Crowell

Litigation Forecast 2022

Where Technology, Litigation, and IP Intersect

What Corporate Counsel Need to Know for the Coming Year

Crowell

Litigation Forecast 2022

Ten Years On: Fast Changes in the World of Litigation

At no time in the 10 years we've published the *Litigation Forecast* has the litigation landscape been in so much flux. Last year, we took a deep dive into the ways in which the litigation process—and the courts—were adapting to changes wrought by the pandemic. This year, with many of those changes now permanently part of the landscape (like remote depositions), we're focusing on game-changing developments in technology litigation, tied largely to intellectual property and the ways in which companies protect what is often their most important asset.

While tech litigation was once dominated by district court patent litigation, it is now more complex, often involving trade secrets, copyright, trademarks, and brand protection disputes in agencies and the ITC as much as in district courts.

This volume explores many facets of the new technology litigation landscape. It also makes clear that to ensure success, companies need to not only navigate this landscape, but prepare for the journey with better alignment—from the start—between commercial and legal interests, thinking through the landscape before litigation arises.

Mark Klapow
Partner, Crowell & Moring
Editor, *Litigation Forecast 2022*

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CREATOR & EDITOR MARK KLAPOW
SENIOR EDITOR AND PROJECT MANAGER EZRA CRAWFORD
ASSOCIATE EDITOR KAYVAN GHAFFARI
CONTRIBUTING EDITOR NICOLE STECKMAN

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PROJECT MANAGER ANDREA OLSTEIN

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When the Disruptors Get Disrupted

IP litigation in the tech industry is changing, with companies using trade secrets, copyright, and more to protect their brands

Technology remains the engine of the global economy, with companies churning out new ideas and innovations by the minute. With this constant flow of new offerings and business models, litigation has long played a prominent role in the industry. But that role is now evolving quickly.

Historically, the industry's legal battles have focused on patent litigation. But tech companies large and small are turning to a broader range of litigation in the ongoing, often-intense struggle to gain advantage and keep competitors at bay.

"We see some more established companies going after startups and using copyrights, trade secrets, and patents to try to protect their platforms and their control of their ecosystems."

—Warrington Parker

A Shift in Strategies

IP litigation between competitors remains critically important in the technology industry, but it is changing. In the past, "if one company saw another as a viable competitive threat, it would file a patent infringement suit in an attempt to cripple that competitor," says Warrington Parker, a partner at Crowell & Moring and a member of the firm's Litigation, White Collar & Regulatory Enforcement and Investigations groups. "Those types of cases still exist. But now, the focus has shifted to copyrights and trade secrets to accomplish the same goal."

There are several reasons behind this shift. Patent law has in some ways been cut back, and with the Patent Office's *inter partes* reviews, patent cases are not as clean and easy to bring as they once were. Changes in venue rules have also made patent enforcement less predictable, particularly in district courts. And while the ITC has become an important battleground for patent dominance, the difficulty in efficiently securing worldwide patent protection is driving innovation away from the patent-only model. Overall, with the changing landscape of patent law, more and more defendants are prevailing on invalidating patents, and companies are questioning how bulletproof their patents are.

Part of that changing landscape has included the Supreme Court's *Alice* decision, which made it more difficult to use patents to protect software—a key form of IP in the industry—

NFTs

stored on blockchains are gaining traction and raising questions about copyright protection.

while copyright and trade secret laws can apply to software. In addition, the 2016 Defend Trade Secrets Act expanded a company's litigation tool set to include protection for trade secrets under federal law, "and people are utilizing it," Parker says. And while the Supreme Court's 2021 *Google v. Oracle* decision said that Google's use of Oracle's APIs was fair use, it left intact the rule that software is eligible for copyright protection. Altogether, then, "we will probably see more and more companies relying on copyright principles, rather than patents, to protect software," he says.

What's Old is New Again

Increasingly, copyright and trade secrets litigation are being used as a defensive weapon by large tech companies, as the previous generation of disruptors now finds itself being disrupted. "We see some more established companies going after startups and using copyrights, trade secrets, and patents to try to protect their platforms and their control of their ecosystems," says Parker. Thus, even as legal tactics change, the old Silicon Valley adage—"If you're getting sued, you must be doing something right"—still rings true.

Tech companies are also using copyright and trade secrets claims on another competitive front—the war for talent. In California, where non-compete agreements are essentially not allowed, employees are able to move easily from a company to its competitor. "So trade secret claims take on even more importance in an environment where employees move regularly," says Parker.

As large tech companies pursue claims against small innovators, Parker says, smaller companies are likely to increase their efforts to push back in other areas in an attempt to gain access to key platforms and, by extension, broader markets and ecosystems. "I would watch for smaller entities challenging some of the big players in the market, either directly or at the margins, with antitrust lawsuits and unfair competition claims in order to create space for themselves in the marketplace," he says. In addition, increasing government actions and regulation focusing on the tech giants may also embolden more startups to go to court. "I think we'll see them taking more risks and becoming more aggressive," he says.

Regulatory Overlay

All this competitor-versus-competitor litigation is taking place against the background of Washington's growing scrutiny of Big Tech companies, which has been making headlines as legislators and regulators explore a variety of issues. These include concerns about ensuring consumer data privacy; the Communications and Decency Act's Section 230 and what responsibility social media platforms should bear for the content they carry; and whether and how to regulate the platform algorithms that have a tremendous impact on how people consume information—and spread information, both good and bad. The result may be new laws and regulations—and litigation.

Both Congress and the Biden administration have shown an increased interest in competition in

technology industries. For example, in August 2021, the FTC filed a revised antitrust action against Facebook, a move that followed a July White House executive order that called for a whole-of-government approach to enforcing antitrust laws "to meet the challenges posed by new industries and technologies, including the rise of the dominant internet platforms," among other things. "With antitrust lawsuits against Facebook at the federal, state, and private levels, does that mean that other big technology players are also in harm's way?" asks Parker. Looking beyond antitrust actions, he adds, "Facebook seems likely to be the thin edge of the wedge on a lot of government regulations for the industry."

This increased activity reflects a political change in Washington, but it also stems from the need to work through a fundamental challenge. "How should the government regulate large platforms that have such an extreme influence on our political, economic, and everyday lives?" asks Parker. It appears that the government is struggling and will continue to struggle with that question. In the meantime, he says, "it seems that large technology companies should have a seat at the table to discuss these issues with regulators."

New Avenues for Innovation—and Private Litigation

While Washington works its way forward on the regulatory front, competitor-to-competitor litigation is likely to keep increasing. For tech companies, the stakes are high in the struggle to control platforms and ecosystems, and many of them have the cash on hand to take that struggle to court. At the same time, emerging technologies will continue to open new avenues of innovation and litigation.

For example, as non-fungible tokens (NFTs) that are stored on blockchains gain traction among artists and content creators, questions will arise about how copyright protections apply. "People are minting NFTs every day without considering whether or not the underlying art that's being used is copyrighted to someone else," says Parker. Already, NFT marketplaces are receiving cease-and-desist letters from major studios and other content owners. "And once something is on blockchain, it is permanently on blockchain—it can't be changed," he says. "So how will courts provide remedies to prevent someone from continuing any infringing conduct?"

Artificial intelligence, too, will pose IP problems. For decades, courts have said that copyright protections can only be extended to human-made expressions. But as artificial intelligence gets smarter and develops more and more expressive content on its own, at what point does that output no longer relate to the original human creation? "This is a new technology frontier," says Parker, "and I believe we are going to see a lot of litigation and policy efforts in this space."

As the tech industry continues to open those kinds of frontiers, legal departments will have to keep adjusting. It will become increasingly important to align and realign their litigation strategies with their technologies and business models to ensure they can survive in a vibrant, competitive, and changing IP marketplace.

It will become increasingly important to

ALIGN

and realign litigation strategies with technologies and business models.

The Changing Rules of the Road

The PTAB now has a new review process and broader discretionary denial power—and a solid constitutional foundation for the future

"*Fintiv* says that the PTAB can deny your petition under the discretionary denial statute if the IPR isn't actually going to make a difference in any parallel litigation."

—Vince Galluzzo

Two decisions have reshaped basic processes at the USPTO's Patent and Trial Appeal Board (PTAB), but exactly what that will mean is still being worked out.

In one of these cases, *Arthrex Inc. v. Smith & Nephew Inc.,* Arthrex defended its challenged patent by claiming that the structure of the PTAB was unconstitutional. This argument, made at the PTAB and then later before a Federal Circuit panel, claimed that the power of the administrative patent judges (APJs) who oversee *inter partes* review (IPR) and post-grant review proceedings violated the Appointments Clause of the U.S. Constitution. The unreviewable authority given to those judges, Arthrex said, should be given only to direct appointees of the president.

In June 2021, the U.S. Supreme Court agreed with Arthrex, holding that the PTAB structure was indeed unconstitutional. To remedy the violation, the Court held that the USPTO director, a presidential appointee, must have the ability to review final PTAB decisions and issue decisions on behalf of the PTAB. "The APJ's decisions don't have to be reviewed by the director in every instance, but they could be. It's up to the discretion of the director," says Vince Galluzzo, a partner with Crowell & Moring's Intellectual Property and Litigation groups. Thus, the USPTO changed its processes, and now parties can petition the director directly to review an unfavorable PTAB decision.

In the four months after *Arthrex* and the establishment of the new director-review procedure, parties made 118 requests for a director review, and the PTAB granted only one, brought by Samsung. In that case, the director found that the PTAB had improperly failed to address the priority date of two dependent claims, vacated the PTAB's decision, and remanded for further findings.

"It seems likely that director reviews will not be granted very often," says Galluzzo. "The director may be more likely to step in when there is a larger issue involved—if, for example, invalidating a patent for a critical technology would create widespread problems for the U.S. economy." Nevertheless, this process is still quite new, he says, and "its lasting effects are still to be seen."

However, one effect already seems clear: with the *Arthrex* decision, the IPR process has now survived the second significant test of its constitutionality since it was established in 2013. The first came in 2018 in *Oil States v. Greene's Energy*, where the Supreme Court upheld the constitutionality of the IPR system under Article III of the Constitution. "*Arthrex* was a closely watched case," says Galluzzo. "The arguments by Arthrex were compelling, and some questioned whether the Supreme Court would topple the entire IPR process. But they didn't—and the big takeaway here is that the IPR process appears to be here to stay."

Discretionary Denials: Racing with the Courts

In March 2020, the PTAB announced a precedential decision in *Apple v. Fintiv*, which laid out several factors that the PTAB can use to deny institution of an IPR proceeding. Since then, the PTAB has been increasingly exercising its discretionary denial power.

"These denials are not based on the merits of the petition for review," says Galluzzo. "*Fintiv* says that the PTAB can deny your petition under the discretionary denial statute if the IPR isn't actually going to make a difference in any parallel litigation." That question is not uncommon, because companies often file an IPR petition after they have been sued for infringement in district court, resulting in overlapping PTAB and district court proceedings. Often, the district court litigation is already at an advanced stage by the time an IPR petition is filed. And in many fast-moving venues, such as the Eastern and Western Districts of Texas or the Eastern District of Virginia, litigation may move as fast as—or faster than—the 18 months that the end-to-end IPR process takes.

Under *Fintiv*, the PTAB may determine that an IPR is likely to be rendered moot by a district court decision on a patent's validity that is delivered before the PTAB can finish its process. "If the IPR would have no real effect because of the district court's timing, the PTAB can say they are not going to waste time on a parallel case that may not make a difference," says Galluzzo. The PTAB has been doing just that: since *Fintiv*, the board has denied 30 percent of IPR petitions where a party raises the issue.

Still, recent statistics show that the trend may be slowing. That may reflect petitioners' use of new techniques that lessen the chance of having a petition discretionarily denied. Over the past year, says Galluzzo, petitioners have found success with filing their IPR much earlier than the one-year deadline; earlier motions to stay the district court action; stipulations that they will present different invalidity grounds at the district court than at the PTAB; or emphasizing the early stage of their court case, such as the limited amount of discovery taken or the lack of a firm trial date. "People have been getting smarter about dealing with this issue, and that could be one reason for the slowdown in *Fintiv* denials," says Galluzzo.

That is not to say that these discretionary denials are going away. "Looking forward, I think that if you have a case in the 'normal speed' courts, the chances of avoiding discretionary denial are improving," says Galluzzo. "But for those who are in faster dockets, it might be best to concentrate your efforts and resources on the district court, because an IPR may not be a practical option."

118

requests were made for a director review in the four months after *Arthrex*. The PTAB granted one.

PATENT CASES

An Open Door for MOT Patent Litigation

Expanded grounds for infringement could give branded drug companies an edge

A recent Federal Circuit ruling has opened what had been considered a closed door for litigation over pharmaceutical method-of-treatment (MOT) patents brought under the Hatch-Waxman Act. While the ruling's implications differ for branded pharmaceutical makers and generic producers, one thing seems likely: MOT litigation is poised to take off.

How did we reach this point? As is typical with litigation, it goes back a few years and requires some explaining.

"Branded pharma companies will very likely bring more infringement cases on method-of-treatment patents. We could see the issue going to the Supreme Court at some point."

—Laura Lydigsen

Old Precedent: Generics Prevail in Rosuvastatin Litigation

In the late 2000s, branded pharmaceutical maker AstraZeneca sued several generic producers for infringement of AstraZeneca's patents on rosuvastatin, a blockbuster drug for reducing cholesterol. AstraZeneca filed two sets of suits, one alleging that the generics infringed a patent directed to the rosuvastatin compound that would expire in 2016, and a second wave alleging infringement of MOT patents directed to using rosuvastatin to treat specific disorders, which would expire as late as 2021.

The District of Delaware dismissed the second-wave suits because the generics had submitted "skinny" product labels that properly omitted the patented methods of use. The Federal Circuit affirmed, essentially holding that generic producers couldn't be liable for infringement of MOT patents as long as generic product labels didn't reference the treatment specified in the relevant MOT patent.

As Laura Lydigsen, a Crowell & Moring partner and co-chair of the firm's Patent & ITC Litigation Group, points out, this was the first time in decades of Hatch-Waxman litigation that the Federal Circuit so unambiguously established the grounds for infringement in a way that favored generics. The number and frequency of MOT claims declined accordingly.

New Precedent: Brands Victorious in Key Case

It didn't take long for the legal tide to turn, however. In 2021's *GlaxoSmithKline v. Teva*, the Federal Circuit expanded the grounds for infringement of MOT patents to allow branded companies to rely on proper skinny labels as well as evidence beyond the labels—and delivered a huge victory to the brands.

GlaxoSmithKline claimed that Teva's carvedilol generic had infringed the MOT patent for GSK's Coreg drug to treat congestive heart failure (CHF) even though Teva's skinny label didn't seek approval to treat CHF. A split Federal Circuit panel agreed, holding that the District of Delaware had failed to properly consider expert testimony regarding the skinny label, press releases, and other promotional materials that the panel found showed that Teva had marketed carvedilol as a CHF treatment.

Against this evidentiary backdrop, the court noted that doctors could have reasonably interpreted information on the skinny label to suggest that carvedilol could be used to treat CHF—and restored GSK's original award of $235 million in damages.

Teva has asked the Federal Circuit to rehear the appeal *en banc*, prompting amicus briefs from the Association for Accessible Medicines, other generic producers, a group of law professors, and former Rep. Henry Waxman, co-author of Hatch-Waxman. At this writing, the court hasn't announced what it will do.

What Now?

The litigation landscape for MOT patents has changed because of the *GlaxoSmithKline* decision. Lydigsen says, "This decision has taken something that Hatch-Waxman and the *AstraZeneca* case had made fairly certain and made it uncertain. Branded pharma companies will very likely bring more MOT infringement cases as they reassess the vulnerability of generic competitors."

In addition to more MOT cases, Lydigsen sees these as *GlaxoSmithKline*'s potential consequences:

- Generic companies could be more hesitant to come out with new products covered by MOT patents due to higher perceived infringement exposure.
- Branded companies could devote more resources to expanding the number of treatments for an existing drug—and thus file more MOT patents—and fewer resources to developing new products.
- The scope and cost of MOT litigation could rise significantly as branded companies increase the number of treatments and patents for existing drugs.
- Consumers could have to wait longer for generics to enter the market, leaving them with few or no alternatives to high-priced branded drugs.

The ultimate outcome is anyone's guess. But Lydigsen is already thinking ahead: "Given the questions the decision raises about Hatch-Waxman's clarity—not to mention the potentially billions of dollars at stake—we could see the issue going to the Supreme Court."

Expect Claims to Keep Rising

Several strong trends are driving companies to protect trade secrets more aggressively

Federal trade secrets litigation has heated up in the past few years. Since passage of the Defend Trade Secrets Act (DTSA) in 2016, yearly claims brought under the act have more than doubled from 2016's 476 to 1,008 in 2020—an annualized growth rate of 21 percent. DTSA cases accounted for 73 percent of all trade secrets cases filed in 2020.

Astor Heaven, a Crowell & Moring Litigation Group partner focusing on trade secrets cases, expects this trend to continue. "A powerful mix of ingredients is pushing businesses to defend their trade secrets more forcefully by filing DTSA cases," he says. "More employees are changing companies due to the pandemic, more companies are using trade secret classification to protect their intellectual property, and courts have emphasized the importance of the statute of limitations."

A Strong Case for More Cases

A closer look at Heaven's key drivers underscores his belief that DTSA filings will keep rising.

Employee mobility. The pandemic has prompted employees to switch jobs and companies at historically high rates. Fueled by burnout and other factors, workers feel less employer loyalty and have a greater willingness to publicize business practices they don't agree with. Add to this the ease of access to confidential information at many companies and a legislative backlash against noncompete agreements and you have a recipe for theft of trade secrets. Look no further than the recent revelations about Facebook to see what can happen.

Trade secret classification. The competitive stakes are rising in many industries, prompting companies to rethink what their trade secrets actually are. They realize that trade secret classification can be an effective way to protect and defend their intellectual property, as well as their business's viability—hence their growing efforts to protect things like customer lists, proprietary manufacturing methods, and algorithms that they believe have economic value if kept secret.

Another tack is to protect intellectual property by using trade secrets instead of, for instance, patents. Note in this context that while U.S. patents typically are enforceable for 20 years after original filing, the enforceability of trade secrets is perpetual.

Statute of limitations. As parties opt to protect their most important technology through trade secrets, the statute of limitations is becoming increasingly important and should serve as a marker for potential litigants. This period under DTSA is three years, as it is in most states.

Courts have ruled that the statute of limitations in various jurisdictions begins to run when the filing party knows (or should have known) about the basis of its claims. This means that if a company believes that its trade secrets have been misappropriated, it must act to protect those secrets or else potentially forfeit trade secret protection. Such statute-of-limitations pressure—exemplified by *Zirvi et al. v. Flatley et al.*, a 2019 Federal Circuit ruling—could incentivize parties to initiate litigation.

Heaven is confident that the only direction for DTSA filings is up: "I don't see that trend changing or reversing course. The reasons for bringing more claims are just too strong," he says.

"A powerful mix of ingredients is pushing businesses to defend their trade secrets more forcefully by filing DTSA cases."

—Astor Heaven

Fair Use: When Clarification Isn't Necessarily Clear

Google v. Oracle will undoubtedly affect copyright litigation. But how?

"Copyright holders will need to think about enforcement more as a PR campaign to set user expectations than as a purely legal matter."

—Gabriel Ramsey

In April 2021, the Supreme Court finally resolved a decade-long copyright case in which both parties had won and lost multiple decisions, appeals, and remands. While the case, *Google LLC v. Oracle America Inc.*, appeared to clarify some legal issues, it also left many observers scratching their heads over the degree of protection that copyrights provide.

"The Supreme Court ruled that Google's copying of Oracle's software was an acceptable form of fair use but somehow ignored undisputed facts to the contrary," says Crowell & Moring's Gabriel Ramsey, a Litigation Group partner who focuses on copyright and software issues. "As a result, businesses of all kinds must reassess whether their copyrights truly grant them control over the use of their intellectual property. They might also calculate that the potential rewards of infringing someone else's copyright could justify the risks."

Twists and Turns on the Way to Resolution

Oracle first sued Google in the Northern District of California in 2010, claiming that Google had developed its Android operating system in a way that infringed Oracle's copyright and patents for its Java programming platform. In 2012, the trial judge ruled that Java's application programming interfaces (APIs)—coding shortcuts that spare developers the need to write their own code to accomplish the same thing—weren't copyrightable.

Because Oracle's case also involved patent claims, the Federal Circuit automatically took on the case. The Federal Circuit held in 2014 that Oracle's APIs were copyrightable (meaning that Google had infringed) and remanded the case to the Northern District of California to determine whether Google's incorporation of the APIs into Android constituted fair use. In a 2016 jury verdict, the district court ruled in Google's favor.

The Federal Circuit heard Oracle's appeal and, in the process, analyzed the aspects of a fair use claim that should be decided by judges and juries. The court held in 2018 that Google's actions didn't constitute fair use and remanded the case to the district court to decide the amount of damages that Google should pay to Oracle. It also reaffirmed that in cases involving fair use, juries decide on factual issues and judges decide on matters of law.

Google appealed to the Supreme Court, asking it to rule on whether APIs were copyrightable and whether use of Java's APIs in Android fell within fair use. In April 2021, the Court decided that Android had acted within the bounds of fair use—which rendered moot the question about copyrighting APIs.

The Court additionally held that Google didn't have the right to a jury trial to decide matters of law, as Google had asserted, and reaffirmed both that juries must decide on underlying facts in dispute and that judges decide on matters of law in cases without disputed underlying facts.

What Should We Learn from *Google v. Oracle*?

Ramsey sees three key takeaways from the Supreme Court's decision.

The first is the importance of jury trials in fair use cases. "There's a huge role for juries to play: they are the ultimate arbiter of a case's disputed facts," he notes. "Judges might also choose to have juries rule on the law on an advisory basis using the facts they've determined, keeping in mind that ultimately, the law is what judges say it is."

Next is that copyright holders will seek to more strictly enforce their copyrights by other means. While Ramsey doubts that the articulation and registration of software copyrights will change, for example, he suggests that holders write stricter licensing agreements and put friction and stronger communication in place to remind developers about the copyright's ownership and conditions of use. "Holders must utilize loud, noisy, persistent messaging for developers to keep the limitations on use top of mind," he says. "They need to think about enforcement more as a PR campaign to set user expectations than as a purely legal matter."

Finally, Ramsey believes that by potentially broadening fair use protections in this particular context, the Supreme Court could have opened the door for similar interpretations not just for software, but also for books, films, music, photographs, and more. On the other hand, he thinks that lower courts could reasonably view the *Google v. Oracle* decision as based on a very specific set of facts and thus not widely applicable.

BIOPHARMA

The Calm Between the CRISPR Storms

The next CRISPR dustup is likely to be even bigger, with many more players

For nearly 10 years, the story of CRISPR litigation has unfolded as an epic battle between two sides. Now, the conflict is poised to erupt again, but this time as a full-fledged fracas with a multitude of players, and it could take another decade to sort out, says Anne Li, a partner in Crowell & Moring's Life Sciences Litigation, Intellectual Property, and Trade Secrets groups.

Scientists have known about CRISPR—clustered regularly interspaced short palindromic repeats—in DNA for decades. It wasn't until 2011, however, that researchers affiliated with the University of California were able to harness that knowledge to successfully edit DNA using CRISPR along with its associated enzyme known as Cas9. In 2012, UC announced it had successfully used the tool to cut DNA, using bacterial cells known as prokaryotic cells.

Months later, researchers from the MIT-Harvard Broad Institute announced they had taken this research a step further by finding a way to use CRISPR-Cas9 to cut the DNA of eukaryotic cells, which include human, animal, and plant cells.

In the ensuing patent litigation, UC argued Broad's invention was merely an obvious—and therefore non-patentable—extension of its researchers' work. Eventually, the Patent Trial and Appeal Board ruled that the two inventions were separately patentable and effectively divided the field.

The Dust Settles … For Now

Today, the dust from the bitter, years-long battle has largely settled,

"The lawsuits haven't started yet because the money isn't there yet. But it will be." —Anne Li and there are essentially two major CRISPR licenses in the United States. Licensees generally select one or the other, based on what kind of cells they need to manipulate.

But, Li says, that won't be the case for long, as inventors from various institutions and companies rapidly build upon the work done by both UC and Broad. Depending on the type of work they are doing, researchers tend to prefer one tool over another. Sometimes researchers within the same company differ on which CRISPR tool they should use, and licensing the rights to multiple tools can be prohibitively expensive, Li says.

A recent search of USPTO patents showed that more than 600 patents with CRISPR in the claim have been issued, and more than 2,500 patent applications that reference CRISPR have been filed—just in the United States. Aside from the many variations that exist on the CRISPR-Cas9 enzyme, scientists have discovered other enzymes, including Cas12, Cas14, CasX, and CasY, and they have begun patenting methods for using these enzymes in gene editing as well.

2,500+

patent applications that reference CRISPR have been filed—just in the United States.

Challenges in the Global Patent Law Landscape—and Market

The patent battle over CRISPR extends around the globe. In Europe, for example, both UC and Broad continue to face significant challenges to securing CRISPR-Cas9 patent protection. In China, where extensive CRISPR research is also taking place, the vast majority of CRISPR patents has been awarded to Chinese inventors.

Given the complexities of the technology as well as the global patent law landscape, understanding who owns which invention, and where, will become increasingly difficult, Li predicts.

"The lawsuits haven't started yet because the money isn't there yet," she says. "But it will be."

The value of the global gene-editing market could easily double in the next few years, topping $10 billion by 2025, according to various estimates. CRISPR technology is already widely used in the field of agriculture as well as disease diagnostics.

The FDA has already approved two CRISPR-based gene therapies—Roche's Luxturna, to treat a rare, inherited form of blindness, and Novartis's Zolgensma, for babies born with spinal muscular atrophy. Dozens of clinical trials are underway for CRISPR-based therapies aimed at treating a wide range of disorders including multiple types of cancer, Parkinson's disease, heart disease, and hemophilia. Some have even touted CRISPR's potential in the field of environmental engineering in the fight against climate change.

Will CRISPR Fulfill Its Promise?

The best-case scenario for an easily navigable CRISPR patent landscape might be the creation of a centralized CRISPR clearinghouse, a kind of one-stop shop for those that wish to license the technology. The worst case, however, is that the CRISPR patent fight becomes so confusing and contentious—with patent holders launching blockbuster infringement suits after products come to market—that CRISPR never fulfills its promise. For the sake of certainty, researchers might end up reverting to older, off-patent gene-editing tools or developing a new one.

Li sees CRISPR patent litigation initially slowing biopharmaceutical progress. But over time, the development of new CRISPR tools will also slow. The value and shortcomings of the various CRISPR inventions will become clearer, and researchers will settle on a finite number of methods that are commonly used. A standardized CRISPR toolbox will emerge, which will have the added benefit of being more widely understood by government regulators, and that, Li says, will ease FDA approvals.

"But that's another 10 years away," she notes. "Right now, we're in the pre-industrial revolution phase for gene therapy. It's like the Wild West in terms of research and development."

Conflicting Decisions Raise Uncertainty

The line between what does and doesn't constitute trademark infringement in the print-on-demand marketplace is being challenged

A pair of conflicting 2021 decisions in trademark infringement cases against print-on-demand marketplace Redbubble will likely result in more litigation involving print-on-demand websites in the years ahead, says Andrew Avsec, a partner and co-lead of Crowell & Moring's Technology Litigation, Trademark & Copyright practice.

The Ohio State University sued Redbubble in 2017, claiming that it sold goods using OSU's trademarked images without approval. Redbubble argued that it had not infringed on OSU's trademark because it was merely a "transactional intermediary" between the artists who display their designs on Redbubble and consumers who order off the site products—such as T-shirts and posters—with those designs printed on them.

An Ohio district court granted summary judgment in favor of Australia-based Redbubble, but in February 2021, that decision was overturned by the U.S. Court of Appeals for the Sixth Circuit, which reasoned that Redbubble plays more than just a transactional role in sales from its site. Redbubble coordinates with third parties for the manufacture and shipping of items ordered on its site, and the shipped packages bear the Redbubble logo.

However, a California jury decision breathed new life into Redbubble's argument in November 2021, when it rejected Atari's claim that Redbubble violated its trademark rights by selling T-shirts with Atari's logo as well as art from Atari video games such as Pong and Centipede printed on them.

In media reports, Redbubble's lawyer heralded the jury's decision as a "complete vindication" of his client.

Courts have typically held that online marketplaces such as Etsy are not liable for trademark-infringing goods sold on their platform by third-party vendors because they don't play a role in manufacturing or shipping the items sold by those vendors—unlike print-on-demand sites such as Redbubble, Zazzle, Society6, and CafePress.

Avsec says that, while third-party sellers often use print-on-demand sites to sell merchandise featuring well-known trademarks, those sites have typically cooperated with brand owners by removing from their site items for which they receive infringement notices. But in these cases, Redbubble has taken a more aggressive stance, he says: "Clearly, they decided to really challenge where the line is drawn and take the position that they were not involved in these acts of infringement."

Through litigation over the next couple of years, it should become clearer how much a print-on-demand site must participate in the marketing, manufacture, and shipping of an item to be considered an infringer.

While Atari has not said publicly whether it intends to challenge the California decision, Avsec says the Sixth Circuit decision could help them make their argument on appeal.

If courts move in the direction of Redbubble's interpretation of trademark law, it could make it much more difficult for brand owners to protect their trademark rights. "It would become a true game of Whac-A-Mole for brand owners to have to go after one creator at a time," says Avsec. "They would have to triage to come up with a strategy for prioritizing the worst instances of infringement."

"Clearly, Redbubble decided to challenge where the line is drawn and take the position that they were not involved in these acts of infringement."

—Andrew Avsec

A Sledgehammer for Fighting Knockoffs

As e-commerce sales grew during the pandemic, so did the importing of knockoff products

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With the ability to block unfair imports, the U.S. International Trade Commission (ITC) offers a powerful tool for protecting the intellectual property of American companies—and more companies are making use of that tool, particularly against a tidal wave of knockoff products.

Under Section 337 of the U.S. Tariff Act of 1930, the ITC can prevent IP-infringing goods from coming into the country. In FY 2021, it took on 82 such cases, compared to 53 the year before. Some of this rise is associated with the increasingly interconnected nature of global markets and simmering international trade tensions. However, a more immediate driver is the intersection of e-commerce and COVID-19. E-commerce sales have been growing for some time, but when the pandemic hit the U.S., e-commerce sales shot up 32 percent, growing from $596 billion in 2019 to $792 billion in 2020. This has created a boom in the importing of knockoff products, as online channels offer bad actors a direct and often unscrutinized pipeline to end consumers.

For companies whose products are copied, knockoffs can mean significant losses in sales—but the ITC offers "a veritable sledgehammer to fight back," says Josh Pond, a partner and co-leader of the ITC Section 337 practice at Crowell & Moring. "You can get injunctive relief, which has become harder to get for design and utility patents in courts," he explains. This comes in the form of ITC exclusion orders against infringing imports, enforced by U.S. Customs at the border. The ITC also has a uniquely broad reach. "In most venues, you have one case against each target infringer, while at the ITC, you can engage multiple targets in one case," he explains. Indeed, in FY 2020, 58 percent of ITC investigations had five or more respondents, with some having as many as 50. Overall, says Pond, "the long arm of the ITC can be attractive for companies fighting knockoff products."

The pandemic has increased that attractiveness. ITC cases typically take a relatively short 18 months from complaint to judgment, while many district courts are still struggling through a COVID-related backlog of criminal cases—which means civil IP cases are often delayed or put on hold. In addition, Pond says, "the ITC adjusted quickly to the pandemic and is now really comfortable working online, with full virtual trials and online depositions—which saves a lot of travel and makes it easier to take depositions overseas."

The Growing Impact of 5G

E-commerce is projected to see rapid growth in the coming years, and knockoff producers are likely to keep exploiting that trend. Next up: disputes related to 5G technology. "That technology is much bigger than just mobile phones," says Pond. "It will be key to the swelling internet of things—everything from smart electric grids to connected vehicles and a wide range of manufacturing industries. By 2035, it is expected to drive $13.1 trillion in global economic activity." With so much at stake, he adds, "there is no reason to doubt that 5G-related cases will find their way to the ITC—and unfair import investigations will continue to increase."

The FTC Flexes Its Muscles

The commission is finding creative ways to get civil penalties from online marketers after an unfavorable Supreme Court decision

Rather than being chastened by a blockbuster 2021 Supreme Court decision that severely curtailed its power to impose monetary penalties, the Federal Trade Commission has made it clear that it will aggressively pursue new enforcement strategies, especially in policing how businesses market themselves on the internet, says Crowell & Moring Advertising & Media partner Lauren Aronson.

In a unanimous ruling last spring, the Court found that the FTC did not have authority to ask federal courts to order restitution, disgorgement, or other monetary relief, overturning a $1.27 billion ruling against online payday lender AMG Capital Management. It also stripped the commission of the enforcement mechanism it had been using to collect billions more from dozens of companies, including purveyors of weight loss programs, dietary supplements, and clothing.

While a bill to amend the FTC Act to allow the commission to seek monetary relief in federal court was quickly introduced in the House, it stalled in the Senate. In the months following AMG, federal courts cited the decision in dismissing several claims for monetary relief, in some cases without FTC opposition.

While the FTC has teamed up with state attorneys general to investigate and punish unfair and deceptive practices, it was eager to reclaim its ability to easily collect civil penalties. It recently sent letters, called Notices of Penalty Offenses, to more than a thousand businesses in the for-profit education sector, multilevel marketing, and so-called gig economy as well as to online advertisers. The letters purport to provide "notice" to companies of activities that violate the FTC Act by citing prior administrative decisions. Recipients are warned that they could face civil penalties of more than $43,000 per violation. To enhance the impact, these notices were sent via process server.

Though the FTC emphasized that recipients had not been found to be in violation, it was unclear how they were selected. Aronson says it could have been based on the size of a company's social media following or the amount it spends on online marketing. "It definitely was not random," she says. "And I certainly don't think those are going to be the last letters they send out."

Aronson says this was the most high-profile among a series of actions the FTC has taken that indicate it is looking for alternative routes to regain its leverage, rather than wait for Congress or rely on state attorneys general. For example, the FTC announced it was streamlining and "reinvigorating" its process for issuing formal rules, which could provide another way to impose civil penalties. Aronson says 2022 could be the year the commission updates guidelines on endorsements as well as in areas such as environmental marketing claims and online disclosures.

The notices seem to be the leading strategy. However, while the FTC has yet to bring a case citing a notice, it is not clear how the notices will hold up in court. A targeted company could decide to challenge that authority in court. The notices rely on old administrative decisions that may not fit with current practices. "Especially if they are relying on an arguably tenuous legal theory," says Aronson, "we could see somebody willing to take them on."

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—Lauren Aronson

For more information, contact:
Mark Klapow
mklapow@crowell.com
Phone: +1.202.624.2975
1001 Pennsylvania Avenue NW
Washington, DC 20004-2595
To access an electronic version of this publication, go to crowell.com/litigationforecast

Talking—and Walking—Tech Litigation

Over the past several years, technology litigation has exploded, and companies have helped propel this growth with an expansion in the ways in which they protect their technology-based IP to include not just patents—as in the past—but also trade secrets, trademarks, and copyrights. Crowell & Moring understands that, in this climate, the best way to serve our clients is with a full and growing complement of top technology litigators, a large percentage of them armed with deep technical knowledge as well as advanced degrees.

In the past year alone, we've brought in nearly 100 such attorneys—in Chicago, Denver, New York, San Francisco, and elsewhere. More than half of those talents arrived when we combined forces with Brinks Gilson, a renowned law firm with deep roots in IP, especially technology-focused IP. All of this growth has allowed us to expand our offerings in such traditional—but evolving—IP disciplines as copyright, trademark, trade secrets, and straight patent litigation, at the same time that we're able to help clients move quickly in their exploration of legal issues tied to such emerging areas as fintech and cryptocurrency.

These developments—many of which are chronicled in this 10th anniversary edition of our *Litigation Forecast*—are very much in line with our long-standing tradition of client service and are consistent with our firmwide focus on helping our clients be more competitive, more nimble, and even more transformative as they navigate this constantly changing landscape.

As always, we hope you'll find the *Forecast* provocative, informative, and useful as you move into the year ahead. We look forward to hearing from you and to continuing the conversation.

Philip Inglima
Chair, Crowell & Moring