

INTELLECTUAL PROPERTY 2015 YEAR IN REVIEW

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Introduction

As discussed in greater detail below, there were a number of notable developments in intellectual property law in 2015.

Patent eligibility challenges to the validity of software, business methods, and medical diagnostic methods continued at a record pace. 2015 also saw the introduction of a new pleading standard for patent suits, which require plaintiffs to file complaints that are more detailed about the alleged infringement. By the end of 2015, we also concluded three years of operation of the new statutory framework provided by the America Invents Act (AIA), which introduced new post-grant procedures for challenging the validity of patents at the U.S. Patent Office. Inter partes review continues to be used as a potent weapon against patent owners. Policymakers also continued to focus on standards-essential patents, with the IEEE adopting new rules designed to curtail inflated valuations and abusive licensing practices.

Key appellate and Supreme Court decisions tackled a variety of issues in the past year, bearing on strategies in the prosecution, litigation, and licensing of intellectual property. These include the standard of review of lower court claim construction decisions, the standard for liability for induced infringement when multiple actors are involved, registration of disparaging marks, and patent misuse in the context of patent licensing. Cases also teed up significant issues that may be decided by the Supreme Court in the coming year, including whether foreign sales trigger patent exhaustion and whether the current test for willful infringement is too stringent.

In the current climate, one in which the eligibility – and hence validity – of many software and business method patents has been thrown into question, and one in which challenging the validity of patents under the AIA has proven quite successful, patent owners would be wise to review their existing portfolios and prosecution strategies and develop strategies to address these changes.

Patentability Attacks are Succeeding at Record Pace After Alice

In Following the trend that started in 2014 after the Supreme Court's 2014 *Alice* decision (*Alice Corp. v. CLS Bank Int'l*, 573 U.S. ___, 134 S. Ct. 2347 (2014)), 2015 continued to be a year in which Section 101 was successfully used to invalidate many patents without ever getting to the issues of anticipation or obviousness over the prior art. Section 101 of the Patent Act defines the scope of patent-eligible subject matter. It has long been interpreted to exclude the patentability of laws of nature, natural phenomena and abstract ideas.

The Supreme Court's 2012 *Mayo* decision (*Mayo Collaborative Services v. Prometheus Labs, Inc.*, 566 U.S. ___, 132 S. Ct. 1289 (2012)) and its subsequent *Alice* decision set forth a two-step test for distinguishing between patents that claim these three categories of ineligible subject matter and those that claim patent-eligible applications based on those categories. First, the claims at issue must be evaluated to determine if they are directed to one of those patent-ineligible concepts. If so, the claims must include an inventive concept that ensures that they cover "significantly more" than the ineligible concept itself. In other words, they must articulate a patent-eligible application of the concept.

Challenges based on Section 101 have often come in the areas of business method patents and software-based inventions. Statistics in 2015 for these two areas have been disheartening to patent owners. Through the end of 2015, more than 70% of Section 101 challenges succeeded in invalidating the challenged claims. Since *Alice*, more than 400 patents have been invalidated under Section 101. In many

cases, this was done by defendants filing either motions on the pleadings (FRCP Rule 12(c)), motions to dismiss or summary judgment motions. Of the 23 Section 101 decisions that have reached the Federal Circuit, only one case (*DDR Holdings LLC v. Hotels.com LP*, 773 F.3d 1245 (Fed. Cir. 2014)) has found the claims at issue to be patent eligible.

Not surprisingly, the majority of District Court decisions involving Section 101 come out of the District of Delaware and the Eastern District of Texas because of their heavy patent dockets. Delaware has had the highest invalidity rate (approximately 90%) while the Eastern District of Texas has found Section 101 invalidity only 30% of the time. Also not surprisingly, most of the successfully challenged patents have been business method patents filed after the 1998 *State Street* decision that generally confirmed the patentability of business methods, but before the 2014 *Alice* decision.

As more Section 101 cases move through the Courts, it is expected that the current murky line between patent-eligible and patent-ineligible subject matter will be clarified. In this regard, in July of 2015, the USPTO issued a very helpful update to its 2014 Interim Guidance on Patent Subject Matter Eligibility which was provided shortly after the *Alice* decision. The July, 2015 Update provides further guidance to Examiners and the public on how to deal with Section 101 issues.

One of the more significant and controversial Section 101 cases in 2015 arose, like the *Mayo* case, in the area of medical diagnostics. *Ariosa v. Sequenom* concerned a Section 101 challenge to a medical diagnostic patent covering techniques for early detection of fetal abnormalities. After discovering that

cell-free fetal DNA ("cffDNA") was present in maternal blood, the inventors obtained a patent on certain of their methods. The methods claimed the use of known techniques to amplify and detect the amount of paternally inherited cffDNA in a blood sample. The medical community considered such methods to be a major advance over the riskier approach of taking samples directly from the fetus or placenta.

In a June, 2015 decision, the Federal Circuit agreed with the District Court and held the method claims at issue to not be patent-eligible under Section 101. Finding that the presence of cffDNA in maternal blood was undisputedly a natural phenomena (the first step of the two-step *Mayo/Alice* test), the Court went on to determine in the second step of the *Mayo/Alice* test that the claimed methods for amplifying and detecting features of the cffDNA were conventional and routine. The Federal Circuit concluded that since the only new and useful aspect of the claims was the discovery of a natural phenomenon (i.e., the presence of cffDNA in maternal blood) which in and of itself was not patent-eligible, the inclusion of conventional processing steps in the method claims did not add a sufficient inventive concept to make the claims patent-eligible.

In December, 2015, the Federal Circuit issued a per curiam opinion (with J. Newman providing the sole dissent) denying the patent owner's petition for rehearing *en banc*. In separate opinions however, several of the Judges expressed their concerns that, while they considered the invention to be worthy of patent protection, they were bound by Supreme Court precedence to find the claims not eligible under Section 101 -- effectively suggesting that the Supreme Court needed to clarify its *Mayo/Alice* framework. A petition for a *writ of certiorari*

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to the Supreme Court is expected to be filed shortly. It remains to be seen if the Supreme Court will take this opportunity to clarify its Section 101 jurisprudence.

New Pleading Standard in Federal Rules of Civil Procedures

On December 1, 2015, revised Federal Rules of Civil Procedure went into effect that require plaintiffs in patent suits to file more than just cookie-cutter complaints, significantly altering the pleading standard for patent infringement cases. The new rules were adopted by the Supreme Court on April 29, 2015, based on recommendations by the Judicial Conference of the United States.

Most significantly, the changes include the elimination of the “Form 18” sample complaint for patent infringement, that plaintiffs have used to file patent suits that include bare-bones assertions, and Rule 84 which allowed for reliance on the form complaint. Under the new rules, complaints alleging direct patent infringement will be subject to pleading standards established by two decisions of the U.S. Supreme Court, *Bell Atlantic v. Twombly* in 2007 and *Ashcroft v. Iqbal* in 2009 which held that plaintiffs must plead sufficiently detailed facts to show their claims for relief are plausible. *Twombly/Iqbal* also gave district court judges more discretion in how they handle complaints that fail to do so.

The shift in rules by the Judicial Conference of the United States is expected to make litigation tougher for non-practicing entities (NPEs) that file patent lawsuits with weak and vague claims against companies that are more likely to settle than face expensive litigation.

Over the past decade, Form 18 has been exploited by these NPEs, or patent trolls, who filed complaints that often contained few details about the alleged infringement. The changes will also make it more difficult for plaintiffs to sue multiple defendants with “cut and paste” type complaints.

So what can we expect in the near future? Judges may use *Twombly* and *Iqbal* for guidance, but pleadings requirements will be subjective and vary from judge to judge. As courts work to resolve the new standards and case law evolves, it may be a while before litigants will have complete guidance on how much detail must be included in complaints alleging infringement. However, it is safe to say that, unlike in the past, plaintiffs should identify the specific claims that are alleged to be infringed and which products are being accused of infringing those claims. Plaintiffs should also add specificity where possible as to how the asserted claims are infringed by the accused product(s). Taking these steps will help defend against assertions brought by defendants trying to dismiss complaints for failing to meet the new pleading standard.

Update on Post-Grant Reviews

Inter partes review (IPR) filings at the Patent Trial and Appeal Board (PTAB) were fairly consistent in 2015, averaging about 150 filings per month according to the most recent data provided by the United States Patent and Trademark Office. Petitioners have benefitted from an overwhelming IPR success rate, with approximately 87% of PTAB Final Written Decisions invalidating at least one claim at issue.

The Year 2015 saw the first wave of PTAB Final Written Decisions appealed to the Court of Appeals for the Federal Circuit (CAFC). Unfortunately for patent holders, their success on appeal appears to be tracking the CAFC’s normal affirmance rate, with the CAFC upholding PTAB decisions in approximately 90% of cases. The CAFC has largely refused to disagree with the PTAB on factual matters related to patentability, such as whether a certain prior art reference or combination of references was sufficient to anticipate or make obvious a certain claim. The CAFC has also largely side-stepped, on jurisdictional grounds, cases arguing that an IPR was improperly instituted in the first place.

The CAFC has, however, shown a willingness to expand the PTAB’s decision to invalidate some claims (and not others) by invalidating all claims at issue (*Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064 [Fed. Cir. 2015]). The CAFC has also shown a willingness to remand in the case of obvious errors or omissions, such as when the PTAB may have mistakenly failed to consider certain prior art (*Ariosa Diagnostics v. Verinata Health Inc.*, 2015 WL 7148267 (Fed. Cir. Nov. 16, 2015)) or erred in claim construction (*Microsoft v. Proxyconn*, 789 F.3d 1292 (Fed. Cir. 2015) and *Straight Path IP Group, Inc. v. Sipnet EU S.R.O.*, No. 15-1212, Slip Op. (Fed. Cir. Nov. 25, 2015)). Patent holders should have the greatest likelihood of success in appeals based on matters of law, though that success remains elusive to date. The Supreme Court is also currently considering whether the PTAB’s “broadest reasonable construction” standard for claim construction is proper, which could impact the review of many proceedings if the Supreme Court decides that judicial standards for claim construction should apply. (*Cuozzo Speed Technologies LLC*

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v. Lee, case number 15-446). The judicial standards for claim construction (*e.g.*, courts look at whether claims should be narrowed in light of the specification and prosecution history) can often lead to a narrower claim construction which may change PTAB invalidity determination.

IPR is still very much in its infancy. Decisions issued over the next few years will allow patent holders to better “IPR proof” their patents and anticipate PTAB and CAFC rulings. In these early stages, however, Petitioners appear to have the upper hand.

Foreign Patent Exhaustion

In April, 2015, in *Lexmark Int'l v. Impression Prod.* (Fed. Cir. 2015), the Federal Circuit ordered *en banc* briefing on the issue of international patent exhaustion.

Patent exhaustion is a judicially-created doctrine that holds that once a patentee abandons its right to exclusivity through the sale of a patented product or by licensing the patent itself, there is no basis for the patentee to impose restrictions or secure royalties on the subsequent use of the invention. Under the doctrine of patent exhaustion, “[a]n authorized sale of a patented product exhausts the patent monopoly as to that product. Thus, a purchaser of such product from the patent owner or one licensed by the patent owner may use or resell the product free of control or conditions imposed by the patent owner.” 5 Donald S. Chisum, *Chisum on Patents* § 16.03[2][a] (2002); *see also Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993) (“The law is well settled that an authorized sale of a patented product places that product beyond the reach of

the patent. The patent owner’s rights with respect to the product end with its sale.”). The doctrine is intended to prevent a patentee from receiving a double royalty on a single patented invention.

One important limitation on the exhaustion doctrine has been territoriality. The Federal Circuit has long held that U.S. patent rights are not exhausted if the authorized sale does not occur in the U.S. *See Jazz Photo Corp. v. International Trade Commission*, 264 F.3d 1094 (Fed. Cir. 2001). However, the U.S. Supreme Court recently addressed the law of international copyright exhaustion, and in that context reached the opposite conclusion. In *Kirtsaeng v. John Wiley & Sons Inc.*, 133 S. Ct. 1351 (2013), the Court ruled that the exhaustion doctrine applied to copies of a copyrighted work that were lawfully made abroad and found that once an authorized copy is made anywhere in the world, the copyright holder’s rights are exhausted.

The Supreme Court’s *Kirtsaeng* copyright exhaustion decision raised the question whether the same rule should apply to patent exhaustion and whether the principles of *Kirtsaeng* should be adopted to overrule the longstanding Federal Circuit rule of no foreign exhaustion.

The Federal Circuit, in *Lexmark*, now has that opportunity. Indeed, by choosing to hear the case *en banc*, the Federal Circuit has given a clear signal that the *Jazz Photo* decision and its rule that foreign sales do not trigger patent exhaustion may well be overruled. With the issue now fully briefed, a decision by the *en banc* Federal Circuit is expected early this year.

Infringement by Multiple Parties

Direct infringement under 35 U.S.C. § 271(a) is established when all steps of a claimed method are performed or attributed to a single entity. When more than one actor is involved, a court must determine if the acts of one are attributable to the others such that a single entity is responsible for the infringement. United States Patent No. 6,108,703 (“Global Hosting System”) claims a method to locate and distribute content on the Internet. The patent owner, Akamai Technologies, asserted infringement against an Internet content provider, Limelight Networks. While most of the steps of the asserted process claim were performed by Limelight, a step of tagging content was performed by Limelight’s customers per instructions from Limelight. After multiple considerations before the Federal Circuit, including a remand from the U.S. Supreme Court, Limelight was found to infringe under Section 271(a). (*Akamai Technologies, Inc. et al. v. Limelight Networks, Inc.*, No. 2009-1372 [Fed. Cir. 2015])

The Federal Circuit held that an entity is responsible for the performance of another’s method steps if either (1) the entity directs or controls the other’s performance, or (2) the actors form a joint enterprise. “Directs or controls” requires the entity to act through an agent or to contract with another to perform one or more steps of the claimed method. A “joint enterprise” requires (1) an agreement among members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest in the purpose, and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

As Limelight conditioned its customer’s use of its content delivery service on the

customer tagging of content, the Court concluded that there was substantial evidence to find that Limelight directed or controlled its customer's performance.

Claim Construction Review

In January, 2015, the Supreme Court rejected the Federal Circuit's long standing practice of applying a de novo review standard to district court claim construction decisions. Instead, in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, No. 13-854 (Jan. 20, 2015), the Supreme Court ruled that factual findings made by the District Court in connection with claim construction can be reversed on appeal only when they are clearly erroneous. This overruled the prior *de novo* standard applied by the Federal Circuit for all claim construction issues, including factual findings. As a result, in cases where extrinsic evidence, such as expert testimony, is relied on to determine factual issues central to claim construction (including claim indefiniteness), it will be more difficult to reverse on appeal.

Clearly, the Supreme Court thought it important to give deference to the District Court's firsthand review of any extrinsic evidence showing what one of ordinary skill in the art would consider to be the right construction of a patent claim, as is the practice in other areas of law, including contract interpretation.

In so doing, the Supreme Court recognized that "[i]n some instances, a factual finding will play only a small role in a judge's ultimate legal conclusion about the meaning of the patent term. But in some instances, a factual finding may be close to dispositive of the ultimate legal question of the proper

meaning of the term in the context of the patent." (Slip Op. at 13).

The *Teva* decision is critical for cases where interpreting patent claims may not be clear cut and where extrinsic evidence is introduced and relied upon. If parties use expert witnesses to opine on factual issues or present other evidence that requires a factual determination, a district court's decision will be harder to reverse on appeal, which should be taken into account when considering strategy related to venue. For a more detailed description of the *Teva* case see our prior advisory: <http://www.wiggin.com/15677>.

Standards Related Patents

In February of 2015, the Institute of Electrical and Electronics Engineers (IEEE) amended its patent policy to clarify the obligations of its members when licensing patents covering IEEE Standards.

Among the significant changes are the following:

- The amended IEEE Patent Policy includes a new definition of what constitutes a reasonable royalty rate that explicitly excludes any value attributable to the inclusion of the patented technology in an IEEE Standard and other factors that recent Federal Circuit cases have used to value Essential Patent Claims. See <http://www.wiggin.com/15609>.
- The amended IEEE Policy also now obligates standards-essential patent owners to not seek injunctive relief or an exclusion order against the practice of essential patent claims by an unwilling licensee until a first level appeal of damages and liability.

■ The amended IEEE Policy has added provisions requiring a standards-essential patent owner to offer a license under fair and reasonable terms to an unrestricted number of licensees, without conditioning such license on the taking of licenses to the owner's non-standards-essential patents or the grant back by the licensee of licenses to any of its non-standards-essential patents.

■ Finally, the amended IEEE Policy states that a member who has agreed to abide by the Policy must advise any subsequent owners of the involved standards-essential patents that these patents are so encumbered.

As evident, these amendments have been made in an effort to clarify the licensing obligations of IEEE members involved in the promulgation of IEEE standards, with an eye to curtailing what some have viewed as abusive licensing practices. For a more detailed description of the IEEE policy see our advisory: <http://www.wiggin.com/15757>.

Functional Claiming

In June, 2015, the Federal Circuit issued an en banc decision that makes it easier to establish that functional claim language should be limited by a patent's disclosure. *Williamson v. Citrix Online, LLC.*, No. 2013-1130 (Fed. Cir. June 16, 2015)(*en banc*). In *Williamson*, the Federal Circuit overruled its own precedent which had created strong presumption that claim elements that do not use the word "means" should not be interpreted as means-plus-function claims.

Means-plus-function claiming, as codified in 35 U.S.C. § 112(f), allows a patentee to use functional language in the claims. However,

the consequence of using functional language is that such claim language is limited to the structure disclosed in the specification that performs the claimed function(s) and equivalent structures. For example, if the claim language is “means for creating a sound” and the disclosure is a car horn, a musical instrument would not likely be covered. Further, if no structure is disclosed in the specification, the claim is invalid as indefinite because it is not possible to limit the means-plus-function element to a disclosed structure.

There is a long history of cases that try to rein in the use of functional claiming going back to the Supreme Court’s decision to invalidate a patent by Samuel Morse that tried to claim the use of “electro-magnetism, however developed for marking or printing intelligible characters, signs, or letters, at any distances...” *O’Reilly v. Morse*, 56 U.S. (15 How.) 62 (1853). However, the Federal Circuit’s strong presumption that a claim will only be interpreted under the means-plus-function statute when the word “means” is used, made it too easy for patent applicants to avoid the limitations of the means-plus-function statute.

Under the new standard, “[w]hen a claim term lacks the word ‘means’,” the presumption can be overcome and [the means-plus-function statute] will apply if the challenger demonstrates that the claim term fails to ‘recite sufficiently definite structure’ or else recites ‘function without reciting sufficient structure for performing that function.’” (Slip op. at 16).

Williamson should be taken into account when reviewing third party patents that use functional language to consider if they should be more narrowly interpreted.

Further, patent applicants should consider if their pending applications use functional language that could be interpreted narrowly under the means-plus-function statute and corrective steps taken.

Willful Infringement

In October, 2015, The Supreme Court granted certiorari in *Halo Electronics Inc. v. Pulse Electronics Inc.* and *Stryker Corp. v. Zimmer Inc.* to review whether the Federal Circuit’s two part test for willful infringement is too restrictive. A patentee who proves willful infringement under 35 U.S.C. § 284 can obtain up to triple damages. Under current law, willfulness can only be found if the patentee shows by clear and convincing evidence “that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” If the patentee proves the accused infringer was objectively unreasonable, the patentee still must prove “subjective recklessness,” that the accused infringer should have known they were infringing.

Some have argued that the stringent test for willful infringement is inconsistent with the Supreme Court’s decision in *Octane Fitness LLC, v. ICON Health & Fitness, Inc.*, 12-1184 (2014). *Octane Fitness* had decided that the Federal Circuit’s standard that a case must be proven to be “objectively baseless” before granting attorney fees was too restrictive and that judges should be able to decide to award attorney’s fees when a case simply “stands out from others” after review of the totality of the circumstances.

The *Halo* and *Pulse* cases should be watched carefully. The standard used by the courts to establish willful infringement has great implications for internal due diligence

procedures like right-to-use searches and whether to obtain formal attorney opinions regarding particular patents that could be asserted against a company’s products or services.

Licensing

In *Kimble v. Marvel*, No. 13-720 (2015), the Supreme Court held that royalties based on an expired patent are not permitted. The Supreme Court considered whether to overrule its controversial decision in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), which “held that a patent holder cannot charge royalties for the use of his invention after its patent term has expired.” [Commentators on *Brulotte* had long opined that this holding was not in keeping with the realities of licensing deals and the parties’ freedom to contract royalty terms that made sense in their particular circumstances.]

However, based on stare decisis, the Supreme Court rejected overruling the *Brulotte* case: “This Court has carefully guarded [against royalties after a patent’s expiration] date, just as it has the patent laws’ subject-matter limits. In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented ... inventions.” They noted that Congress could change the law if there are strong policy reasons to allow post-expiration royalties.

In licensing, one must keep this limitation on royalties in account in structuring a royalty structure that fairly compensates the patentee.

Disparaging Trademarks

In a curious matchup between the Lanham Act's decades old Section 2(a) prohibition against registration of disparaging marks and Pro-Football's similarly decades old rights in the "REDSKINS" mark, members of the public who find the "REDSKINS" mark disparaging, fans of the Washington Redskins and the Trademark Bar have been keenly following the various "Redskins cases."

The first such case, *Harjo v. Pro-Football, Inc.*, was an administrative cancellation action (Cancellation No. 21,069) before the Trademark Trial and Appeal Board of the Patent and Trademark Office seeking cancellation of Pro-Football's various "REDSKINS" marks on the ground that the marks violate Lanham Act Section 2(a)'s prohibition against registration of matter that may disparage persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. While the Patent and Trademark Office eventually ruled in favor of the petitioner, ordering the registrations cancelled, Pro-Football appealed the decision to the U.S. Court of Appeals for the District of Columbia (*Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005)), which reversed, finding the evidence of disparagement had been insufficient to support the Trademark Trial and Appeal Board's decision. Subsequent appeals by *Harjo* were denied as barred by laches. In 2009, the Supreme Court declined to take up the case.

A second cancellation action (*Blackhorse v. Pro-Football, Inc.* Cancellation No. 92046185) was filed by a group of younger-aged petitioners, who again claimed that the various "REDSKINS" marks are

disparaging and prohibited from registration under Section 2(a) of the Lanham Act. The Trademark Trial and Appeal Board once again ruled in favor of the petitioners, again ordering the registrations cancelled. Pro-Football appealed to the U.S. District Court for the Eastern District of Virginia, which affirmed the decision of the Trademark Trial and Appeal Board. Pro-Football has appealed the decision to the U.S. Court of Appeals for the Fourth Circuit. In addition to arguing that the District Court's decision ignored precedential case law and was contrary to the weight of the evidence, Pro-Football also argues that Section 2(a) of the Lanham Act is unconstitutionally vague and violates their First Amendment right to free speech. The appeal is pending.

In an interesting turn of events, on December 22, 2015, the Court of Appeals for the Federal Circuit issued its decision in the case *In re Tam*, Case No. 2014-1203. *Tam* was an appeal from the Trademark Trial and Appeal Board's decision affirming the refusal, on Section 2(a) grounds, of Simon Shiao Tam's application for federal registration of the name of his band, "The Slants." Tam, who is of Asian descent, said that his band had in fact purposely chose the name "the Slants" because of its historical use as a racial slur "in an effort 'to reclaim' and 'take ownership' of Asian stereotypes." Nevertheless, the reviewing Examining Attorney and the Trademark Trial and Appeal Board, on appeal, found that "a substantial composite of persons of Asian descent would find the term offensive."

Finding that First Amendment jurisprudence had evolved significantly, in an *en banc* review, the Court found:

■ That Lanham Act Section 2(a)'s denial of important legal rights to private speech based on disapproval of the message conveyed is subject to, and cannot survive, strict scrutiny;

■ That Lanham Act Section 2(a)'s disparagement provision regulates the expressive aspects of the mark, not its function as commercial speech;

■ That Lanham Act Section 2(a) is not saved from strict scrutiny because it bans no speech or by government speech or government-subsidy doctrines; and

■ That Lanham Act Section 2(a) is unconstitutional even under the *Central Hudson* Test for commercial speech

As a result, the Court of Appeals for the Federal Circuit held that the disparagement provision of Section 2(a) is unconstitutional because it violates the First Amendment, and remanded the case back to the Trademark Trial and Appeal Board.

While it will remain to be seen whether the Government appeals the decision to the Supreme Court, or whether the Supreme Court would agree to review the case, it should be interesting to watch the impact of the *Tam* decision on the current appeal in the *Blackhorse* case before the Court of Appeals for the Fourth Circuit. Keep watching!

Copyright and Code

Oracle and Google will go toe-to-toe again this year in a case with significant implications on intellectual property

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protections available for software (*Oracle America, Inc. v. Google, Inc.*, No. 3:10-cv-03561, N.D. Cal.). The Silicon Valley giants have been facing off since 2010, when Oracle sued Google for unauthorized copying of Oracle's Java application programming interface (API) packages and integration of the APIs into Google's Android operating system.

In May 2014, the Federal Circuit ruled that Oracle's Java APIs are copyrightable, prompting Google to petition the U.S. Supreme Court to review the decision. In 2015, the U.S. Supreme Court declined to take up the case. This spring, Oracle and Google will return to the Northern District of California for a trial to evaluate Google's "fair use" defense. The interoperability question—whether one is permitted to copy Oracle's Java APIs to write programs in the Java language—will be a key focus.

The *Oracle v. Google* trial is one to watch closely this year. After *Alice*, it has become far more challenging to protect software under patent laws. Whether a copyright will provide a viable means of protection for software and code remains to be seen.

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