting intellectual property issues during the remainder of the 2020 term, including (1) whether adding “.com” to an otherwise generic mark creates a protectable trademark; (2) the ability to obtain copyright protection for software interfaces; (3) the requirements for recovering an infringer’s profits in trademark cases; and (4) whether annotations of state laws are entitled to copyright protection. We provide a brief summary of each case below.

1. Whether Adding “.com” to a Generic Mark Creates a Protectable Trademark

In *USPTO v. Booking.com BV*, the Supreme Court will address whether adding “.com” to a generic term can result in a protectable trademark.¹

To register a trademark under the Lanham Act, the mark must be “distinctive”—*i.e.*, capable of distinguishing the applicant’s goods from those of others.² Courts typically measure distinctiveness on an ascending scale: (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; and (5) fanciful.³ Generic marks—those that refer to “the genus of which the particular product is a species”—cannot distinguish the goods of an applicant and therefore cannot be registered.⁴

In *Booking.com*, the United States Patent and Trademark Office (the “USPTO”) refused to register the mark “BOOKING.COM,” finding it generic.⁵ The district court reviewed and reversed the USPTO’s decision, finding that the combination of “booking” and “.com” created a descriptive term that was eligible for trademark protection.⁶

On appeal, the Fourth Circuit agreed with the district court that “booking.com” is eligible for trademark protection.⁷ The Fourth Circuit explained that “BOOKING.COM” must be assessed as a whole, rather than considering “booking” and “.com” separately.⁸ The court then found that the USPTO had failed to offer any evidence showing that “booking.com” as a whole is used to refer generically to online hotel reservation services.⁹ The court further held that the mark is not generic because the “primary significance” of “booking.com” to consumers—as evidenced by a consumer survey—is as a brand name, not as a category of services.¹⁰

On November 8, 2019, the Supreme Court granted certiorari in the *Booking.com* case to consider whether “the addition by an online business of a generic top-level domain (.com) to an otherwise generic term can create a protectable trademark.” The USPTO argues that “booking” is a generic term that cannot be transformed into a protectable trademark with the addition of “.com.” The USPTO reasons that “.com” is akin to entity designations, such as “Co.” or “Inc.,” which also cannot transform generic terms into protectable trademarks.¹¹ Booking.com responds that the USPTO is attempting to create a *per se* category of generic marks, which the USPTO calls “generic.com” marks. According to Booking.com, such a *per se* approach is contrary to prior Supreme Court rulings that genericness is a factual determination

that depends on the “primary significance” of a mark to consumers.¹²

The decision in *Booking.com* could have a significant impact on online commercial activities. The USPTO has argued that protecting “generic.com” marks will give companies holding those marks an unfair ability to prevent competitors from describing their services. For example, the USPTO argues that Booking.com could sue other online reservation companies to prevent them from using “booking” in their domain name (e.g., “ebooking.com,” “hotelbooking.com”). Conversely, if the Supreme Court holds that “generic.com” names cannot be registered, well-known domain names could lose protection and companies may reconsider the use of such names in the future. Booking.com provided several possible examples in its opposition to certiorari, including “weather.com,” “answers.com,” and “ancestry.com,” all of which the USPTO has previously registered.

Oral argument in the *Booking.com* case was scheduled for March 23, 2020, but the argument was postponed in light of the COVID-19 pandemic. The Supreme Court has selected *Booking.com* as one of the ten cases in which the Court will hear oral argument by telephonic conference in May 2020.

2. Ability to Copyright Software Interfaces

In *Google LLC v. Oracle America, Inc.*, the Supreme Court will wade into a long-running battle of goliaths to determine the copyrightability of software interfaces that allow computer programs to communicate with each other and with computer hardware.¹³

The *Google* case concerns Java “application programming interfaces” (APIs), which are “pre-written Java source code programs” that perform certain computer functions.¹⁴ These APIs allow programmers to use pre-written code for common functions.¹⁵ The Java APIs are comprised of two types of source code—“declaring code” that provides information about the function to be performed and “implementing code” that gives step-by-step instructions to the computer to perform the function.¹⁶

In developing the Android OS for mobile phones, Google wanted to encourage Java developers to build Android-compatible apps.¹⁷ To facilitate development of these Java-based apps, Google copied declaring code for 37 Java API packages relevant to mobile devices (11,500 lines of code) as part of the Android platform.¹⁸ Although Google copied the Java API declaring code, it wrote its own implementing code.¹⁹

In 2010, Oracle accused Google of copyright infringement. After extensive proceedings—including two jury trials and two Federal Circuit appeals—the Federal

Circuit held that the Java APIs are entitled to copyright protection and Google’s copying of those APIs for the Android OS did not amount to “fair use.”²⁰

In November 2019, the Supreme Court granted certiorari to consider two issues: (1) whether copyright protection extends to a software interface; and (2) whether Google’s copying of a software interface in the context of creating a new computer program constitutes fair use.

On the first issue, Google argued that software interfaces are not copyrightable because they are “methods of operation,” which are excluded from copyright protection. Google also argued that the “merger doctrine” gave Google the right to use Oracle’s declaring code because copying the declarations was the only way to achieve the functions represented by those declarations, thus “merging” the expressive and functional aspects of the code. Oracle responded that the Java declaring code is a particular expression of an idea, which is copyrightable. Oracle further responded that the “merger” doctrine does not apply because Java programmers can write code to perform a function in many ways without using Java’s declarations. For example, Google could have developed its own library of declaring code and provided that code to programmers to use as an alternative to Oracle’s declaring code.

On the second issue, Google argued that the Federal Circuit improperly overturned the jury’s verdict of fair use, which was supported by substantial evidence. Oracle responded that the Federal Circuit properly considered the statutory fair use factors and that no other case in history has sanctioned widespread copying that competes with an original work as “fair use.”

The stakes in *Google* are quite high. Indeed, over 60 amicus briefs have been filed in the case. If the Court confirms the copyrightability of software interfaces—as Oracle advocates—companies will be able to restrict the use of the interfaces or demand licensing fees for such use/interoperability. Alternatively, if the Court finds that software interfaces are not copyrightable—as Google urges—companies may have less incentive to author creative or innovative interfaces and companies such as Oracle will need to find new methods to monetize their products.

Oral argument in the *Google* case was scheduled for March 24, 2020, but the argument was postponed in light of the COVID-19 pandemic and will likely be held in the Fall of 2020.

3. Requirements for Recovering an Infringer’s Profits in Trademark Cases

In *Romag Fasteners, Inc. v. Fossil, Inc.*, the Supreme Court will address whether a trademark holder must

establish willful infringement to qualify for an award of an infringer's profits.²¹

In *Romag*, a jury found that Fossil, Inc. had infringed trademarks associated with magnetic clasps on handbags. The jury awarded Romag Fasteners, Inc. \$6.7 million in damages based on the profits Fossil earned from the infringing sales. The district court, however, vacated the damages award, finding that Romag failed to establish willful infringement of the trademarks.²² The Federal Circuit affirmed, holding that the Second Circuit requires proof of willful infringement as a prerequisite for an award of an infringer's profits.²³

The Supreme Court granted *certiorari* and will now interpret the requirements of 15 U.S.C. § 1117(a), which provides that, "subject to the principles of equity," a plaintiff may "recover . . . defendant's profits" upon proving "a violation under section 1125(a) or (d) . . . or a willful violation under section 1125(c)." Romag argues that this provision only requires a "willful" violation in connection with § 1125(c) (trademark dilution), and not in connection with § 1125(a) (false designation of origin). Fossil, Inc. responds that "principles of equity" always require a showing of willful infringement, including with respect to § 1125(a).

The Supreme Court heard oral argument in the *Romag* case on January 14, 2020. The Justices' questions largely focused on whether willfulness has always been an equitable requirement for profit awards. Fossil argued that profits have never been awarded in any case without willfulness. Romag responded that (i) willfulness has typically been weighed as one of several factors, but not as a dispositive, "gateway" determination; and (ii) "willfulness" in many older cases meant something less than what it means today (*e.g.*, callous disregard).

The Court's decision will likely have a significant impact on the availability of damages for trademark infringement. Indeed, an infringer's profits are often the most viable method for quantifying damages. If a trademark owner must show willfulness to recover profits, trademark owners may be left with no monetary remedy in many cases.

4. Copyright Protection for State Law Annotations

In *Georgia v. Public.Resource.Org Inc.*, the Supreme Court will consider whether the annotations to state laws are "government edicts" that are exempt from copyright protection.²⁴

The government edicts doctrine precludes copyright protection for certain government works, such as state and federal statutes and judicial decisions. In *Public.Resource.Org*, the Eleventh Circuit held that the annotations

included in the Official Code of Georgia (OCGA) are government edicts even though the annotations do not themselves have the force of law.²⁵ The Eleventh Circuit reasoned that citizens should have "unfettered access" to such legal edicts that govern their lives.²⁶

Before the Supreme Court, the State of Georgia argued that copyright protection is appropriate in this case because the annotations do not themselves have the force of law even if they provide context for the law. *Public.Resource.Org*, by contrast, argued that the annotations are not copyrightable because the code has merged with the annotations and anyone who wants to understand the law must also consult the annotations.

The Supreme Court held oral arguments in *Public.Resource.Org* on December 2, 2019. During the argument, the Justices were interested in hearing from both sides on the policy implications of the case. *Public.Resource.Org* asserted that Georgia has erected a "pay wall" that will prevent citizens from accessing official legislation. Georgia responded that copyright protection is necessary to widely disseminate the law because copyrights incentivize third-party publishing companies to create and publish the laws and annotations.

Part 3: Efforts To Clarify Patent Eligibility under § 101

Since the Supreme Court's decisions in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*²⁷ and *Alice Corp. v. CLS Bank International*,²⁸ patent eligibility has likely been the single most confounding and controversial issue in the area of patent law. Below, we briefly recap the current state of patent eligibility since the decisions in *Mayo* and *Alice* and then address several patent eligibility issues that are percolating in 2020.

1. Patent Eligibility Confusion After *Mayo* and *Alice*

The threshold question for any invention is whether the subject matter of that invention is patentable under 35 U.S.C. § 101. Under § 101, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." Although § 101 uses positive language to indicate what is patentable (*i.e.*, a "process, machine, manufacture, or composition of matter"), the Supreme Court has crafted certain negative exceptions for inventions that are not patent eligible. These exceptions include "laws of nature,

natural phenomena, and abstract ideas.”²⁹ The Court has explained that these exceptions exist to prevent patents on the basic building blocks and tools of science.

In *Alice* and *Mayo*, the Supreme Court articulated a two-part test to determine patent eligibility under § 101. First, a court must determine whether a patent claim is “directed to” a law of nature, abstract idea, or natural phenomena. Second, if so, the court must examine whether the limitations of the challenged patent claim go beyond the ineligible subject matter so as to “transform the nature of the claim into a patent-eligible application.”³⁰ A patent claim “directed to” patent-ineligible subject matter may be sufficient under § 101 if the claim adds something beyond “well-understood, routine, conventional activity” to the ineligible concept.³¹

Since the *Alice* decision, district courts have granted roughly 40% of motions challenging patent eligibility. Perhaps the most troubling aspect of these decisions is the lack of predictability. Indeed, in cases involving arguably similar patents, the Federal Circuit has repeatedly reached divergent results.³² Recognizing the confounding state of the law on patent eligibility, Federal Circuit judges have almost universally recognized the need for Supreme Court intervention.³³

2. The Supreme Court Is Unlikely to Clarify Patent Eligibility in 2020

Hopes that the Supreme Court would clarify patent eligibility standards in 2020 have largely been dashed. Indeed, as if sending a signal to the entire patent bar, the Court denied five separate petitions directed to § 101 on January 13, 2020, including the petition in *Athena Diagnostics Inc. v. Mayo Collaborative Services, LLC*.³⁴ Since that time, the Court has denied six additional petitions directed to § 101.³⁵

Many—including the Solicitor General on behalf of the United States—urged the Court to hear the *Athena* case. In that case, the Federal Circuit held that a patented method of diagnosing an autoimmune disease was invalid for claiming a “natural law.” Specifically, the court found that the correlation between the presence of naturally-occurring autoantibodies and certain neurological diseases was a correlation that “exist[ed] in nature apart from any human action.”³⁶ Therefore, the patent claims reciting this correlation were “directed to” a law of nature under step 1 of the *Alice/Mayo* test.³⁷ The Federal Circuit also found that the additional limitations of the challenged patent claims were merely “conventional techniques to detect that natural law” and not “an improvement in the underlying immunoassay technology.”³⁸ The panel thus affirmed the trial court’s dismissal of the patent under § 101. Later, the entire court declined to rehear

the case *en banc* (7 to 5), even though the judges largely agreed that the invention should have been patentable as a matter of public policy.³⁹

Athena petitioned for certiorari and asked the Supreme Court to provide further guidance as to the scope of *Mayo*. The Solicitor General and numerous *amiciae* supported the petition for certiorari. Despite the strong support for *Athena*’s petition (and the frustration expressed by several Federal Circuit judges with the current state of § 101 jurisprudence), the Court denied the petition, as well as numerous others relating to other questions of patent eligibility. The Court seemed to be sending a message to the bar that it was not interested in wading into the § 101 bog again and that it would be up to policymakers and legislators to address the concerns that have been expressed in the wake of *Alice* and *Mayo*.

In light of the Supreme Court’s refusal to reconsider the test for patent eligibility, we expect that the Federal Circuit and district courts will take it upon themselves to further winnow the impact and applicability of the § 101 defense in 2020. Indeed, shortly after the Supreme Court refused to review the *Athena* case, the Federal Circuit issued a new decision—arguably inconsistent with the decision in *Athena*—confirming the patent eligibility of conventional diagnostic testing techniques when those techniques are applied in the context of a newly discovered law of nature.⁴⁰

3. Using Artful Pleading to Avoid § 101 in 2020

In February 2018, the Federal Circuit issued decisions in the *Berkheimer* and *Aatrix* cases holding that the *Alice/Mayo* test may raise questions of fact that cannot be resolved on the pleadings.⁴¹ For example, under part 2 of the *Alice/Mayo* test, “[t]he question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact.”⁴²

The procedural issues addressed in *Berkheimer* and *Aatrix* have substantial practical significance. A large part of the potency of § 101 defenses following *Mayo* and *Alice* has been that those defenses can be raised at the earliest stages of a case, before incurring the expenses of fact and expert discovery. The availability of a dispositive defense at the beginning of a case has been particularly effective in combatting the type of litigation cost arbitrage on which many non-practicing entities relied. The decisions in *Berkheimer* and *Aatrix* raised a concern that plaintiffs would be able to thwart early case resolutions through artful pleading. For example, can plaintiffs now avoid a motion to dismiss by including allegations that an invention is not “abstract” or that claim limitations are not “routine” or “conventional”?

There is some evidence that *Berkheimer* and *Aatrix* are having an impact that will become further entrenched in 2020. Although district courts have granted roughly 40% of motions challenging patent eligibility since *Alice*, the rate has been on a declining trend, especially in recent years. For example, in 2019, the grant rate dropped to roughly 33%. Moreover, there have been several widely-reported decisions in the first part of 2020 that have denied motions to dismiss under § 101, purportedly due to disputed factual issues that would likely exist in any case.⁴³ Going forward, we expect to see fewer motions granted as patent owners become even more savvy at alleging facts and creating disputes that cannot be resolved on the pleadings.

4. “Machine-or-Transformation” Test, Version 2.0

Under Federal Circuit law prior to *Alice*, courts used the machine-or-transformation test to determine whether or not an invention was a patent-eligible “process” under § 101.⁴⁴ Under that test, a process was eligible for patenting if it was tied to a particular machine or apparatus or transformed a particular article into a different state or thing.⁴⁵ In *Bilski*, the Supreme Court cautioned that “the machine-or-transformation test [was] a useful and important clue, an investigative tool,” but that it was “not the sole test for deciding whether an invention [was] a patent-eligible ‘process.’”⁴⁶ Later, in *Alice*, the Supreme Court expressly found that the claimed invention was ineligible for patenting even though the invention was tied to various physical components of a computer.

Since *Alice*, a number of courts have seemingly sought to resurrect a dichotomy between “abstract ideas” and “physical” or “concrete” inventions. For example, in *2-Way Computing Inc.*, a district court denied a § 101 motion because invention was “directed to a concrete, physical task” and not an “abstract concept.”⁴⁷ A similar rationale was offered in *Chamberlain Corp.*, where the district court found that the claims were not directed to an “abstract idea” because they have “physical and tangible components.”⁴⁸ Certain Federal Circuit decisions have resisted a return to relying on “physical” characteristics in assessing patent eligibility. For example, the court in *ChargePoint, Inc.* observed that “a tangible system (in § 101 terms, a machine) is not dispositive.”⁴⁹ But other Federal Circuit cases, such as *Versata Development Group*, have relied on the absence of a “particular concrete or tangible form” as evidence that claims are directed to an abstract idea.⁵⁰

While the presence of “tangible” or “concrete” components is unlikely to become dispositive in § 101 challenges, courts will likely continue to elaborate on the role that physical components play in the patent eligibility analysis in 2020. In particular, courts may increasingly rely on

the presence of tangible components as a “useful tool” in determining that an invention is eligible for patenting.

5. Potential Legislative “Fixes” For Patent Eligibility under § 101

We can expect further calls in 2020 for legislators to revise § 101, particularly in light of the Supreme Court’s refusal to clarify the *Alice/Mayo* test. Numerous proposals have been suggested over the past several years. One major challenge to bringing policymakers together has been that powerful stakeholders are often pitted on opposite sides of the debate. For example, biomedical companies have advocated limiting the significance of § 101, while technology companies have generally advocated maintaining a strong patent eligibility requirement.

Early last year, a group of Senators on the Judiciary Committee led by Senators Thom Tillis (R-NC) and Chris Coons (D-DE) made efforts to pursue legislative reform. They released a draft bill in May 2019 that would, among other things, require § 101 to be construed in favor of eligibility, abrogate all judicial exceptions to patent eligibility, and reject step 2 of the *Alice/Mayo* analysis.

After release of the draft bill, the Judiciary Committee followed up with three intense days of hearings, soliciting views from 45 witnesses across industry and academia, including many public and private practitioners. After these hearings concluded, Senators Tillis and Coons released a joint statement reflecting concerns that recent court decisions had made it difficult to patent “life-saving precision medicine and diagnostics” as well as “exciting and important technologies like artificial intelligence.” The Senators determined that the system was “broken” and “desperately needs to be repaired.”

Since Senators Tillis and Coons released their joint statement in June 2019, there has been little further development in Congress. But the environment appears to be growing more hospitable to new legislation. Now that the Supreme Court has refused, at least for the short-term, to re-engage on the substantive test for patent eligibility, there may be new room for changes to the law. We expect that policymakers and legislators will once again bring these issues to the forefront in 2020.

Part 4: Hot Topics in Inter Partes Review Proceedings In 2020

There are a number of hot topics related to *inter partes* review that are likely to continue to grab headlines. Below, we review several of these issues, including: (1) whether

the appointment of PTAB Administrative Patent Judges violates the Appointments Clause of the Constitution; (2) whether the PTAB will allow a greater number of claim amendments under the Pilot Program announced in March 2019; (3) whether the deadline for filing an IPR petition should continue to run when an infringement case is dismissed without prejudice; and (4) whether the PTAB will be able to coherently apply the standard for identifying real-parties-in-interest.

1. Constitutionality of the PTAB

On October 31, 2019, the Federal Circuit released a landmark opinion in *Arthrex, Inc. v. Smith & Nephew, Inc.* holding that the appointment of Administrative Patent Judges (APJs) violated the Appointments Clause of the Constitution.⁵¹ In particular, the court found that APJs are principal officers subject to appointment by the President and confirmation by the Senate. As such, the court determined that appointment of APJs by the Secretary of Commerce was unconstitutional. Rather than striking down the Board in its entirety, however, the court instead severed the statutory provision allowing the dismissal of APJs “only for such cause as will promote the efficiency of service.” Without such protections, the court reasoned, APJs could be dismissed at will by the Secretary or Director, ensuring proper supervision and oversight and curing the constitutional defect.

The *Arthrex* Court sought to limit the reach of its holding “to those cases where final written decisions were issued and where litigants present an Appointments Clause challenge on appeal.”⁵² The court also made clear that institution decisions were not impacted by its holding, because “the statute clearly bestows [institution] authority on the Director pursuant to 35 U.S.C. Section 314.”⁵³ And the court also saw “no error in the new panel proceeding on the existing written record”⁵⁴

After the panel’s decision, the parties—including the USPTO as intervenor—filed three separate petitions for *en banc* review. On March 23, 2020, the Federal Circuit denied all petitions for rehearing *en banc* in an apparent 8-4 split.⁵⁵ In the lead concurrence, Judge Moore explained that the panel decision was limited in impact to no more than 81 cases because: (1) after the panel’s decision, IPR decisions would no longer be rendered by unconstitutional panels; and (2) remand was only available for decisions where the Appointments Clause challenge was raised prior to or in the appellant’s opening brief.⁵⁶ Moreover, any remands would be “narrow in scope” and would not “necessitate anything like a full-blown process.”⁵⁷ Meanwhile, the dissent authored by Judge Dyk stressed that the removal of protections for APJs was a “draconian remedy” that “rewr[ote] the statute contrary to Congressional intent.”⁵⁸

Given the constitutional implications of the dispute, and the relative rarity of successful Appointments Clause challenges, there is a significant chance that the Supreme Court will ultimately address the constitutionality of the appointment of APJs.

2. Whether the PTAB’s Pilot Program Will Result in More Claim Amendments

On March 15, 2019, the PTO announced a pilot program that allows patent owners in IPR proceedings to request preliminary guidance from the PTAB regarding motions to amend. Upon receiving such a request, the PTAB provides the patent owner with a non-binding assessment of whether the motion satisfies formal requirements—*e.g.*, whether the claim amendments respond to an instituted ground, enlarge claim scope, and introduce new matter. The PTAB also provides its initial views on whether the amended claims are patentable in light of the petitioner’s opposition to the motion to amend.

As of April 2020, the PTAB has provided preliminary guidance in 22 IPRs. In eighteen of these instances, the PTAB advised that the amended claims were likely unpatentable.⁵⁹ In one case, the PTAB advised that some of the claims were likely patentable, but also that the amendments were directed to new matter.⁶⁰ In the remaining three cases, the PTAB found some or all of the amended claims patentable.⁶¹

The largely negative guidance provided to-date is, perhaps, unsurprising given that the PTAB issues its views after receiving the petitioner’s opposition to the proposed claim amendments, but before the patent owner submits a reply to the opposition. Thus, the PTAB often only has one side of the patentability story when it issues its guidance. The PTAB has recognized this procedural oddity in each of the guidance decisions issued to date.⁶²

Although the Pilot Program has provided patent owners with useful preliminary guidance, the ultimate success of the Pilot Program, however, will be judged based on whether the program gives patent owners the practical ability to obtain appropriate claim amendments. Notably, as of the PTAB’s March 2019 Update, fewer than 4% of motions to amend had been granted.

3. Whether the Deadline for Filing an IPR Petition Should Continue to Run When an Infringement Case Is Dismissed Without Prejudice

In a series of opinions—including the 2018 decision in *Wi-Fi One, LLC v. Broadcom Corp.*—the Federal Circuit

has held that the time period for filing a petition for *inter partes* review under 35 U.S.C. § 315(b) begins to run upon the service of an infringement complaint, even if the complaint is later dismissed without prejudice.⁶³

The *WiFi One* rule creates an incentive for an accused infringer to file an IPR petition even if an infringement case is dismissed. At the same time, patent owners may be incentivized to file infringement cases and then voluntarily dismiss those cases in order to trigger defendants' deadlines for filing their IPR petitions. We expect these arguably undesirable incentives to impact IPR decision-making in 2020. The Supreme Court may even intervene if it grants *certiorari* in *Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*⁶⁴

The Federal Circuit's decision in *Bennett Regulator Guards* reflects the implications of the *WiFi One* rule in practice.⁶⁵ In 2012, Bennett served Atlanta Gas with a complaint alleging patent infringement. The complaint, however, was ultimately dismissed without prejudice due to lack of personal jurisdiction. In response to the original complaint, Atlanta Gas filed an IPR petition in 2013. The PTAB, however, dismissed this initial IPR petition because Atlanta Gas had failed to update its disclosure of real-parties-in-interest. Atlanta Gas then filed a second IPR petition in 2015 that fixed this procedural deficiency. The PTAB instituted *inter partes* review and ultimately found that all of the claims of Bennett's patent unpatentable.

On appeal to the Federal Circuit, Bennett argued that the second IPR petition was untimely under § 315(b) because the 2015 petition was filed more than one year after service of the original infringement complaint in 2012. Even though the original complaint was dismissed for lack of personal jurisdiction over Atlanta Gas, the Federal Circuit held that the *WiFi One* rule applies. The court reasoned that serving a complaint "unambiguously implicates" § 315(b) and that "the complaint's subsequent success or failure" is irrelevant.

Atlanta Gas has petitioned for Supreme Court review, arguing that dismissal of a complaint without prejudice should reset the time-bar calculation under § 315(b).⁶⁶ Atlanta Gas argues that a contrary result would have the effect of triggering the § 315(b) time bar when any fatally defective "complaint" is "served," even where subject matter or personal jurisdiction is missing.

Under the *WiFi One* rule, dismissal of a complaint alleging infringement is not necessarily the end of the road for an accused infringer. If the complaint is dismissed without prejudice—for example, for failure to state a claim under Fed. R. Civ. P. 12(b)(6)—the patent owner may still file a new lawsuit in the future. In the meantime, the accused infringer's time to file an IPR petition continues to run. While it may be unattractive to incur the cost of an IPR petition when no infringement case is

pending, filing a petition may be the only way to ensure the accused infringer access to an IPR proceeding if the patent owner later files a new lawsuit.

4. Difficulties in Determining a Real Party-In-Interest Under the Current Standard

A petition for *inter partes* review must identify all real-parties-in-interest (RPIs) to the petition. Since its inception, the PTAB generally focused its RPI analysis on whether a third party provided direct funding for, or asserted control over, an IPR petition. In 2018, however, the Federal Circuit held in *Applications in Internet Time LLC v. RPX Corp. (AIT)* that the PTAB must apply a more "flexible" approach to identify RPIs.⁶⁷ The Federal Circuit explained that this "flexible approach" looks at "both equitable and practical considerations, with an eye toward determining whether the non-party is a clear beneficiary that has a preexisting, established relationship with the petitioner."⁶⁸

The Federal Circuit's "flexible approach" to identifying RPIs has resulted in substantial uncertainty. If the *AIT* standard is read literally, nearly every corporate affiliate of a petitioner would have a "preexisting relationship" with the petitioner and stand to benefit from a successful IPR petition. A petitioner's business partners and customers would also likely fit this description. Moreover, members of a traditional district court joint defense group would also arguably satisfy the "flexible" criteria set forth in *AIT*.

Highlighting the potentially expansive (and ambiguous) nature of the *AIT* "flexible approach," the PTAB has now identified *Ventex Co. Ltd. v. Columbia Sportswear North America, Inc.* as a precedential decision.⁶⁹ In *Ventex*, the PTAB found that a party to an indemnification agreement and exclusive manufacturing agreement with the Petitioner was an RPI that should have been identified in the petition.

Adding to the uncertainty, a different Federal Circuit panel recently addressed the RPI analysis in *Global Equity Management v. Ebay Inc.*⁷⁰ While the panel recognized the holding of *AIT*, it focused its analysis on the Patent Owner's admission that there were no facts in the record that the allegedly missing RPI actually wrote the IPR petitions or controlled the IPR proceedings. This would imply that the pre-*AIT* analysis—focusing on whether a party funded or controlled the IPR—still carries weight as part of the "flexible approach" mandated by *AIT*, at least before some Federal Circuit panels.

In the meantime, while PTAB panels refer to the "flexible" analysis of *AIT*, they generally hew closer to the old standard. For example, PTAB panels have rejected

arguments that an RPI relationship is created by (i) general membership in a patent defense group where there was no direct payment for, control of, or obligation to file the subject IPR;⁷¹ (ii) general business relationships;⁷² or (iii) extensive development and manufacturing relationships with the petitioner.⁷³ In at least one case, however, the PTAB has held that a third party was an RPI based on a development agreement that included various provisions related to intellectual property protection and indemnification.⁷⁴

As 2020 unfolds, we expect to see further litigation, both at the PTAB and Federal Circuit level, as to the outer bounds of the RPI analysis. Patent holders will seek to build on cases like *Ventex* to implicate as many general business relationships as possible, while Petitioners will seek to keep the focus on factors akin to those at issue in the prior funding and control analysis.

Part 3: Intellectual Property Legislation to Watch in 2020

Several pieces of proposed legislation related to intellectual property are also worth tracking in 2020, including the Inventors Rights Act, the Copyright Alternative in Small-Claims Enforcement (CASE) Act, the Counterfeit Goods Seizure Act, and the Trademark Modernization (TM) Act.

1. The Inventor Rights Act (H.R. 5478, introduced December 18, 2019)

The Inventor Rights Act proposes to “restore patent rights to inventors” by establishing several protections for “inventor-owned patents.” An “inventor-owned patent” is defined as a patent to which the inventor, or an entity controlled by the inventor, is the owner of the patent *and* holds all substantial rights in the patent.

For such “inventor-owned patents,” the bill would create a number of protections, including (i) prohibiting the USPTO from reexamining or reviewing such patents; (ii) allowing infringement actions to be filed in more venues, including in judicial districts where the inventor conducted research; (iii) establishing a presumption that an injunction will issue upon a finding of infringement; and (iv) allowing a patentee to seek disgorgement of profits.

The Inventor Rights Act would thus effectively create two classes of patent assets. Patents falling into the narrower class of “inventor-owned patents” would be transformed into super-strength assets. An inventor (or an entity “controlled by” the inventor) would have

substantially stronger rights than other types of patent owners, including corporations, universities, and large-scale patent licensing companies. As such, the Act may incentivize individual inventors or small (inventor-controlled) businesses to participate in the patent system.

The Act may also spur innovation in the secondary market for patent rights. For example, rather than simply purchasing inventor-owned patents, investors could seek to structure deals to ensure inventors continue to hold “all substantial rights” to their patents so as to take advantage of the Act’s protections.

If passed, the Act may also have a number of unintended consequences. For example, the Act may unintentionally transform inventor-controlled patent assertion entities into a new breed of super “trolls.” At the same time, universities and corporations—entities that invest billions of dollars in R&D—would be left with patents that are suddenly second-class assets. Moreover, operating companies accused of infringing inventor-owned patents would face the threat of an injunction, even in cases where the inventor is not manufacturing any patent-practicing product. Under these circumstances, it is fair to wonder whether the proposed legislation would do more harm than good.

2. The CASE Act (H.R. 2426, S. 1273, introduced May 1, 2019)

The CASE Act was introduced in both chambers of Congress on May 1, 2019. It carries bipartisan sponsorship with 153 representatives for the House Bill and 19 Senators for the Senate version. It passed the House on October 22, 2019, with overwhelming support (410 Yeas, 6 Nays, 15 Not Voting) and is currently pending in the Senate.

If passed, the CASE Act would establish an alternative forum to federal courts for copyright disputes involving less than \$30,000 in damages. This new forum, called the “Copyright Claims Board” (CCB), would be created within the Copyright Office. The Board would consist of three full-time officers recommended by the Register of Copyrights and appointed by the Librarian of Congress.

The CCB would be empowered to hear claims of infringement, claims seeking a declaration of noninfringement, and claims of misrepresentation in connection with assertions of infringement. Importantly, proceedings before the CCB would be “voluntary” and a respondent has the ability to “opt out” of the proceeding within 60 days of service. If the respondent “opts out,” the claim would be dismissed without prejudice.

Once CCB proceedings are commenced, parallel district court proceedings must be stayed. A party can seek district court review of a final determination from the

CCB within 90 days of the determination. The grounds for review, however, are limited by statute. For example, a party could seek review alleging that the CCB determination was the result of fraud or corruption, but a party could not argue merely that the CCB was wrong on the merits. A party could also seek district court assistance in enforcing a final determination from the CCB if the losing party fails to comply with the determination. Fees incurred in such enforcement proceedings would be shifted to the non-compliant party.

A significant amount of copyright infringement goes unaddressed because the cost of district court litigation is too high. The Copyright Claims Board may provide a mechanism for copyright owners to pursue lower-value claims that are not otherwise economically viable to litigate. But there are reasons to be circumspect about the practical significance of the CCB. Given that accused infringers can simply “opt out” and trigger dismissal of CCB proceedings, copyright owners may routinely face a familiar choice—either incur the costs to litigate in federal court or forego enforcement proceedings.

3. The Counterfeit Goods Seizure Act (S. 2987, introduced December 5, 2019)

The Counterfeit Goods Seizure Act was introduced in the Senate on December 5, 2019, with bipartisan sponsorship. The bill authorizes the U.S. Customs and Border Protection Agency (CBPA) to seize imported merchandise that infringes a design patent. Of course, the CBPA already has the authority to automatically seize counterfeit merchandise involving other IP rights, such as copyrights and trademarks.

Allowing the CBPA to readily seize articles infringing design patents—without the need for an exclusion order from the U.S. International Trade Commission—allows the CBPA to respond more quickly and cost-effectively to design patent infringement. Design patent holders would not necessarily need to go through the long and costly

process of obtaining an exclusion order through the ITC. This legislation may help prevent a common counterfeit scheme designed to skirt current CBPA seizure protocols—where counterfeiters wait until after importation to affix infringing marks to counterfeit items. So long as these articles are also covered by a design patent, then the Counterfeit Goods Seizure Act would give the CBPA the ability to seize the items without the need for an exclusion order.

4. The TM Act (H.R. 6196, S. 3449, introduced March 11, 2020)

The TM Act was introduced in both the House and Senate with bipartisan support on March 11, 2020. The TM Act seeks to address false claims of commercial use made during the trademark registration process. More specifically, the TM Act would amend the Lanham Act to (i) allow third parties to submit evidence during the trademark registration process; (ii) give the USPTO flexibility to set response periods to office actions; (iii) create *ex parte* procedures to reexamine a trademark on the basis that the mark has never been used in commerce; and (iv) create a presumption that a trademark owner suffers irreparable harm from infringement and, as such, is entitled to an injunction.

The USPTO and brand owners have raised substantial concerns on Capitol Hill about the flood of false or misleading trademark registrations. Brand owners, in particular, have complained that it is expensive and time-consuming to clear invalid marks from the Trademark Register in cases where brand owners wish to register similar marks. Sponsors of the TM Act have also alleged that there has been a flood of fraudulent registrations from China that relied on doctored photos of products to falsely show the use of a trademark in commerce.

The new *ex parte* procedures under the TM Act would promote timely and low-cost removal of invalid marks from the register. The Act would also make it easier for trademark owners to enjoin infringing activity by restoring a presumption of irreparable harm.

1. *USPTO v. Booking.com B.V.*, petition for cert. pending, No.19-46 (filed Jul. 5, 2019).
2. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).
3. *Id.*
4. *Id.*
5. *In re Booking.com B.V.*, 2016 WL 1045674 (T.T.A.B. Feb. 18, 2016).
6. *See Booking.com v. Matal*, 278 F. Supp. 3d 891 (E.D. Va. 2017).
7. *See Booking.com B.V. v. USPTO*, 915 F.3d 171 (4th Cir. 2019).
8. *Id.* at 176.
9. *Id.* at 182.
10. *Id.* at 183.
11. *See Goodyear’s India Rubber Clove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888).
12. *See Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 118 (1938).
13. *Google LLC v. Oracle Am., Inc.*, petition for cert. pending, No. 18-956 (filed Jan. 24, 2019).

14. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018).
15. *Id.* at 1186.
16. *Id.*
17. *Id.* at 1187.
18. *Id.*
19. *Id.*
20. *Id.* at 1188, 1210.
21. *Romag Fasteners, Inc. v. Fossil, Inc.*, petition for cert. pending, No. 18-1233 (filed Mar. 22, 2019).
22. *Romag Fasteners, Inc. v. Fossil, Inc.*, 29 F. Supp. 3d 85 (D. Conn. 2014).
23. *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782 (Fed. Cir. 2016).
24. *Georgia v. Public.Resource.Org Inc.*, petition for cert. pending, No. 18-1150 (filed Mar. 1, 2019).
25. *See Code Revisions Comm’n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc.*, 906 F.3d 1229 (11th Cir. 2018).
26. *Id.* at 1255.

27. *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012).
28. *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014).
29. *Mayo*, 566 U.S. at 70.
30. *Alice*, 573 U.S. at 217.
31. *Mayo*, 566 U.S. at 79–80.
32. *Compare Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015) (innovation in fetal DNA testing is not patentable) with *Illumina, Inc. v. Ariosa Diagnostics, Inc.*, 952 F.3d 1367 (Fed. Cir. 2020) (finding fetal DNA testing patents to claim patent-eligible invention); compare also *Trading Techs. Int'l, Inc. v. IBG LLC*, 921 F.3d 1084, 1093 (Fed. Cir. 2019) (affirming Patent Trial and Appeal Board decisions finding patent claims ineligible) with *Trading Techs. Int'l, Inc. v. CQG, Inc.*, 675 F. App'x 1001, 1006 (Fed. Cir. 2017) (finding challenged claims are patent eligible).
33. See, e.g., *Athena Diagnostics, Inc. v. Mayo Collaborative Servs.*, 927 F.3d 1333 (Fed. Cir. 2019) (denying petition for rehearing *en banc*) (“*Athena I*”).
34. *Athena Diagnostics Inc. v. Mayo Collaborative Servs., LLC*, 915 F.3d 743 (Fed. Cir. 2019), cert. denied, 589 U.S. ___, 140 S. Ct. 855 (Jan. 13, 2020) (No. 19-430); *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018), cert. denied, 589 U.S. ___, 140 S. Ct. 911 (Jan. 13, 2020) (No. 18-415); *Vanda Pharms. Inc. v. West-Ward Pharms. Int'l Ltd.*, 887 F.3d 1117 (Fed. Cir. 2018), cert. denied, 589 U.S. ___, 140 S. Ct. 911 (Jan. 13, 2020) (No. 18-817); *Power Analytics Corp. v. Operation Tech. Inc.*, 748 Fed. App'x 334 (Fed. Cir. Jan. 15, 2019), cert. denied, 589 U.S. ___, 140 S. Ct. 910 (Jan. 13, 2020) (No. 19-43); *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306 (Fed. Cir. 2019), cert. denied, 589 U.S. ___, 140 S. Ct. 907 (Jan. 13, 2020) (No. 19-400).
35. *Trading Techs. Int'l, Inc. v. IBG LLC*, 921 F.3d 1084 (Fed. Cir. 2019), cert. denied, 589 U.S. ___, 140 S. Ct. 954 (Jan. 27, 2020) (No. 19-353); *Trading Techs. Int'l, Inc. v. IBG LLC*, 767 Fed. App'x 1006 (Fed. Cir. May 21, 2019), cert. denied, 589 U.S. ___, 140 S. Ct. 955 (Jan. 27, 2020) (No. 19-522); *ChargePoint, Inc. v. SemaConnect, Inc.*, 920 F.3d 759 (Fed. Cir. 2019), cert. denied, 589 U.S. ___, 140 S. Ct. 983 (Jan. 27, 2020) (No. 19-521); *Maxell, Ltd. v. Fandango Media, LLC*, 779 Fed. App'x 745 (Fed. Cir. Oct. 8, 2019), cert. denied, 589 U.S. ___, 2020 U.S. LEXIS 1827 (Mar. 23, 2020) (No. 19-852); *SRI Int'l, Inc. v. Cisco Sys.*, 773 Fed. App'x 1090 (Fed. Cir. July 12, 2019), cert. denied, 589 U.S. ___, 140 S. Ct. 1108 (Feb. 24, 2020) (No. 19-619); *Reese v. Sprint Nextel Corp.*, 774 Fed. App'x 656 (Fed. Cir. June 10, 2019), cert. denied, 589 U.S. ___, 2020 U.S. LEXIS 1766 (Mar. 23, 2020) (No. 19-597).
36. *Athena Diagnostics, Inc. v. Mayo Collaborative Servs.*, 915 F.3d 743, 750 (Fed. Cir. 2019) (“*Athena I*”).
37. *Id.* at 751.
38. *Id.* at 751, 753.
39. *Athena II*, 927 F.3d 1333.
40. *Illumina, Inc. v. Ariosa Diagnostics, Inc.*, 952 F.3d 1367 (Fed. Cir. 2020).
41. *Berkheimer v. HP, Inc.*, 881 F.3d 1360 (Fed. Cir. 2018); *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121 (Fed. Cir. 2018).
42. *Alice*, 573 U.S. 208; *Mayo*, 566 U.S. 56.
43. See, e.g., *Scanning Technologies Innovations, LLC v. Brightpearl, Inc.*, 20-cv-00114 (W.D. Tex. Apr. 11, 2020) (Slip Op.); *Sound View Innovations, LLC v. Delta Air Lines*, No. 19-cv-00659, 2020 WL 1667239 (D. Del. Apr. 3, 2020).
44. *Bilski v. Kappos*, 561 U.S. 593 (2010).
45. *Id.*
46. *Id.* at 604.
47. *2-Way Computing, Inc. v. Grandstream Networks, Inc.*, 2016 WL 6090726 (D. Nev. 2016).
48. *Chamberlain Grp., Inc. v. Linear LLC*, 114 F. Supp. 3d 614 (N.D. Ill. 2015).
49. *ChargePoint, Inc. v. SemaConnect, Inc.*, 920 F.3d 759 (Fed. Cir. 2019).
50. *Versata Dev. Group, Inc. v. SAP Am., Inc.*, 793 F.3d 1306 (Fed. Cir. 2015).
51. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019).
52. *Id.*
53. *Id.* at 1339.
54. *Id.*
55. *Arthrex, Inc. v. Smith & Nephew, Inc.*, Case No. 2018-2140, Dkt. 115 (Fed. Cir. Mar. 23, 2020) (denying petitions for rehearing *en banc*).
56. *Id.*, slip op. at 9–11 (Moore, J., concurring).
57. *Id.*, slip op. at 11.
58. *Id.*, slip op. at 21 (Dyk, J., dissenting).
59. See, e.g., *Mylan Pharm. Inc. v. Sanofi-Aventis Deutschland GMBH*, IPR2018-01679, Paper 55 at 5–8 (P.T.A.B. Oct. 16, 2019); *FormFactor, Inc. v. Feinmetall, GmbH*, IPR2019-00080, Paper 23 at 6–11 (P.T.A.B. Nov. 5, 2019); *L&P Property Mgmt. Co. v. Remarco Mach. & Tech. Co., Ltd.*, IPR2019-00255, Paper 23 at 6–10 (P.T.A.B. Nov. 8, 2019); *Henrob Ltd. V. Newfrey LLC*, IPR2019-00269, Paper 19 at 5–12 (P.T.A.B. Nov. 13, 2019); *Becton, Dickinson and Co. v. Baxter Corp. Englewood*, IPR2019-00121, Paper 39 at 6–11 (P.T.A.B. Nov. 14, 2019); *Becton, Dickinson and Co. v. Baxter Corp. Englewood*, IPR2019-00120, Paper 39 at 6–11 (P.T.A.B. Nov. 14, 2019); *Koa Corp. v. Vishay Dale Electronics, LLC*, IPR2019-00201, Paper 21 at 5–9 (P.T.A.B. Nov. 14, 2019); *Apple Inc. v. Zomm, LLC*, IPR2019-00275, Paper 16 at 6–11 (P.T.A.B. Nov. 19, 2019); *Smartmatic USA Corp. v. Election Sys. & Software, LLC*, IPR2019-00531, Paper 23 at 9–15 (P.T.A.B. Feb. 3, 2020); *Unified Patents, Inc. v. Universal Cipher, LLC*, IPR2019-00498, Paper 17 at 9–15 (P.T.A.B. Feb. 5, 2020); *Am. Nat'l Mfg., Inc. v. Sleep Number Corp.*, IPR2019-00497, Paper 77 at 6–10 (P.T.A.B. Feb. 7, 2020); *Am. Nat'l Mfg., Inc. v. Sleep Number Corp.*, IPR2019-00500, Paper 77 at 6–12 (P.T.A.B. Feb. 7, 2020); *Unified Patents, LLC v. Portal Commc'ns, LLC*, IPR2019-00513, Paper 21 at 4–9 (P.T.A.B. Feb. 24, 2020); *ClearOne, Inc. v. Shure Acquisition Holdings, Inc.*, IPR2019-00683, Paper 55 at 6–17 (P.T.A.B. Feb. 25, 2020); *Facebook, Inc. v. BlackBerry Ltd.*, IPR2019-00516, Paper 25 at 5–14 (P.T.A.B. Feb. 27, 2020); *Uniden Am. Corp. v. Escort Inc.*, IPR2019-00724, Paper 13 at 5–10 (P.T.A.B. Mar. 27, 2020); *Japan Radio Co., Ltd. v. Broadcom Corp.*, IPR2019-00816, Paper 13 at 5–14 (P.T.A.B. Apr. 6, 2020); and *u-blox AG v. Broadcom Corp.*, IPR2019-00737, Paper 14 at 5–14 (P.T.A.B. Apr. 6, 2020).
60. See *ZTE (USA), Inc. v. Cywee Group, Ltd.*, IPR2019-00143, Paper 35 at 4–10 (P.T.A.B. Dec. 5, 2019).
61. See *U.D. Electronic Corp. v. Pulse Electronics, Inc.*, IPR2019-00511, Paper 19 at 7–13 (P.T.A.B. Feb. 4, 2020), *Smartmatic USA Corp. v. Election Sys. & Software, LLC*, IPR2019-00527, Paper 23 at 7–10, (P.T.A.B. Feb. 18, 2020), and *Snap, Inc. v. BlackBerry Ltd.* IPR2019-00715, Paper 26 at 8–14 (P.T.A.B. March 30, 2020).
62. See, e.g., *ZTE (SUA), Inc. v. Cywee Group, Ltd.*, IPR2019-00143, Paper 35 at 3 (P.T.A.B. Dec. 5, 2019) (“We emphasize that the views expressed herein are subject to change upon consideration of the complete record, including any revision to the Motion filed by Patent Owner. Thus, this Preliminary Guidance is not binding on the Board, for example, when it renders a final written decision”).
63. *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018).
64. *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, petition for cert. pending, No.18-999 (filed Jan. 28, 2019).
65. *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, 905 F.3d 1311 (Fed. Cir. 2018).
66. *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, petition for cert. pending, No.18-999 (filed Jan. 28, 2019).
67. *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018).
68. *Id.* at 1350.
69. *Ventex Co. Ltd. v. Columbia Sportswear N. Am., Inc.*, IPR2017-00651, Paper 148 (P.T.A.B. Jan. 24, 2019).
70. *Global Equity Mgmt. (SA) Pty. Ltd. v. Ebay Inc.*, Case Nos. 2019-1303, 2019-2304, 2019 U.S. App. LEXIS 38898 (Fed. Cir. 2019).
71. *RPX Corp. v. Publ'g Techs., LLC*, IPR2018-01131, Paper 44 (P.T.A.B. Jan. 7, 2020).
72. *NOF Corp. v. Nektar Therapeutics*, IPR2019-01397, Paper 24 (P.T.A.B. Feb. 10, 2020), *Sawai USA, Inc. v. Biogen MA Inc.*, IPR2019-00789, Paper 17 (P.T.A.B. Sep. 12, 2019).
73. *Google LLC v. Cywee Group, Ltd.*, IPR2018-01257, Paper 87 (P.T.A.B. Jan. 9, 2020).
74. *Bungie, Inc. v. Worlds Inc.*, IPR2015-01264, Paper 63 (P.T.A.B. Jan. 14, 2020).

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