

Thursday, November 18, 2021

11:15 — 11:25 Check-in**11:25 — 11:30 Welcome and Introductions**
*(Hutz, Powers, Rea, Weinlein)***11:30 — 1:00 [Panel 1] Unique Problems and Opportunities Posed by Global Patent Litigation – Part I (Unified Patent Court + Global SEP/FRAND combined)**
(Buchinski, Delgado, Grzimek, Huang, Jarosz, Marshall, Oliva, Singh (J), Stark, Whiting)*

The first part of this panel will introduce WG10's forthcoming efforts on the Development of Patent Litigation Best Practices in Europe before the Forthcoming Unified Patent Court. The Unified Patent Court system will be a completely new playing field for international patent litigation. The various courts scattered throughout Europe that are about to be established will decide infringement and validity of Unitary Patents and, during a transitional period, all other European Patents which have not been converted into Unitary Patents. The three main instruments setting up and defining the details of this new system—the Agreement on a Unified Patent Court, the Statute of the Unified Patent Court, and the Rules of Procedure of the Unified Patent Court—will likely have to be applied in the first "real" cases for the very first time starting in 2022 or 2023. Every aspect of patent litigation and civil procedure will be the subject of intense discussions in the first few years before there can be an established case law of any kind. This applies to venue selection, the languages used, the composition of the court, case management, including the choice to bifurcate infringement and validity or not, evidence taking, remedies and many more aspects. All stakeholders involved—patentees, defendants, practitioners and judges—will look for guidance in the relevant provisions, but also in the body of case law formed by national court practice and decisions. There will be a joint struggle to find the best way to litigate Unitary Patents before the new court, keeping in mind the potential competition from national courts for shorter, more effective and cheaper national procedures.

The second and main part of this panel will discuss our WG9 drafting team's Framework for Analysis of Standard-Essential Patent (SEP) and Fair, Reasonable, and Non-Discriminatory (FRAND) Issues—"Global Edition". This "Global Edition" builds and expands upon the "US Edition" published for public comment in November 2019 and covers the same and related issues in licensing and patent litigations outside of the US. The "Global Edition" also discusses additional topics that have not played the same or any role in the US so far, including:

- the legal nature of FRAND declarations

- the calculation of FRAND royalties
- nondiscrimination
- the FRAND defense (applying European antitrust laws)
- international jurisdiction and cross-border issues

Materials

- 1.1 WG10 Guidelines for the Efficient Resolution of Disputes before the Forthcoming Unified Patent Court in Europe – Project Charter (Nov. 2021 ver.)
- 1.2 WG9 Framework for Analysis of Standard-Essential Patent (SEP) and Fair, Reasonable, and Non-Discriminatory (FRAND) Issues – US Edition (Nov. 2019 public comment ver.)
- 1.3 WG9 Framework for Analysis of Standard-Essential Patent (SEP) and Fair, Reasonable, and Non-Discriminatory (FRAND) Issues – Global Edition (Nov. 2021 ver.)

1:00 — 1:15 Break

1:15 — 2:45 [Panel 2] Streamlining Lower-Value Patent Cases

(Albright (J), Burke (J), Ferguson, Powers*, Saunders, Vladescu)

One common critique of the US patent litigation system is that it is too expensive and time consuming for many kinds of disputes, and does not provide an efficient, speedy, and accurate way to resolve lower value disputes or disputes where either the quality of claim or defense is very low. The goal of this drafting effort is to propose streamlined procedures for identifying and resolving such cases more cost effectively.

Materials

- 2.1 WG10 Streamlining Lower-Value Patent Cases (Nov. 2021 ver.)
- 2.2 WG9 & WG10 Executive Summary of Publications (July 2020)
- 2.3 WG9 Patent Damages Contentions (June 2017 ed.)
- 2.4 WG9 Patent Damages Hearings (May 2017 publ. comm. ver.)

2:45 — 3:00 Break

3:00 — 4:15 [Panel 3] The Evolving Relationship Between Federal Courts and Administrative Agencies

(Armond, Banowitz, Cheney (J), Conti (J), Haapala (J), Muñoz, Nathan*, Patnaik)

The WG10 Commentary on the Evolving Relationship Between Federal Courts and Administrative Agencies seeks to explore various issues that arise from related proceedings in Federal District and Appellate Courts, before the U.S. Patent and Trademark Office's Patent Trial and Appeal Board (PTAB), and Section 337 investigations at the International Trade Commission (ITC). This Working Group focuses this commentary on issues including stays of litigation, accelerated and conflicting trial scheduling, estoppel, ANDA provisions, standing, and availability of judicial review.

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For example, regarding stays, district courts and the ITC consider whether or when to grant stays due to parallel post-grant challenges filed at the PTAB, often with drastically different approaches. Accelerated trial scheduling has further complicated this question on both sides—in certain district courts and the ITC, trial dates are approaching the same 18-month timeline as PTAB proceedings, leading to an increased risk of conflicting outcomes between proceedings when they proceed in parallel; in the PTAB, challenges that would otherwise be timely are being denied due to quickly approaching trial dates. Regarding estoppel, courts are still addressing the contours of how estoppel flows from prior challenges at the PTAB to related district court litigation (nearly a decade after the enactment of the 2011 America Invents Act).

The primary focus of the WG10 team on this commentary is the development of Principles and Best Practices that should be considered by both litigants and judges participating in these related proceedings. The objectives of this effort are to help these bodies avoid conflict by identifying and addressing potential points of friction between proceedings, to move the law forward by proposing ways these bodies can modify their rules and procedures to conform or consider one another, and to harmonize the litigation process. For each issue addressed in this commentary, best practices will be proposed for how to navigate the existing (and evolving) rules and law, and additionally, what can be done moving forward to better integrate these proceedings with one another and promote more efficient resolution of patent disputes.

Materials

- 3.1 *WG10 Commentary on The Evolving Relationship Between Federal Courts, Project Charter* (Nov. 2021 ver.)
- 3.2 *WG10 Parallel USPTO Proceedings “Stage One”* (Oct. 2016 ed.)
- 3.3 *WG10 Parallel USPTO Proceedings “Stage Two”* (July 2017 publ. comm. ver.)
- 3.4 *WG10 ITC Section 337 Investigations Chapter* (May 2019 ed.)

4:15 — 5:00 Interview: Hon. Kathleen M. O’Malley—Reflections on a distinguished career and thoughts about what can be done to improve the patent system.

5:00 — 5:05 Closing Statement for Day One

Friday, November 19, 2021

11:15 — 11:25 Check-in**11:25 — 11:30 Welcome and Introductions**
(Hutz, Powers, Rea, Weinlein)**11:30 — 12:45 [Panel 4] Unique Problems and Opportunities Posed by Global Patent Litigation – Part II**
(Antush, Busey, Cooper*, Métier, Müller-Stoy, San Martin*, Sterpi, Trenton, Wuttke)

The U.S., which for a time has been the dominant venue for many of the largest global disputes, now is only one of several significant fora for coordinating global litigation. Increasingly multinational corporations with global patent portfolios are seeking to enforce their patent portfolios on multiple fronts across different patent jurisdictions around the world. On the other hand, companies that expect to be asked to license such global portfolios—either on FRAND terms (because they constitute SEPs) or because they constitute platform technology patents—need to consider strategies to maximize commercialization whilst limiting their exposure by steering dispute resolution to more favorable venues.

In light of this shift in the management of global patent disputes, international arbitration of different patent jurisdictions and the different substantive and/or procedural systems is an inevitable requirement. There is no unitary global system—either for the issuance of patents or for the litigation of patents.

The goals of WG10's Commentaries in Global Patent Litigation are as follows:

- Develop best practices for addressing the procedural realities of global patent enforcement
- Identify, for the bench and bar, the main global strategies that multinational corporations deploy to take advantage of the different patent systems, so courts can better understand where the case they are presiding over fits within the larger global dispute, which may provide useful context for their case management and decision-making.
- Help the bench and bar understand how different jurisdictions and venues address the problems common to all patent jurisdictions so as to facilitate improvements in procedures for the benefit of all stakeholders.

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- Improve the resolution of global patent portfolio enforcement actions so that they are conducted in a more fair and efficient manner for the benefit of all stakeholders.

Materials

- 4.1 WG10 Framework for Analysis for Strategic and Tactical Considerations in Selecting Venues for International Patent Enforcement (Nov. 2021 ver.)
- 4.2 WG10/12 Commentary on Cross-Border Discovery in U.S. Patent and Trade Secret Cases ["Stage One"] (May 2021 public comment ver.)
- 4.3 L. Cannon, *Comparative Approaches to the Attorney-Client Privilege in the U.S., Canada, UK & EU* (2007)

12:45 — 1:00 Break

1:00 — 2:30 **[Panel 5] The Role of Patents in Biopharma v. High-Tech Industries: Can One Patent System Effectively Accommodate Both?**

(Agusta, Blake, Brown, Groombridge*, Matal, Pearson, Whitaker)

The high-tech and biopharma industries are two poles of the patent ecosystem. The arguments for and against the value of patent protection in each industry often diverge significantly. Some biopharma industry participants point to the need for patent protection to counterbalance costs associated with long product development lead time, a high and unpredictable failure rate, low barriers to entry when a product comes to market, and the need to facilitate competitive market entry after an appropriate period of exclusivity. Others cite increased cost and diminished access to lifesaving medicines as countervailing considerations.

In contrast, in the high-tech industry, critics of excessive patent protection note that high-tech industries operate in a world of much faster product development, significant non-patent barriers to entry, multi-feature products potentially covered by thousands of patents, and much greater risk than any given patent will be overvalued due to holdup effects. On the other side of the debate, other market participants identify a need to reward innovative approaches as well as incentives to share innovation with the public rather than maintain advances as trade secrets to justify strong patent protection. These disparate economic realities lead to very different views of what is good, and bad, in patent law. And in the context of standards-essential patents, the arguments on both sides take on additional complexity.

Recently, the two industries' competing conceptions of the patent system have come to a head in the context of ongoing debate about the role of Section 101 in evaluating patent-eligibility. Many in the life sciences industry argue that the notion that pioneering

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advances in diagnostics and therapeutics should be ineligible for patent protection is both arbitrary and profoundly harmful to these industries. In the technology space, an equally vocal contingent points to the need to preserve Section 101 as a bulwark against vague, abstract, ambiguous patents that purport to cover mathematical algorithms and similar fundamental scientific tools used on a daily basis by software engineers and data scientists.

It has been a tenet of the patent system for as long as it has existed that one size does fit all: the same legal rules should apply regardless of technological field. And the only major industry-specific change to U.S. patent law—the Hatch-Waxman Act—has frequently been criticized as the cause of distortions that promote needless litigation and gaming of the system. But with major industries facing fundamentally different challenges and realities in product development and commercialization, is it time to reconsider whether one patent system can fully serve the needs of today's complex global economy? The goal of this Sedona commentary drafting team is to examine the practical reasons pushing the two industries toward different objectives, and to consider to what extent a single legal regime can work for both.

Materials

- 5.1 WG10 Framework for Analysis on The Role of Patents in Biopharma v. High-Tech Industries: Can One Patent System Effectively Accommodate Both? Project Charter (Nov. 2021 ver.)
- 5.2 WG10 Commentary on Patent Litigation Best Practices: Unique Aspects of Biopharma Litigation Chapter (Oct. 2021 publ. comment ver.)

2:30 — 2:45 Break

2:45 — 4:15 [Panel 6] Judicial Roundtable
(Burke (J), Cheney (J), Conti (J), Freeman (J), Haapala (J), Jordan (J), Rea)

4:15 — 4:20 Closing Statement
(Weinlein)