

## Attorneys React To Supreme Court Patent Royalties Case

*Law360, New York (June 22, 2015, 7:33 PM ET)* -- On Monday, the U.S. Supreme Court issued a ruling in *Kimble v. Marvel Enterprises* that leaves intact a 50-year-old rule barring royalty agreements that continue after a patent expires. Here, attorneys tell Law360 why the decision is significant.

### Michael Albert, Wolf Greenfield

“Kimble faced a high hurdle: Abandoning stare decisis requires a special justification, and the court found none here. *Brulotte* prohibits post-expiration patent royalties. Even if *Brulotte* is based on bad economics (i.e., the idea that post-expiration payments are always anti-competitive), that is not enough to overturn the law. The majority doubted that *Brulotte* created real-world problems, noting that parties could essentially contract around the rule with deferred payments, joint ventures or royalties tied to nonpatent rights. Today’s decision will encourage the workarounds suggested by the court. Of course, this requires that, unlike *Kimble* and *Marvel*, parties know of *Brulotte*.”

### Jamil Alibhai, Munck Wilson Mandala

“*Kimble v. Marvel Entertainment* rests more on stare decisis than interpretation of the Patent Act. Declining to overrule *Brulotte*, the court’s decision is predicated on the idea that if the expiration of a patent passes the right to make the invention to the public, then a patent holder cannot charge royalties after the expiration of the patent. Rather than defend *Brulotte* on the merits, the 6-3 majority decision relies on a 'superpowered form of stare decisis' because *Brulotte* interprets a statute. Finding no 'superspecial justification' for reversal, the court left it to Congress to fix any error.”

### Erik Paul Belt, McCarter & English LLP

“Many innovative companies will view *Kimble* as a missed opportunity to modernize the anachronistic five-decade-old *Brulotte* rule and bring it into line with how product development and commerce works. Any sector with heavy upfront costs or long lead times to commercialization — for example, life sciences — felt the sting. Willing parties should be free, absent coercion, to structure royalty obligations as they see fit. *Kimble* forces those businesses to creatively structure royalty obligations to reflect — as best they can — commercial and economic realities. For example, parties can specify a reduction in royalty rates after patent expiration to reflect other benefits of the bargain.”

### Marla Butler, Robins Kaplan LLP

“In *Kimble v. Marvel Enterprises*, the Supreme Court ultimately decided that the doctrine of stare decisis required that the *Brulotte* rule be left intact. That doctrine aside, however, this case highlighted a tension between patent policy and the policy in favor of parties’ right to freely contract. The U.S.

Constitution gives Congress the power '[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.' The fact that the Constitution mandates that the exclusivity is for a limited duration has tilted the decision in favor of patent policy. A patent is the result of a bargain the inventor has made: In exchange for a limited period of exclusivity, the inventor makes his or her invention freely available to the public."

**J. David Cabello, Blank Rome LLP**

"The Kimble decision is only significant in its inability to effect change. Brulotte and now Kimble preserve the constitutional principle of promoting the 'progress of science and useful arts by securing for limited times to ... inventors the exclusive rights to their ... discoveries.' While patent owners may argue that Kimble conflates a patent holder's exclusionary rights during a patent's term with a patent holder's contractual right to negotiate royalty payments, thus dishonoring the long-standing principles of freedom of contract on balance, the public interest is best served by limiting a patent licensee's royalty payments to the patent term."

**Damir Cefo, Cohen & Gresser LLP**

"Today's decision squarely imputes the presumptive knowledge of an expired patent royalty ban on parties to any future agreements. The Brulotte rule, as clarified in Kimble, however, does not foreclose all royalties after the patent expires. Indeed, the parties still have many alternatives to explore for continued royalties post patent expiration, a number of which the court provides in its opinion. This decision further provides certainty and predictability for both patentees and licensees, because it reaffirms that the patent-related benefits end when the patent expires, and underscores that Congress, not the court, is the venue for any patent policy changes."

**Scott A.M. Chambers, Porzio Bromberg & Newman PC**

"Many economists and patent practitioners have suggested the rule restated in *Brulotte v. Thys Co.* should end, arguing that allowing a longer term for collecting royalties made good economic sense by permitting the patent holder to settle for a lower initial royalty rate. In *Kimble et al. v. Marvel Enterprises Inc.* the court rejected this reasoning in a 6-3 opinion. Regrettable, but perhaps this is wise given the bargaining position of the holders of some patents. If royalties that go beyond the term of the patent are contemplated, it will be necessary to provide additional consideration in the agreement, perhaps in the form of providing valuable know-how, ongoing consultation or trademark use. Such extended terms are not precluded (e.g., *Aronson v. Quick Point*) but would likely receive heavy scrutiny."

**Christopher J. Chan, Sutherland Asbill & Brennan LLP**

"The U.S. Supreme Court's decision in *Kimble v. Marvel Entertainment* is a reminder to all current and potential licensing parties that patent royalties cannot be obtained after a patent expires. This has long been known as the Brulotte rule, which the Court has apparently declined to overturn. Even though the Brulotte rule limits patent royalties, licensing parties may continue to structure license agreements to pay nonpatent royalties after the patent expires, even when such royalties are closely related to the patent, such as royalties paid for the licensing of trade secrets, copyrights, trademarks and trade dress."

**John Dragseth, Fish & Richardson PC**

"This is a hulking decision by the court with biting prose by Justice Kagan deserving of a *Kraven Daily Bugle* headline, that hopefully is a finisher on this issue and won't make anyone climb the walls. It really

didn't matter much how the court ruled because savvy parties have been working around the Brulotte web for decades. And the stare decisis law is open to any result the court wanted, so there was support for both the majority and the dissent of three justices (who could not muster a Fantastic Four) to mask their motives. Bottom line: Don't expect any change or avengers, let alone a dark reign."

**B. Scott Eidson, Stinson Leonard Street LLP**

"This decision reinforces that it is up to the practitioners to carefully spin their licensing agreements in such a way as to avoid the seemingly harsh consequences of Brulotte. As acknowledged by the court, Brulotte and its progeny give licensors several ways to craft agreements that allow for, in essence, post-patent expiration royalties. Parties to a licensing agreement can: defer payments past patent expiration dates; amortize payments past the patent expiration date; and — as is often done — tie post-expiration royalties to a nonpatent right and discount the amount of the royalty. Practitioners have had, and will continue to have, these tools at their disposal. Bottom line, parties can sidestep any issues created by this decision with continued attention to creative licensing arrangements."

**Casey Fitzpatrick, Christensen O'Connor Johnson Kindness**

"Although the Kimble decision offers lessons in license drafting, it also makes clear that patent applicants and their patent counsel must be aware of the effect their actions or inactions during prosecution can have on patent term and, by extension, future royalties. Patent prosecutors will be expected to do what they can to avoid loss of patent term so that royalties can be collected for as long as possible. This will be true even where licenses are drafted with the Kimble/Brulotte rule in mind, because a shortened patent term may affect the patent holder's bargaining position."

**Jeremiah B. Frueauf, Sterne Kessler Goldstein & Fox**

"At first blush, the Supreme Court's affirmance today in *Kimble v. Marvel Entertainment LLC* simply maintains day-to-day licensing practices. However, that view is limited. The court's sanctioning of Brulotte's bright-line rule against royalties for post-expiration patent use brings renewed significance to risk leveraging and royalty allocation over the life of a patent. The court's decision also makes clear that those adversely affected by the court's affirming Brulotte's bright-line rule have a path to resolution through legislative action rather than the courts. This is particularly timely given legislators' keen interest in enacting patent reform in 2015."

**Melvin Garner, Leason Ellis**

"Today, the Supreme Court in *Kimble v. Marvel Enterprises* upheld a 50-year-old ruling that post-patent royalty payments are unlawful. By declining to overturn *Brulotte v. Thys*, the Court has confirmed patent law's policy of free public access to unpatented and formerly patented inventions. In light of *Kimble*, in-house counsel should review their license agreements to see if they were drafted with Brulotte in mind. While the rule is well-known among practitioners, in *Kimble*, both parties admitted to not being aware of Brulotte when they drafted the agreement. This case reconfirms that knowledgeable contract drafting in the patent space is critical."

**Robert M. Gerstein, Marshall Gerstein & Borun LLP**

"*Kimble* will have little impact on straightforward royalties on expired patents because most licensees will not agree to continue paying royalties when competitors have no such obligation, no matter the state of the law. There are rare situations, mostly in life sciences, where post-expiration royalties make economic sense for all parties, who will continue to use other structures to achieve their goals. Absent prodding Congress to change the law, which seems unlikely, *Kimble*'s most significant impact comes

from its acknowledgment that those other structures are legitimate ways to circumvent the bar on post-expiration royalties, ensuring their future use.”

**Jeanne Gills, Foley & Lardner LLP**

“Parties have relied on the fact that a patent is dedicated to the public at the end of its term. Parties have thus been free to negotiate a business deal that allocates both risk and reward without running afoul of *Brulotte*, including, as the justices recognized, provisions such as deferred payments, royalties on nonpatented IP or other patents, and a myriad of other business arrangements not discussed (e.g., joint venture, cross-licensing, consulting relationships, etc.). Today’s ruling simply means business as usual, although it may encourage parties to be more creative in negotiating patent licenses going forward, especially with breakthrough technology.”

**Eric E. Grondahl, McCarter & English LLP**

“The *Kimble* decision, while nominally maintaining the status quo, may result in unnecessary, increased complexity in patent licenses. This will increase the cost of negotiating licenses and may subject more licenses to legal challenge. Licensors seeking to avoid the limits imposed by *Brulotte* — and now *Kimble* — will have to look to license other, nonpatent rights, such as trade secrets, to continue royalty streams after a patent expires. Counsel working on these agreements must be careful to identify the nonpatent rights with sufficient specificity to ensure such agreements are enforceable.”

**Steve Hankins, Schiff Hardin LLP**

“Despite high hopes, and contrary to just about every economic argument that the *Brulotte* rule should be abandoned, the Supreme Court stuck to its guns and refused to overturn the 50-year-old case. Riffing off of the *Spiderman* technology at issue, the majority identified several 'superpowered' legal doctrines that license drafters need to navigate — all of which guarantee that, when a patent expires, it is dead. The court suggested ways to avoid these superpowered doctrines — e.g., license something 'more' than the invention, bundle patents with long terms, and avoid a license altogether, call the deal a joint venture. Of these suggestions, I suspect that the solution where payments are amortized over an extended period of time may be the simplest solution for license drafters. The court certainly kept it simple from a jurisprudential standpoint — *stare decisis* is *stare decisis* — but it was at the expense of license drafters who still will have to navigate these options so as not to run afoul of the *Brulotte* per se rule which, itself, has taken on an unassailable superpower aspect of its own. Only Congress, apparently, has the secret weapon to ultimately kill the *Brulotte* rule. The Supreme Court has proclaimed itself powerless.”

**Melissa Hunter-Ensor, Saul Ewing LLP**

“This is a very significant decision — particularly for licensors and licensees in the life sciences — where there is a long and uncertain timeline to commercialization. By declining to overrule *Brulotte*, the court has left in place a per se rule that clearly links the payment of royalties to the life of the patent. It also emphasizes the need for creativity in crafting license agreements that maximize value for patent owners and reward innovation by providing royalty payments, not only for patent rights, but for other forms of intellectual property, as well.”

**Mark Jansen, Crowell & Moring LLP**

“Today’s ruling is surprising in light of narrowing blanket prohibitions in the patent and antitrust areas. Even if there is a 'web of precedent' relying on the old rule, that 'web' seems to ignore related developments based on modern law and economics and real-world patent licensing. The key piece of

the opinion is the court's identification of other ways licensing parties can achieve the 'same ends' as overturning Brulotte, for example by deferring payments so that compensation is based on pre-expiration use of the patent, tying post-patent expiration royalties to nonpatent rights such as trade secrets, and entering into joint ventures."

**Lori Johnson, Chamberlain Hrdlicka**

"By upholding the Brulotte rule, the Supreme Court retained a simple and predictable test for the end date of a patent royalty. *Kimble v. Marvel* underscores the importance of keeping patent agreements separate from other business agreements. Business agreements can support any number of financial obligations, but patents serve a greater purpose. Patents inform the public and for that, they are given a period of commercial exclusivity. At the end of that monopoly period, the bargain is to allow the invention to enter the public domain."

**Neal Katyal, Hogan Lovells**

"Justice Kagan's opinion for the Court in *Kimble* is a masterpiece. It puts to rest the long-simmering question of whether *Brulotte* should be overruled — which will provide important stability to patent law. But its significance will reach far beyond patent law. It is the single best distillation of when it is appropriate to follow *stare decisis* in decades, and will stand as a classic exposition on that subject — well apart from patent law."

**John Keville, Winston & Strawn LLP**

"The only significance is it upheld precedent. But it was still interesting. *Kimble v. Marvel Entertainment LLC* addressed a settlement on a patent to a web-shooting glove. Although the agreement set no end date for royalties, prior case law made such agreements antitrust violations. In rejecting *Kimble's* argument for ongoing royalties, Justice Kagan, a comic book fan, paid tribute to Spider-Man noting, 'What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly,' referencing the iconic line, '[I]n this world, with great power there must also come — great responsibility.'"

**Jim Klaiber, Pryor Cashman LLP**

"The Supreme Court says little about hybrid licenses (combining patent and nonpatent rights), which were at issue in this case. There was no reference to its earlier decision in *Aronson*, which held that a discount after the patent rights expired took the license outside *Brulotte's* per se rule, saying only that 'a patent and a trade secret [license] can set a 5 percent [combined] royalty during the patent period ... and a 4 percent royalty' after the patent expires. So the risk of entering a hybrid license continues — parties could consider a free nonsuit patent covenant and a constant ongoing nonpatent royalty."

**Jeffrey R. Kuester, Taylor English Duma LLP**

"Beleaguered patent attorneys sigh in collective relief to dodge another landmark change to patent jurisprudence. For over 10 years, through *eBay*, *KSR* and *Alice*, the court has ignored *stare decisis*. It is good news if such certainty is here to stay, and leaving matters to Congress in the absence of clear negative impacts would help revive predictability, perhaps the court's greatest responsibility. While refusing to change the prohibition against post-expiration royalties, the court did note that there are still ways for licenses to be drafted to accomplish the same goals, placing a premium on good drafting and thoughtful lawyering."

### **Benjamin Lieb, Sheridan Ross**

"The Supreme Court's ruling in *Kimble v. Marvel Enterprises* is not surprising, and simply highlights the need for creative licensing structures for royalties due after patent expiration. For example, the licensing of know-how along with the patent allows for continuing royalties on the know-how after patent expiration, so long as the royalty amount is adjusted after patent expiration to distinguish between the value of the patent and the know-how alone. Another possibility would be to design a milestone payment that is calculated based upon future revenue projections and is due before patent expiration, but that allows the licensee to pay that milestone over a time span that extends beyond the patent expiration date."

### **David Maiorana, Jones Day**

"The Supreme Court's decision in *Kimble v. Marvel Enterprises* is significant as much for what it did not do as for what it did. Relying on *stare decisis*, the court declined to disturb its own 50-year-old rule set forth in *Brulotte* precluding royalty agreements that extend beyond the patent term. The court pointed *Kimble* to Congress, noting that the legislature was the 'proper audience' for his concerns that the rule stifled competition. The court also justified its decision by pointing to the rule's simplicity and ease of application. In dissent, Justice Alito referred to *Brulotte* as 'baseless and damaging precedent.'"

### **Melanie Mayer, Fenwick & West LLP**

"*Kimble* upholds *Brulotte*, which allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period, but bars royalties for using patented technology after the patent has expired. To be enforceable under *Brulotte*, contracts should be explicit that any post-expiration royalties are not for use of an expired patent, but are for use of nonpatent IP, amortized payments for patent use during the patent term, etc. Likewise, licensing agreements covering multiple patents/patent applications or a mix of patents and other IP should provide a step-down royalty that applies upon expiration of each of the licensed patents."

### **Gregg Metzger, Feldman Gale**

"I think that greatest significance of *Kimble* is that the Supreme Court took it up in the first place. By granting cert to reaffirm what was already well-settled law under *Brulotte*, the Supreme Court confirms that it has been confronting, quite deliberately, the interrelationship among competing notions: natural property rights, constructive property rights — especially government-conferred intellectual property rights in the form of patent protection — freedom of contract, antitrust principles, social responsibility and even eminent domain. Very salient, given what's happened to our culture and social-economic structure over the last 30 years. (See also the 2005 eminent domain decision in *Kelo*.) It really goes beyond just patent law. *Bilski* and *Alice Corp.* are, in reality, about a lot more than just method patents. And *Kimble* is, in reality, about a lot more than just patent licensor rights."

### **Gerard P. Norton, Fox Rothschild LLP**

"The Supreme Court's ruling [Monday] in *Kimble v. Marvel* upholding the court's 1964 decision in *Brulotte* provides clarity to those involved in transactional work regarding existing and future licensing agreements involving a patent component. Prior to today, the practitioner would likely mutter, 'I know of *Brulotte*, I understand *Brulotte* — an almost excruciatingly simple holding stating that collection of royalties from a licensee post-patent expiration is "unlawful per se" — but I wonder, given the general disdain for *Brulotte* in numerous lower courts, whether some 50 years later this basic concept would pass muster of Supreme Court review.' Today, the court put any such apprehension to rest. At the end of the day, a 6-3 majority resolved that the doctrine of *stare decisis* required *Brulotte* to stand, with the

majority concluding that there was no compelling reason to disturb the earlier ruling (and in fact noting several well-heeded examples which allow the parties licensing flexibility with Brulotte in mind), instead placing any such future action regarding Brulotte at the doorstep of Congress. For better or worse, at least we have clarity — maybe for another 50 years.”

**Charles O’Brien, Cantor Colburn**

“The Kimble court declined to overrule its often-criticized Brulotte decision that agreements requiring payment of post-expiration royalties are unlawful per se. While the court acknowledged that Brulotte may prevent parties from entering into deals they desire, it held that a 'superpowered form of stare decisis' applies, thereby preventing the rule from being overturned. Going forward, licensors and licensees will need to continue to abide by the Brulotte rule in drafting and negotiating royalty provisions, including employing the options set out by the court that are allowed under Brulotte.”

**A. Antony Pfeffer, Kenyon & Kenyon LLP**

This decision should have little impact on patent licensing. For existing and future agreements nothing changes. The entire court appears to agree that Brulotte was possibly wrongly decided, but the justices disagree on whether they should fix it. The majority approvingly acknowledges a number of different ways that the restrictions from Brulotte can be sidestepped. While these methods have long been in the hands of skilled licensing attorneys they have now been recognized as appropriate ways to avoid Brulotte while not rendering your agreements unenforceable. The majority opinion seems to be 'even if it is broke, don't fix it, just live with it.'”

**W. Edward Ramage, Baker Donelson Bearman Caldwell & Berkowitz PC**

“While the Brulotte rule may be long-standing, a surprisingly high number of patent owners and licenses may have been unaware of it. Perhaps the main significance of today's decision is educational: reminding those engaging in licensing transactions of the existence of Brulotte and the need to give careful consideration to how royalties are structured.”

**Stacey Ravetta, Perkins Coie LLP**

“The Supreme Court’s decision with respect to Kimble v. Marvel Enterprises is as we expected. In its opinion, the Court endorses the current practice of finding various ways to draft around Brulotte to achieve the desired business result. We fully expect that this practice will continue post-decision. Given that current attempts at patent reform are primarily litigation focused, it will be interesting to see if Congress adds the payment of royalties accruing after the patent’s expiration to the list of issues to address.”

**James W. Repass, Norton Rose Fulbright**

“The Supreme Court’s decision in Kimble v. Marvel Enterprises Inc. reaffirms the bright-line rule from Brulotte that it is per se unlawful to provide for patent royalty payments after the patent has expired. The decision reminds licensors that they should separately designate royalties for patent and nonpatent intellectual property if they want royalties to continue to flow after the patent expires.”

**Art Rose, Knobbe Martens Olson & Bear LLP**

“The significance of the decision lies in its clarification of several issues. First, the court explicitly confirmed the legitimacy of some Brulotte workarounds, such as royalty agreements involving multiple patents running until the last patent expires and hybrid royalty agreements involving patent and

nonpatent rights such as trade secrets. Second, the opinion didn't rely on Brulotte's rationale that post-expiration patent royalty agreements 'enlarge the monopoly of the patent.' Instead, the court appears to agree that post-patent expiration royalties are not invariably anti-competitive. This reduces the risk that patents involved in such agreements may be rendered unenforceable."

**Harry Rubin, Ropes & Gray LLP**

"In *Kimble v. Marvel Entertainment LLC*, the U.S. Supreme Court reaffirmed that post-patent expiration royalty requirements are unlawful *per se*. The court expressly sanctioned other contractual provisions allowing an IP owner to monetize IP beyond the life of a patent in an IP transaction involving a bundle of IP rights. Patent owners may continue monetizing if the patent in question is part of a larger patent bundle and such other patents would expire later, and, most importantly, they may tie royalty payments on an ongoing basis to other types of intellectual property, such as trade secrets and know-how, that are licensed in the same transaction. The court also sanctioned payment streams that are part of larger commercial transactions, such as joint ventures. Significantly, both parties in *Kimble* were not actually aware of the post-patent royalty prohibition. The big message to practitioners and IP companies, therefore, is to monitor carefully the law pertaining to patent monetization and craft creative solutions to achieve commercial objectives consistent with applicable law."

**Laura Seigle, Irell & Manella LLP**

"*Kimble* leaves in place what the court calls a workable and easy to apply rule, rather than replace it with a rule of reason, which the court feared would produce high litigation costs and unpredictable results. The decision not to overturn the rule against royalties for post-expiration patent use was influenced by the recognition that, as a practical matter, parties can find ways around that rule, such as by deferring payments, having royalties run until the last of multiple licensed patents expires, or including nonpatent rights in the license. *Kimble* does not affect the viability of those alternatives."

**Christopher A. Shield, Bracewell & Giuliani LLP**

"The court's opinion in *Kimble v. Marvel Entertainment LLC* reaffirms a common-sense approach to licensing, i.e., that patentees should not be able to receive royalty payments outside of the patent term. Because the opinion is not a change in the state of the law, the opinion's significance is minimal."

**Charles W. Shifley, Banner & Witcoff**

"In an important decision today for patent-licensing freedom, the Supreme Court cleared the way for spreading patent royalty payments after the expiration of patents. The court affirmed the decision of *Brulotte v. Thys* that royalties may not be collected on sales that occur after patents expire, but it opened the freedom to extend 'in-term' royalties on patents into the post-expiration period. The court specifically stated, for example, that '*Brulotte* leaves open various ways — involving both licensing and other business arrangements — to accomplish payment deferral and risk-spreading alike.' Patent owners and licensees may now confidently and without concern for *Brulotte*'s *per se* bar (1) extend in-term patent royalty payments into post-term periods, (2) extend payments to the expiration of the latest-expiring patent in a group, (3) extend payments to the end of the continued use of trade secrets that are closely related to licensed patents, and (4) use joint ventures and like business arrangements that extend the sharing of risks and rewards of commercialization of inventions after the conclusion of patent terms."

**Neil Smith, Rimon Law**



"I always viewed the Brulotte precedent as antitrust and not really patent-law based, and found in my own licensing and ADR mediation/settlement of patent cases that the precedent interfered with the most rational and fair basis for settling a running royalty based upon use in the future. Often, one cannot accurately predict how much and how long a product, such as the toy at issue here, will be sold or have a demand in the market. The running royalty satisfies most expectations. The licensee doesn't want to pay ahead for fear the market will dry up, and the licensee hopes the sales will continue and wants a fair payment if they do. It is ironic that the beneficiary in this case is the big company licensee who claims ignorance of the law set down by the Supreme Court, who can now stop paying under the contract."

**Michael Sandonato, Fitzpatrick Cella Harper & Scinto**

"It's fitting that in a case about a superhero, the high court based its decision on a 'superpowered form' of stare decisis and the absence of a 'superspecial justification' for overturning Brulotte. Although there is a little bit of discussion of the soundness of the Brulotte rule, the clear takeaway here is that if the rule is to be changed, it's Congress' job to do so."

**Jon Steinsapir, Kinsella Weitzman Iser Kump & Aldisert**

"Those looking for clues as to the court's view of patent licensing generally will not find much in the court's decision. Rather, the court's reasoning had little to do with patent law — the court simply affirmed its commitment to stare decisis, particularly in statutory cases where Congress can 'correct' a purportedly 'erroneous' decision. Were the court writing on an empty slate, it very well may have reached the opposite result. However, the court's view was that the country has lived for five decades under the existing rule, and if that rule should be changed, Congress should do it, not the court."

**Kirk Watkins, Womble Carlyle Sandridge & Rice PLLC**

"'Patents endow their holders with certain superpowers, but only for a limited time.' The Supreme Court quoted Justice Brandeis' holding that it is 'usually "more important that the applicable rule of law be settled than that it be settled right." ... Stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle.' This decision is likely an outlier rather than a new wave upholding bad law for good reasons. Where a larger impact is expected, the dissent's view that the entire burden of correction of this court's errors should not be placed on Congress will prevail."

**Bryan Wheelock, Harness Dickey & Pierce PLC**

"Today's Supreme Court decision in *Kimble v. Marvel Entertainment* means that a patent owner's ability to reap the rewards for the invention remain artificially limited. *Kimble* and Marvel negotiated a 3 percent royalty. *Kimble* probably wanted a higher royalty, but stretching the payments beyond the patent's term allowed him to accept a lower rate that Marvel was willing to pay. The majority's application of Brulotte to upset the parties' agreement is correct, but the dissent is equally correct that Brulotte makes no sense. Critics of the rule are free to take their objections to Congress which, the majority points out, has spurned multiple opportunities to reverse Brulotte."

--Editing by Mark Lebetkin.