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HOW IPRs BECAME KEY TOOLS IN PATENT DISPUTES

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The 2011 Leahy-Smith America Invents Act (AIA) created new administrative post-grant proceedings in the U.S. Patent and Trademark Office's Patent Trial and Appeal Board (PTAB) for third parties to challenge a patent's validity.¹ The intent was to provide more efficient and cost-effective alternatives to traditional district court litigation. These proceedings—post-grant review (PGR), covered business method, and *inter partes* review (IPR)—have steadily climbed in number to a total of almost 10,000 filed cases, with IPRs being far and away the most common.

IPRs have become key tools for the patent challenger and major risks for the patent owner. They can be filed against any patent, even those that pre-date enactment of the AIA. In terms of subject matter, 60 percent of IPR petitions are in the high-tech areas (e.g., electronics, software, telecommunications, and semiconductor-related technology), 15 percent involve biotechnology and chemical arts, and 10 percent are related to mechanical technology, including medical devices.²

The growing importance of IPRs has come at the expense of district court litigation. One-third of all patent validity disputes today are filed in the PTAB, with IPR filings having remained steady or increased while district court patent litigations have declined.³ However, most IPRs—roughly 90 percent—are filed against a patent

already involved in district court or International Trade Commission (ITC) litigation. Such double-pronged attacks increase the chances of a patent being invalidated.

IPRs have also emerged as a particularly powerful tool to combat the litigation threat posed by nonpracticing entities (NPEs) seeking to enforce a patent portfolio they do not themselves practice. While most patent infringement lawsuits filed in district court are still filed by NPEs—accounting for approximately 53 percent of 2018 litigations—the numbers have steadily decreased since 2014.⁴ At the same time, almost 60 percent of patents challenged through IPRs are owned by NPEs, while most of the petitioners are operating or practicing companies, with Apple and Samsung Electronics ranking among the top petitioners in the past five years.⁵

One reason why IPRs have become so popular and important is that the standing requirement to file is quite low: “A person who is not the owner of a patent” may file an IPR petition.⁶ By contrast, in district court, a patent challenger would have to either have been sued to assert invalidity as a defense or establish declaratory judgment jurisdiction. The more relaxed standing requirement for IPRs has led to a wide range of petitioners, including commercial competitors, public interest nonprofits, and for-profit investment organizations. Unified Patents Inc., for example, is a for-profit, membership-based organization that deters NPE activity within a given technology zone by filing IPR petitions against patents it believes should not have been issued.⁷ Using this model, Unified Patents has positioned itself as one of the top IPR filers.

IPRs are here to stay and will only continue to gain importance. Shaped by court challenges and new policies, they have, however, evolved from their inception. Some changes have made them even more powerful weapons for petitioners, while others have tried

to balance some of the equities in favor of patent owners. Further changes and shifts can also be expected. Understanding these changes is critical to understanding how IPRs may affect the value of and risks to intellectual property today and into the future.

IPRs Continue to Be Refined and Reshaped

While IPRs are still a relatively new administrative procedure, the Federal Circuit and the Supreme Court have had opportunities to weigh in and provide guidance on their conduct. The PTAB has responded by changing important aspects of IPRs and has also unilaterally acted to further refine its procedure. These further refinements have significantly impacted, for both patent owners and patent challengers, the use and importance of IPRs in comprehensive patent strategies.

From their start, the constitutionality of PTAB proceedings had been questioned. How can an agency take away a private property right? The Supreme Court answered this question in *Oil States Energy Services LLC v. Greene's Energy Group LLC*. IPRs, the Court held, do not violate the separation of powers by authorizing an administrative law judge, instead of an Article III judge, to invalidate a patent. Nor do IPRs deprive a patent owner of its Seventh Amendment jury right. Instead, “*inter partes* review falls squarely within the public-rights doctrine” where Congress has “significant latitude to assign adjudication ... to entities other than Article III courts.”⁸

The Court, however, “address[ed] only the precise constitutional challenges that *Oil States* raised” and left open the door to other constitutionality challenges, including “the retroactive application of *inter partes* review” and “a due process challenge.”⁹ Notwithstanding this apparent invitation, the Court has denied certiorari on the question of whether retroactively applying IPRs to patents issued before enactment of the AIA violated the Takings Clause.¹⁰ Although there are more constitutional challenges on the way, the Court’s message appears to be that IPRs are here to stay.

An All-Or-Nothing Game Raises the Stakes

At the same time it decided that PTAB proceedings were constitutional, the Supreme Court substantially reshaped how the proceedings would continue. The PTAB had initially interpreted its mandate under the AIA as including discretion to partially institute IPRs based “on all *or some* of the challenged claims and on all *or some* of the grounds of unpatentability asserted for each claim.”¹¹ For example, if a petitioner’s first ground challenges claims 1-5 as anticipated, its second ground challenges claims 6-10 as obvious over one set of references, and its third ground challenges claims 1-10 as obvious over another set of references, the PTAB might institute only on the first ground (claims 1-5). Consequently, partial institution might mean that the patentability of some challenged claims—claims 6-10 in this example—would not be considered in the proceeding or decided in the PTAB’s final written decision.

In *SAS Institute Inc. v. Iancu*, the Court held that partial institutions addressing only some claims violated the statutory requirement that “if an *inter partes* review is instituted...’ the [PTAB] ‘shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.’”¹² Finding that “the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises, not just those the decision-maker might wish to address,”¹³ the Court held that “the agency cannot curate the claims at issue but must decide them all.”¹⁴

In the wake of *SAS*, the PTAB changed its policy such that “if the PTAB institutes a trial, the PTAB will institute on all challenges raised in the petition.”¹⁵ The PTAB’s institution decision is now binary: either all grounds or no grounds are instituted. The Federal Circuit has similarly read “*SAS* [to] require[] institution on all challenged claims and all challenged grounds.”¹⁶

Interestingly, while all challenged claims will be addressed in the final written decision, the PTAB continues to exercise discretion to not address all instituted grounds.¹⁷ In the example above, for instance, while the IPR would now have to be instituted on all three grounds, the final written decision might only address the obviousness challenge of the third ground on claims 1-10. While the first ground (claims 1-5) and the second ground (claims 6-10) are not addressed in the final written decision, the PTAB would have still “issue[d] a final written decision with respect to the patentability of any patent claim challenged” (i.e., claims 1-10).¹⁸

Before addressing how the change to all-or-nothing institutions further raises the stakes in IPRs, especially for the petitioner, we need to take a step back. Recall that one goal of the AIA was to create faster and more efficient proceedings to challenge patent validity.¹⁹ In an effort to avoid redundant or duplicative district court and PTAB validity determinations, the AIA includes an estoppel provision that precludes a petitioner from “assert[ing] ... in a civil action ... that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that *inter partes* review.”²⁰

However, according to two Federal Circuit decisions, not estopped are grounds raised in a petition that was not instituted by the PTAB.²¹ These would be preserved and could be raised in the district court. But this category of non-estopped, non-instituted grounds disappears with binary all-or-nothing institutions following *SAS*. And, with some district courts broadly applying estoppel to preclude grounds that were not actually raised in the IPR but which a petitioner “reasonably could have raised,” losing an IPR could mean that a petitioner may have waived all anticipation and obviousness defenses based on printed publications. This puts increased pressure on the petitioner to, first, ensure that its pre-IPR investigation is as comprehensive as possible; second, include in the petition all—or at least all the best—grounds it may ever want to assert; and, finally, win one or more asserted grounds.

Low Standing Requirement Opens Patents to Unprecedented Challenges

As mentioned earlier, one reason why IPRs have become so important is that the standing requirement to file is quite low. The only express limits are that an IPR may not be instituted where the petitioner previously filed a declaratory judgment action for invalidity of the patent, was sued in district court for infringement more than one year before filing the petition, or is estopped based on a prior IPR.²² Subject to these few exceptions, essentially “any person” except the patent owner may file an IPR. As a consequence, two key avenues of attacks on a patent’s validity that could not be pursued in a district court action may proceed in an IPR.

First, to establish declaratory judgment standing to challenge a patent’s validity in district court, “the facts alleged, under all the circumstances, [must] show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”²³ But without a showing that the controversy has the “sufficient imme-

diacy” required by the test, the district court would lack jurisdiction to provide a declaratory judgment of invalidity.

The declaratory judgment test simply does not apply to IPRs. The result has been that patents are subject to attack in IPRs from parties that could not have otherwise challenged their validity. This includes IPRs filed by innovative companies not currently in a dispute with the patent owner, such as where the petitioner may be trying to clear a freedom-to-operate path for a future product. For example, although it is not marketing a product accused of infringement, Pfizer Inc. filed a series of IPRs to, apparently, proactively challenge patents of Genentech Inc. related to autoimmune disease therapies and Genentech’s biologic product Rituxan®.²⁴

The “any person” standard has also led to attacks from unexpected parties. As noted previously, Unified Patents is a member-based organization formed after the passage of the AIA to reduce NPE activity. Further to its mission, since 2014 Unified Patents has filed over 150 IPR petitions against patents held by NPEs. But Unified Patents is not alone. Financial hedge funds have also filed IPRs attacking pharmaceutical patents. Generally speaking, these hedge funds short sell a company’s stock and then try to drive down the stock price by invalidating patents covering the company’s key products.²⁵ Most notable were challenges from the Coalition for Affordable Drugs, which frankly explained that “IPRs are part of its investment strategy, and it will only succeed by invalidating patents.”²⁶ Although these hedge fund attacks have led to calls to restrict IPR standing, they were found to be permissible under the AIA’s broad standing test.²⁷

Second, in district court actions, “assignor estoppel prevents a party who assigns a patent to another from later challenging the validity of the assigned patent.”²⁸ For example, an inventor who assigns a patent to his or her employer, as is typically required in employment agreements, may not later challenge the patent’s validity after starting a competitive company.

A patent’s prior owner is not estopped, however, from challenging the validity of its former patent in an IPR. Instead, the Federal Circuit has held that the statute establishing IPR standing, “by allowing ‘a person who is not the owner of a patent’ to file an IPR, unambiguously dictates that assignor estoppel has no place in IPR proceedings.”²⁹ This allowed Arista Networks Inc., a company founded by former employees of Cisco Systems Inc., including Cisco’s former chief product architect, David Cheriton, to file an IPR against a patent covering an invention Cheriton created at and assigned to Cisco. Although Arista may have been precluded from attacking the patent’s validity in a district court, assignor estoppel did not apply in the IPR. Indeed, Arista successfully proved that some claims in Cheriton’s patent were anticipated or obvious over the prior art.

Standing to file an IPR does not mean, however, that a petitioner necessarily has standing to appeal an adverse decision to the Federal Circuit. Petitioners who cannot show “injury in fact” may have difficulty establishing Article III standing to appeal the PTAB’s adverse decision.³⁰ For instance, the Federal Circuit decided that when a petitioner is neither a competitor nor a licensee of the challenged patent and did not have research activity that could lead to an infringing act, the petitioner had no standing to appeal.³¹ When a petitioner failed to show insufficient evidence for “economic injury,” the Federal Circuit also found no standing to appeal.³² Nor was the Federal Circuit convinced that a petitioner had standing to appeal when the petitioner was only in an initial stage of product development without receiving any infringement allegation from the

patent owner.³³ The pressure on a petitioner that lacks declaratory judgment standing to win before the PTAB is particularly high: losing may be unappealable but still result in estoppel in future district court actions.

The low threshold for IPR standing will remain one of the key reasons why IPRs are important to petitioners and an unprecedented threat to patent owners: virtually anyone can attack a patent with no warning. It is possible, however, that legislative changes may one day limit standing to be more like the declaratory judgment standard.

The One-Year Time Bar Now Favors the Patent Owner

As noted, there are limitations on institution of IPRs where the petitioner has been previously sued for patent infringement; specifically, an IPR “may not be instituted if the petition requesting the proceeding is filed more than one year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.”³⁴ For the first six years of IPRs, the PTAB did not apply this time bar where a complaint was served but subsequently dismissed. The prior action, it reasoned, became a nullity once dismissed.

In August 2018, the Federal Circuit said that the PTAB had gotten it wrong. In *Click-to-Call Technologies LP v. Ingenio Inc.*, the court held that the one-year bar applies to any defendant served with a complaint even if the complaint is voluntarily dismissed.³⁵ Piling on, *Bennett Regulator Guards Inc. v. Atlanta Gas Light Co.* held that the one-year bar likewise applies to complaints that were involuntarily dismissed without prejudice.³⁶ In view of *Click-to-Call* and *Bennett*, the PTAB has also concluded that the one-year clock is triggered even if the complaint is dismissed without prejudice for lack of personal jurisdiction.³⁷ Interestingly, the PTAB has found that filing a complaint to initiate an ITC investigation does not start the one-year clock.³⁸

In addition to the clock not being tolled by dismissal, the importance of this time bar has been amplified by broad interpretation of the “real party in interest” (RPI) definition because a prior suit against any RPI will start the one-year clock. In *Applications in Internet Time LLC (AIT) v. RPX Corp.*, the Federal Circuit clarified that an RPI determination demands a “flexible approach that takes into account both equitable and practical considerations, with an eye toward determining whether the nonparty is a clear beneficiary that has a pre-existing, established relationship with the petitioner.”³⁹ Adopting the *AIT* standard, the PTAB acknowledged that whether a nonparty exercises “actual control” over a petitioner’s participation in the proceeding is not the only measure for determining an unnamed RPI.⁴⁰ However, even the broadened RPI standard has boundaries.

The PTAB has decided, for example, that a nonparty does not become an RPI merely based on membership in an association, especially when the nonparty had been adjudged to be a noninfringer of the challenged patent.⁴¹ The PTAB also found that a patent owner failed to show that some nonparties were RPIs by only presenting generic statements from a petitioner’s web page that generally describes the petitioner’s business without referring to those nonparties.⁴² In addition, the PTAB emphasized that existence of a parent-subsidiary or other corporate relationship, by itself, is insufficient proof to show that a nonparty is an RPI.⁴³

Since the *AIT* decision, patent owners have more frequently requested the PTAB to dismiss a petition by asserting that a petitioner

failed to name a nonparty RPI. However, simple failure to name all RPIs may be correctable; the time bar only comes into consideration when the missing RPI was previously served with an infringement complaint.⁴⁴

A determination of RPI is also important to the scope of estoppel following the conclusion of the IPR. The broader *AIT* standard could potentially result in more parties beyond the petitioner being precluded from “assert[ing] ... in a civil action ... that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that *inter partes* review.”⁴⁵ Resolving any RPI issue can thus be critical for not only the patent owner and the petitioner, but also for third parties as well.

Evidence in the Petition Must Fully Establish Unpatentability

The petitioner bears the burden in IPRs of proving the unpatentability by a preponderance of the evidence.⁴⁶ The lower evidentiary standard, as compared with the clear and convincing standard in district court, continues to make IPRs attractive to petitioners. Unlike district court litigation, however, IPRs are front-loaded. The expectation is that the substantive evidence in support of invalidity will be submitted in the petition itself.⁴⁷ While there are limited opportunities post-institution for a petitioner to introduce additional evidence, institution will generally stand or fall based solely on the evidence in the petition.

If the petition is not persuasive for institution, the petitioner may lose any chance to file another IPR. In one of its limited number of precedential decisions, the PTAB held that denying institution of a follow-on petition may be warranted because “multiple, staggered petitions challenging the same patent and same claims raise the potential for abuse.... This is unfair to patent owners and is an inefficient use of the *inter partes* review process and other post-grant review processes.”⁴⁸ One of the recognized abuses of follow-on petitions is that they improperly “allow petitioners the opportunity to strategically stage their prior art and arguments in multiple petitions, using [the PTAB’s] decisions as a roadmap, until a ground is found that results in the grant of review.”⁴⁹ For example, applying this equitable consideration in favor of the patent owner, the PTAB denied institution of a second petition filed “18 months after filing [the first petition] without reasonable justification.”⁵⁰ Notably, the PTAB’s decision to deny institution is generally unreviewable.⁵¹

If an IPR is instituted, the patent owner has the right to file a response to which the petitioner may then reply.⁵² Questions have arisen as to the proper scope of a petitioner’s reply and further responses from the patent owner in view of the Administrative Procedure Act (APA) and the allocation of the burdens.⁵³ Helpful to the petitioner, the Federal Circuit has endorsed, under appropriate circumstances, introduction of additional evidence beyond the petition.

In one case considered by the Federal Circuit, the petitioner’s reply newly introduced specific portions of a reference to support its validity challenge, yet the PTAB denied the patent owner an opportunity for a sur-reply because the relevant portions had been cited in the petition of a companion IPR.⁵⁴ The Federal Circuit rejected the PTAB’s reasoning and held that the patent owner was entitled under the APA to an opportunity to respond to the new argument. The Federal Circuit has made it clear that there is no blanket prohibition against the introduction of new evidence post-institution. To the contrary, “the introduction of new evidence in the course of the trial is to be expected in *inter partes* review trial proceedings and, as long as

the opposing party is given notice of the evidence and an opportunity to respond to it, the introduction of such evidence is perfectly permissible under the APA.”⁵⁵

With respect to the allocation of evidentiary burdens on the substantive questions of patentability, the burden of persuasion never shifts to the patent owner.⁵⁶ Helpful to the petitioner, the Federal Circuit has held that the petitioner’s appropriate reliance on certain presumptions may, however, shift the burden of production to the patent owner.

More specifically, in *In re Magnum Oil Tools International Ltd.*, a decision favorable to patent owners, the Federal Circuit stated that “in an *inter partes* review, the burden of persuasion is on the petitioner to prove unpatentability by a preponderance of the evidence ... and that burden never shifts to the patentee.”⁵⁷ The court further *rejected* the argument that when the PTAB institutes an IPR—meaning that it had found the petitioner to establish a reasonable likelihood that at least one challenged claim is unpatentable—the burden of producing evidence of patentability shifts to the patent owner.⁵⁸ This was interpreted by some as an absolute rule that the burden of production related to patentability could never shift to the patent owner.⁵⁹

The Federal Circuit clarified in *E.I. DuPont de Nemours & Co. v. Synvina C.V.* that, in some instances, the petitioner can rely on a presumption of obviousness in the absence of evidence to the contrary from the patent owner. In particular, where the patent claims a range (e.g., a temperature of 250°C to 275°C) falling within a prior art range (e.g., a temperature of 200°C to 350°C), there is, in effect, a burden of production to the patent owner to offer evidence showing that the claimed range has some criticality or yields some unexpected benefit.⁶⁰ Confirmation that an obviousness presumption based on overlapping ranges applies in the IPR framework is incredibly important, particularly in the chemical, biotechnological, and pharmaceutical technologies, which often encounter this issue. It becomes all the more important now for patent owners to carefully draft their patent applications and claims in the first place, and to be prepared to present evidence to support assertions of criticality or unexpected results.

The Future for IPRs

As a legal tool, IPRs are still quite young. They will certainly continue to evolve, especially since the PTAB seems inclined to proactively reform its procedure in the direction of greater balance in favor of the patent owner.

As of Nov. 13, 2018, for example, patent claims in newly filed IPRs are no longer construed under the so-called “broadest reasonable interpretation” standard that is used during patent prosecution.⁶¹ Instead, claim construction in IPRs will follow the same standard applied in district court litigations.⁶² The effect may be to somewhat reduce the petitioner’s advantage in challenging the claims over the prior art since the patent owner will no longer have to defend claims broader than it can assert for infringement.

Another PTAB initiative involves its motion to amend practice. By statute, the patent owner is entitled to file a motion to amend that cancels or proposes a reasonable number of substitutes for any challenged claim.⁶³ Prior to the Federal Circuit’s 2017 decision in *Aqua Products Inc. v. Matal*,⁶⁴ the PTAB had placed the burden on the patent owner to establish the patentability of the proposed amended claims. In practice, claim amendments were rarely authorized

during this period. *Aqua Products* held that the PTAB cannot place the burden on the patent owner to establish the patentability of proposed amended claims, and this standard was then implemented by the PTAB.⁶⁵ However, there were still very few successful motions to amend.

The PTAB has now implemented a pilot program intended to provide preliminary feedback on the merits of a proposed amendment and an opportunity for the patent owner to further revise its proposed amendment in light of this guidance.⁶⁶ But the pilot program is not without controversy. There is concern, for example, that it will substantially increase the cost and complexity of IPRs, contrary to the congressional intent for an efficient and lower-cost alternative to litigation.⁶⁷

We will also likely see growth in PGRs, which allow for potentially powerful challenges to the sufficiency of the patent's disclosure and the definiteness of its claims in addition to the prior art grounds available in an IPR. PGRs are available for the ever-growing pool of patents having an effective filing date on or after March 16, 2013, which include patents claiming but not actually entitled to an earlier filing date. For example, in *Arkema Inc. v. Honeywell International Inc.*, even though the patent claimed a priority chain back to 2002, it was found to be PGR eligible because the earlier-filed applications lacked written description support for, and failed to enable, the challenged claims.⁶⁸ A downside of PGRs, however, is that they potentially expand the scope of petitioner's estoppel to the non-prior art grounds.

The path ahead for IPRs (and PGRs) will likely continue to curve and be realigned by the courts and the PTAB balances. But all signs point to continued growth in importance in the patent enforcement/defense landscapes. Stay tuned for what promises to be an exciting road ahead. ☺



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Endnotes

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¹⁰*Advanced Audio Devices LLC v. HTC Corp.*, 721 F. App'x 989 (Fed. Cir.), presenting the question whether IPRs of patents filed before enactment of the AIA violate the Fifth Amendment Takings Clause, *cert. denied*, 139 S. Ct. 334 (2018).

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¹²*SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1353-54 (2018) (quoting 35 U.S.C. § 318(a)) (first alteration in original) (emphasis added).

¹³*Id.* at 1355.

¹⁴*Id.* at 1353.

¹⁵*Guidance on the Impact of SAS on AIA Trial Proceedings*, PTAB (Apr. 26, 2018), <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/trials/guidance-impact-sas-aia-trial> (emphasis added).

¹⁶*BioDelivery Scis. Int'l Inc. v. Aquestive Therapeutics Inc.*, 898 F.3d 1205, 1209-10 (Fed. Cir. 2018) (citing *PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018) ("Equal treatment of claims and grounds for institution purposes has pervasive support in SAS.")) (emphases added).

¹⁷*See, e.g., Equistar Chemicals LP v. ExxonMobil Chem. Patents Inc.*, IPR2017-01534, Paper 64 at 59 (Dec. 7, 2018).

¹⁸*SAS Inst.*, 138 S. Ct. at 1354 (quoting 35 U.S.C. § 318(a)) (emphasis added).

¹⁹*See, e.g., Joe Matal, A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435, 461 (2012).

²⁰35 U.S.C. § 315(e)(2).

²¹*Shaw Indus. Grp. Inc. v. Automated Creel Sys. Inc.*, 817 F.3d 1293, 1300 (Fed. Cir.) ("Shaw did not raise—nor could it have reasonably raised—the [non-instituted] ground *during* the IPR. The plain language of the statute prohibits the application of estoppel under these circumstances."), *cert. denied*, 137 S. Ct. 374 (2016); *HP Inc. v. MPHJ Tech. Invs. LLC*, 817 F.3d 1339, 1347-48 (Fed. Cir. 2016) (citing *Shaw*, 817 F.3d at 1299-300) finding that the non-instituted grounds were not estopped because they were not raised and could not be raised in the IPR because review was denied as to those grounds).

²²35 U.S.C. §§ 315(a), (b), & (e).

²³*MedImmune Inc. v. Genentech Inc.*, 549 U.S. 118, 127 (2007) (citation omitted).

²⁴*See, e.g., Pfizer Inc. v. Genentech Inc.*, IPR2017-01923, -01488, -01489, -01726, -01727, -02019, -02020, -02063, -02126, -02127, & IPR2018-00016.

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²⁶*Coalition for Affordable Drugs VI LLC v. Celgene Corp.*, IPR2015-01092, Paper 12 at 2 (P.T.A.B. Aug. 11, 2015).

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¹¹*Aatrix Software Inc. v. Green Shades Software Inc.*, 882 F.3d 1121, 1123 (Fed. Cir. 2018).

¹²*Berkheimer*, 890 F.3d at 1371 (concurring opinion).

¹³*Aatrix*, 890 F.3d at 1358.

¹⁴*Pure Data Sys. LLC v. Ubisoft Inc.*, 329 F. Supp. 3d 1054, 1059 (N.D. Cal. 2018).

¹⁵*TMI Sols. v. Bath & Body Works Direct Inc.*, 329 F. Supp. 3d 1054, 1059 (N.D. Cal. 2018).

¹⁶*Guada Tech. LLC v. Vice Media LLC*, No. 17-1503, 2018 WL 4441460, at *6 (D. Del. Sept. 17, 2018).

¹⁷*Uniloc USA v. Apple Inc.*, No. C 18-00358, 2018 WL 2287675, at *7 (N.D. Cal. May 18, 2018).

¹⁸*Search & Social Media Partners LLC v. Facebook Inc.*, No. 17-1120, 2018 WL 4674572, at *8 (D. Del. Sept. 28, 2018).

¹⁹*DiStefano Patent Trust III LLC v. LinkedIn Corp.*, No. 17-1798, 2018 WL 4674571, at *7 (D. Del. Sept. 28, 2018).

²⁰*TriPlay Inc. v. WhatsApp Inc.*, No. 13-1703, 2018 WL 1479027, at *12 (D. Del. Mar. 27, 2018).

²¹*Symantec Corp. v. Zscaler Inc.*, No. 17-cv-04426, 2018 WL 3539267, at *3 (N.D. Cal. July 23, 2018).

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²⁰*In re Tempnology LLC*, 559 B.R. 809, 822-23 (B.A.P. 1st Cir. 2016).

²¹*In re Tempnology LLC*, 879 F.3d 389, 404 (1st Cir.), cert. granted in part sub nom. *Mission Prod. Holdings Inc. v. Tempnology LLC*, 139 S. Ct. 397 (2018).

²²*Tempnology*, 879 F.3d at 402 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)).

²³*Tempnology*, 879 F.3d at 402-03.

²⁴*Id.*

²⁵The author is not suggesting the Court's approach to statutory construction has changed in the past two years, only that analyzing more recent decisions may be more instructive.

²⁶*Lamar, Archer & Cofrin LLP v. Appling*, 138 S. Ct. 1752, 1757 (2018).

²⁷*Id.* at 1759.

²⁸*Ransom v. FIA Card Servs. N.A.*, 562 U.S. 61, 69 (2011).

²⁹*Appling*, 138 S. Ct. at 1759.

³⁰*Merit Mgmt. Gp. LP v. FTI Consulting Inc.*, 138 S. Ct. 883, 892 (2018).

³¹11 U.S.C. § 546 (e) provides: "Notwithstanding sections

544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title."

³²*Merit Mgmt.*, 138 S. Ct. at 897.

³³*Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983, (2017).

³⁴*Id.* (citation omitted).

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IPR2015-01092, Paper 19 at 4 (PTAB Sept. 25, 2015).

²⁸*Mentor Graphics Corp. v. Quickturn Design Sys. Inc.*, 150 F.3d 1374, 1377 (Fed. Cir. 1998).

²⁹*Arista Networks Inc. v. Cisco Sys. Inc.*, 908 F.3d 792, 804 (Fed. Cir. 2018) (quoting 35 U.S.C. § 311(a)).

³⁰*Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258 (Fed. Cir. 2014).

³¹*Id.*

³²*Phigenix Inc. v. Immunogen Inc.*, 845 F.3d 1168 (Fed. Cir. 2017).

³³*JTEKT Corp. v. GKN Auto. LTD.*, 898 F.3d 1217 (Fed. Cir. 2018), petition for cert. filed (U.S. Dec. 7, 2018) (No. 18-750).

³⁴35 U.S.C. § 315(b).

³⁵*Click-to-Call Techs. LP v. Ingenio Inc.*, 899 F.3d 1321, 1336 (Fed. Cir. 2018).

³⁶*Bennett Regulator Guards Inc. v. Atlanta Gas Light Co.*, 905 F.3d 1311, 1314-15 (Fed. Cir. 2018).

³⁷*Infiltrator Water Techs. LLC v. Presby Patent Tr.*, IPR2018-00224, Paper 18 (P.T.A.B. Oct. 1, 2018).

³⁸See, e.g., *Robert Bosch Tool Corp. v. SD3 LLC*, IPR2016-01751,

Paper 15 (P.T.A.B. Mar. 22, 2017).

³⁹*Applications in Internet Time LLC v. RPX Corp.*, 897 F.3d 1336, 1351 (Fed. Cir. 2018).

⁴⁰*Sirius XM Radio Inc. v. Fraunhofer-Gesellschaft zur Förderung der Angewandten Forschung E.V.*, IPR2018-00689, Paper 11 at 5-6 (P.T.A.B. Sept. 21, 2018).

⁴¹*RPX Corp. v. Publ'g Techs. LLC*, IPR2018-01131, Paper 10 (P.T.A.B. Dec. 3, 2018).

⁴²*Unified Patents Inc. v. Mobility Workx LLC*, IPR2018-01150, Paper 9 (P.T.A.B. Dec. 3, 2018).

⁴³*Tesco Offshore Servs. Inc. v. Weatherford/Lamb Inc.*, IPR2018-01308, Paper 19 (P.T.A.B. Dec. 10, 2018).

⁴⁴*Arm Ltd. v. Advanced Micro Devices Inc.*, IPR2018-01148, Paper 16 (P.T.A.B. Dec. 12, 2018); *Tesco Offshore Servs.*, IPR2018-01308, Paper 19.

⁴⁵35 (P.T.A.B. Dec. 10, 2018) U.S.C. § 315(e)(2).

⁴⁶*Id.* § 316(e).

⁴⁷See *Intelligent Bio-Sys. Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359 (Fed. Cir. 2016).