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How Intellectual Property Law Affects You and Your Practice

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The Supreme Court has heard more intellectual property cases in the last few years than ever before. For example, the Supreme Court has heard and written verdicts on more patent cases in the last ten (10) years, from 2006-2015, than the previous thirty (30), from 1975-2005.[1] The Supreme Court has decided thirteen cases (13) alone in the last three (3) years.[2] For reference, the Court has only heard seventy-six (76) patent cases since 1952.[3] That means approximately one (1) out of every six (6) patent cases the Court has **ever** heard occurred in the last three (3) years.[4]

For the 2016-2017 Supreme Court term, the Court has already granted certiorari to four (4) intellectual property cases, before the September 26, 2016 conference.[5] For comparison, the Supreme Court has only granted certiorari to thirty-one (31) cases total for the 2016-2017 term.[6] As noted below, the Court may grant certiorari to even more intellectual property cases before the October 2016 term commences. At least some commentators explain this uptake in intellectual property cases due to the lack of division between justices and ideologies, especially when the Supreme Court is primed for a deadlock on its eight (8) person bench.[7] In fact, the vast majority of intellectual property decisions issued by the High Court are either unanimous or lopsided majority decisions.[8] Regardless of the reasons why the Supreme Court is issuing more intellectual property opinions, the decisions are issuing at an exceedingly high rate and infiltrate almost all areas and subjects of the law.

Patents

Kimble et al. v. Marvel Entertainment, LLC[9]

If the numbers don't convince you of the importance of intellectual property law to the American public at large (or if you hate numbers and anything that looks like math and skipped over the latter half of the previous paragraph), the cases have decided issues that not only affect how attorneys interpret patents, but also who financially profits off Spider-Man. In June of 2015, the Supreme Court decided who would receive a portion of the profits when you bought your son/daughter/niece/nephew/yourself a Spider-Man Web Blaster from your neighborhood toy market.[10] Since 1964, the rule of law has been that no licensing agreement, for use of a patent, could require payment of royalties after the patent expires.[11] The inventor of the patented Spider-Man Web Blaster toy, who licensed the toy to Marvel Enterprises during the term of the patent,

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[1] Lisa Larrimore Ouellette et al., *Supreme Court Patent Cases*, WRITTEN DESCRIPTION, http://writtendescription.blogspot.com/p/patents-scotus.html (last visited Sept. 23, 2016).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Granted & Noted List*, *Cases for Argument in October Term 2016*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/grantednotedlist/16grantednotedlist (last updated Sept. 1, 2016).
[6] *Id.*
[7] Lawrence Hurley, *Divided U.S. Supreme Court Turns to Less Sensitive IP Cases*, REUTERS (Sept. 21, 2016, 7:08 AM), http://www.reuters.com/article/us-usa-court-cases-idUSKCN11R0D0.
[8] Travis Hartman, *Decisions Not Divisions*, REUTERS GRAPHICS, http://fingfx.thomsonreuters.com/gfx/rngs/USA-COURT-CASES/010021RY4CH/index.html (last visited Sept. 22, 2016).
[9] *Kimble et al. v. Marvel Entertainment, LLC*, 135 S.Ct. 2401 (2015).
[10] *Id.*; Ryan Davis, *Justices Keep 50-Year-Old Ban on Expired-Patent Royalties*, LAW360 (June 22, 2015, 10:14 AM), http://www.law360.com/articles/639593.
[11] *Kimble*, 135 S.Ct. at 2405; Davis, *Justices Keep 50-Year-Old Ban on Expired-Patent Royalties*, *supra* note 10.

was seeking royalties on the license after the patent expired.[12] The Supreme Court upheld the fifty-one (51) year old rule and held that the bright-line rule would remain in effect until Congress declared otherwise.[13] Thus, even though post patent expiration royalties would likely foster further competition in the marketplace for many products, from the shoes on your feet to the Spider-Man Web Blaster hidden in your closet, and potentially decrease the price of said products, the Supreme Court held fast and denied the inventor of the Blaster, and any similar inventor, the right to obtain guaranteed royalties from a patent licensing agreement for longer than the patent term (twenty (20) years at best).[14]

SCA Hygiene Products Aktiebolag SCA et al. v. First Quality Baby Products, LLC et al.[15]

In this case, the Federal Circuit upheld the use of laches as a specific argument/defense against unreasonable damages for defendants in a patent suit.[16] Laches bars many legal remedies when a plaintiff unreasonably delays bringing a patent infringement lawsuit in order to drive up the amount of potential damages the patent owner may collect if successful in suit.[17]

The decision to allow laches as a defense was split sharply (6-5) in the en banc Federal Circuit Court, opening the door to the Supreme Court hearing the issue on appeal in order to provide guidance and clarity for the use of laches in patent cases.[18] As expected, the Supreme Court has granted certiorari to hear the case during the 2016-2017 term.[19]

The dispute arises over how this defense coincides with a six (6) year statute of limitations for winning past damages contained within patent law.[20] Innocent infringers of patents would be prejudiced by the removal of laches since the plaintiff could potentially rack up damages and force the defendant to pay exorbitant amounts of damages, hurting not only the individual defendant, but also the market in which the defendant resides. Further, methods for ensuring the defendant pays an appropriate amount of damages already exist if the defendant is found to have willfully and knowingly infringed the patent.[21] As such, the Supreme Court can determine conclusively whether the use of laches is barred by the statutory limitations period for damages as outlined in the Patent Act.

While this may appear to be a technical issue, specific to Patent Law, a change in the standard for laches and the timeframe for recovering damages for patent infringement will certainly impact business valuations for various businesses. Further, any practitioner actively

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[12] *Kimble*, 135 S.Ct. at 2406; Davis, *Justices Keep 50-Year-Old Ban on Expired-Patent Royalties*, *supra* note 10.
[13] *Kimble*, 135 S.Ct. at 2414-15; Davis, *Justices Keep 50-Year-Old Ban on Expired-Patent Royalties*, *supra* note 10.
[14] *Kimble*, 135 S.Ct. at 2414; Davis, *Justices Keep 50-Year-Old Ban on Expired-Patent Royalties*, *supra* note 10.
[15] *SCA Hygiene Products Aktiebolag SCA et al. v. First Quality Baby Products, LLC et al.*, 807 F.3d 1311 (Fed. Cir. 2015), *appeal granted*, No. 15-927 (May 2, 2016).
[16] *Id.*; Ryan Davis, *Patent Troll Weapon Survives, but High Court May be Next*, LAW360 (Sep. 18, 2015, 10:19 PM), http://www.law360.com/articles/704617.
[17] *SCA Hygiene*, 807 F.3d at 1316; Davis, *Patent Troll Weapon Survives, but High Court May be Next*, *supra* note 16.
[18] Davis, *Patent Troll Weapon Survives, but High Court May be Next*, *supra* note 16.
[19] *Granted & Noted List*, *Cases for Argument in October Term 2016*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/grantednotedlist/16grantednotedlist (last updated Sept. 1, 2016).
[20] *SCA Hygiene*, 807 F.3d at 1315-17; Davis, *Patent Troll Weapon Survives, but High Court May be Next*, *supra* note 16.
[21] 35 U.S.C. § 284 (2012); *See Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S.Ct. 1923 (2016).

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