

## Thursday, November 19, 2020

**11:15 — 11:25 Check-in****11:25 — 11:30 Welcome and Introductions**  
*(Hutz, Powers, Rea, Weinlein)***11:30 — 12:45 [Panel 1] The Role of Patents in Biopharma v. High-Tech Industries: Can One Patent System Effectively Accommodate Both?**  
*(Bencivengo (J), Fishman, Geiszler, Groombridge\*, Johnson, Korea, Lieberman, Liu, Menell, Pearson, Udupa)*

The high-tech and biopharma industries are the two poles of the patent ecosystem. The very divergent realities of their respective innovation cycles push each to seek different things from the patent system. Biopharma must contend 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. By contrast, 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 that any given patent will be over-valued due to hold-up effects. These disparate economic realities lead to very different views of what is good, and bad, in patent law.

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. The biopharma industry has long been a powerful voice on potential patent law reform and in recent years the tech industry has achieved similar influence. As a result, often change is possible only when the two can agree. The goal of this panel 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**

- 1.1 WG10 Commentary on Patent Litigation Best Practices: Biopharma Litigation Chapter (Nov. 2020)
- 1.2 WG9 & WG10 Executive Summary of Publications (July 2020)

**12:45 — 1:00 Break**

**1:00 — 2:30 [Panel 2] The Evolving Relationship Between Federal Courts and Administrative Agencies**

(Armond, Banowitz, Barney, Cheney (J), Fink (J), Haapala (J), Kim (J), Lehman, Munoz, Smith, Stroud\*, Thompson)

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 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). Issues this Working Group intends to focus this commentary on include stays of litigation, accelerated and conflicting trial scheduling, estoppel, ANDA provisions, standing, and availability and scope of judicial review.

For example, regarding stays, District courts and the ITC must consider if 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; in the PTAB, challenges that would otherwise be timely are being denied due to quickly approaching trial dates. Regarding estoppel, courts are just now 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 drafting 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. The analysis and recommendations below proceed in two parts: first, how to best navigate the existing rules and law, and second, what can be done moving forward to better integrate these proceedings with one another and promote more efficient resolution of patent disputes.

**Materials**

- 2.1 WG10 Commentary on The Evolving Relationship Between Federal Courts (Nov. 2020 proj. charter)
- 2.2 WG10 Parallel USPTO Proceedings "Stage One" (Oct. 2016 ed.)
- 2.3 WG10 Parallel USPTO Proceedings "Stage Two" (July 2017 publ. comm. ver.)
- 2.4 WG10 ITC Section 337 Investigations Chapter (May 2019 ed.)

**2:30 — 2:45 Break**

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**2:45 — 4:15 [Panel 3] Streamlining Lower-Value Patent Cases***(Albright (J), Beard, Burke (J), Chatterjee, Ferguson, Freeman (J), Powers, Vidal\*)*

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**

- 3.1 WG10 *Efficient and Accurate Resolution of Low-Value Patent Cases* (Nov. 2020 proj. charter)
- 3.2 WG9 *Patent Damages Contentions* (June 2017 ed.)
- 3.3 WG9 *Patent Damages Hearings* (May 2017 publ. comm. ver.)

**4:15 — 4:35 Keynote Address on “The Importance of Balance in the IP System: USPTO Director Andrei Iancu****4:35 — 5:05 Open discussion: What's next for WG9&10? How can I get more involved?**

## Friday, November 20, 2020

**11:15 — 11:25 Check-in****11:25 — 11:30 Welcome and Introductions**  
(Hutz, Powers, Rea, Weinlein)**11:30 — 1:00 [Panel 4] Unique Problems and Opportunities Posed by Global Patent Litigation**  
(Bowbeer (J), Busey, Cooper, Jordan (J), Rea\*, San-Martin, Trenton)

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 side, companies that expect to be asked to license such global portfolios are considering strategies to limit their exposure by steering dispute resolution to more favorable venues.

The U.S. patent system, which for a time has been the dominant venue for many of the largest global disputes, is no longer the primary jurisdiction for patent portfolio enforcement; it is now merely one of several significant aspects of a global litigation strategy.

International arbitrage of different patent jurisdictions and the different substantive and/or procedural systems is inevitable. There is no unitary system – either for the issuance of patents or for the litigation of patents.

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

- Identify for the bench and bar the main global strategies that multinational corporations employ to take advantage of the different patent systems, so courts can better understand where the case they are presiding over fits within the larger puzzle, which may provide useful context for their case management and decision-making.
- Help the bench and bar understand how different jurisdictions address the problems common to all patent jurisdictions, and to learn from this information.
- Improve the resolution of global patent portfolio enforcement actions.

**Materials**

4.1 WG10 Intro to Global Patent Litigation (Nov. 2020 ver.)

4.2 WG10 Framework for Analysis for Strategic and Tactical Considerations in Selecting Venues for International Patent Enforcement (Nov. 2020 ver.)

4.3 WG10 Primer for Cross-Border Discovery Issues for Patent Litigation and Trade Secrets

Litigation in the U.S. and Abroad (Nov. 2020 ver.)

1:00 — 1:15 Break

1:15 — 2:45 **[Panel 5] The Global Implications of Standard-Essential Patent (SEP) and Fair, Reasonable, and Non-Discriminatory (FRAND) Litigation**  
(Geiszler, Giles, Grzimek, Huang, Hutz\*, Long, Lynn (J), Marshall, O'Malley (J), Selwyn, Stark, Vary)  
This panel endeavors to describe the various legal aspects involved in SEP and FRAND litigations in the world. The recently launched SEP/FRAND “Global Edition” drafting team will function as an addition to the Framework for Analysis published by The Sedona Conference in 2018 and 2019 which is limited to the US. The Global Edition’s international focus will mean that the interplay, including any competitive relationship, between parallel litigations in a number of jurisdictions will receive particular attention.

One particularly important aspect is the availability of injunctive relief, and the developing case law defining the requirements parties have to meet to either successfully request or defend an injunction. Another is the availability of FRAND determination and the extent to which this is possible in a national court when the dispute between the parties is about a rate for a global portfolio. Last but not least, the increasing role of competition authorities in and separate from the infringement venues will be analyzed.

**Materials**

- 5.1 WG9 Framework for Analysis of Standard-Essential Patent (SEP) and Fair, Reasonable, and Non-Discriminatory (FRAND) Issues – US Edition (Nov. 2019 public comment ver.)
- 5.2 WG9 Framework for Analysis of Standard-Essential Patent (SEP) and Fair, Reasonable, and Non-Discriminatory (FRAND) Issues – Global Edition (Nov. 2020 proj. charter)

2:45 — 3:00 Break

3:00 — 4:30 **[Panel 6] Judicial Roundtable**  
(Burke (J), Freeman (J), Lynn (J), Jordan (J), Powers\*, Standish (J))

**Materials**

[N/A]

4:30 — 4:35 **Closing Statements**

(Weinlein)