

## **2024 PATENT LANDSCAPE -- YEAR IN REVIEW**

Over the course of 2024, the patent law landscape has continued to evolve as significant court rulings and emerging technologies shaped its direction. During 2024, activities at the Supreme Court, the Federal Circuit, various District Courts, and the Patent and Trademark Office not only influenced existing patent frameworks—such as a complete rewrite of the long-standing obviousness test for design patent invalidity—but also raised new questions about intellectual property rights in a rapidly evolving marketplace. Although each of these sources of law will be addressed, in turn, special attention will be paid to developments at the Federal Circuit where several themes emerged this year regarding design patents, damages, validity, equitable defenses, attorney’s fees, standing, and marking. Looking forward, from landmark decisions in the ever-evolving litigation funding space to the growing impact of artificial intelligence and congressional debates about potential patent legislation changes on the horizon, the events of 2024 highlight the continuing dynamism in the patent law ecosystem, both from a legal and an innovation perspective.

### **I. SUPREME COURT**

In 2024, patent law was left largely untouched by the Supreme Court, evidenced by the fact that the Court did not issue any opinions directly relating to patent law principles. However, despite this absence of new Supreme Court precedent, patent law procedures and rules are still likely to be influenced by both the Court’s *Loper Bright* administrative decision and its decision to deny certiorari in several significant patent cases.

On June 28, 2024, through its decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Supreme Court overturned its long-standing *Chevron* doctrine. While *Loper Bright* does not directly address patent law, the ruling could have significant implications for patent

law procedures and regulations. The *Chevron* doctrine, established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), required courts to defer to agency interpretations of ambiguous statutes so long as those interpretations were deemed reasonable. However, in *Loper Bright*, the Supreme Court concluded that *Chevron* was incompatible with the Administrative Procedure Act (“APA”), finding that the APA provides the proper framework for evaluating agency rules. The Court held that when reviewing an agency action, a court should deem it unlawful if: (i) it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (ii) it is contrary to a constitutional right, power, privilege, or immunity; or (iii) it exceeds statutory jurisdiction.

*Loper Bright* is significant because it eliminates a court’s need to defer to the United States Patent and Trademark Office (“USPTO”) when assessing USPTO actions. Similarly, *Loper Bright* lowers the bar for patent owners and patent challengers who dispute the USPTO’s decision-making processes and regulations. In the wake of *Loper Bright*, it is expected that parties will be more willing to question USPTO practices that aren’t explicitly supported by statute, such as whether the rules and practices of the Patent Trial and Appeal Board (“PTAB” or “Board”) comport with the America Invents Act (“AIA”).

Regarding the Supreme Court’s review of patent laws and principles, a significant denial of certiorari issued in *Intel Corp. v. Vidal*, U.S., No. 23-135 (cert. denied Jan. 8, 2024). The case began in 2021 when the Northern District of California dismissed a group of plaintiff’s claims that the PTAB unlawfully applied the *Fintiv* rules to deny numerous IPR petitions. *See Apple Inc. v. Iancu*, No. 5:20-CV-06128-EJD, 2021 WL 5232241 (N.D. Cal. Nov. 10, 2021). After making its way through the appeals process, Intel, and several other companies, challenged the USPTO’s

*Fintiv* rules, arguing that they violated the Administrative Procedure Act (“APA”). Intel’s petition aimed to contest a 2020 USPTO policy that limited the number of patents the agency would review. The *Fintiv* rules establish a set of six factors that the PTAB uses to determine whether to review a patent or, instead, to exercise the USPTO’s discretionary ability to decline instituting an inter partes review (“IPR”) because there is a parallel district court proceeding deemed by the USPTO to be sufficiently underway. As it stands, given this denial of certiorari, the Supreme Court has implicitly endorsed the USPTO’s self-granted discretion in deciding whether to institute IPR proceedings. However, following the previously mentioned Supreme Court’s decision in *Loper*, which fundamentally altered the judicial approach to evaluating agency regulations and decision, future challenges to USPTO policies may face increased scrutiny and possible reforms due to courts applying a more rigorous review standard.

Following the Supreme Court’s denial of certiorari, the case was remanded from the Federal Circuit back down to the Northern District of California where the claims were again dismissed. The Northern District stated that *Fintiv* was excluded from the APA’s notice-and-comment rulemaking requirements because *Fintiv* is a general statement of policy that guides the Board and not a substantive or legislative rule. *Apple Inc. v. Vidal*, No. 20-CV-06128-EJD, 2024 WL 1382465, at \*13 (N.D. Cal. Mar. 31, 2024). Nevertheless, the case is once again working its way through the appeal process at the Federal Circuit and should continue to be monitored in 2025, as its outcome has the potential to substantially alter the *Fintiv* rules and the PTAB’s discretionary ability to grant or deny institution of IPR.

In the fall of 2024, the Supreme Court once again denied certiorari in a patent case, this time in *Collect LLC v. Vidal*, U.S., No. 23-1231 (cert. denied Oct. 7, 2024). The case focused on

whether a patent could be ruled invalid due to a patent term adjustment (“PTA”) that resulted in an improper extension of the patent term, thereby triggering invalidity under the judicially created doctrine of non-statutory obviousness-type double patenting (“ODP”). As an initial matter, ODP is a judicially created doctrine that is designed to prevent a patentee from obtaining a time extension of a patent for the same invention or an obvious modification of such, i.e., ODP prevents a patentee from obtaining a second patent on an invention that is not distinct from the invention in the first patent. The Federal Circuit held that “ODP for a patent that has received PTA, regardless of whether or not a terminal disclaimer is required or has been filed, must be based on the expiration date of the patent after PTA has been added.” *In re: Collect, LLC*, 81 F.4th 1216, 1229 (Fed. Cir. 2023), *cert. denied sub nom. Collect, LLC v. Vidal*, No. 23-1231, 2024 WL 4426602 (U.S. Oct. 7, 2024). The Supreme Court’s decision to deny certiorari is significant because, with the Federal Circuit’s ruling now in effect, it is crucial for parties to ensure that their patents with PTA’s do not contain potential ODP issues, otherwise they run the risk of having their patents invalidated.

## **II. FEDERAL CIRCUIT**

Naturally, there was a lot of activity at the Federal Circuit in 2024 regarding the interpretation of patent law. In fact, the Federal Circuit issued more than forty precedential patent opinions. Notably, the Federal Circuit also sat en banc in a patent case for the first time in five years (and in a design patent case for the first time in 15 years) when it granted en banc review in *LKQ Corp. v. GM Global Tech. Operations LLC*, Case No. 21-2348 (Fed. Cir. 2024).

**A. PTAB/PTO PROCEDURE**

To begin our discussion about the Federal Circuit, we start with cases that touch on PTAB/PTO procedures and decision making. In *Pfizer Inc. v. Sanofi Pasteur Inc.*, 94 F.4th 1341 (Fed. Cir. 2024), Pfizer argued that the PTO’s Director Review procedure violates that APA because it was not promulgated through notice-and-comment rulemaking. The Federal Circuit, however, disagreed with Pfizer, reasoning that it had already addressed this precise issue in *Carcucel Invs. L.P. v. Vidal*, where it held that “even if the PTO’s guidance governing Director Review was not exempt from notice-and-comment rulemaking, any error by the PTO in that regard would be harmless absent a showing of prejudice by the party challenging the agency action.” Applying this reasoning, the Federal Circuit held that Pfizer failed to demonstrate that it suffered from any prejudicial error and, thus, any APA violation by the PTO was harmless and did not provide a basis to reverse or vacate the Board’s decision. This case may foreshadow how the Federal Circuit will rule in the ongoing appeal taking place in *Intel v. Vidal* appeal as it addresses this precise issue.

Furthermore, in 2024, the Federal Circuit issued several opinions touching on motions to amend patent claims during PTAB proceedings. First, in *CyWee Grp. Ltd. v. ZTE (USA), Inc.*, 90 F.4th 1358 (Fed. Cir. 2024), the Federal Circuit held that PTAB procedures do not bar a third party that has joined an IPR proceeding from raising certain new prior-art references in opposition to a patentee’s revised motion to amend its claims. The Court explained that inter partes review (“IPR”) statutory provisions prohibiting an otherwise time-barred party (i.e., a third party) from introducing new issues into the proceeding do not apply to motions to amend. Then, in *ZyXEL Commc’ns Corp. v. UNM Rainforest Innovations*, 107 F.4th 1368 (Fed. Cir. 2024), the Federal

Circuit affirmed the Board’s decision to grant UNMRI’s motion to amend, explaining that any error committed by the Board was harmless because ZyXEL failed to demonstrate that it suffered from prejudice. These cases highlight the complex, rules-based nature of the PTAB IPR process for even common, seemingly straightforward issues such as a patentee’s motion to amend claim language. Furthermore, these cases place emphasis on the Federal Circuit’s trend of looking to find actual prejudice to a party when deciding whether a court committed error.

**B. 35 U.S.C. § 101 AND PATENT ELIGIBLE SUBJECT MATTER**

As has been the case for a number of years now, in 2024, the Federal Circuit continued to issue several opinions in an effort to further clarify what constitutes non-patentable subject matter under 35 U.S.C. § 101. *See, e.g., Broadband iTV, Inc. v. Amazon.com, Inc., et al.*, No. 2023-1107 (Fed. Cir. 2024); *Contour IP Holding LLC v. GoPro, Inc.*, No. 2022-1654, 2022-1691 (Fed. Cir. 2024). To assess whether a patent involves patent-eligible subject matter, courts apply the Supreme Court’s *Alice/Mayo* framework, which involves a two-step analysis. First, the court must determine whether the patent is directed to an abstract idea. If it is, the court then moves to step two, where the court assesses whether the invention includes a sufficiently inventive concept that transforms the abstract idea into patent-eligible subject matter. Building on this, one area the Federal Circuit specifically focused on in 2024 was computer-implemented patents. The Court issued three decisions related to such and in each case, the court concluded that the patents were directed to abstract ideas and lacked an inventive concept sufficient to transform them into patent-eligible subject matter. *See, e.g., AI Visualize, Inc. v. Nuance Commc’ns, Inc.*, 97 F.4th 1371 (Fed. Cir. 2024); *Brumfield, Trustee for Ascent Trust v. IBG LLC*, 97 F.4th 854 (Fed. Cir. 2024); *Chewy, Inc. v. IBM Corp.*, 94 F.4th 1354 (Fed. Cir. 2024). Considering the numerous decisions related to

§ 101 issued in 2024, the Federal Circuit appeared to place greater emphasis on the second step of the *Alice* test and whether additional claim elements provide enough of a technological advance to transform the abstract idea into patent eligible subject matter. In addition, as seen in *Contour IP*, the Federal Circuit clarified that even if a patent incorporates known components, the patent can still become patent eligible if it offers a specific, innovative solution to a technological problem. Moving forward, patent practitioners should ensure that they clearly articulate what the specific technological issue is in the specification, and draft claims that clearly address that technological problem, otherwise they run the risk of having the patent rejected or later invalidated.

**C. 35 U.S.C. § 103 AND OBVIOUSNESS-TYPE INVALIDITY**

As is the case with § 101 issues, the Federal Circuit typically issues several opinions related to 35 U.S.C. § 103 and the test for obviousness each year. 2024 was no different as the Federal Circuit issued several opinions reaffirming the test for utility patent obviousness for utility patents. *See, e.g., IOENGINE, LLC v. Ingenico Inc.*, 100 F.4th 1395 (Fed. Cir. 2024); *Voice Tech Corp. v. Unified Pats., LLC*, 110 F.4th 1331 (Fed. Cir. 2024); *Unification Techs. LLC v. Micron Tech. Inc.*, No. 2023-1348, 2024 WL 3738401 (Fed. Cir. Aug. 9, 2024). Regarding the application of § 103 to utility patents, the Federal Circuit has continued to hold that the determination of obviousness is a legal conclusion based on factual evidence and that any such determination be based on the four-part Graham test, emphasizing that one of the critical factors is whether a person of ordinary skill in the art would have been motivated to combine specific prior art references. And although the Federal Circuit released a number of § 103 opinions related to utility patents, the most notable § 103 opinion came in *LKQ v. GM*, discussed below, in which the Federal Circuit completely

redefined the obviousness test for design patents in such a manner that it now mirrors the test for utility patent obviousness.

**D. 35 U.S.C. § 103 AS APPLIED TO DESIGN PATENTS**

The most notable ruling from the Federal Circuit in 2024 likely came on May 21, when the Court, sitting en banc, overruled its long-established *Rosen-Durling* test for determining obviousness in design patents and replaced it with the more flexible four-factor *Graham* test. (In the spirit of full disclosure, Irwin IP LLP was privileged to be lead counsel for LKQ during these proceedings.) In *LKQ v. GM*, the en banc court found the *Rosen-Durling* test to be too rigid and, thus, inconsistent with Supreme Court’s precedent in *KSR* and 35 U.S.C. § 103. The Court held that the factors for determining obviousness in design patents should mirror those used for utility patents: (i) the scope and content of the prior art, (ii) the differences between the prior art and the claimed design, (iii) the level of ordinary skill in the art, and (iv) secondary considerations of non-obviousness.

In its opinion, the Court briefly acknowledged the concerns of some members of the patent bar about overruling the long-standing *Rosen-Durling* test but emphasized that the new *Graham*-centered test has a long line of established precedent and case law that courts can rely on when assessing obviousness in design patents under the court’s new standard. This case represents a major shift in how design patents obviousness tests are to be conducted, and the adoption of the *Graham* test will likely lead to a higher number of design patents being rejected at the USPTO and a higher rate of invalidity decisions for litigated design patents and an increased success rate for defendants. That said, the new test may also lead to longer trials because, moving forward, design patent invalidity defenses will likely become harder to summarily dismiss.



**E. 35 U.S.C. § 112 AND WRITTEN DESCRIPTION**

Turning our attention to § 112 and the written description requirement, on February 9, 2024, in *Rai Strategic Holdings, Inc. v. Philip Morris Products S.A.*, No. 2022-1862 (Fed. Cir. 2024), the Federal Circuit vacated the PTAB’s finding that claimed ranges of length rendered Rai’s patent claims invalid for lack of written description. The Federal Circuit rejected Philip Morris’s rigid argument that the claims lacked written description support because the specification did not identify the specific claimed range. Instead, the court found the claims valid because the claimed range was within a broader range disclosed in the specification and there was no evidence that the claimed ranges resulted in a different invention than what was disclosed. This case is of particular importance to patent practitioners dealing with inventions involving claimed ranges, as it is important to understand when a patent may be invalid for lack of written description.

There were several other notable § 112 decisions in 2024 that elaborated on various aspects of a written description determination. *See e.g., PureCircle USA Inc. v. SweeGen, Inc.*, No. 2022-1946, 2024 WL 20567 (Fed. Cir. Jan. 2, 2024) (original claims doctrine does not provide sufficient § 112 written description support when the original claims fail to provide additional information about common structural features); *Allergan USA, Inc. v. MSN Lab ’ys Priv. Ltd.*, 111 F.4th 1358 (Fed. Cir. 2024) (expert testimony may be relevant and useful in determining satisfaction of written description but the key focus should be on the intrinsic record and the four corners of the specification).

**F. [FALSE] PATENT MARKING**

On October 3, 2024, the Federal Circuit held that a party may be liable for false advertising violations under Section 43(a)(1)(B) of the Lanham Act when it “falsely claims that it possesses a

patent on a product feature” and advertises that product feature in a manner that misleads consumers about “the nature, characteristics, or qualities of its product.” *Crocs, Inc. v. Effervescent, Inc.*, No. 1:06-cv-00605 (Fed. Cir. October 3, 2024). To begin, the district court granted summary judgment in favor of Crocs, concluding that—in light of *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 US 23 (2003) and *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009)—the defendants (collectively “Dawgs”) had failed to state a cause of action under Section 43(a)(1). The district court determined that there was no cause of action because Crocs’ use of terms such as “patented,” “proprietary,” and “exclusive” were directed to Crocs’ “inventorship” of its products rather than nature, quality, or characteristics of its products.

The Federal Circuit reversed the district court’s ruling, reasoning that the case was distinguishable from *Dastar* and *Baden*. The Federal Circuit noted that Crocs conceded it did not possess patent protection for “Croslite,” i.e., the resin material used to make Crocs shoes, and further rejected the district court’s reasoning that Crocs’ false claims were directed to the originality and inventorship of “Croslite.” According to the Federal Circuit, a cause of action under the Lanham Act arose because Crocs falsely claimed that “Croslite” was patented to mislead its consumers into thinking the primary material in Crocs possessed tangible benefits. The Federal Circuit agreed with Dawgs’ allegation that Crocs promotional materials “deceive consumers and potential consumers into believing that all other molded footwear ... is made of inferior material compared to Crocs’ molded footwear.” This case highlights the importance of properly advertising patented features through the use of patent markings on products; due to the various methods of damages available under the Lanham Act, it is imperative that companies review their marketing

and promotional materials to ensure that the company does not falsely advertise patent protection on a product feature.

#### **G. STANDING**

Turning to standing and whether or not a party has the right to bring a lawsuit, on May 21, 2024, the Federal Circuit vacated and remanded the Central District of California’s grant of summary judgment that Core Optical lacked standing to assert a patent. *Core Optical Technologies, LLC v. Nokia Corp., et al.*, Nos. 2023-1001, -1002, -1003 (Fed. Cir. 2024). In its motion for summary judgment, Nokia argued that the inventor’s assignment of the patent to Core Optical was ineffective because the inventor had already assigned his rights to his employer through an employment associated invention agreement. However, the Federal Circuit interpreted the language of the assignment agreement to be “capable of more than one reasonable interpretation.” Thus, the Federal Circuit rejected the district court’s reasoning that there was no genuine issue of material fact. This case reiterates the importance of using unambiguous language when drafting agreements and highlights yet another way vague and ambiguous terms in an agreement can result in avoidable disputes down the road.

#### **H. DAMAGES**

After dusting the cobwebs off of the en banc review process with *LKQ v GM*, the Federal Circuit subsequently ordered a second en banc rehearing on September 25, 2024, this time in *EcoFactor, Inc. v. Google LLC*, Appeal No. 2023-1101 (Fed. Cir. Sept. 25, 2024). One of the primary issues in *EcoFactor* is the practice of using lump sum agreements to calculate a per unit royalty in patent damages cases. In the district court case, EcoFactor’s expert argued that a specific royalty rate was reasonable based on three prior lump sum settlement agreements. The agreements

each contained a clause that implicitly indicated what a reasonable royalty rate would be in this scenario, but no evidence was provided that proved the royalty rate was accurate. The practice of using a patentee’s own prior agreements to determine royalty rates can become quite complicated when the agreements differ in scope or term. The Federal Circuit’s decision to rehear the case en banc is significant and parties should pay particular attention to the results of this case as it may play a significant role in shaping how damages are calculated in patent infringement lawsuits.

The Federal Circuit further addressed damage-related issues, in *Provisur Technologies, Inc. v. Weber, Inc.*, 119 F.4th 948 (Fed. Cir. Oct. 2, 2024), when it partially reversed a \$10.5 million jury verdict related to infringement of patents covering food processing machinery. The Court held that Provisur’s damages expert impermissibly used the entire market value in calculating a reasonable royalty because she failed to present sufficient evidence demonstrating the patented features drove the demand for the entire slicing line, stating that Provisur failed to offer sufficient evidence that other features of the machinery did not cause customers to purchase the accused products. This case highlights the importance of conducting proper and detailed apportionment analyses and offering specific evidence that explicitly demonstrates why the patented features of a product drive customer demand or substantially create the value of the product.

#### **I. EQUITABLE DEFENSES**

On the equitable defenses front, on April 12, 2024, in *Luv N’ Care, Ltd. v. Laurain*, 98 F.4th 1081 (Fed. Cir. 2024), the Federal Circuit affirmed a finding of unclean hands, stating that misconduct in litigation—including withholding relevant patent applications, blocking discovery, and giving false testimony—could bar relief. Notably, even though the misconduct in the case was related to a utility patent claim, the Court held that after five years of litigation, the misconduct

could not be cordoned off from the other claims. The Federal Circuit also remanded the district court’s finding of no inequitable conduct, signaling a potential shift toward a looser standard for both materiality and intent. The Court noted that the correct test for materiality is whether the patentability decision might have changed had the information been disclosed properly, which reflects a broader, more flexible view of material. With respect to intent, the Court criticized the district court for considering the patentee’s misconduct in isolation and instead suggested that deceptive intent could be inferred from repeated attempts to mislead the Patent Office. Thus, this decision signals a shift away from the more stringent need for direct evidence of intent and instead embraces a more contextual approach, where intent can be inferred from actions that show a pattern of misrepresentation or withholding of information. Overall, *Luv N’ Care* is significant because it suggests a more expansive application of both defenses, potentially making it easier for accused infringers to raise claims of both unclean hands and inequitable conduct in patent litigation by softening the standards for proving such claims.

**J. ATTORNEY’S FEES**

Regarding awards of attorney’s fees, on May 20, the Federal Circuit held that 35 U.S.C. § 285 “does not entitle Appellants to recovery of fees incurred in parallel IPR proceedings and does not entitle Appellants to hold” opposing counsel “jointly and severally liable for fees.” *Dragon Intellectual Property LLC v. DISH Network L.L.C., et al.*, Nos. 2022-1621, 2022-1777 (Fed. Cir. 2024). It should be noted that even though the IPR in *Dragon* was instituted after *Dragon* filed suit in the district court, the Federal Circuit reaffirmed its previous ruling in *Amneal Pharmaceuticals LLC v. Almirall, LLC*, holding that IPR proceedings are not “cases” for purposes of § 285, and thus a party may not recover fees incurred during such proceedings. However, the

Federal Circuit noted that parties may recover costs and fees from counsel under 28 U.S.C. § 1927 when counsel “multiplies the proceedings in any case unreasonably.” Thus, when such conduct arises, counsel may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct. Thus, when such conduct arises, counsel may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.

Furthermore, on August 23, 2024, in *Realtime Adaptive Streaming LLC v. Sling TV LLC*, No. 23-1035 (Fed. Cir. 2024), the Federal Circuit vacated the district court’s award of attorney’s fees finding that the district court had abused its discretion because the district court had failed to provide an explanation for its decision. Although the district court identified several “red flags” to support the award, the Federal Circuit ruled that the district court committed reversible error when it failed to clearly provide its reasoning behind the weight it assigned to each of these red flags in its determination. This decision reiterates the importance of presenting concrete evidence when claiming that clear warnings and red flags demonstrate exceptional circumstances when seeking to recover attorneys’ fees and makes clear that a court must actually explain the weight given to each red flag when awarding damages, otherwise, the party against whom fees are levied against may prevail on appeal.

### **III. DISTRICT COURTS**

In 2024, there were several eye-popping damages awards in patent infringement cases, but none were bigger than that of the \$525 million jury verdict awarded in *Kove IO, Inc. v. Amazon Web Services, Inc.*, (N.D. Ill. No. 1-18-cv-08175). Not far behind, however, were the \$445 million awarded by an Eastern District of Texas jury in *Netlist, Inc. v. Micron Technology, Inc.* (E.D. Tex.

No. 2:22-cv-294-JRG) and the \$315 million awarded by a Central District of California jury in *SPEX Technologies v. Western Digital* (C.D. Cal. No. 8:2016-cv-01799). These verdicts, along with several other nine-figure awards, demonstrate that juries continue to grant plaintiffs substantial victories (which some may view as excessive). As expected, all of these awards have been appealed, and it remains to be seen how the appeal process unfolds in cases with large awards and whether the Federal Circuit takes issue with any of these sizeable awards.

As one would expect, interest in district court litigation did not stop with massive damages awards, as courts across the country continued to analyze critical issues. For example, the District of Delaware found that Siri, the digital assistant produced by Apple, is not subject to the patent marking requirement pursuant to 35 U.S.C. § 287(a) because it is an intangible product. *IPA Technologies Inc. v. Microsoft Corporation*, No. CV 18-1-RGA, 2024 WL 1797394 (D. Del. 2024). Halfway across the country, the Western District of Texas addressed the issue of personal jurisdiction, ruling that the mere existence of a parent-subsidiary relationship does not support jurisdiction over a foreign parent, thus dismissing *Swissdigital*'s claims of patent infringement. *Swissdigital USA Co., Ltd. v. Samsonite International S.A.*, No. 6:23-CV-00196-ADA-DTG (W.D. Tex. May 14, 2024). And finally, over on the west coast, the Northern District of California addressed standing in patent cases, reaffirming the doctrine of comity by holding that foreign law applies for purposes of deciding patent ownership. *Valjakka v. Netflix, Inc.*, 710 F. Supp. 3d 782 (N.D. Cal. 2024).

#### **IV. USPTO**

On January 2, 2024, the USPTO officially launched the new design patent bar, enabling individuals to become registered design patent practitioners. Shortly thereafter, the USPTO also

released new guidance relating to the patentability of inventions involving artificial intelligence (“AI”). The guidance aims to strike a balance between protecting human ingenuity and ensuring that patent rights do not stifle future innovation. Effective as of February 13, 2024, the USPTO’s AI guidance emphasizes that AI-assisted inventions are not automatically unpatentable. The guidance provides criteria for determining whether the human contribution to an invention is substantial enough to warrant patent protection, even when AI is involved. For example, the guidance explains that “the inventorship analysis should focus on human contributions, as patents function to incentivize and reward human ingenuity.” It also refines the inventorship framework, offering clearer guidelines on identifying the correct inventor(s) for inventions created with the assistance of AI systems. Relatedly, effective as of July 17, 2024, the USPTO also issued an update regarding AI patent subject matter eligibility. The update clarifies how AI-related inventions should be evaluated under 35 U.S.C. § 101 and includes three new examples to help examiners assess AI inventions, focusing on determining whether a claim recites an abstract idea and how such ideas can be integrated into practical applications. The examples are intended to assist in patent examinations, appeals, and post-grant reviews. These guidelines make clear that the USPTO’s recognizes the importance of artificial intelligence, its growing impact on the legal landscape, and the USPTO’s need to keep pace with the rapid developments in the AI landscape.

More recently—and of particular importance to patent practitioners and innovative companies, alike—the USPTO approved patent fee changes for 2025 that took effect on January 19. These changes will be applied through targeted fee adjustments, across the board fee increases, and front-end fee increases and are designed to increase fee collections by approximately \$440 million per year, an amount the USPTO states is necessary to grow its patent operating reserve and



to allow the USPTO to “enhance patent examination quality, achieve patent pendency goals, and continue investing in modern information technology systems and architecture.” And although these changes will reduce the cost of filings for some parties—such as small or micro entities—the changes still represent an approximate 7.5% increase in all USPTO fees. Notable fee changes include design issue fee increasing from \$740 to \$1,300, requests for continued examination (RCE) fees increasing from \$2,000 to \$2,860, patent term extension applications increasing from \$1,180 to \$2,500, each independent claim in excess of 3 increasing from \$480 to \$600, and excess claim fees for each claim in excess of 20 increasing from \$100 to \$200. Considering these changes, practitioners should analyze their active dockets and deadlines so that future fees can be minimized and factored into patent prosecution strategies.

## **V. DEVELOPING AREAS OF THE PATENT LAW LANDSCAPE**

### **A. PATENT LITIGATION FILING TRENDS**

In 2024, the total number of patent litigation filings reversed a declining trend, rising to approximately 3,667, up from 3,118 in 2023. However, there was also a notable shift in the venues where these cases were filed. For instance, the Eastern District of Texas saw an increase of nearly 450 filings (629 in 2023 to 1073 through early December 2024), while the Western District of Texas experienced a significant decrease for the third consecutive year. This change can likely be attributed to a 2022 court order that randomized the assignment of patent cases to all judges in the Western District, minimizing the practice of “judge shopping.” Before this order, plaintiffs often filed cases in the Western District with the goal of being assigned to Judge Albright, who is known for his fast-paced docket. However, as a result of this shift in policy, the Eastern District of Texas has recaptured the title of being the most active venue for patent filings. The Northern District of

Illinois continues to see its number of filings increase, which is likely due in large part to “Schedule A” cases being filed where the names of the defendants are temporarily filed under seal in an attached under Schedule A, thereby allowing a plaintiff to sue multiple defendants in a (temporarily) confidential manner in order to allow for the freezing of the defendants’ assets when the entities are deemed likely to “take the money and run” instead of making an appearance in the case to address the infringement claims leveled against them. For example, in the first half of 2024, 88% of all design patent cases filed against “Schedule A” defendants were filed in the Northern District of Illinois. On the other hand, other key districts, such as the District of Delaware, continued to see a decline in case numbers. Nevertheless, patent litigation continues to be the most common type of intellectual property case filed.

#### **B. LITIGATION FUNDING**

In 2024, the use of third-party litigation funding (“TPLF”) was thrust into the spotlight as the use of TPLF became more prevalent in patent litigation cases, with funders providing an estimated \$2-5 billion in patent litigation funding. As one would expect, questions have arisen, such as whether parties must disclose from whom they have received funding. Numerous concerns regarding the effect these third-party funders have on active litigation—such as influencing case strategies and settlement negotiations—have also arisen and, at the moment, there are no federal laws regulating the disclosure of third-party funders. However, on October 7, 2024, Congressman Issa (Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet) and Congressman Fitzgerald introduced the Litigation Transparency Act of 2024, which would require the disclosure of parties receiving payments in civil litigation if passed.

In addition to this proposed legislation, various courts have already begun to address the use of litigation funding. For example, courts throughout Delaware have been at the forefront of the disclosure battle since 2022, when Delaware federal court Chief Judge Connolly introduced a standing order requiring that all parties appearing before him disclose any-third party litigation funding they receive, describe the nature of the funding, and whether the funders approval is required for litigation or settlement decisions. Moving forward, companies and their legal representatives will want to monitor this proposed legislation and whether any notable decisions regarding the use of litigation funders are issued by any Courts.

#### **C. ARTIFICIAL INTELLIGENCE**

During 2024, various courts and judges issued or decided against issuing local rules and standing orders regarding the use of AI in court proceedings. For example, in the Northern District of Illinois, Judge Coleman issued a standing order, effective 4/3/2024, stating “Parties may not use Artificial Intelligence to draft their memoranda or as authority to support their motions.” On the other hand, the Court of Appeals for the Fifth Circuit decided against issuing its proposed rule amendment regarding the use of AI in legal proceedings. The amendment would have required attorneys to certify to the extent which they used generative AI in drafting legal documents submitted to the court. The rules regarding use of AI in the legal setting is something all practitioners should keep in mind to ensure that they are in compliance with the specific rules of the jurisdiction in which they are practicing in.

#### **D. PENDING LEGISLATION**

In addition to the Litigation Transparency Act, discussed in Section B, above, there are several other pending legislative acts, such as: (i) the Patent Eligibility Restoration Act (PERA)

which is designed to allow American inventors to patent a wider variety of inventions that foreign nations already allow their own inventors to patent by amending patent eligibility subject matter laws, otherwise known as 35 U.S.C. § 101, to establish that only certain subject matter (e.g., a natural process wholly independent of human activity) is ineligible for patenting; (ii) the Promoting and Respecting Economically Vital American Innovation Leadership Act (PREVAIL Act) which is designed to make reforms to the PTAB to promote fair treatment for inventors, improve efficiency, and ensure that the USPTO has the resources it needs to effectively administer a patent system that incentivizes American innovation; and (iii) the Inventor Diversity for Economic Advancement Act (IDEA) which would require the USPTO to request demographic information from each inventor residing in the United States on each patent application submitted.

Realistically speaking, the IDEA Act will likely be the only piece of legislation to pass, though (or, perhaps, because) it is substantively inconsequential. And although all of the proposed bills would bring meaningful changes to the law, they all face an uphill battle and a very uncertain future when the new Congress is sworn in, early next year, due to the unified control of both the House and Senate by Republicans, which will likely lead to patent law reform becoming a low priority in the upcoming Congress. Thus, the probability of any new patent-related legislation in the near term seems remote.

## **VI. CONCLUSION**

As we look to 2025, several challenges loom on the patent landscape horizon. The rapid advancement of complex technologies poses ongoing challenges for patent examination and enforcement. As we move forward, stakeholders must navigate an ever-evolving landscape,

balancing the need for robust intellectual property protection with the promotion of innovation and access to technology.