



Morgan Lewis

IP YEAR IN REVIEW: IMPORTANT CASES DECIDED IN 2018

Andrew Gray
May 09, 2019

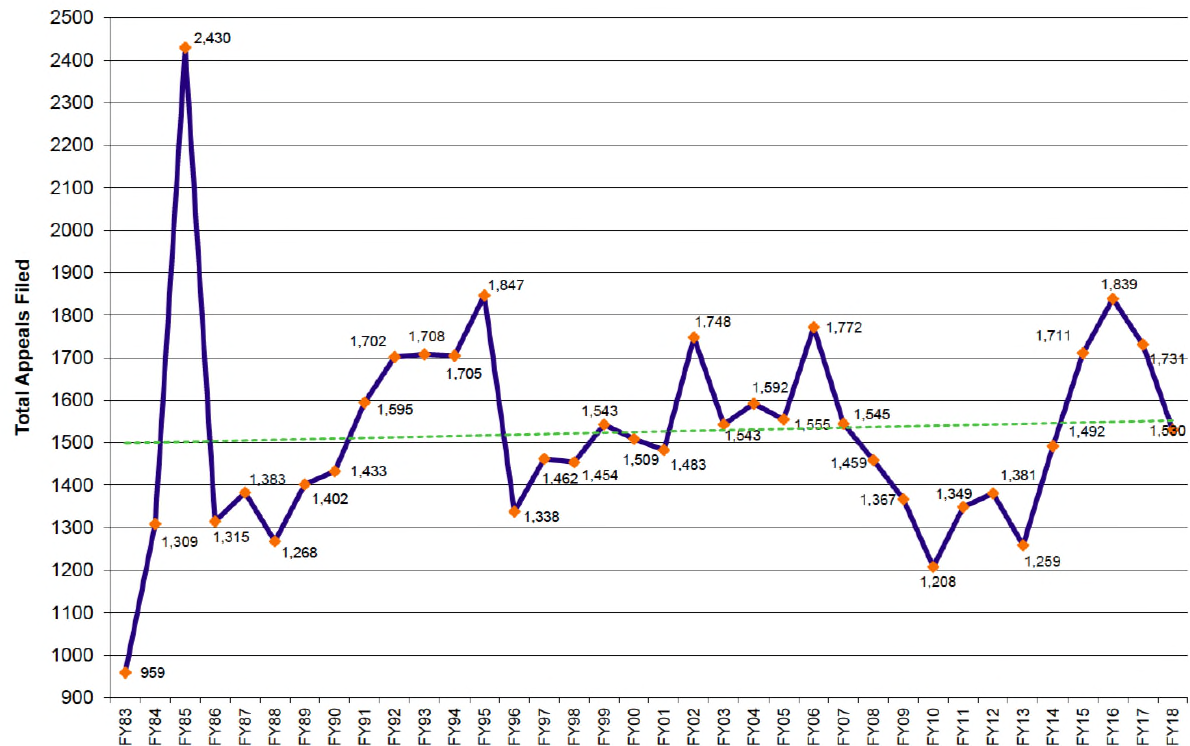
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The Cases:

- *Click-to-Call Techs., LP v. Ingenio* – Scott Tester
- *Amgen v. Sanofi* – Jenn Wang
- *Wi-Fi One v. Broadcom* – David Bernstein
- *Texas Advanced Optoelectronic Solutions v. Renesas* – Thom Nolan
- *Oracle Americas, Inc. v. Google LLC* – Kannan Narayanan
- *Nantkwest, Inc. v. Iancu* – Alec Mandell
- *Finjan, Inc. v. Blue Coat Systems, Inc.* – Pablo Herrera
- *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC* – Keon Seif-Naraghi
- *Patent Eligible Subject Matter* – Ben Pezzner

2018 US COURT OF APPEALS FOR THE FEDERAL CIRCUIT CASELOAD STATISTICS

United States Court of Appeals for the Federal Circuit Historical Caseload

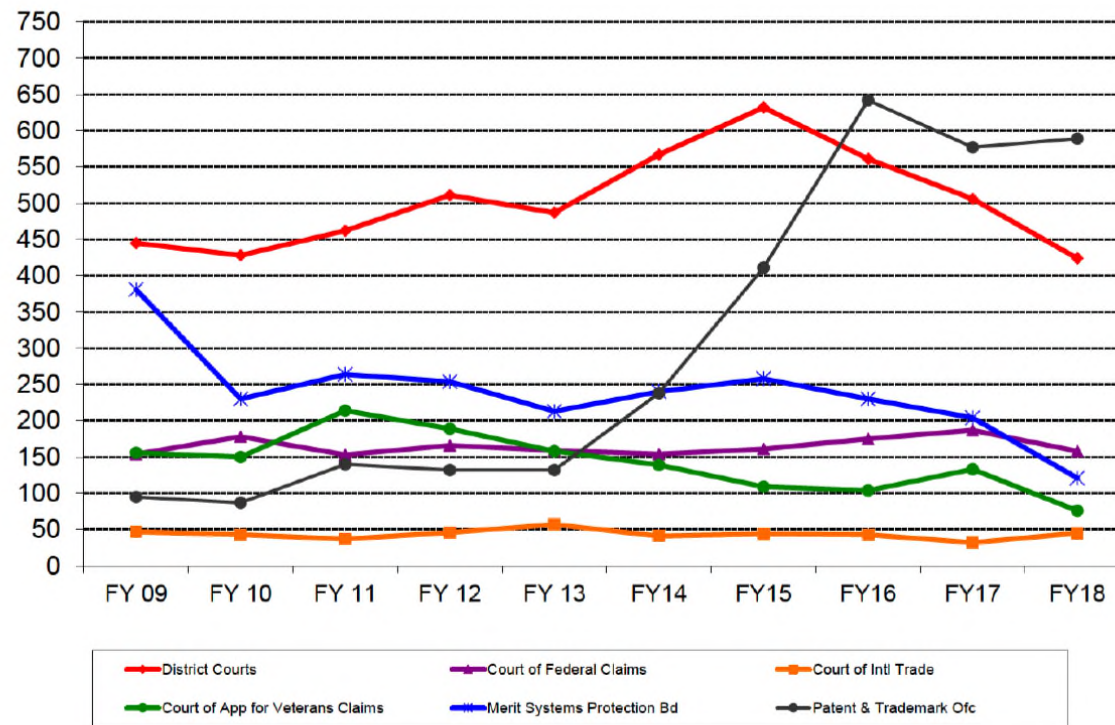


Note: Includes reinstated, cross- and consolidated appeals.

Source: http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Historical_Caseload_Graph_83-18.pdf

United States Court of Appeals for the Federal Circuit

Appeals Filed in Major Origins

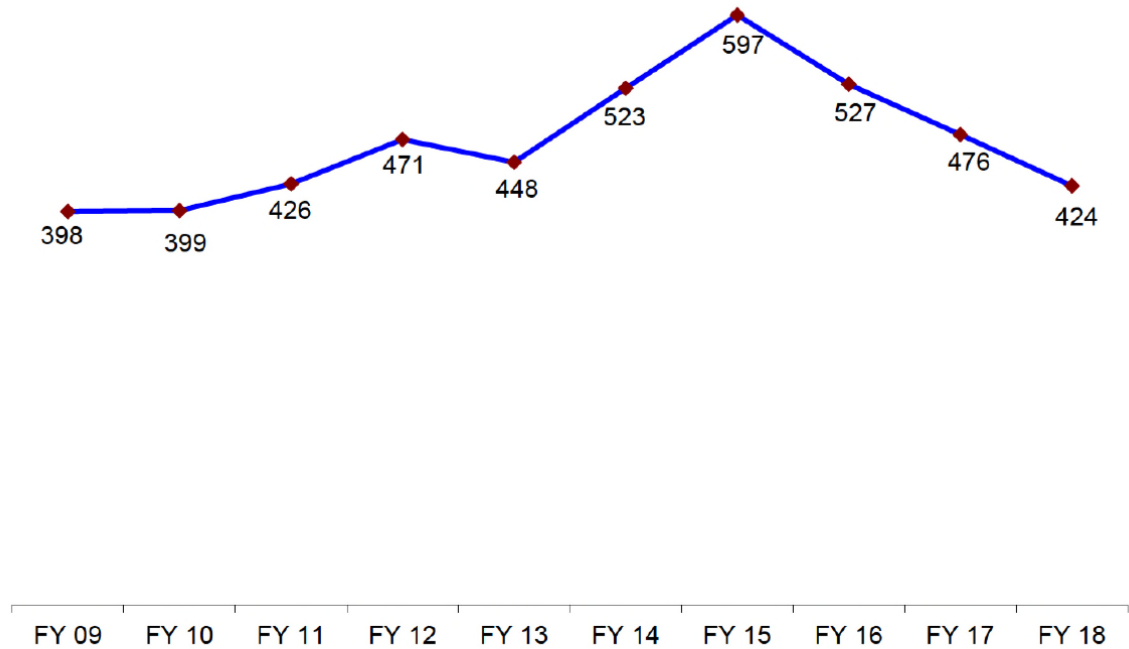


Notes: Includes reinstated, cross-, and consolidated appeals.

Source: http://www.caafc.uscourts.gov/sites/default/files/the-court/statistics/Hist_Caseld_by_Major_Origin_10-year.pdf

United States Court of Appeals for the Federal Circuit

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



Note: Includes reinstated, cross- and consolidated appeals.

United States Court of Appeals for the Federal Circuit

Median Time to Disposition in Cases Terminated After Hearing or Submission¹

Docketing Date² to Disposition Date, in Months

	<u>FY 09</u>	<u>FY 10</u>	<u>FY 11</u>	<u>FY 12</u>	<u>FY 13</u>	<u>FY 14</u>	<u>FY 15</u>	<u>FY 16</u>	<u>FY17</u>	<u>FY 18</u>	<u>Overall Median per Origin</u>
District Court	11.0	11.0	11.2	11.8	11.8	12.0	12.0	13.0	13.0	14.0	11.9
Court of Federal Claims	10.3	10.0	10.6	9.9	10.4	10.0	10.0	9.0	9.0	11.0	10.0
Court of International Trade	11.5	11.0	12.2	12.6	12.4	13.0	12.0	13.0	15.0	14.0	12.5
Court of Appeals Veterans Claims	9.3	9.3	6.0	8.6	11.2	10.0	7.0	7.5	6.0	14.0	9.0
Board of Contract Appeals	11.9	8.8	10.0	11.5	13.3	16.0	10.0	10.0	9.0	13.5	10.8
Department of Veterans Affairs	18.9	n/a	19.4	15.7	n/a	n/a	16.0	13.0	17.0	19.0	16.5
Department of Justice	8.9	8.9	n/a	n/a	9.7	12.0	5.9	12.0	13.0	12.0	9.7
International Trade Commission	14.4	14.8	14.6	16.1	13.7	16.0	13.0	17.0	13.0	11.0	14.5
Merit Systems Protection Board	6.5	6.1	6.1	6.4	7.4	6.0	6.5	7.0	6.0	12.0	6.4
Office of Compliance	n/a	13.0	15.0	n/a	n/a	n/a	n/a	n/a	n/a	14.0	14.0
Patent and Trademark Office	9.3	8.2	11.2	11.7	10.1	10.0	11.0	11.0	13.0	15.0	11.0
Government Accountability Office	n/a	n/a	n/a	n/a	n/a	n/a	n/a	11.0	n/a	n/a	11.0
Overall Median per Fiscal Year	10.7	9.7	11.2	11.7	11.2	12.0	10.5	11.0	13.0	14.0	11.5

¹ Excludes cross and consolidated appeals, writs, and OPM petitions

² Calculated from Date of Docketing or Date of Reinstatement, whichever is later

FEDERAL CIRCUIT

CLICK-TO-CALL V. INGENIO

IMPACTS OF PRIOR LITIGATION ON IPR TIME-BARS

W. SCOTT TESTER

899 F. 3d 1321 (FED. CIR. 2018)

Click-to-Call Timeline (pre-IPR)

- June 2001: Inforocket sued its competitor Keen in SDNY on '836 Patent.
 - Served its complaint on September 14, 2001.
- 2003: Keen purchased Inforocket and dismissed all cases “**without prejudice**” then changed its name to Ingenio.
- 2004: Ingenio requested *ex parte* re-examination of the '836 Patent.
 - PTO confirmed some claims, cancelled some, and added new ones
- May 29, 2012: Click-To-Call obtained ownership of '836 and sued Ingenio
- May 28, 2013: Ingenio (with YellowPages and Oracle) petitioned for IPR of the '836 patent

***Click-to-Call* Timeline (IPR Proceedings)**

- October 2013: The Board agreed Ingenio (Keen) was served with a Complaint for patent infringement in 2001, but held it was “as though the action had never been brought” and found the Petition to have been filed within a year of service of the complaint.
 - Petition instituted.
- 2014: The Board cancelled many of the challenged claims.
 - Click-to-Call appealed.

Effect of Dismissals Without Prejudice

Existing law:

- “The effect of a voluntary dismissal without prejudice pursuant to Rule 41(a) is to render the proceedings a **nullity** and **leave the parties as if the action had never been brought.**”
 - *Bonneville Assocs., Ltd. P'ship v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999)
- A “voluntary dismiss[ed]” action is “something that ***de jure* never existed.**”
 - *Holloway v. U.S.*, 60 Fed. Cl. 254, 261 (2004), *aff'd*, 143 F. App'x 313 (Fed. Cir. 2005)

Federal Circuit Holding:

- Voluntary dismissed cases ***do*** have effects for things such as Rule 11 attorneys fees and justification for declaratory judgment actions.

Inter Partes Review Time-Bar Requirement

- Start with the statute:
 - 35 U.S. Code § 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.”
- The statute requires only “serv[ice]” of the complaint, not that there be any legal “effect” of the service.
- If a party was served with the complaint, the clock starts, even if the case the complaint relates to “never existed.”

Joining With a Time-Barred Petitioner Bars Petition

- Ingenio petitioned for review along with third-parties YellowPages and Oracle. Can YellowPages and Oracle Petition even if Ingenio is barred?
 - Held: All parties certified that “Ingenio” was a “real party in interest” when they filed the joint petition. Accordingly, **“Petitioners are... treated as an undifferentiated unit.”**
- The Court noted the PTAB had previously held where one of a group of petitioners was barred, the whole Petition is barred.
 - 35 U.S.C § 315(b) refers to a time-bar on a “Petition,” not on a “Petitioner.”
- Unanswered Question: Had Oracle filed a separate (identical) Petition, would IPR have been permissible?

Takeaways

- The time-bar for Petitioning for an IPR is one year from the time a party (or predecessor-in-interest) was served with an infringement Complaint on a patent, even if the suit was dismissed.
- When considering an IPR Petition with co-defendants, consider separate petitions rather than a single one, especially if the parties are not related.
- When purchasing your opponent, consider having its cases dismissed ***with prejudice***.
- When exclusively licensing a patent for a time period, consider putting in the agreement that the patent can never be asserted against you or any successor-in-interest.

FEDERAL CIRCUIT

AMGEN INC. V. SANOFI

**WRITTEN DESCRIPTION AND ENABLEMENT
REQUIREMENTS**

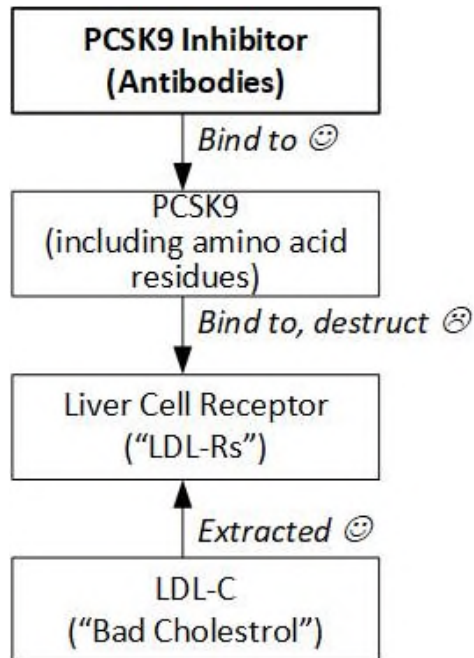
JIANBAI JENN WANG

872 F.3D 1367 (FED. CIR. 2017)

Litigation History

- 2014 – earlier 2017: U.S. District Court for the District of Delaware in Nos. 1:14-cv-01317-SLR, 1:14-cv-01349-SLR, 1:14-cv-01393-SLR, 1:14-cv-01414-SLR (e.g., *Amgen Inc. v. Sanofi*, 227 F. Supp. 3d 333 (D. Del. 2017))
- October 5, 2017: the Federal Circuit rendered a decision in *Amgen Inc. v. Sanofi* that brought clarity to how the Court (and U.S. Patent and Trademark Office) should apply the written description requirement in 35 U.S.C. § 112(a) to properly circumscribe the scope of claims to monoclonal antibodies (e.g., *Amgen Inc. v. Sanofi*, 872 F.3d 1367 (Fed. Cir. 2017))
- January 7, 2019: The Supreme Court denied *certiorari* in *Amgen Inc. v. Sanofi*, in a case that asked the Court to review the Federal Circuit's jurisprudence related to the written description requirement of 35 U.S.C. § 112(a).

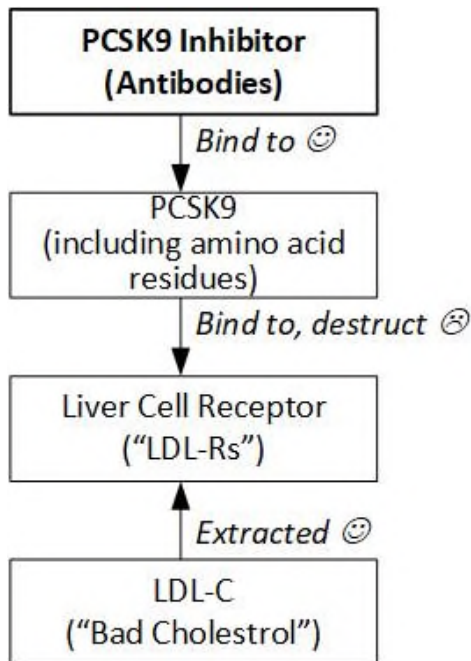
Patent Matter – 8,829,165 and 8,859,741



- Both applications are assigned to Amgen Inc., and share the same specification.
 - Priority date: January 9, 2008.
 - Repatha is approved by FDA August 2015
- Claim 1 of the '165 patent is representative:

An isolated monoclonal antibody, wherein, when bound to PCSK9, the monoclonal antibody binds to at least one of the following residues: S153, I154, P155, R194, D238, A239, I369, S372, D374, C375, T377, C378, F379, V380, or S381 of SEQ ID NO:3, and wherein the monoclonal antibody blocks binding of PCSK9 to LDL[-]R.

Patent Matter – 8,829,165 and 8,859,741 (continued)



- The patents disclose:
 - A trial-and-error process: 3,000 human monoclonal antibodies were screened to narrow down to “85 antibodies that blocked interaction between the PCSK9 ... and the LDLR [at] greater than 90%”
 - Three-dimensional structures of two antibodies: 21B12 (Repatha) and 31H4
 - Amino acid sequences of 22 other antibodies that “bin” with Repatha or 31H4
- However, the patents does NOT disclose:
 - Praluent (a monoclonal antibody that targets PCSK9 to prevent it from binding to and destroying LDL-R proteins) – by *Sanofi*
 - Praluent’s patent has a priority date of November 2011
 - Praluent is approved by FDA July 2015

District Court Decisions:

- The district court excluded Sanofi's evidence (e.g., its product Praluent) regarding written description and enablement
- The district court gave a jury instruction that disclosing an antigen can satisfy the written description requirement for a claim to an antibody.

Legal Standards for Written Description

- **Section 112: the specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same**
- This requirement ensures “that the inventor actually invented the invention claimed.” *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). To show invention, a patentee must convey in its disclosure that it “had possession of the claimed subject matter as of the filing date.” *Id.* at 1350.
- Demonstrating possession “requires **a precise definition” of the invention.** *Id.* To provide this “precise definition” for a claim to a genus, a patentee must disclose “a representative number of species falling within the scope of the genus or structural features common to the members of the genus” so that one of skill in the art can ‘visualize or recognize’ the members of the genus.” *Id.*
- Under the enablement requirement, “the specification of a patent must teach those skilled in the art how to make and use the full scope of the claimed invention without undue experimentation.” *Genentech, Inc. v. Novo Nordisk A/S*, 108 F.3d 1361, 1365 (Fed. Cir. 1997).

Appellate Court Holdings:

- The use of post-priority-date evidence to show that a patent does not disclose a representative number of species of a claimed genus is proper.
 - It is legal error for the district court to categorically preclude all post-priority-date evidence of Praluent and other antibodies. *Id.*
- “[P]ost-priority-date evidence ... could have been relevant to determining if the claims were enabled as of the priority date and should not have been excluded simply because it post-dated the claims’ priority date. See, e.g., *White Consol. Indus., Inc. v. Vega Servo-Control, Inc.*, 713 F.2d 788, 791 (Fed. Cir. 1983)
 - Undue experimentation

Functional Terminology v. Structures in Claims

- A “newly characterized antigen” test: (NO!)
 - In the case of a claim to antibodies, the correlation between structure and function may also be satisfied by the disclosure of a newly characterized antigen by its structure, formula, chemical name, or physical properties if you find that the level of skill and knowledge in the art of antibodies at the time of filing was such that production of antibodies against such an antigen was conventional or routine.
- An adequate written description must contain enough information about the actual makeup of the claimed products—“a precise definition, such as by structure, formula, chemical name, physical properties, or other properties, of species falling within the genus sufficient to distinguish the genus from other materials,” which may be present in “functional” terminology “when the art has established a correlation between structure and function.” Ariad, 598 F.3d at 1350.
 - *Key in a lock*
 - *Not a lock and “a ring with a million keys on it” (e.g., antigen and antibodies)*

Petition for *Certiorari* by Amgen

- Section 112: the specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same
 - Advocate for plain meaning of 112 and against court-created rules (e.g., possession, representative-species test, structure-function test, common-structural-features test, separate enablement requirement, etc.)
- *Amicus curiae brief* by Bristol-Myers Squibb, Morphosys, Bavarian Nordic, and UCB Biopharma
 - Narrow and inflexible rule
 - “Courts should not read into the patent laws limitations and conditions which the legislature has not expressed.”
- ***Denied***

Takeaways

- Post-priority-date evidence cannot be used to show post-priority-date state of the art, but can be introduced to show: (1) whether a patent fails to disclose a representative number of species (written description) and (2) whether a patent teaches those skilled in the art how to make and use the full scope of the claimed invention without undue experimentation (enablement).
- Functional claim language can be used if the art has established a correlation between structure and function.
- The discussion may be narrowly interpreted in the context of biochemistry patents.
- For non-biochemistry patents (e.g., electrical, computer, mechanical patents):
 - Make sure a number of representative examples are described to show “possession”
 - Functional claim language is broad, but “a correlation between structure and function” need to be established. More description of representative examples helps.

FEDERAL CIRCUIT

***TEXAS ADVANCED OPTOELECTRONIC
SOLUTIONS V.
RENESAS ELECTRONICS AMERICA***

**EXTRATERRITORIALITY OF INFRINGING OFFERS FOR
SALE**

THOM NOLAN

895 F.3D 1304,1330 N. 12 (FED. CIR. 2018)

Texas Advanced Optoelectronic Sols. v. Renesas Electronics America

- In case for patent infringement, the Court excluded 98.8% of the sales of the accused products because they were “extraterritorial.”
- For those 98.8% of sales, the products were manufactured, packaged, and delivered outside of the U.S.
- But, there was evidence that the sales were negotiated in the U.S. and that some of the products were tested in the U.S., and both companies were from the U.S. with principal places of business in the U.S.

Territoriality Requirement For Patent Infringement

[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, **within the United States** or imports **into the United States** any patented invention during the term of the patent therefor, infringes the patent.

35 U.S.C. § 271(a)

Federal Circuit: Offering To Sell In the U.S. Is Not Enough

An offer to sell in the United States must be an offer to make a sale that will occur in the United States; it is not enough that the offer is made in the United States.

Texas Advanced Optoelectronic Sols. Inc. v. Renesas Elecs. Am., Inc.,
895 F.3d 1304, 1330 n.12 (Fed. Cir. 2018)

Takeaways: Planning for Extraterritoriality According to the Federal Circuit

- **Easy Cases:**

- Negotiate Inside U.S., Deliver Inside U.S. = Territorial ✓
- Negotiate Outside U.S., Deliver Outside U.S. = Extraterritorial ✗

- **Close Cases:**

- Negotiate Outside U.S., Deliver Inside U.S. = Territorial ✓
 - *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296, 1309 (Fed. Cir. 2010).
- Negotiate Inside U.S., Deliver Outside U.S. = Extraterritorial ✗
 - *Texas Advanced Optoelectronic Sols. Inc. v. Renesas Elecs. Am., Inc.*, 895 F.3d 1304, 1330 n.12 (Fed. Cir. 2018)

FEDERAL CIRCUIT

WI-FI ONE V. BROADCASTAM

APPEALABILITY OF IPR INSTITUTION DECISIONS

DAVID BERNSTEIN

878 F.3D 1364 (FED. CIR. 2018) (EN BANC)

Inter Partes Review

- Inter partes review (IPR) is a procedure, introduced as part of the America Invents Act in 2012 for challenging the validity of a patent before the USPTO.
- Inter parties review is “intended to be quick and cost effective alternatives to litigation for third parties to challenge the patentability of issued claims.” *Wi-Fi One, LLC v. Broadcom Corporation*, 878 F.3d 1364 (2018).
- The validity of a patent can be challenged under 102 and 103 only. 35 U.S.C. 311(b).
- A petitioner files a petition identifying the claims challenged and the grounds and evidence for challenging those claims. 35. U.S.C. 312(b).

Inter Partes Review

- The Director decides whether to institute an IPR under the following standard:
 - (a)Threshold.** - The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition. 35 U.S.C. 314(a)
- “The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” 35 U.S.C. 314(d)

Inter Partes Review

- Under 35 U.S.C. 315(b), an accused infringer in a civil suit has 1-year after being served with the complaint to file an IPR petition:

(b)Patent Owner's Action.— 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. The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).

Cuozzo Speed Technologies, LLC v. Lee, 136 S.Ct. 2131 (2016)

- In *Cuozzo*, the Supreme Court considered the question of what types of issues arising from IPR institution decisions would be appealable, notwithstanding 314(d).
- There, the patentee argued that the IPR petition was not plead “with particularity” under section 312.
- The Supreme Court held that section 314(d) bars review as to the Director’s decision “to initiate an inter partes review *under this section*,” or **where the challenge consists of questions closely tied to the application and interpretation of statutes related to that determination**. *Cuozzo*, 136 S.Ct. at 2141. (Emphasis added).
- In *Cuozzo*, the patentee’s “claim that [the] petition was not pleaded ‘with particularity’ under § 312 [was] little more than a challenge to the Patent Office’s conclusion, under § 314(a), that the ‘information presented in the petition’ warranted review.” *Cuozzo*, 136 S.Ct. at 2142.

Cuozzo Speed Technologies, LLC v. Lee, 136 S.Ct. 2131 (2016)

- The Supreme Court expressly declined to “decide the precise effect of [§ 314\(d\)](#) on appeals that implicate constitutional questions, that depend on other less closely related statutes, **or that present other questions of interpretation that reach, in terms of scope and impact, well beyond ‘this section.’**” *Cuozzo*, 136 S.Ct. at 2141. (Emphasis added).
- Thus, the Supreme Court did not “categorically preclude review of a final decision where a petition fails to give ‘sufficient notice’ such that there is a due process problem with the entire proceeding, nor does our interpretation enable the agency to act outside its statutory limits by, for example, canceling a patent claim for ‘indefiniteness’”. *Id.*

Wi-Fi One, LLC v. Broadcom Corporation, 878 F.3d 1364 (2018) (En Banc)

- In 2010, Ericsson filed a Complaint for infringement for several patents against multiple defendant. These defendants did not include Broadcom.
- In 2013, Broadcom filed three separate IPR petitions challenging the patents at issue.
- During the pendency of the IPR, Ericsson transferred ownership of the three patents to Wi-Fi One.
- In response to Broadcom's petitions, Wi-Fi "argued that the Director lacked authority to institute IPR under § 315(b) because Broadcom was in privity with defendants that were served with a complaint in the Eastern District of Texas litigation." Wi-Fi at 1370.
- The PTAB, acting under authority delegated by the Director, instituted the IPR and canceled the challenged claims.

Wi-Fi One, LLC v. Broadcom Corporation, 878 F.3d 1364 (2018) (En Banc)

- The Federal Circuit granted en banc re-hearing on the following question:

Should this court overrule *Achates Reference Publishing, Inc. v. Apple Inc.*, 803 F.3d 652 (Fed. Cir. 2015) and hold that judicial review is available for a patent owner to challenge the PTO's determination that the petitioner satisfied the timeliness requirement of 35 U.S.C. § 315(b) governing the filing of petitions for inter partes review?

Wi-Fi One, 878 F.3d at 1371.

Wi-Fi One, LLC v. Broadcom Corporation, 878 F.3d 1364 (2018) (En Banc)

- The Federal Circuit held that judicial review *is* available for a patent owner to challenge the PTO's determination that the petitioner satisfied the timeliness requirement of 35 U.S.C. § 315(b).
- The Federal Circuit reasoned that 315(b) is not "is not 'closely related' to the institution decision addressed in § 314(a), and it therefore is not subject to § 314(d)'s bar on judicial review." *Wi-Fi One*, 878 F.3d at 1374.
- Rather, issues are "closely related" to the institution decision when they concern the Director's "preliminary patentability determination or the exercise of discretion not to institute." *Wi-Fi One*, 878 F.3d at 1373.
- Thus, *Achates Reference Publishing, Inc. v. Apple Inc.*, 803 F.3d 652 (Fed. Cir. 2015) is overruled.

Takeaways

- Section 314(d) bars judicial review for “mine-run” claims that are little more than a challenge to the Director’s initial determination of patentability.
- Section 314 does not bar judicial review of issues less closely related to the preliminary patentability determination or the exercise of discretion not to institute.
- *Achates Reference Publishing, Inc. v. Apple Inc.*, 803 F.3d 652 (Fed. Cir. 2015) is overruled.

FEDERAL CIRCUIT

ORACLE AMERICA V. GOOGLE

SOFTWARE API COPYRIGHTABILITY

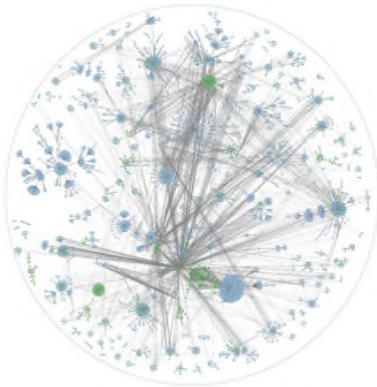
KANNAN NARAYANAN

886 F.3D 1179 (FED. CIR. 2018)

Background (The Java Platform and APIs)

Oracle's version:

Google Copies Thousands Of Lines Of Code And The Structure And Organization Of 37 Software Packages



Map of the structure and organization of just the packages and classes

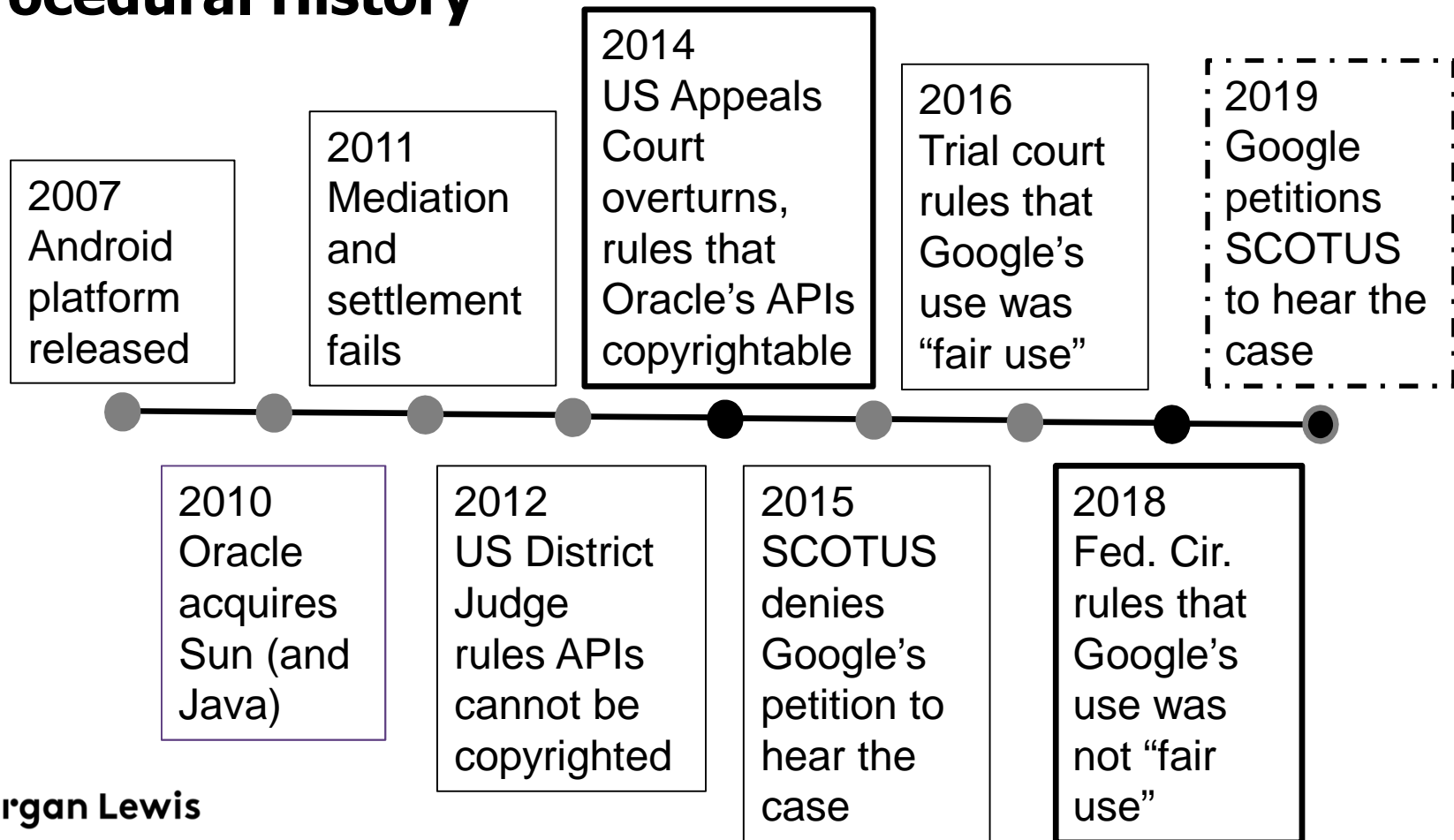
Morgan Lewis

Google's version:

Because Google independently wrote the implementing code that formed the body of each method, using only certain declarations, only 3% of the code was the same across the 37 disputed Java API libraries and the corresponding Android libraries. App., *infra*, 220a. In total, that overlapping code represented less than 0.1% of the over 15 million relevant lines of code in Android.



Procedural History



Holdings

- **Oracle's Java APIs entitled to copyright protection.**

1. Idea contained in developer's computer code did not merge with its expression.
 - Developer had unlimited options and exercised creativity in selection and arrangement.
2. A set of commands may contain copyrightable expression even if the commands are only “short phrases”.
3. The copying of software was not de minimus (using the copied files even for testing would have been significant)

Affirmed in part, reversed in part, and remanded. Oracle Am., Inc. v. Google Inc., 872 F. Supp. 2d 974 (N.D. Cal. 2012), rev'd and remanded, 750 F.3d 1339 (Fed. Cir. 2014)

- **Google's use of Java APIs not a “fair use.”**

1. Use of API packages was commercial in nature (even though free, revenue came from ads).
2. Use of API packages was not “transformative” (copying was verbatim, had identical function and purpose).
3. Oracle suffered actual and potential harm (Google effectively precluded Oracle from the smartphone market).
4. Even if (i) Google did not act in bad faith, (ii) functional considerations were both substantial and important, and (iii) Google copied only small portion of packages.

Reversed and remanded. Oracle Am., Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018)

Takeaways

- **Software copyright licensees:**
 - Acquire a license to third-party APIs, when possible.
 - Develop APIs using “clean room” development without accessing competitor’s API.
 - Avoid writing APIs that are “substantially similar” to a competitor’s API.
 - Beware of limitations of the “fair use” defense, when reusing copyrighted software.
- **Software copyright licensors:**
 - Protect ideas with patents, and protect expressions of ideas (i.e., code) by registering copyrights.
 - The Oracle case provides a number of arguments for enforcing software copyrights, including APIs.
 - Beware of conflicting interpretations of law; some courts are more favorable to licensors.
 - A copyright holder will be able to invoke the Federal Circuit’s jurisdiction by including a patent claim.
 - The DMCA provides additional protections against circumvention of anti-copying protections.
- Revisit licensing decisions when and if the Supreme Court takes up the case.

FEDERAL CIRCUIT

NANTKWEST, INC. V. IANCU

**CAN THE USPTO COLLECT ATTORNEY FEES UNDER
§ 145 OF THE PATENT ACT?**

ALEC MANDELL

898 F.3D 1177 (FED. CIR. 2018)

Nantkwest, Inc. v. IANCU

- When the Patent Trial and Appeal Board (PTAB) affirms an examiner's rejection, § 145 of the Patent Act permits the disappointed applicant to challenge the PTAB's decision in district court, which Nantkwest, the plaintiff-appellee, has done so here.
- § 145 of the Patent Act states, "All the expenses of the proceedings *shall* be paid by the applicant."
- After 170 years the U.S. Patent and Trademark Office (USPTO) is using this language to recover its attorney fees (i.e. the expense of diverting agency attorneys and paralegals from other matters).

Nantkwest, Inc. v. IANCU

- The United States Court of Appeals voted *sua sponte* to hear the appeal *en banc* and vacated the circuit court's judgment. The Court of Appeals ultimately came to the same decision as the circuit court, which was the USPTO cannot recover attorney's fees.
- The United States Court of Appeals based this decision on the following:
 - The "American Rule" applies to § 145.
 - It was not Congress' intent to displace the "American Rule" with the language of § 145.

The American Rule

- The “American Rule”
 - Under common-law, “each litigant bears its own attorneys’ fees, win or lose, and a statute must use “specific and explicit” language to depart from this rule.” Nantkwest, at 12
- The USPTO relies on the Fourth Circuit’s “*Shammas*” opinion for the proposition that the “American Rule” only governs the interpretation of statutes ***that shift fees from a prevailing party to a losing party.***
 - *Shammas* awarded attorneys’ fees to the PTO under 15 U.S.C. § 1071(b)(3)—the trademark analogue to § 145—which also refers to “all the expenses of the proceeding.”
- The United States Court of Appeals disagrees with the Fourth Circuit’s decision in *Shammas* and believes that they misapplied the rule from *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)

§ 145 Does Not Replace the American Rule

- Congress has the power to displace the “American Rule,” and provide for the recovery of attorney’s fees.
- To show Congress’s intent to shift attorney’s fee’s when the statutory language does not expressly state “attorney’s fee’s” “[a]ll the “ordinary meaning must supply a “specific and explicit” directive to depart from the American Rule. *See Summit Valley*, 456 U.S. at 722–23
 - “The American Rule and the ‘specific and explicit’ requirement demand more than language that merely *can be* and *is sometimes used* broadly to implicitly cover attorneys’ fees.” *Nantkwest* at 17
- Congress, across multiple categories of legislation has distinguished between “expenses” and “attorneys’ fees,” and consistently treats “expenses” as being separate from “attorneys’ fees.” (See examples in *Nantkwest* at 18-21)
 - Had Congress intended to cover attorney’s fees it would have included the language of “attorney’s fees” in addition to “expenses,” like it has done so in other forms of legislation.

Takeaways

- Under § 145 of the Patent Act, the USPTO does not have the right to collect attorneys' fees.
- The USPTO can still collect expenses related to § 145 proceedings (e.g., expert witness expenses).
- There is now an incongruity between § 1071(b)(3)—the trademark analogue to § 145, and § 145 of the Patent Act.

FEDERAL CIRCUIT

FINJAN, INC. V. BLUE COAT SYS., INC.

**SMALLEST SALEABLE UNIT:
CALCULATING REASONABLE ROYALTY DAMAGES**

PABLO HERRERA

879 F.3D 1299, 1310 (FED. CIR. 2018)

Underlying Facts

- Blue Coat Systems was found liable for the infringement of three patents owned by Finjan
 - The damages for two patents ('731 and '633) were affirmed
 - At issue are the calculated damages for a third patent, the '844 patent
- The 844 patent's features are infringed by Blue Coat's Webpulse product. Specifically, a component of Webpulse, the Dynamic Real-Time Rating engine (DRTR)
 - DRTR contains both infringing and non-infringing features
 - All of the infringing functionality occurs in DRTR

Finjan's damage calculations

- Finjan attempted to tie the royalty base to the incremental value of the infringement
 - Finjan multiplied WebPulse's total number of users by the percentage of traffic that passes through DRTR
 - DRTR processes roughly 4% of WebPulse's total requests. Finjan established a royalty base by multiplying the 75 million worldwide WebPulse users by 4%.
 - Although DRTR also performs the non-infringing functions, Finjan did not perform any further apportionment on the royalty base.
- Finjan argued that apportionment to DRTR is adequate because DRTR is the "smallest, identifiable technical component" tied to the footprint of the invention.

Federal Circuit's Decision

- The smallest salable unit principle
 - In cases involving multicomponent products, damages may not be calculated based on sales of the entire product, as opposed to the smallest salable patent-practicing unit, without showing that the demand for the entire product is attributable to the patented feature. *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 67–68 (Fed. Cir. 2012)
- Finjan established a royalty base based on the “smallest, identifiable technical component,” but that did not insulate them from the “essential requirement.” The “ultimate reasonable royalty award must be based on the incremental value that the patented invention adds to the end product.” *Ericsson*, 773 F.3d at 1226.
 - If the smallest salable unit—or smallest identifiable technical component—contains non-infringing features, additional apportionment is still required. *VirnetX*, 767 F.3d at 1327
- Conclusion: Because DRTR is a multicomponent software engine that both includes infringing and non-infringing features, further apportionment was required to reflect the value of the patented technology compared to the value of the unpatented elements.

Takeaway

- The smallest salable unit principle should be used to determine the royalty base for multi-component products
 - If the smallest salable unit is a multi-component product, or a product that includes both infringing and non-infringing features, then additional apportionment is required to determine the respective value of the features.

Takeaway

- The smallest salable unit principle in practice:
 - If an infringing feature is found in a smallest salable unit with multiple components, the calculated damages can be affected by the attributable importance of the infringing feature
 - Damages can be minimized if an infringing feature is combined with non-infringing features
 - The non-infringing features must have some functional role in the overall product
 - Non-infringing features found to be unrelated to the overall product would not reduce damages
 - Damages can be maximized if an infringing feature within a multicomponent is found to be the main driver of the overall product
 - Focusing on the importance of the infringing feature in relation to the non-infringing features does not, by itself, increase damages
 - Designing the infringing feature in a way that requires its use, even by non-infringing features, will maximize damages

SUPREME COURT

***FOURTH ESTATE PUBLIC BENEFIT CORP. V.
WALL-STREET.COM, LLC***

COPYRIGHT INFRINGEMENT COMMENCEMENT

KEON SEIF-NARAGHI

586 U.S. ____ (2019)

Background

- Wall-Street.com is a news website.
- Fourth Estate is a news organization that licensed out certain works (*i.e.*, articles) to Wall-Street.com.
- Wall-Street cancelled the license agreement but did not take down Fourth Estate's content from its website, which was required by the license agreement.
- Fourth Estate sued Wall-Street and its owner for copyright infringement and alleged that Fourth Estate has filed "applications to register [the] articles [licensed to Wall-Street] with the Register of Copyrights."
- However, the Register of Copyrights had not yet acted on Fourth Estate's applications.

Procedural History

- Fourth Estate filed copyright infringement suit against Wall-Street.com in the Southern District of Florida.
- In March 2016, the court granted Wall-Street.com's motion to dismiss.
- Fourth Estate appealed to the 11th Circuit, which upheld lower court's decision in May 2017.
- On March 4, 2019, the Supreme Court affirmed the 11th Circuit's ruling.

Copyright Act of 1976

- Copyright protections attach to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a).
 - “exclusive rights” immediately upon work’s creation
- Copyright owner can institute infringement suit (§ 501(b)), but generally must comply with § 411(a)’s requirement that “**registration** of the copyright claim **has been made.**”
 - Some statutory exceptions: *e.g.*, preregistration allows filing suit before undertaking full registration where specific type of work is vulnerable to predistribution infringement (*e.g.*, movie, music). § 408(f)(2).
 - If deposit, application, and fee required for registration have been submitted to Copyright Office in proper form and registration has still been refused, then applicant is allowed to sue for infringement (Register may become a party w/r/t registrability issue). § 411(a).

Circuit Split and Parties' Dispute

- Main issue: whether “registration . . . has been made” under § 411(a) when copyright owner submits application, materials, and fee, or only when the Copyright Office grants registration?
 - “application approach” vs. “registration approach”
- 5th and 9th Circuits follow “application approach”
- 10th and 11th Circuits follow “registration approach”

Supreme Court's Holding

- “Registration approach” is the only proper reading of the statute.
 - Copyright owner must wait until the Copyright Office has acted on the application before bringing suit.
- Any other reading would render language in the statute superfluous. For example:
 - There would be no need for obtaining preregistration if just applying for registration automatically allowed copyright owners to file infringement suit.
 - The language in § 411(a) permitting a copyright claimant to file suit when the Copyright Office has refused its application would be rendered meaningless if that claimant already had the power to file suit before hearing back from the Copyright Office.

Takeaways

- Will likely cut down on forum-shopping in copyright litigation.
- Will lessen the power of unregistered copyrights and thus reduce the copyright owner's ability to threaten immediate infringement lawsuits.
- For prompt injunctive relief, plaintiffs will likely pay the extra \$800 "special handling" fee to expedite applications at the Copyright Office.
- Congress may push to enact the "application approach" instead.
- **Wait until the Copyright Office acts on your application before bringing suit or threatening to bring suit.**

FEDERAL CIRCUIT

SUBJECT MATTER ELIGIBILITY

FEDERAL CIRCUIT CASES IN LIGHT OF USPTO GUIDANCE

Normally...

Congress enacts a statute

35 U.S.C. 101: Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter ... may obtain a patent



Courts interpret the statute

Alice/Mayo, Step 1: Is the claim directed to a judicial exception?

Alice/Mayo, Step 2: Are there any additional elements that amount to significantly more?



Administrative agency makes rules

MPEP 2106.04, Step 1: Here's what "directed to" means (list of abstract ideas)

MPEP 2106.05, Step 2: Here's what "significantly more" means (inventive concept)

But lately...

Congress enacts a statute

35 U.S.C. 101: Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter ... may obtain a patent



Courts interpret the statute

Federal Circuit: User interfaces are not abstract. (Core Wireless, Judge Moore)

Also the Federal Circuit: User interfaces are abstract. (Trading Technologies, Judge Moore)



Administrative agency gets confused



As a result...

Congress (maybe) revises the statute

Senate IP Subcommittee: Released a framework to replace judicial exceptions with “statutory categories of ineligible subject matter.” (April 2019)



Courts react to the guidance

PTAB: Follows the guidance. Examiner reversals are up.

CAFC: Still does its own thing. Confusion remains.



Administrative agency creates new guidance

Step 1(i): Claims ~~directed to~~ recite an exception? (enumerated groupings of abstract ideas)

Step 1(ii): Claims practically apply the exception? (application may be conventional)

PTAB Statistics

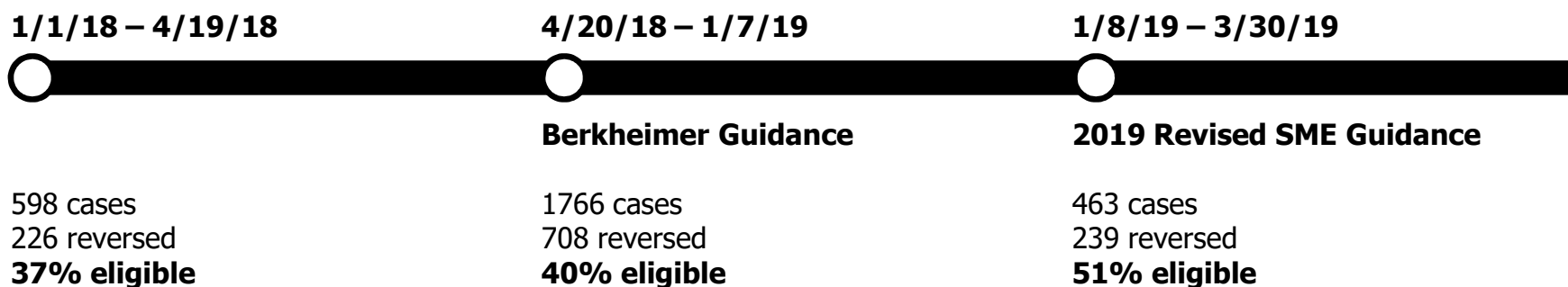
PTAB Recent 101 Decisions (by year)



Source: <https://e-foia.uspto.gov/Foia/PTABReadingRoom.jsp> (search results for decisions including “101” and “eligible”)

PTAB Statistics

PTAB Recent 101 Decisions (by guidance)



Source: <https://e-foia.uspto.gov/Foia/PTABReadingRoom.jsp> (search results for decisions including “101” and “eligible”)

PTAB Statistics

PTAB Decisions Citing “2019 Revised Patent SME Guidance”

January 2019



78 cases
38 reversed
49% eligible

February 2019



154 cases
79 reversed
51% eligible

March 2019



186 cases
94 reversed
51% eligible

Source: <https://e-foia.uspto.gov/Foia/PTABReadingRoom.jsp> (search results for decisions including "2019 revised patent subject matter eligibility guidance")

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PTAB Decisions

2019 Revised SME Guidance

Step 1(i): Recite an exception?
(enumerated groupings)

Step 1(ii): Practical application?
(can be conventional)

Step 2: Significantly more?
(factual issue)

PTAB 2019 Totals (through March 30th)

- 467 cases
- 241 reversed
- **51% eligible**

PTAB Decisions

2019 Revised SME Guidance

Step 1(i): **Recite an exception?**
(enumerated groupings)

Step 1(ii): Practical application?
(can be conventional)

Step 2: Significantly more?
(factual issue)

ELIGIBLE

13/287,831

- A method for providing services corresponding to productivity applications comprising:
 - collecting usage information from devices connected to a computing system...;
 - providing an interface...;
 - receiving ... the usage information; and
 - automatically altering operations....
- Examiner: “collecting usage information” is abstract
- PTAB: “collecting usage information” is not an enumerated exception = **claim does not recite an abstract idea**

PTAB Decisions

2019 Revised SME Guidance

Step 1(i): **Recite an exception?**
(enumerated groupings)

Step 1(ii): **Practical application?**
(can be conventional)

Step 2: Significantly more?
(factual issue)

ELIGIBLE

14/282,015

- A system comprising:
a processor of a vehicle configured to communicate with an update server...; and
a software update management module ... configured to ... determine that a software update is an optional software update ...;
....
- Examiner: “updating software” and “organizing human activity” is abstract
- PTAB: **not enumerated exceptions** + **practical application** of updating software specifically for a vehicle module, in which user consent is required

PTAB Decisions

2019 Revised SME Guidance

Step 1(i): Recite an exception?
(enumerated groupings)

Step 1(ii): Practical application?
(can be conventional)

Step 2: Significantly more?
(factual issue)

ELIGIBLE

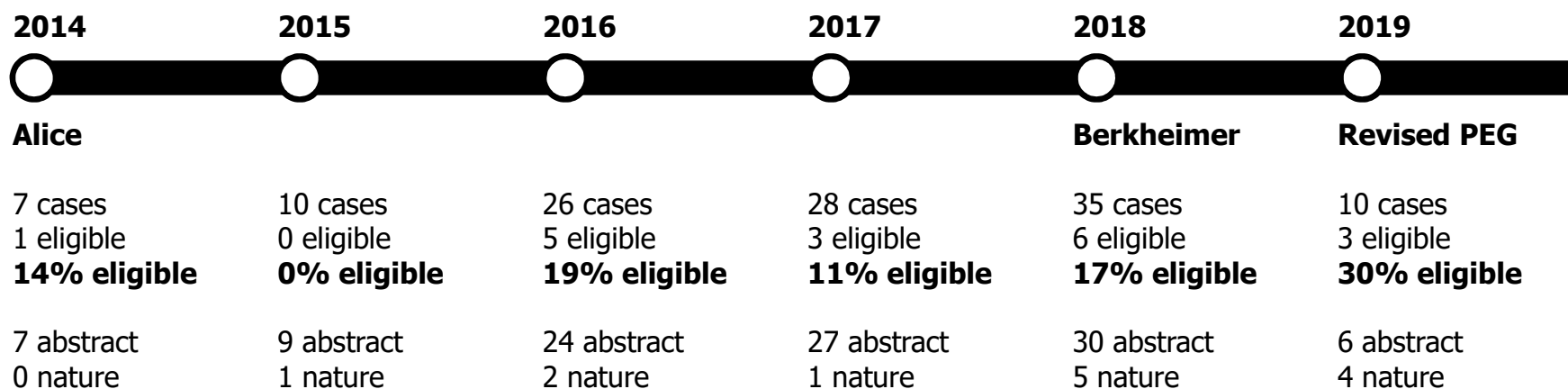
12/374,372 EPG Slap Down!

- A method comprising: a. clicking on information; and b. in response to the clicking, conducting a web search on the information.
- Examiner: claims similar to Electric Power Group (collecting/analyzing info and displaying results)
- PTAB: “Examiner’s statement [is] **conclusory with no support/analysis** for the Examiner’s conclusion.”

Examiner’s “overgeneralized abstract idea similarly does not meet the Examiner’s **requisite burden for analysis** under the 2019 Revised Patent Subject Matter Eligibility Guidance”

CAFC Statistics

CAFC Decisions Citing Alice



2014-2018 Source: https://www.uspto.gov/sites/default/files/documents/ieg-sme_crt_dec.xlsx

2019 Source: Thomson Reuters Westlaw (search results for CAFC decisions citing Alice)

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CAFC Decisions

2019 Revised SME Guidance

Step 1(i): Recite an exception?
(enumerated groupings)

Step 1(ii): Practical application?
(can be conventional)

Step 2: Significantly more?
(factual issue)

CAFC 2019 Totals (through May 1st)

- Software: 6 cases, 1 eligible
- Nature: 4 cases, 2 eligible

CAFC Decisions

2019 Revised SME Guidance

Step 1(i): ~~Recite~~ an exception?
(enumerated groupings)

Step 1(ii): ~~Practical application?~~
(can be conventional)

Step 2: Significantly more?
(factual issue)

INELIGIBLE

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Voit Technologies, LLC v. Del-Ton, Inc.

757 Fed.Appx. 1000, 1002 (CAFC, 2019)

- Entering, transmitting, locating, compressing, storing, and displaying data (including text and image data) to facilitate buying and selling of items.
- CAFC, Step 1: “**directed to**” collecting, analyzing, displaying info (EPG), and storing images (TLI)
- CAFC, Step 2: Void’s asserted improvements (more advanced compression) are unsupported in the spec
Instead, the spec says, “the actual data compression methods employed could include the *industry standard JPEG format* ... or other proprietary or *commercially available* techniques”

CAFC Decisions

2019 Revised SME Guidance

Step 1(i): ~~Recite an exception?~~
(enumerated groupings)

Step 1(ii): ~~Practical application?~~
(can be conventional)

Step 2: Significantly more?
(factual issue)

INELIGIBLE

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Trading Technologies Int'l, Inc. v. IBG LLC

(2018-1063) (CAFC, 2019)

- GUI for electronic trading, displaying bids and offers on the same screen
- CAFC, Step 1: “**directed to receiving a user input to send a trade order**”
- CAFC, Step 2: spec describes invention as helping the trader process information more quickly => not an improvement to computer functionality

The spec also says the invention can be implemented “on any existing or future terminal or device.”

CAFC Decisions

2019 Revised SME Guidance

Step 1(i): ~~Recite an exception?~~
(enumerated groupings)

Step 1(ii): ~~Practical application?~~
(can be conventional)

Step 2: Significantly more?
(factual issue)

INELIGIBLE

Morgan Lewis

ChargePoint, Inc. v. SemaConnect, Inc.

920 F.3d 759, 765 (CAFC, 2019)

- A network-enabled electric vehicle charging station; turns on based on communication with server
- CAFC, Step 1: “involves ... the abstract idea of ... communication over a network”
- CAFC, Step 2: “the only possible inventive concept is the abstract idea [network communication] itself”
“the specification gives no indication that the patented invention involved how to add network connectivity to these charging stations in an unconventional way”

CAFC Decisions

2019 Revised SME Guidance

Step 1(i): Recite an exception?
(enumerated groupings)

Step 1(ii): Practical application?
(can be conventional)

Step 2: Significantly more?
(factual issue)

ELIGIBLE

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SRI International, Inc. v. Cisco Systems, Inc.

918 F.3d 1368, 1374 (CAFC, 2019)

- Network monitors that report network traffic data; find suspicious activity and generate reports
- CAFC, Step 1: claims are “necessarily rooted in computer technology in order to solve a specific problem in the realm of computer networks”

The “focus of the claims is on the specific asserted improvement in computer capabilities” discussed in the spec, to which the CAFC cited.

Distinguish: EPG (collect/analyze data to solve a power grid problem), vs. SRI (collect/analyze data to improve functionality of computer networks themselves)

Takeaways

The USPTO 2019 SME Guidance works best at the examination/PTAB level, but the CAFC has not adopted it. Therefore...

- Drafting the spec: Discuss practical applications (to satisfy PTAB) **AND** specific improvements to technological problems (to satisfy CAFC)
- Drafting the claims: Ensure that the above points, as described in the spec, are reflected in the claims (see Berkheimer guidance)
- Avoid admitting conventionality in the spec
 - Voit: compression can include industry standard format (ineligible)
 - Trading Tech: can be implemented on any existing or future device (ineligible)
- Ensure that the inventive concept is not the abstract idea itself
 - ChargePoint: using a network in a conventional way (ineligible)
 - SRI International: improving the network in an unconventional way (eligible)

Biography



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Serving as the leader of Morgan Lewis's semiconductor practice and as a member of the firm's fintech and technology practices, Andrew J. Gray IV concentrates his practice on intellectual property (IP) litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on 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



Jianbai “Jenn” Wang, Ph.D., has technology development and patent law experience in many hardware and software fields. Jenn has prosecuted patents covering the areas of microelectronic fabrication, digital and analog circuit design, microcontrollers, signal processing, sensors and actuators, memory systems, software applications, and computer system architecture.

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David Bernstein counsels clients in intellectual property and, in particular, focuses on patent prosecution. He has drafted and prosecuted patent applications in a variety of technological fields in signal processing, circuit design, semiconductor devices, memory architecture, and GPS navigation. Additional areas of his work include computer science and other fields of engineering.

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Thomas Y. Nolan handles intellectual property matters, including patent disputes in federal courts and administrative agencies, as well as trademark prosecution. He also assists clients in responding to data breaches and other data security incidents. While in law school, Thomas worked with the Samuelson Law, Technology and Public Policy clinic to research and advise clients on the evidentiary implications of police use of body-worn cameras.

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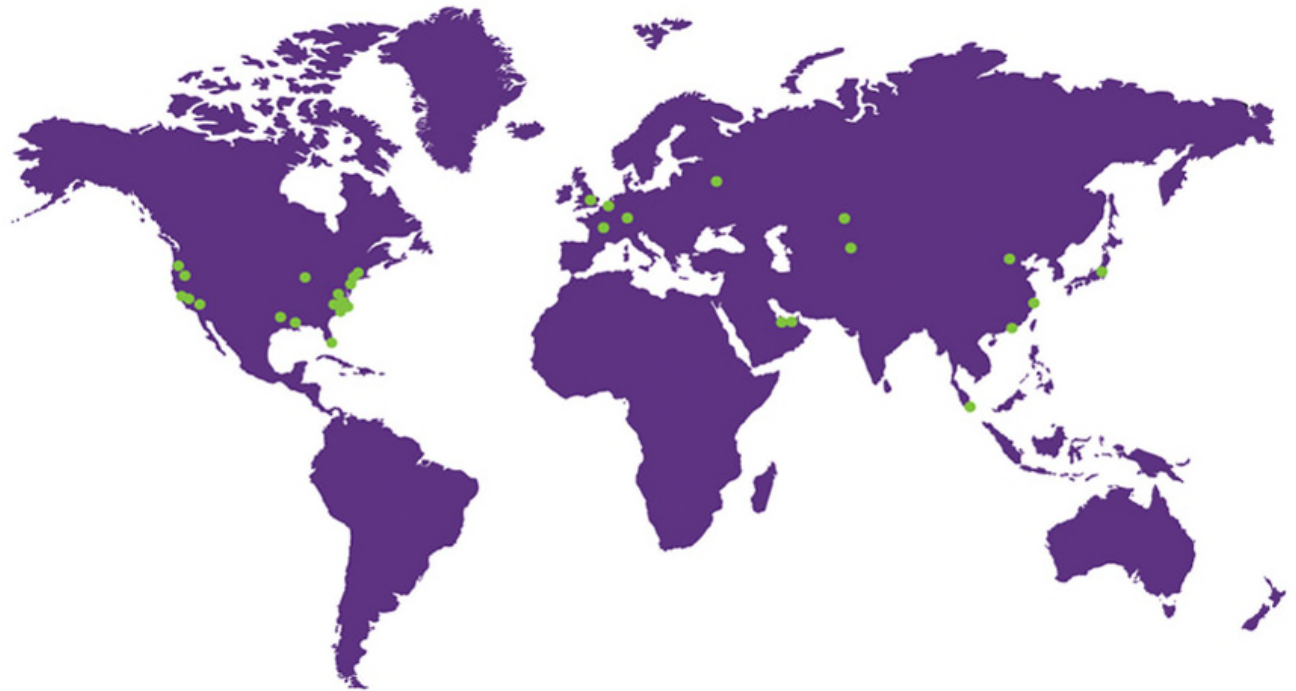
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