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IP YEAR IN REVIEW: IMPORTANT CASES DECIDED IN 2020

Andrew Gray, Julie Goldemberg, Thomas Nolan, Ben Pezzner, Jacob Minne, Derek West, Kannan Narayanan, Scott Tester, Alex Petterson, Rebecca Ho, Zehra Jafri, An Le, and Garrett Pierson

June 23, 2021

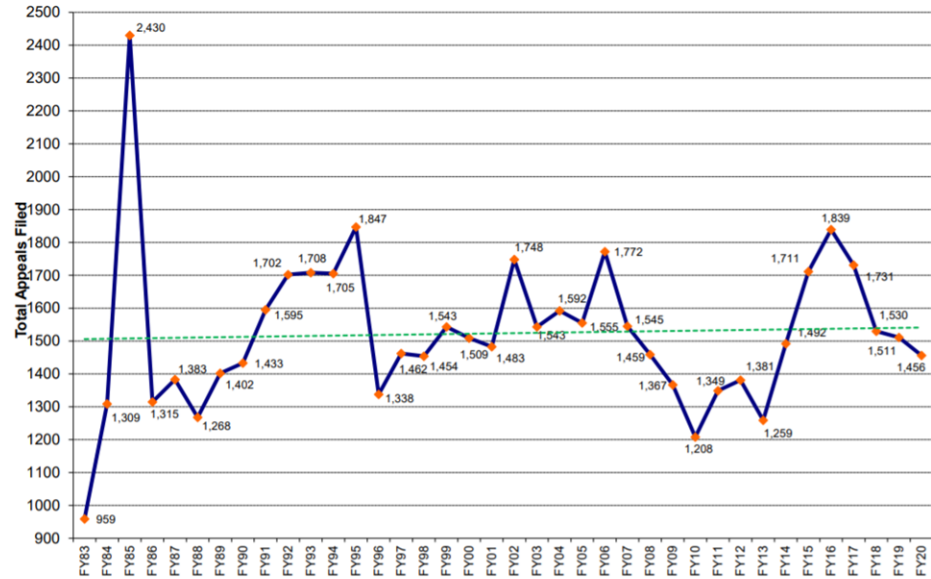
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2020 FEDERAL CIRCUIT CASELOAD STATISTICS

Julie Goldemberg

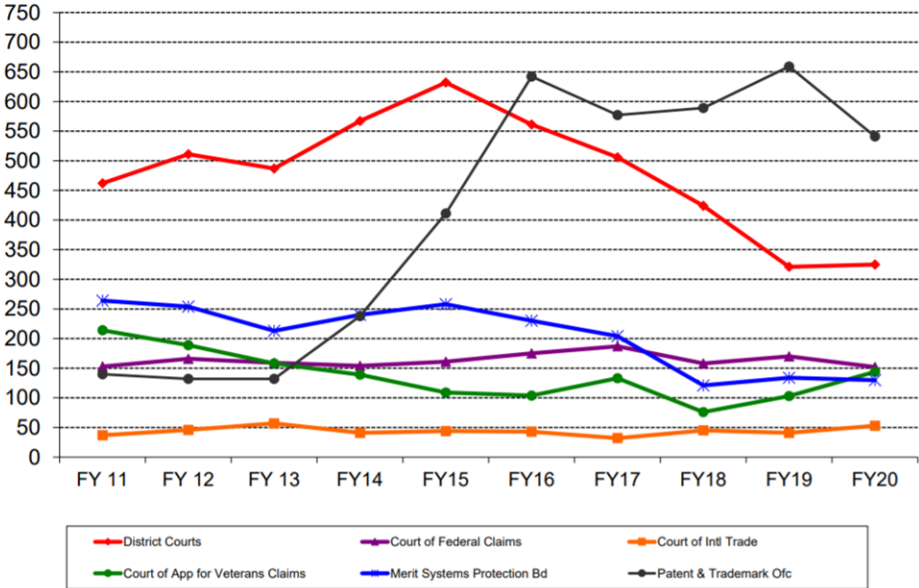
Historical Caseload

United States Court of Appeals for the Federal Circuit
Historical Caseload



Appeals Filed in Major Origins

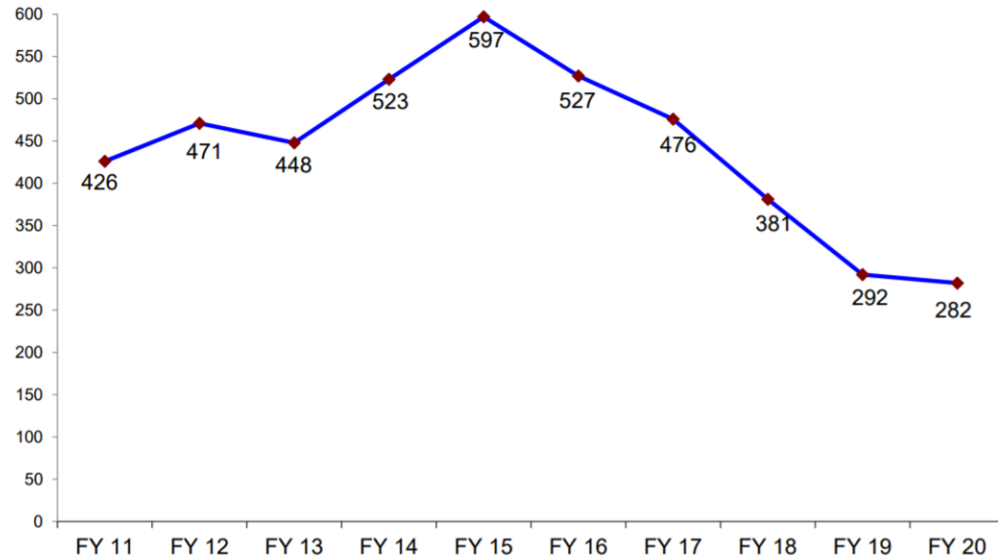
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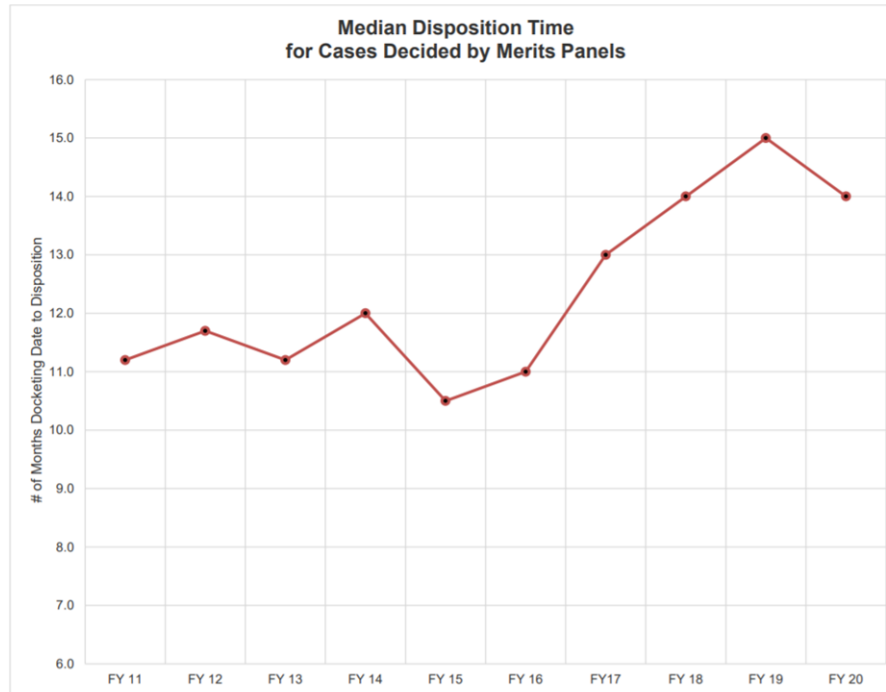
Filings from District Courts

United States Court of Appeals for the Federal Circuit

Filings of Patent Infringement Appeals
from the U.S. District Courts



Median Disposition Time



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UNILOC 2017 LLC V. HULU, LLC

**PTAB Can Consider Subject Matter Eligibility
When Assessing Amended Claims in Inter Partes
Reviews**

**Thomas Nolan
966 F.3d 1295 (Federal Circuit 2020)**

Scope of IPR Petition and Amendment

- 35 U.S.C. § 311(b): “**SCOPE.**—A petitioner in an **inter partes review** may request to cancel as unpatentable 1 or more claims of a patent only on a ground that **could be raised under section 102 or 103** and **only on the basis of prior art consisting of patents or printed publications.**”
- 35 U.S.C. § 316(d): “During an [IPR] . . . , the patent owner may file [one] **motion to amend the patent,**” and by that motion “[c]ancel any challenged patent claim,” and “[f]or each challenged claim, propose a reasonable number of **substitute claims.**” The statute provides that any proposed substitute claim “**may not enlarge the scope of the claims of the patent or introduce new matter.**”

The IPR Proceedings Before PTAB

- Uniloc attempted to amend challenged claims by substituting new independent claims that it argued were patentable in spite of the grounds of unpatentability proposed by Hulu, the petitioner, in its IPR petition.
- In response to Uniloc's motion to amend the challenged claims, Hulu argued that the challenged claims—as amended—were directed to ineligible subject matter under Section 101.
- Rather than challenge this argument, Uniloc argued in its reply only that Hulu should not be permitted to make the argument.
- Finding no dispute with Hulu's arguments, PTAB rejected the proposed amended claims.

The Federal Circuit Appeal

- The Federal Circuit’s opinion pointed to 35 U.S.C. 318, which directs the PTAB to “issue a final written decision with respect to the patentability of . . . any new claim added under [Section] 316(d).”
- Previous Federal Circuit decisions establish that subject matter eligibility under Section 101 qualifies as a question of “patentability.”
 - *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1330 (Fed. Cir. 2015) (“[B]oth our opinions and the Supreme Court’s opinions over the years have established that § 101 challenges [are] . . . patentability challenges.”)
 - *Aristocrat Techs. Austl. Ltd. v. Int’l Game Tech.*, 543 F.3d 657, 661 (Fed. Cir. 2008) (“It has long been understood that the Patent Act sets out the conditions for patentability in three sections: [Sections] 101, 102, and 103.”).

Takeaways

- After a final written decision, the petitioner “may not assert as a defense in district court “any ground that the petitioner raised or reasonably could have raised during that inter partes review.” 35 U.S.C. § 315(e)(2).
 - Although not addressed in the opinion, the decision raises the stakes of potential IPR estoppel in cases involving claims that were successfully amended.
 - But, amendment may prevent the patent holder from obtaining past damages.
- Future patent owners who successfully amend and are primarily interested in prospective relief may use this decision to argue that estoppel should apply to *all* grounds of unpatentability with respect to any amended claims.
 - The Federal Circuit has now affirmed the PTAB’s practice of considering at least Section 101 challenges, on the basis that they concern “patentability.”

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EDGEWELL V. MUNCHKIN

Claim vitiation and the doctrine of equivalents

Benjamin Pezzner
2020-1203 (Fed. Cir. 2021)

Edgewell v. Munchkin

Edgewell
(Diaper Genie)



Munchkin
(Accused Product)



Edgewell v. Munchkin

Edgewell



Munchkin



Sued Munchkin in Central District of CA,
alleging DOE infringement of US 6,974,029

Moved for summary judgment of
noninfringement, alleging claim vitiation

Court granted motion

Appealed to CAFC

Reversed

Edgewell v. Munchkin

Edgewell



1. A cassette for use in dispensing a pleated tubing comprising:

an annular body having a generally U-shaped cross-section defined by an inner wall, an outer wall and a bottom wall joining a lower part of said inner and outer walls, said walls defining a housing in which the pleated tubing is packed in layered form;

an **annular cover** extending over said housing; said cover having an inner portion extending downwardly and **engaging an upper part of said inner wall** of said body and a top portion extending over said housing; said top portion including a **tear-off outwardly projecting section** having an outer edge **engaging an upper part of said outer wall** of said annular body; said tear-off section, when torn-off, leaving a peripheral gap to allow access and passage of said tubing therebetween; said downwardly projecting inner portion having an inclined annular area defining a funnel to assist in sliding said tubing when pulled through a central core defined by said inner wall of said body; and

cooperating inter-engagement means on said upper part of said body and on opposite edges of said cover to lock said cover to said body.

Munchkin



Annular cover:

- an inner piece of molded plastic, and
- an outer piece of shrink wrap that is designed to be torn off before installation

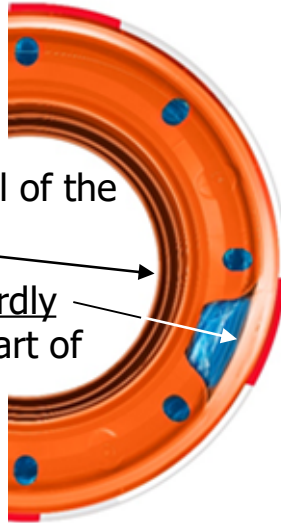
Edgewell v. Munchkin

Edgewell



Annular cover:

- an inner portion engaging the inner wall of the body, and
- a top portion including a tear-off outwardly projecting section engaging an upper part of said outer wall of said annular body



Munchkin



Annular cover:

- an inner piece of molded plastic, and
- an outer piece of shrink wrap that is designed to be torn off before installation

Edgewell v. Munchkin

Edgewell



Literal Infringement?

District court: No, "annular cover" and "tear-off" section must be part of the same structure.

Munchkin



Annular cover:

- an inner portion engaging the inner wall of the body, and
- a top portion including a tear-off outwardly projecting section engaging an upper part of said outer wall of said annular body

Annular cover:

- an inner piece of molded plastic, and
- an outer piece of shrink wrap that is designed to be tear off before installation

Equivalent?

District court: No, would vitiate the "tear-off section" limitation

DOE and Claim Vitiating

- A patentee seeking to assert a patent must prove (i) literal infringement or (ii) infringement under Doctrine of Equivalents (DOE)
 - Literal: accused product has every claimed feature
 - DOE: accused product doesn't have every claimed feature, but performs substantially same function in substantially same way to obtain substantially same result
- Defense against reliance on DOE: Claim Vitiating
 - Reading a claim element to encompass an accused product would so stretch the claim language as to "vitate" (*i.e.*, make ineffective or eliminate) that claim element
 - In the past, has been invoked as an exception to DOE
 - No longer an exception; now, merely a finding under the DOE test

Edgewell v. Munchkin

- CAFC:
 - Courts should be cautious not to shortcut the DOE inquiry by identifying a “binary” choice in which an element is either present or not present.
 - The determination of equivalence depends not on labels like “vitiation” but on the proper assessment of the language of the claimed limitation and the substantiality of whatever relevant differences may exist in the accused structure
- Application to this case:
 - District court erred in evaluating annular cover as a binary choice between a single-component structure and a multi-component structure, rather than evaluating the evidence to determine whether a reasonable juror could find DOE infringement (function-way-result)
 - Here, Munchkin’s annular cover performs:
 - the same function (extending over housing while still providing means of access),
 - in the same way (plastic engages inner wall, shrink-wrap can be torn off),
 - to achieve the same result (when shrink-wrap is torn off, peripheral gap is exposed)

Takeaways

- Limiting question of DOE infringement to a binary choice (vitiating or not vitiating) is improper where a reasonable juror could have found an accused element performs substantially the same function-way-result. This precludes summary judgment of DOE noninfringement based on vitiating.
- Litigation: Address DOE function-way-result evidence *in addition to* (not as a substitute for) vitiating arguments
- Prosecution: Include functional language in the specification, even for structural elements, in order to provide basis for DOE function-way-result arguments

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IN RE: GOOGLE LLC

Limits on venue and a “regular and established place of business”

Jacob Minne

949 F.3d 1338 (Fed. Cir. 2020)

In re: Google – When do local servers support venue?

- Super Interconnect Technologies sought venue against Google in the Eastern District of Texas based on the provision of “Google Global Cache” (“GGC”) servers to several ISPs in the district. Google moved to dismiss and sought mandamus.
- Federal Circuit granted mandamus noting two clear issues:
 - (1) whether a server rack, a shelf, or analogous space can be a "place of business" and
 - (2) whether a "regular and established place of business" requires the regular presence of an employee or agent of the defendant conducting the business."

Refresher: Patent Venue under 28 USC 1400(b)

- **(b)**Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

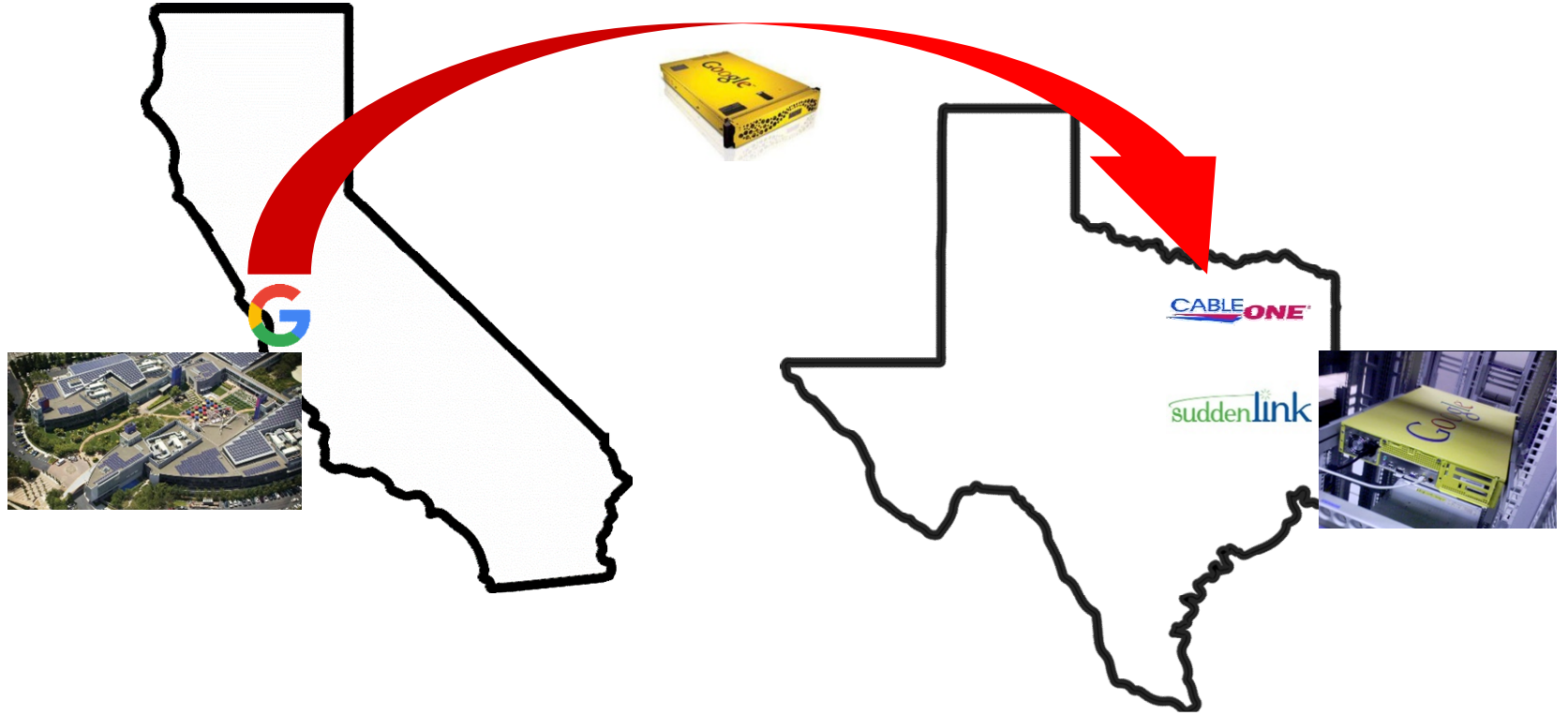
Refresher: Patent Venue under 28 USC 1400(b)

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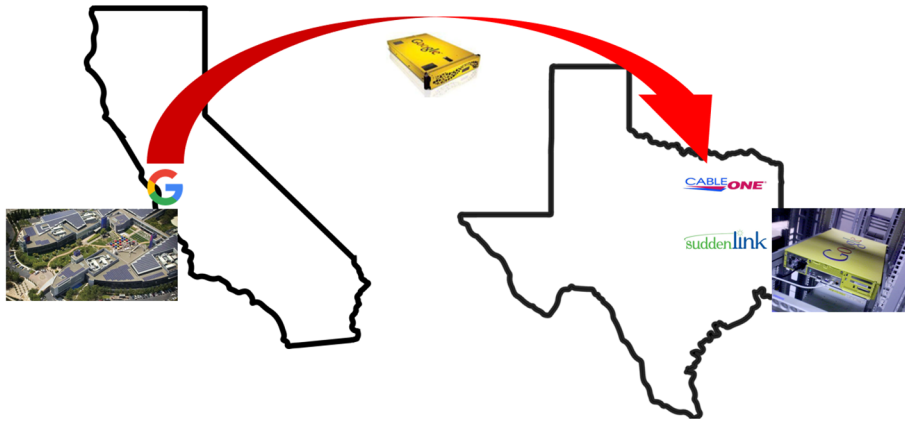
TC Heartland: “a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute”

Cray: “(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant.”

Google Global Cache Servers



Google Global Cache Servers



ISPs would:

- provide rack space, power, network interfaces, IP addresses, and network access;
- “Installation Services”
- “basic maintenance activities”

No Google employees were on site.

Applying the *Cray* Factors:

- Does Google have a “physical place in the district”?
- Does Google have a “regular and established place of business”?



“a ‘place of business’ is not restricted to real property that the defendant must ‘own[] or lease,’ ... leased shelf space or rack space can serve as a ‘place’ under the statute”



“a ‘place of business’ generally requires an employee or **agent** of the defendant to be conducting business at that place”

- Installation is not enough because it does not provide “interim instructions” to support an “agency relationship”
- Maintenance is not enough because it “**is meaningfully different from—as only ancillary to—the actual producing, storing, and furnishing to customers of what the business offers.**”

Take-Aways – How To Avoid Venue In Texas

- Option 1: Don't put things in Texas.
- Option 2: Don't put people in Texas
 - Make sure that work is being done by contractors and not employees
 - Don't contract any mission-critical work out to locations in Texas. This is easier if you are a software company and hardware is "ancillary" to your business.
 - Some litigation is likely to continue.

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**THRYV, INC. V.
CLICK-TO-CALL TECHNOLOGIES, INC.**

**BARS TO APPEAL ON USPTO DECISIONS TO
INSTITUTE INTER PARTES REVIEW**

Derek West

United States Supreme Court, 18-916, April 20, 2020

Facts

- 1995, Click-to-Call granted a patent related to technology for anonymous phone calls.
- 2001, an infringement action was filed against Thryv's predecessor, which ended in voluntary dismissal without prejudice.
- 2013, Thryv sought inter partes review.
- Click-to-Call argued §315(b) barred institution of inter partes review because Thryv filed its petition too late.
- The Board disagreed, concluding a complaint dismissed without prejudice does not trigger the statute's one-year limit.

Question Presented

- Does 35 U.S.C. §314(d) bar judicial review of the USPTO's decision that an IPR petition is timely given the limitation in §315(b)?
- §314(d) "The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable."
- §315(b) "An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 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."

Holding

- 35 U.S.C. §314(d) does not allow an appeal of the PTAB's decision to institute an IPR after finding that a one-year time bar does not apply.
- The Court expanded on its interpretation of §314(d) in *Cuozzo Speed Technologies, LLC v. Lee*. *Cuozzo* precluded from judicial review matters "closely tied to the application and interpretation of statutes related to" the institution of inter partes review.
- The "under this section" limitation in §314(d) does not apply only to threshold determinations under §314(a), but to the "entire determination whether to institute an inter partes review" to include timeliness in §315(b).
- Gorsuch, dissenting, writes "[n]o matter how wrong... the Director's assessment of a petition's timeliness is always immune from review."

Takeaways

- The decision to institute an inter partes review is unappealable.
- The *America Invents Act* provided inter partes review to weed out bad patents efficiently and allowing §315(b) appeals would “tug against that objective.
- The right to appeal under §319 does not include any ruling barred from appeal under §314(d).
- The interpretation of §314(d) has been applied by the Federal Circuit to §324(e) regarding the institution of post-grant reviews.

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**GOOGLE LLC V.
ORACLE AMERICA, INC.**

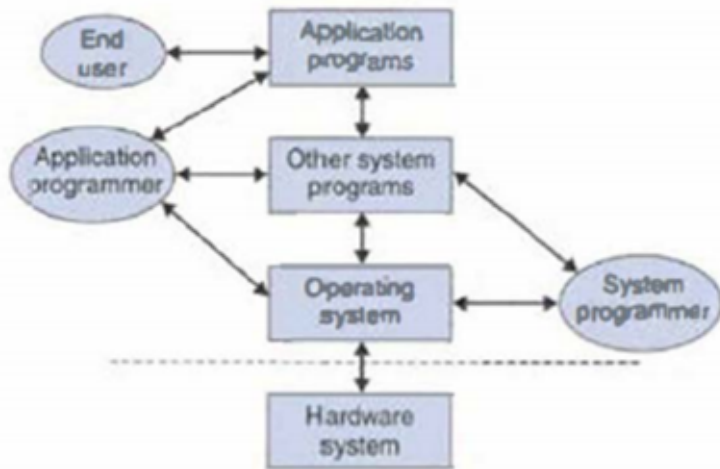
SOFTWARE API COPYRIGHTABILITY

Kannan Narayanan

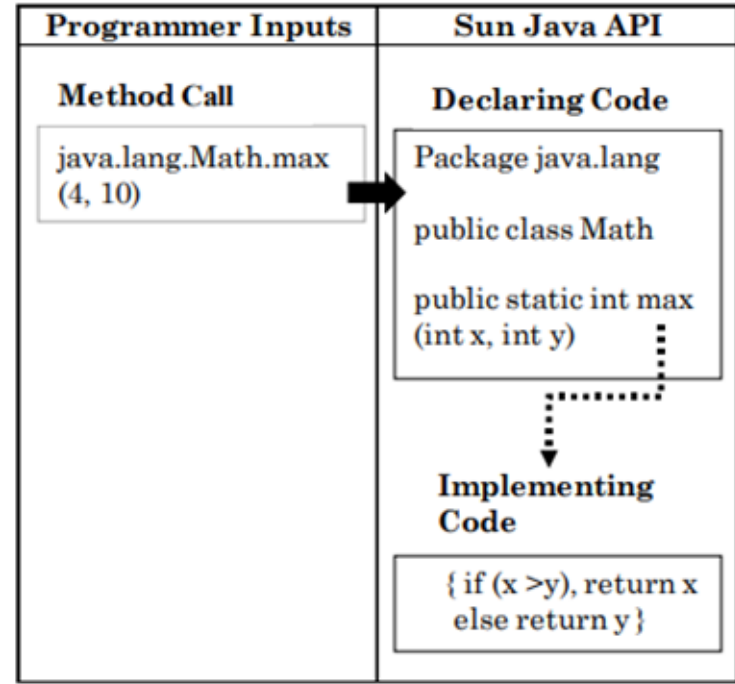
No. 18-956, 141 S. Ct. 11853 (U.S. Apr. 5, 2021)

Background (The Java Platform and APIs)

Sun Java API Diagram



J. Garrido & R. Schlesinger, Principles of Modern Operating Systems 8 (2008) ("Figure 1.4. An External View of a Computer System").



Procedural History

2007
Android
platform
released

2011
Mediation
and
settlement
fails

2014
US Appeals
Court
overturns,
rules that
Oracle's APIs
copyrightable

2016
Trial court
rules that
Google's
use was
"fair use"

2019
Google
petitions
SCOTUS
to hear the
case

2010
Oracle
acquires
Sun (and
Java)

2012
US District
Judge
rules APIs
cannot be
copyrighted

2015
SCOTUS
denies
Google's
petition to
hear the
case

2018
Fed. Cir.
rules that
Google's
use was
not "fair
use"

2021
SCOTUS
declares
Google's
use was
"fair use"

Copyright Law - A Quick Overview

- Copyrights and patents serve to “**promote the Progress of Science and useful Arts**, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Art. I, §8, cl. 8.
- The scope of copyright protection is limited to ensure that **a copyright holder’s monopoly does not harm the public interest**. Towards this end, the Copyright Act provides:
 - Protection cannot extend to “any idea, procedure, process, system, method of operation, concept, principle or discovery.” 17 U.S.C. §102(b).
 - A copyright holder may not prevent another person from making a “fair use” of a copyright work. §107.
 - The doctrine of “fair use” is flexible and considers technological changes.
 - Because computer programs are always functional, fair use provides a context-based check and keeps monopoly within its lawful bounds.
 - The fair use question is a mixed question of fact and law. Questions on facts go to a jury, but ultimately whether those facts amount to a fair use is a legal question.
 - The Copyright Act sets forth the following four guiding factors for the fair use provision:
 1. The purpose and character of the use;
 2. The nature of the copyrighted work;
 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 4. The effect of the use upon the potential market for or value of the copyrighted work. §107.
 - The Court has recognized that some factors may prove more important in some contexts than in others. *Campbell v. Acuff-Rose Music, Inc.*, 510 U. S. 569, 577. Pp. 21– 35

Holdings

1. Whether Java SE's owner (Oracle) could copyright the portion (i.e., APIs) that Google copied.
 - The Court assumed, for argument's sake, that the material was copyrightable.
 - "A holding for Google on either question presented [i.e., copyrightability of API and applicability of fair use] would dispense with Oracle's copyright claims. **Given the rapidly changing technological, economic, and business-related circumstances, we believe we should not answer more than is necessary to resolve the parties' dispute.** We shall assume, but purely for argument's sake, that the entire Sun Java API falls within the definition of that which can be copyrighted."
2. Whether Google's use of the copied lines was a "fair use."
 - **Google's copying of the Java SE API, which included only those lines of code that were needed to allow programmers to put their accrued talents to work in a new and transformative program, was a fair use of that material as a matter of law.**

Fair Use Analysis (Majority Opinion)

1. The nature of the work at issue favors fair use.

- Copied lines of code part of “user interface.”
- Value of the program is derived from computer programmers who have learned the API’s system.

2. Google’s limited copying of the API shows “the purpose and character” is transformative.

- Google copied only what was needed to allow programmers to work in a different computing environment (smartphones) without discarding a familiar programming language.
 - Purpose consistent with creative progress, the basic constitutional objective of copyright.

3. For “the amount and substantiality of the portion used,” the copied code is one small part of the considerably greater whole.

- 11,500 lines of declaring code are only 0.4 percent of the entire API consisting of 2.96 million total lines.
- The copied lines are inextricably bound to other lines of code accessed by programmers.
- Google copied those lines not because of their creativity or beauty but because the lines would allow programmers to bring their skills to the new smartphone environment.

4. The “market for or value of the copyright work” also favors fair use.

- Android is not a market substitute for Java SE.
- The copyright holder would benefit from the reimplementations of its interface into a different market.
- Enforcement risks causing creativity-related harms to the public.

Fair Use Analysis (Thomas, J., dissenting)

1. Nature of copyrighted work. The majority wrongly concluded that declaring code is unworthy of copyright protection.

- “A Broadway musical script needs actors and singers to invest time learning and rehearsing it. But a theater cannot copy a script—the rights to which are held by a smaller theater—simply because it wants to entice actors to switch theaters and because copying the script is more efficient than requiring the actors to learn a new one.”
- Value of the implementing code is directly proportional to how much programmers value the associated declaring code.

2. Market effects. “By copying Oracle’s code to develop and release Android, Google ruined Oracle’s potential market.”

- While Oracle earned revenue by charging device manufacturers to install the Java platform, Google obtained revenue primarily from ads.
- “Google interfered with opportunities for Oracle to license the Java platform to developers of smartphone operating systems.
- About potential lock-in effect due to copyright enforcement, “Google controls the most widely used mobile operating system in the world. ... If the majority is worried about monopolization, it ought to consider whether Google is the greater threat.”

3. Purpose and character of the use.

- “Begin with the overwhelming commercial nature of the Google’s copying.”
- “Google’s repurposing of Java code from larger computers to smaller computers resembles none of them [e.g., criticism, comment, news reporting, teaching . . . , scholarship, or research]. Google did not use Oracle’s code to teach or reverse engineer a system to ensure compatibility. Instead, to “avoid the drudgery in working up something fresh,” id., at 580, Google used the declaring code for the same exact purpose Oracle did.”

4. The amount and substantiality of the portion used.

- “But even if the copier takes only a small amount, copying the “heart” or “focal points” of a work weighs against fair use, Harper, 471 U. S., at 565– 566, unless “no more was taken than necessary” for the copier to achieve transformative use, Campbell, 510 U. S., at 589.”
- “The proper denominator is declaring code, not all code. A copied work is quantitatively substantial if it could “serve as a market substitute for the original” work or “potentially licensed derivatives” of that work.”
- “The declaring code is what attracted programmers. And it is what made Android a “market substitute” for “potentially licensed derivatives” of Oracle’s Java platform. Google’s copying was both qualitatively and quantitatively substantial.”

Takeaways

- Not all software code is treated equal. A court is more likely to determine that use of declaring code, is not protected.
- Reimplementation of an API (e.g., for a different platform) may be a fair use.
- When considering the substantiality of the code copied, a court is likely to consider the overall number of lines of code.
- Programmers have more leeway to borrow third-party code (especially APIs) and could rely on fair use; but consider developing APIs using “clean room” approach.
- It is worthwhile to negotiate licenses for software APIs because such negotiation can be used later in defense.
- Developers of APIs or systems that are likely to become a standard for programmers, could be at risk.
- Copyright owners who are not exploiting a derivative market, beware of larger competitors.
- The ultimate question of fair use is reviewed de novo, so could argue on appeal that trial judge was wrong.
- The Court avoided API copyrightability question and focused on fair use analysis, thereby making this a fact-intensive decision and minimized the impact to the software industry.
- The Court’s analysis of market effects is likely to impact other cases, not just in software industry.

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IN RE: PERSONALWEB

Claim Preclusion and the Kessler Doctrine

Scott Tester

In Re PersonalWeb: Timeline

- 2011: PersonalWeb sued Amazon (and Dropbox) of infringement
 - Multiple patents covering intelligent caching to avoid transferring data that does require transmission
 - PersonalWeb’s infringement contentions covered both Amazon’s Simple Storage Service (“S3”) “multipart upload” and “conditional get” functions.
 - Case focused primarily on “multipart upload” requests
 - After *Markman*, parties stipulated to dismissal with prejudice based on construction.
 - No conditions were placed on the dismissal.
- 2018: PersonalWeb sued numerous parties, including eight Amazon S3 customers, of infringing the same patents
 - Amazon argued claim preclusion and the *Kessler* Doctrine bar PersonalWeb’s claims against S3’s customers.

In Re PersonalWeb: Kessler Doctrine

- In *Kessler v. Eldred*, Eldred sued Kessler on a patent, lost, and then sued Kessler's customer on the same patent.
- The Supreme Court held (in 1907!) this to be improper.
 - [T]he question here is **whether, by bringing a suit against one of Kessler's customers, Eldred has violated the right of Kessler**. The effect which may reasonably be anticipated of harassing the purchasers of Kessler's manufactures by claims for damages on account of the use of them would be to diminish Kessler's opportunities for sale. **No one wishes to buy anything if with it he must buy a law suit.** ... Kessler's customers ceased to send orders for lighters, and even refused to pay for those which had already been delivered. **Any action which has such results is manifestly in violation of the obligation of Eldred, and the corresponding right of Kessler, established by the judgment.**
 - *Kessler v. Eldred*, 206 U.S. 285, 289 (1907)

***In Re PersonalWeb*: PersonalWeb's Arguments**

- PersonalWeb argued that the *Kessler* Doctrine did not impact its later lawsuits for at least two reasons:
 1. Different functions of Amazon's S3 product were accused in 2011 and the later cases, resulting in different causes-of-action.
 2. Neither infringement nor validity were "actually litigated" in the earlier suit due to the agreed dismissal prior to adjudication.
- PersonalWeb did not dispute that Amazon's customers are in privity with it, the same patents are being asserted, or that the same S3 product is accused of infringement.

In Re PersonalWeb: Federal Circuit Holdings

- The Federal Circuit described the *Kessler* Doctrine as “a substitute for claim preclusion” and held that it bars “both those claims that were brought as well as those that **could have been brought** in the earlier lawsuit.”
- Determining whether two causes-of-action are the same is a factual inquiry:
 - How much overlap is between the products?
 - If the products differ, do the changes relate to the patented features?
 - Are the same patents involved in the two suits?

In Re PersonalWeb: Federal Circuit Holdings

- PersonalWeb accused “a product.” Accordingly, the Court held accusing differing features of the same product is the same cause-of-action.
 - Additionally, because PersonalWeb included both features in its 2011 infringement contentions, the Court found that both features were in the earlier action.
- Failure to “adjudicate” does not excuse claim preclusion.
 - By agreeing to dismiss with prejudice, the effect is the same as if the judge had ruled as such.
- PersonalWeb chose to dismiss with prejudice and without conditions.
 - A party can put conditions on its dismissal with prejudice, such as paying a licensing fee or other requirements, but that must be stated.
 - Here, the record shows just an agreement to dismiss.

In Re PersonalWeb: Takeaways

- When you agree to dismiss a case, make sure that you specify in the dismissal the reasons (*e.g.*, taking a license) and that the dismissal is “conditioned” on that being done.
- When you agree to dismiss a case, consider the impacts to any other parties you may wish to sue, and reserve your rights to sue them, if appropriate.

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**ROMAG FASTENERS, INC.,
PETITIONER V. FOSSIL, INC., ET AL.**

Profit Remedies in Trademark Infringement Cases

Alex Petterson

Facts

- “Romag sells magnetic snap fasteners for use in leather goods.”
- “Fossil designs, markets, and distributes a wide range of fashion accessories.”
- The parties “signed an agreement allowing Fossil to use Romag’s fasteners in Fossil’s handbags and other products.”
- “Romag discovered that the factories Fossil hired in China to make its products were using counterfeit Romag fasteners—and that Fossil was doing little to guard against the practice.”
- Romag sued and won. Jury found that Fossil’s behavior was not willful, which barred an award of profits under the Second Circuit’s precedent.
- Federal Circuit applied law of regional circuit and affirmed.

Question Presented

- Whether a plaintiff can win a profits remedy only after showing the defendant *willfully* infringed its trademark.
- Even split between the Federal appeals courts:
 - Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits do not require a threshold showing of willfulness
 - The Second, Eighth, Ninth, Tenth, DC, First Circuits, for the most part, do require a threshold showing of willfulness.

Remedies under the Lanham Act - 15 U. S. C. §1117(a)

- “When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established . . . , the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.”
- Here, we’re concerned with a violation of section 1125(a) (trademark infringement).

Plaintiff's argument

- §1117(a) says nothing about willfulness with respect to a violation under section 1125(a), and yet expressly requires willfulness with respect to “a willful violation under section 1125(c)” (trademark dilution).

Defendant's argument

- Traditional principles of equity, expressly incorporated into §1117(a) (“subject to the principles of equity”), require willfulness for an award of profits.

Gorsuch Majority Opinion (Joined by all but Sotomayor)

- A plaintiff in a trademark infringement suit is not required to show that a defendant willfully infringed the plaintiff's trademark as a precondition to a profits award.
- "Without question, a defendant's state of mind may have a bearing on what relief a plaintiff should receive. An innocent trademark violator often stands in very different shoes than an intentional one. But some circuits have gone further."

Alito Concurrence (joined by Breyer and Kagan)

- “[W]illfulness is a highly important consideration in awarding profits under §1117(a), but not an absolute precondition.”

Sotomayor Concurrence

- “[A] district court’s award of profits for innocent or good-faith trademark infringement would not be consonant with the “principles of equity” referenced in §1117(a).”

Takeaway

- A lack of willfulness does not bar awarding profits for trademark infringement

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HOLOGIC, INC. V. MINERVA SURGICAL, INC.

**AN ASSIGNOR CAN CIRCUMVENT THE DOCTRINE
OF ASSIGNOR ESTOPPEL BY CHALLENGING THE
VALIDITY OF A PATENT IN THE PTO**

Rebecca Ho

957 F.3d 1256 (FED. CIR. 2020)

Facts

- Csaba Truckai co-founded the company NovaCept. He developed a system called NovaSure, which detects perforations in the uterus. Truckai assigned his interest in two patent applications relating to NovaSure to NovaCept.
- Cytyc acquired NovaCept, and Hologic then acquired Cytyc. The patent rights from Truckai's two patent applications were assigned to Hologic.
- The two patent applications ultimately issued as U.S. Patent Nos. 6,872,183 and 9,095,348.
- Truckai left NovaCept and founded Minerva. He developed the Endometrial Ablation System (EAS).
- Hologic sued Minerva in district court, claiming that Minerva's EAS infringed the '183 and '348 patents.

Procedural History

- Minerva challenged the patentability of `183 and `348 in district court and also filed petitions for IPR in the PTO. However, the PTO reviewed only `183 and found that the `183 claims were unpatentable as obvious.
- Hologic appealed the Board's decision. Hologic argued that the doctrine of assignor estoppel, whereby a party who assigns a patent to another cannot later challenge the validity of that patent in district court, barred Minerva from challenging the validity of `183 and `348.
- The district court held that Minerva was not estopped from challenging the validity of the patents in an IPR proceeding, but that Minerva was estopped from challenging the validity of the patents in district court.

Questions Presented & Holding

- **Does assignor estoppel bar Minerva from challenging '183 in an IPR proceeding?**
 - No. The Federal Circuit affirmed the district court's decision.
 - Judge Stoll wrote for the court and cited the court's precedent *Arista Networks*. In *Arista*, the court interpreted 35 U.S.C. Section 311(a), which provides that "a person who is not the owner of a patent" may file an IPR, to mean that "an assignor, who is no longer the owner of a patent, may file an IPR petition as to that patent."
- **Does assignor estoppel preclude Minerva from challenging '348 in district court?**
 - Yes. The Federal Circuit affirmed the district court's decision.
 - The court found unpersuasive Minerva's argument that it would be unfair to block Truckai from challenging '348 when Hologic, not Truckai, prosecuted the '348 patent and expanded the scope of the claims during that prosecution.
 - The court cited its precedent *Diamond Scientific* where it found that the assignee's later amending of the claims was irrelevant.

Takeaways

- Judge Stoll acknowledged the “seeming unfairness to Hologic” in that Minerva was able to “circumvent the assignor estoppel doctrine” and challenge the validity of `183 in an IPR proceeding when Minerva would have been unable to do so in district court.
- **Thus, an assignor can circumvent the doctrine of assignor estoppel by challenging the validity of a patent in the PTO.**
- This case is currently pending before the U.S. Supreme Court so this is all subject to change.
 - Minerva argues that the Court should abrogate the doctrine of assignor estoppel. Hologic argues that the Court should not abrogate the doctrine of assignor estoppel and that it should be left for Congress to make changes to the doctrine if they wish to do so.

Morgan Lewis

IN RE: FORNEY INDUSTRIES INC.

Zehra Jafri

Appeal No. 2019-1073 (TTAB April 8, 2020)

Standard Prior to *In Re Forney*

- An applicant for a color mark has been required to prove that the color serves as an indicator of source in the minds of consumers by showing that the mark has acquired secondary meaning

Qualitex Co. v. Jacobson Products Co. and *Wal-Mart Stores, Inc. v. Samara Brothers Inc.*

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Background – *In Re Forney*



Procedural Background – *In Re Forney* - USPTO

- In 2014, Forney applied to register the mark on the Principal Register
- The examining attorney at the USPTO found that color marks could never be inherently distinctive and denied Forney's application in 2014-2015
- Forney appealed the examining attorney's decision to the Trademark Trial and Appeal Board (TTAB) which affirmed the examining attorney's decision in 2018
- Forney appealed the TTAB's ruling to the Federal Circuit, which reversed in 2020

Federal Circuit – *In Re Forney*

- Are product packaging marks based on color arguably inherently distinctive as indicating the source of goods to the consumer and thus do not require acquired distinctiveness
- Do marks based on color have to be associated with the specific peripheral shape or border to be inherently distinctiveness or should the be analyzed using the Supreme Court's *Seabrook* factors

Qualitex vs. Forney

- Supreme Court declined to “find . . . any obvious theoretical objection to the use of color alone as a trademark, where that color has attained secondary meaning” *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 163 (1995)
- (1) *Qualitex* involved a **product design** trade dress for dry-cleaning pads, whereas *Forney* involved a **product packaging** trade dress for accessories and tools for welding and machining.
- (2) *Qualitex* involved a green **single-color** mark, whereas *Forney* involved a red, orange, and yellow **multi-color** mark.



Two Pesos and Samara Bros vs. Forney

- “Trade dress can be inherently distinctive and protectable without secondary meaning”

Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992)

- “design, like color, is not inherently distinctive.”

Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 212 (2000)

Key Takeaways for Applicants: Current Standard in light of *In Re Forney*

- Are the colors commonly used in the field or are they unique?
- Does the color create an impression that is distinct from the accompanying words?
- Are the colors merely a refinement of a well-known design for a particular class of goods?

Circuit Split?

Federal Circuit

- Forney's multi-color mark was registrable, and that multi-color marks on product packaging can be registered as a trademark without evidence of acquired distinctiveness

Tenth Circuit

- Forney's multi-color mark was *not* registrable, and that multi-color marks on product packaging could be registered only without a showing of acquired distinctiveness if they were part of a well-defined shape, pattern or other distinctive design. [*Forney Indus., Inc. v. Daco of Missouri, Inc.*](#), 835 F.3d 1238 (10th Cir. 2016).

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IN RE: APPLE INC.

**MOTIONS TO TRANSFER FROM THE WESTERN
DISTRICT OF TEXAS**

An Le
979 F.3d 1332 (Fed. Cir. 2020)

Background

Uniloc 2017 LLC is a Delaware company with an office in Tyler, TX, and employees in Plano, TX.

Apple is a California corporation headquartered in Cupertino, CA. In the Western District of Texas ("WDTX"), Apple has:

- A second campus in Austin with 8,000 employees.
- Two stores in Austin, three in San Antonio, and three in El Paso.

September 10, 2019: Uniloc filed suit alleging infringement of U.S. Patent No. 6,467,088.

November 12, 2019: Apple filed a motion to transfer venue to the Northern District of California ("NDCA").

May 12, 2020: WDTX held a hearing and denied the motion but did not issue a written order.

June 15, 2020: Apple filed a petition for a writ of mandamus after the WDTX held a *Markman* hearing, issued its claim construction order, held a discovery hearing, and issued a corresponding discovery order.

June 22, 2020: WDTX court issued its order denying transfer.

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The Fifth Circuit and Transfer Requests

Under 28 U.S.C. § 1404(a), “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought”

The Federal Circuit follows regional circuit law on § 1404(a) transfer motions.¹

Under Fifth Circuit law, Apple bore the burden of demonstrating that “the transferee venue is clearly more convenient.”²

On mandamus review, Apple bears the burden of demonstrating that the district court’s denial amounted to a clear abuse of discretion.³

¹*In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008).

²*In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008).

³*Id.* at 308.

The Fifth Circuit and Transfer Requests

The Fifth Circuit assesses transfer requests using well-established private and public interest factors.

PRIVATE INTEREST	PUBLIC INTEREST
1. Relative ease of access to sources of proof	1. Administrative difficulties flowing from court congestion
2. Availability of compulsory process to secure attendance of witnesses*	2. Local interest in having localized interests decided at home
3. Cost of attendance of willing witnesses	3. Familiarity of the forum with the law that will govern the case
4. All other practical problems that make trial of a case easy, expeditious, and inexpensive	4. Avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law

In re Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004).

Factors not highlighted were agreed by the parties to be neutral in this case.

* The Federal Circuit agreed with the district court and held this factor to be neutral.

Private Interest Factors

1. Relative ease of access to sources of proof

- **WDTX:** Slightly in favor of transfer.
- **Federal Circuit:** Noted errors in district court's analysis but did not reweigh the evidence because the remaining factors weighed in favor of transfer.
 - Witness convenience should not be assessed under this factor.
 - District court failed to mention Apple's sources of proof, such as the relevant source code, records relating to the research, design, and financial information of the accused products, were all stored in NDCA.

3. Cost of attendance of willing witnesses

- **WDTX:** Factor was neutral.
- **Federal Circuit:** Slightly in favor of transfer.
 - Most relevant party witnesses are in NDCA.
 - While Uniloc's third-party witnesses in New York might have a shorter travel distance to WDTX than NDCA, they will only be "slightly more inconvenienced by having to travel to California."
 - In either instance, NDCA or WDTX, these individuals will likely "have to leave home for an extended period of time and incur travel, lodging, and related costs."

Private Interest Factors

4. All other practical problems that make trial of a case easy, expeditious, and inexpensive
 - **WDTX:** “Weighs heavily against transfer.”
 - “Significant steps” already taken in the case: parties exchanged infringement and invalidity contentions, briefed and argued *Markman* claim terms, the court held a *Markman* hearing and issued a claim construction order.
 - NDCA has more pending civil cases than WDTX, thus transfer would be against judicial economy.
 - **Federal Circuit:** Slightly in favor of transfer.
 - All “significant steps” were taken after Apple moved for transfer.
 - “A district court’s decision to give undue priority to the merits of a case over a party’s transfer motion should not be counted against that party in the venue transfer analysis.”
 - There are pending cases in NDCA with “some overlapping issues.”

Public Interest Factors

1. Administrative difficulties flowing from court congestion

- **WDTX:** “Weighs against transfer.”
- **Federal Circuit:** Factor is neutral.
 - WDTX relied too heavily on its scheduled trial date.
 - “A district court cannot merely set an aggressive trial date and subsequently conclude that other forums that historically do not resolve cases at such an aggressive pace are more congested.”

2. Local interest in having localized interests decided at home

- **WDTX:** Factor was neutral.
 - WDTX has significant localized interest because of tax benefits pledged to Apple to build its Austin campus.
- **Federal Circuit:** Weighs in favor of transfer.
 - Factor involves not the parties’ significant connections to each forum, but the “significant connections between a particular venue and *the events that gave rise to [the] suit.*”¹
 - Uniloc has a presence in NDCA and is absent from WDTX; the accused products were designed, developed, and tested in NDCA; and the lawsuit “calls into question the work and reputation of several individuals residing” in NDCA.

¹*In re Acer Am. Corp.*, 626 F.3d 1252, 1256 (Fed. Cir. 2010).

Takeaways

WHAT WEIGHS IN FAVOR OF A MOTION TO TRANSFER?

- Relevant documents and physical evidence to the case are located in the transferee venue.
- Witnesses will be required to travel a significant distance no matter where they testify.
- Motion to transfer is to a court which has numerous cases involving some overlapping issues with the case being considered.
- There are significant connections between the transferee venue and the events that gave rise to the case.
- Once a party files a transfer motion, that motion should take top priority.

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DONNER TECH V. PRO STAGE GEAR

When is a reference within the field of the inventor's endeavor?

Garrett Pierson

Donner Tech v. Pro Stage Gear : Background

- Pro Stage Gear invents a new pedalboard design which allows for easier positioning and changing of the guitar effects while maintaining confined and secure cable routing ('023 patent)
- In the 1960s, Mullen invented a support structure for circuit relays (Mullen)
- Donner Tech requests *inter partes* review with the Patent Trial and Appeal Board (PTAB) to challenge the patentability of the '023 patent

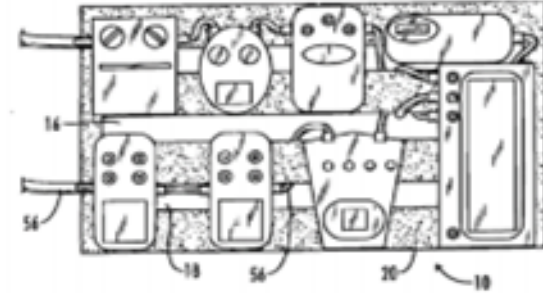
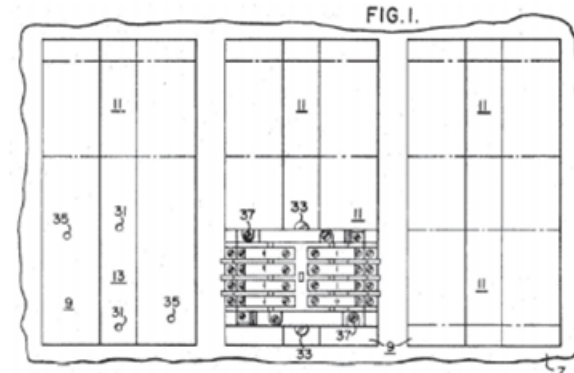


FIG. 12



***Donner Tech v. Pro Stage Gear* : Legal Standard**

- Test when the reference is not within the field of the inventor's endeavor: "Whether the reference is ***reasonably pertinent*** to the ***particular problem*** with which the inventor is involved."
In re Bigio, 381 F.3d 1320, 1325 (Fed. Cir. 2004)
- "Reasonable pertinence" ultimately rests on the extent to which the reference of interest and the claimed invention relate to a similar problem or purpose *Wyers v. Master Lock co.*, 616 F.3d 1231, 1238 (Fed. Cir. 2010)
- Whether the reference is analogous is a factual inquiry, and the reasonable pertinence must be considered from the point of view of a person having ordinary skill in the art (PHOSITA)
Sci. Plastic Prods., Inc. v. Biotage AB, 766 F.3d 1355, 1360 (Fed. Cir. 2014)

Donner Tech v. Pro Stage Gear : Holding

- Whether a reference is analogous art: The problems to which both the reference and the claimed invention relate must be ***identified*** and ***compared***
- The problems of both the reference and the claimed invention must be identified and compared from the perspective of a PHOSITA in the field of the claimed invention
- Patent Trial and Appeal Board (PTAB) failed to identify and compare the problems to which the '023 patent and Mullen relate
- PTAB also failed to explain how the differences between the '023 patent and Mullen are not directed toward a similar problem, how a PHOSITA would not have reasonably consulted Mullen, or how Mullen's age relates to the problem that it solves

Donner Tech v. Pro Stage Gear : Takeaways

- More scrutiny when determining whether a reference not within the field of the claimed invention qualifies as analogous art
 1. Establish PHOSITA
 2. Identify problem solved/purpose of the claimed invention
 3. Identify problem solved/purpose of the reference
(even if PHOSITA may have trouble understanding the reference)
 4. Compare the problems solved or purposes from the perspective of the PHOSITA
 5. Are the problems solved/purposes similar enough to be “reasonably pertinent”?

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



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Serving as the leader of the firm's semiconductor practice and as a member of the firm's fintech and technology industry teams, Andrew J. Gray IV concentrates his practice on intellectual property litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on AI, machine learning, Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.

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Biography



Alexandra V. Petterson

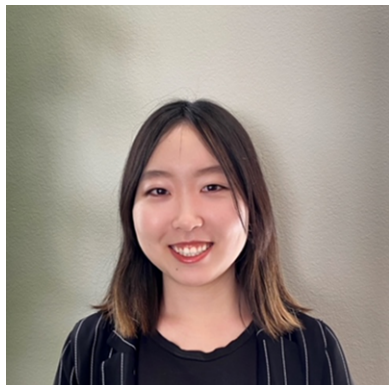
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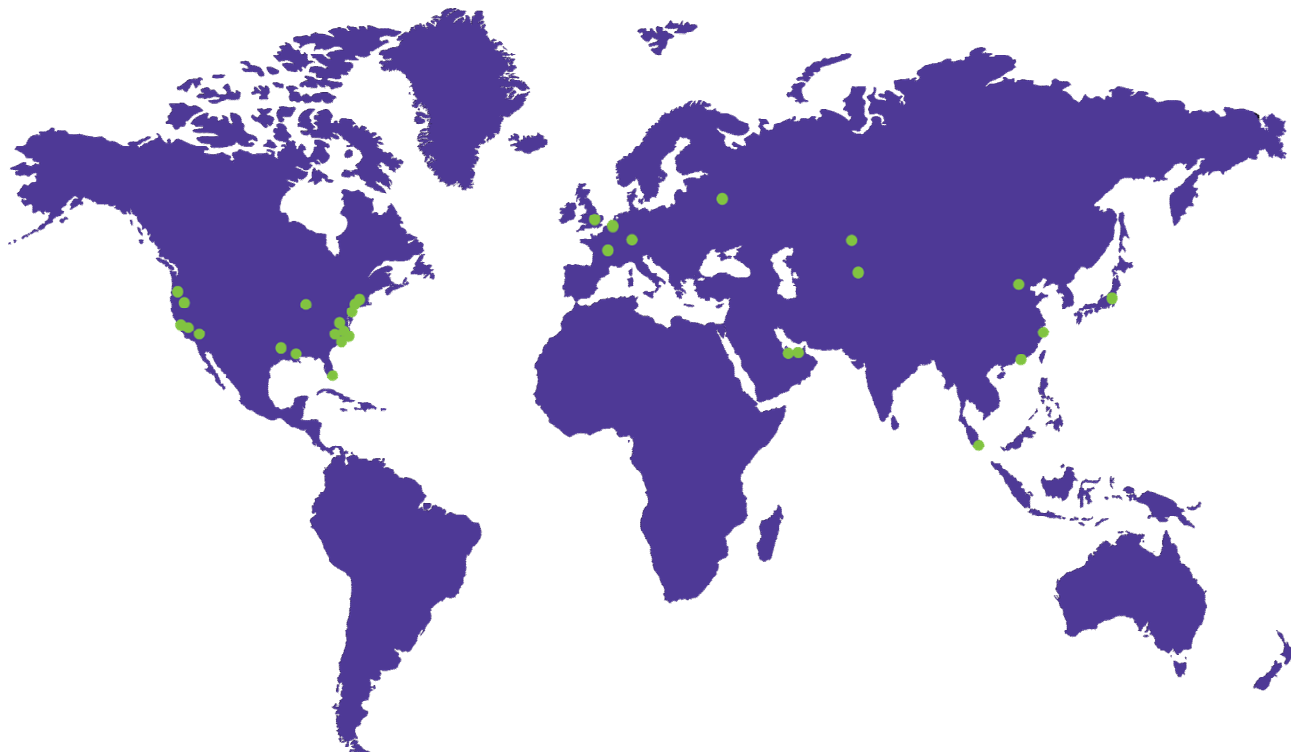
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