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2022 Trends And Predictions For Patent Litigation

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As the calendar flips to 2022, intellectual property litigators are wondering what the new year has in store.

We predict substantive and procedural uncertainty in two key areas. Substantively, there will be continued demands for clarity on Section 101 law, but no real clarity. Procedurally, recent U.S. Court of Appeals for the Federal Circuit mandamus decisions will cause patentees to reconsider their venue selections.

The only certainty this year is that hybrid work will continue, as litigants grow even more accustomed to remote work and new variants temper our return to physical offices.

No Real Clarity on Section 101

Walk into a room of sophisticated patent litigators, and talk will invariably turn to one thing: What is happening with patent eligibility law?

Some will advocate for higher standards for invalidating a patent under Section 101 of the Patent Act. Others will bemoan the U.S. Patent and Trademark Office's laxity in allowing patents on what one could do with pen and paper. But all will emphasize the need for greater clarity from both the Federal Circuit and the U.S. Supreme Court on these issues.

This, of course, raises the questions: Do we really need greater clarity, and will we get it next year? A review of Federal Circuit decisions over the past 12 months suggests that the answer to both questions is "no." The Federal Circuit is humming along with its application of Section 101 law, and the right fact pattern and the right Supreme Court case are necessary to change things considerably.

The Federal Circuit's Section 101 jurisprudence since last December has been a model of consistency. Of the 31 decisions, excluding Rule 36 affirmances, that the appellate court issued during that time frame, 29 held patents to be unpatentable, and two held them to be patentable. Those cases involved just one dissent, by U.S. Circuit Judge Pauline Newman, and one concurrence, by U.S. Circuit Judge Jimmie Reyna, meaning that the Federal Circuit agreed on

patentability outcomes over 90% of the time.

There also were five reversals, meaning that the Federal Circuit agreed with the district courts or Patent Trial and Appeal Board judges over 80% of the time. If one includes Rule 36 affirmances, these rates would only be higher. In fact, the Federal Circuit's decisions were so mundane that it designated 21, or 68%, of them nonprecedential, higher than prior statistics might suggest.[1]

The types of cases appealed also reflected consistency, at least in the types of patents being challenged. All the patents reviewed in those 31 opinions involved computers in some way. This included the claims of two life sciences-related patent applications that the Federal Circuit deemed unpatentable.[2]

And despite early fears that the 2018 Federal Circuit decision Berkheimer v. HP Inc.[3] sounded the death knell for early motions to dismiss due to lurking factual issues, 19 of the 20 decisions addressing district court rulings came from motions to dismiss under Federal Rules of Civil Procedure 12(b)(6) and 12(c).

The Supreme Court might, of course, mix things up by granting certiorari in American Axle & Manufacturing Inc. v. Neapco Holdings LLC, after the Solicitor General's Office finally submits its views.[4] But that case involved a mechanical patent — a "method for manufacturing driveline propeller shafts" — that is quite a bit different from the type of patents that typically wend their way to the Federal Circuit.[5]

After the Supreme Court's trifecta of Bilski v. Kappos in 2010, Mayo Collaborative Services v. Prometheus Laboratories Inc. in 2012, and Alice Corp. v. CLS Bank International in 2014,[6] one can only speculate on what additional clarity the high court might provide on Section 101.

Western District of Texas, Waco Division, Transfers

The Waco Division of the U.S. District Court for the Western District of Texas's reluctance to transfer cases made the venue a hot spot for patent cases. But that may change in light of the Federal Circuit's recent mandamus orders.[7]

The U.S. Court of Appeals for the Fifth Circuit provides an eight-factor framework to analyze motions to transfer for convenience under Title 28 of the U.S. Code, Section 1404.[8] The Federal Circuit confirmed in In re: Quest Diagnostics Inc. that while none of the factors are of dispositive weight, the cost of attendance for willing witnesses is the most important factor in the transfer analysis.[9]

The Waco Division reiterated that it will grant transfer motions only if the movant meets its burden of showing that the transferee venue is clearly more convenient. In its analysis, the court previously emphasized Waco's speediness to trial after filing when considering the administrative difficulties flowing from the court congestion factor and placed less weight on party witnesses when considering the cost of attendance for willing witnesses factor.

In response, the Federal Circuit has instructed the district court to give more weight to party witnesses[10] and less weight to Waco's speediness to trial. In the August In re: Hulu LLC decision, the Federal Circuit emphasized that "a court's general ability to set a fast-paced schedule is not particularly relevant to the court congestion factor."[11]

U.S. District Judge Alan Albright has noted the Federal Circuit's instructions regarding the weight given

to particular transfer factors in several of his recent opinions granting transfer motions.[12]

All of this points to potentially significant changes to the future number of cases filed in Waco. Given the Federal Circuit's views on transfer motions, there are four questions for litigants to consider going into 2022:

1. How much discretion will district courts enjoy making transfer determinations?

2. Will the burden remain with the movant to clearly demonstrate that the proposed venue is clearly more convenient?

3. Will this lead to forum shopping by defendants?

4. Will Waco remain a hot spot for patent litigation?

Omicron Means Hybrid Work Continues

One thing is clear about the new year: There will be no norm when it comes to returning to the workplace, particularly with the uncertainty posed by the omicron variant. Three areas we continue to watch include depositions, mediation and remote mock trials.

Depositions

This year, we expect an uptick in in-person depositions, particularly when a party objects to a remote deposition.

Recently, in Takeda Pharmaceuticals USA Inc. v. Mylan Pharmaceuticals Inc. in the U.S. District Court for the District of Delaware, U.S. District Judge Richard Andrews ordered an in-person deposition of a nonparty witness over the objection of a party. The moving party requested an in-person deposition to judge the witness's "credibility, body language, and other intangible qualities that one can only appreciate in the witness's presence."[13]

The court was not swayed by the argument that counsel for the objecting party would need to travel by air because their law firm maintained a local office and could rely on local attorneys to cover the deposition.[14] The court was also not persuaded by the inconvenience to the witness, who did not raise an objection based on the pandemic but preferred not to leave his office for the deposition.

Even with this uptick in in-person depositions, the benefits of remote depositions — such as reduced expenses and avoiding travel — suggest that virtual depositions are here to stay.

Mediation

In the past two years, we also have seen the benefits of virtual mediation. It allows the parties greater flexibility in scheduling multiple, shorter sessions. High-level representatives, who may otherwise be reluctant to commit to an in-person mediation, have been more willing to attend virtually.

That said, in-person attendance at mediation reflects an investment of expenses and time. Being physically present allows — even forces — the parties and mediator to develop a rapport. As time passes, willingness to participate only in virtual mediation may signal that a party is less committed to

resolving a dispute.

Remote Mock Trials

Conducting virtual mock trials is no small technical feat, but with advanced planning, jury consultants have provided a viable option for in-person mock trials.

While we expect virtual jury testing of discrete issues may continue, we believe that parties will aim to conduct in-person mock trials. It allows counsel to develop a more direct connection with mock jurors, and there will be fewer temptations and distractions for mock jurors during testing.

With these virtual practices now widespread, IP litigators will need to develop and fine-tune best practices for using them.

So what does this mean for 2022? Keep pressing your Section 101 challenges. Further clarity is not around the corner for the great majority of Section 101 challenges, i.e., against computer-related patents, but the right case will come along.

Watch the Federal Circuit's venue decisions, as each provides snippets of wisdom as to how to keep a case in a venue — or how to challenge it. And expect to do all of this, at least partially, from the comforts of your home office.

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[1] See, e.g., D. Bagatell, "Federal Circuit's 2017 Patent Decisions: A Statistical Analysis," Law360 (Jan. 5, 2018) (noting that 166 of 282 issued decisions in 2017 were non-precedential).

[2] See In re Bd. of Trs. of Leland Stanford Junior Univ., 991 F.3d 1245, 1247 (Fed. Cir. 2021) (claim to "[a] computerized method for inferring haplotype phase in a collection of unrelated individuals" held unpatentable); In re Bd. of Trs. of Leland Stanford Junior Univ., 989 F.3d 1367, 1247 (Fed. Cir. 2021) (claim to "[a] method for resolving haplotype phase, comprising . . . storing the haplotype phase . . . using a computer system" held unpatentable).

[3] 881 F.3d 1360, 1370 (Fed. Cir. 2018) ("Whether claims 4-7 perform well-understood, routine, and conventional activities to a skilled artisan is a genuine issue of material fact making summary judgment inappropriate with respect to these claims. . . . [O]n this record, summary judgment was improper, given the fact questions created by the specification's disclosure.").

[4] Am. Axle & Mfg., Inc. v. Neapco Holdings LLC, 967 F.3d 1285, 1289 (Fed. Cir. 2019).

[5] Id.

[6] Bilski v. Kappos, 561 U.S. 593 (2010); Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66

(2012); Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. 208 (2014).

[7] See, e.g., In re Samsung Elecs. Co., No. 2021-139, No-21-140; In re Uber Techs., Inc., No. 2021-150; In re Hulu, LLC, No. 2021-142; In re Dish Network L.L.C., No. 2021-182; In re Juniper, No. 2021-160; In re Quest Diagnostic, No. 2021-193; In re Altassian Corp. PLC, No. 2021-177.

[8] See In re Volkswagen of Am., Inc., 545 F.3d 304, 315 (5th Cir. 2008); the factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive; (5) the administrative difficulties flowing from court congestion; (6) the local interest in having localized interests decided at home; (7) the familiarity of the forum with the law that will govern the case; and (8) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.

[9] In re Quest Diagnostics Inc., No. 2021-193.

[10] In re Samsung Elecs. Co., No. 2021-139, No-2021-140; In re Uber Techs., Inc., No. 2021-150.

[11] In re Hulu, LLC, No. 21-142.

[12] E.g., HD Silicon Sols. LLC v. Microchip Tech., Inc., No. W-20-CV-01092; Super Interconnect Technologies v. Google LLC, No. 6:21-CV-00259; OpenText Corp. v. Alfresco Software Ltd., No. 6:20-cv-00941.

[13] Takeda Pharms. USA, Inc. v. Mylan Pharms, Inc., Civil Action No. 19-2216, ECF No. 206 (D. Del. Nov. 12, 2021).

[14] Id., ECF No. 207 (November 12, 2021).