Litigation Forecast 2024

Protecting IP In a Changing Digital Economy

Untangling Today's Interwoven Supply Chain

Annual Jurisdictional Analysis

Protecting a Company's Most Critical Assets

As technology allows businesses to do things better, faster, and cheaper, the value of intellectual property and the efficiencies derived from new technologies—which are protected by patents, copyrights, trademarks, and trade secrets—are at the heart of a company's success. Driven by technology's advancing pace, IP litigation has occupied a privileged position in U.S. courts, and for many corporate clients, it has remained the first among equals in terms of importance to the enterprise.

While that remains true, the IP litigation landscape itself is changing rapidly. For most of the past 25 years, patent litigation was king. No more. As patents became harder to obtain and more expensive to enforce, and with a shift in value from hardware to software as the core of the digital economy, other forms of IP —especially copyrights and trade secrets, often in combination—are now at the core of the digital economy. Increasingly, that is how IP is protected.

Throughout this volume, our attorneys explore changes in the litigation landscape, providing you, we hope, with insights into what is coming next around the corner.

MARK KLAPOW
Partner, Crowell & Moring
Editor, *Litigation Forecast 2024*

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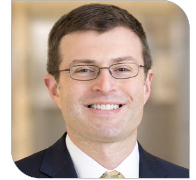

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IP LITIGATION

Patents

A proposed legislative fix for patent eligibility ambiguity could impact litigation strategy

A proposed overhaul of U.S. patent eligibility law could shape the patent litigation landscape in 2024, with some parties rushing to court before Congress enacts reform and others holding back on filing suit in the hope that the changes will strengthen their legal case, says Crowell & Moring partner Gang Chen.

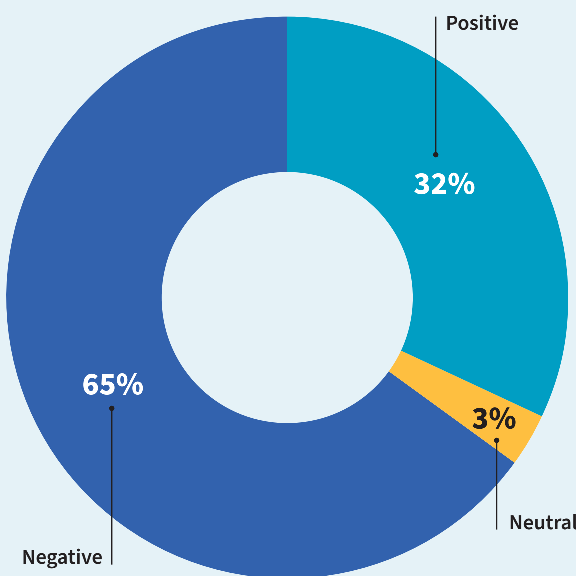
Courts have been grappling with judicially imposed patentability standards since 2014, when the U.S. Supreme Court issued a series of decisions attempting to establish guidelines for what is—or, more importantly, is not—eligible for patent protection in the U.S.

Most notably, in *Alice Corp. v. CLS Bank*, the Supreme Court held that laws of nature, natural phenomena, and abstract ideas were unpatentable, absent a showing of some additional "inventive element." In *Alice* and in many cases since, the exception has been used to invalidate software patents, but it has also been applied to patents involving DNA sequences and artificial intelligence-related works.

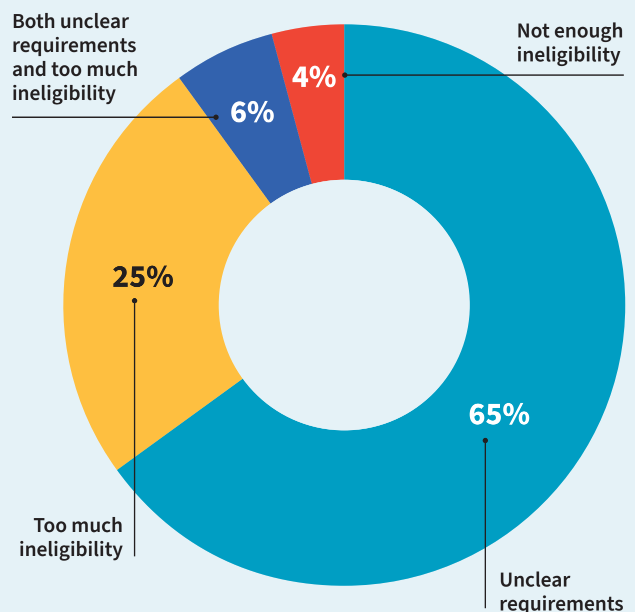
The 2014 rulings were aimed at updating patent law to address issues raised by new technologies. But the result has been to make patentability standards too unpredictable and to render many innovations unpatentable in the U.S., though eligible for patent protection in other countries, says Chen, who holds a Ph.D. in physics and has been a practicing patent lawyer for nearly a decade.

"The general consensus is that the whole process has become somewhat confusing," he says. "The statute itself is quite broad, but the judicial exceptions are applied inconsistently. The framework consists of the judicial exceptions to the statute to render a subject matter ineligible and then provides ways out of the judicial exception that are vague. So the framework is really a system of exceptions to the exceptions to the statute."

Views of current eligibility jurisprudence



Submissions viewing eligibility/ jurisprudence negatively



SOURCE: "ASSESSING RESPONSES TO THE PTO'S 2021 PATENT ELIGIBILITY STUDY," UTAH LAW DIGITAL COMMONS, MARCH 2022

“The Court seemed to absolutely be saying, ‘We’ve said what we have to say on this issue, and if you want more than that you’ll need to seek a legislative solution.’” GANG CHEN

Chen says the unpredictability as to what is patentable exists not only among the courts but even within the U.S. Patent and Trademark Office, where different patent examiners have differing views on how to apply the *Alice* standard of judicial exception to the statutory definition of what is patentable and what constitutes sufficient limitations to take a claimed subject matter out of the judicial exception.

In a 2021 survey by the USPTO, nearly two-thirds of respondents reported a negative view of current patent eligibility jurisprudence, saying it undermines innovation and discourages investment in cutting-edge technologies, not only because of its ambiguity but also because it rules too many innovations ineligible for patent protection.

Critics of current patent eligibility jurisprudence say the restrictions leave unprotected some innovations that could be patented in Europe and China, and that the current framework has hurt U.S. competitiveness.

Nearly a decade after *Alice*, however, the Supreme Court appears to have signaled that it is finished weighing in on the eligibility issue. Despite the urging of the U.S. solicitor general, in May 2023 the Court announced that it would not review two cases in which lower courts had found patents to be invalid on eligibility grounds. “The Court seemed to absolutely be saying, ‘We’ve said what we have to say on this issue, and if you want more than that you’ll need to seek a legislative solution,’” Chen says.

The following month, Sens. Thom Tillis (R-N.C.) and Chris Coons (D-Del.) introduced the Patent Eligibility Restoration Act of 2023, which would undo the judicially created exceptions to eligibility and replace them with a statutorily defined list of unpatentable subject matter. The list includes, for example, mathematical formulas, mental processes, unmodified human genes and natural materials, and economic, financial, business, social, cultural, or artistic processes. However, a process *would* be patentable “if it cannot practically be performed without the use of a machine or manufacture.”

Upon introducing the bill, Sen. Coons specifically cited medical diagnostics and artificial intelligence as two categories that need more protection under U.S. patent law.

While the bill appears to have more momentum than a similar one introduced by Sen. Tillis in 2019, even its most optimistic supporters have noted that it wouldn’t go into effect until 2025, at the earliest. Nevertheless, its impact could be felt in 2024, Chen says.

For example, those seeking to challenge the validity of certain patents might want their claims heard under the current, more restrictive judicial framework. Others wanting to assert that their patent has been infringed may hold off, in the hopes that Congress will limit the powerful ineligibility arguments made by so many patent infringement defendants today, and therefore strengthen the validity of many existing patents.

“All the discussions around the wording of the statute—especially the list of exceptions to patentability—will be very closely watched,” says Chen. “The stakes are very high for some, so you can expect to see some anticipatory litigation in reaction to it.”

AI Patent Litigation Set to Surge

Regardless of whether Congress takes up the issue of patent eligibility in 2024, the courts will likely see a dramatic increase in artificial intelligence-related patent litigation in the coming year, says Crowell & Moring partner Gang Chen.

A surge in AI patent litigation is the logical outcome of the explosion in the number of AI patent applications filed over the past two decades. In 2020, the USPTO reported it received 80,000 utility patent applications involving AI—over 150 percent higher than in 2002. In the fall of 2023, the USPTO said that AI appeared in more than 18 percent of all utility patent applications it received.

In addition, many of those AI inventions patented in the past two decades have been brought to the commercial market over the past couple of years, making infringement claims increasingly likely. They also are getting more valuable, with the size of the global AI market forecasted to increase sevenfold, from nearly $60 billion in 2021 to more than $420 billion in 2030.

“So much has been invested and so much progress made, it’s inevitable that disputes will arise,” says Chen.

Some of the disputes may not even involve any issue of infringement. For example, an AI patent case that the U.S. Supreme Court declined to take up in 2023 could hint at one area that could be the focus of future disputes. While the justices allowed to stand a lower court’s ruling that inventions created solely by AI are not patentable, it left open the issue of whether inventions made by humans, but with some assistance from AI, are eligible for patent protection.

IP LITIGATION

Trade Secrets

Trade secret litigation: When secrets must be identified

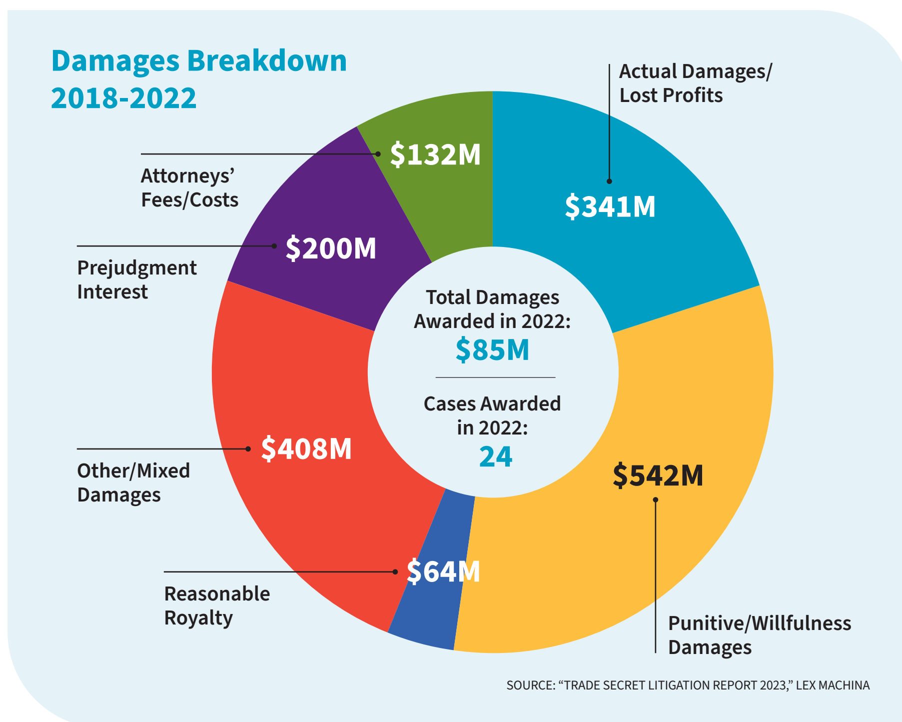
Courts across the country will continue grappling with the question of exactly how and when trade secret plaintiffs should be required to identify the very information they are suing to protect, says Paul Keller, a partner in Crowell & Moring's Patents Group.

The nature of trade secrets has always presented this tension when it comes to litigation. A trade secret holder who is claiming misappropriation must at some point—and to some extent—identify the secret that they believe the defendant has misappropriated. In general, trade secret plaintiffs have sought to define their trade secret in more general terms, especially at the outset of litigation, while defendants have pushed for more specificity to enable them to mount a defense.

That tension has been ratcheted up, however, since the 2016 enactment of the Defend Trade Secrets Act, which created a federal cause of action for trade secret misappropriation. It has ushered in a wave of new trade secret misappropriation cases nationwide—under both state and federal law—some of which have resulted in eye-popping jury verdicts.

The number of trade secret cases filed in the U.S. surged by more than 30 percent in 2017. In 2022, a Virginia jury awarded the cloud computing firm Appian Corp. more than $2 billion after it found its competitor, Pegasystems Inc., willfully and maliciously misappropriated its trade secrets.

Eight years after the enactment of the DTSA, the federal and state courts are still grappling with at what point a court should require plaintiffs to identify the trade secret and with how much specificity. Although the trend generally has been in the direction of more specific, earlier identification, Keller says, myriad questions remain.



SOURCE: "TRADE SECRET LITIGATION REPORT 2023," LEX MACHINA

For plaintiffs, the consequence of getting the answer wrong can be significant. In 2023, a federal judge in the Northern District of Ohio threw out a $64 million jury verdict against Goodyear Tire in a dispute with a Czech company that claimed in 2015 that Goodyear had misappropriated its designs for a self-inflating tire. After eight years of litigation, the judge held that the plaintiff had not identified with sufficient definiteness the information it sought to protect as trade secrets.

In many cases, the issue has been not only the specificity of the trade secret identification, but also the timing of it. Certainly, Keller says, courts do not expect a plaintiff to disclose the specifics of its claimed trade secret in a publicly filed complaint. However, they may demand more detail if the plaintiff is seeking a preliminary injunction or a temporary restraining order.

Once the court has imposed a protective order sealing court records and limiting access to those records to certain individuals, the standards for specificity generally become higher. Many courts require a plaintiff to identify its trade secret with "reasonable particularity" before discovery can begin, reasoning that plaintiffs should not be able to use discovery as a "fishing expedition" for information they could later claim constitutes a trade secret.

However, defendants have been known to use the specificity requirement as a tactic to significantly delay the commencement of discovery. In addition, the term "reasonable particularity" has been interpreted and applied

"Black-and-white lines are unlikely, but better-defined gray areas should be expected."

PAUL KELLER

in different ways by different courts.

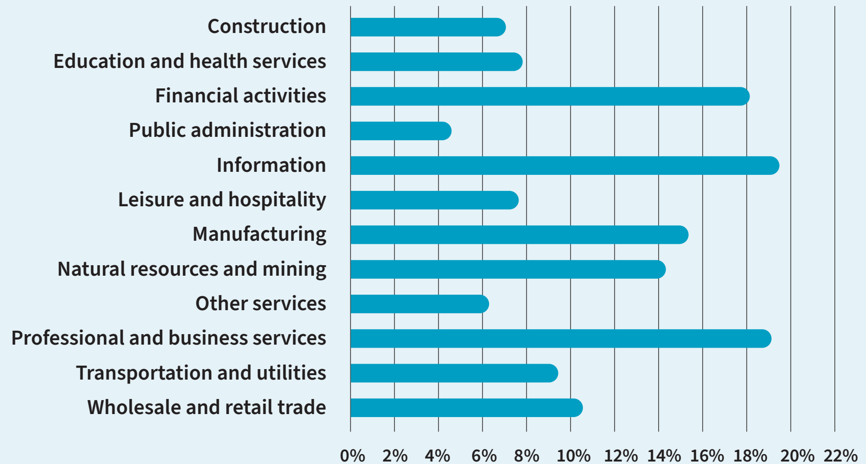
While some courts are willing to give plaintiffs broad latitude to amend their trade secret identification as the discovery process unfolds, others are more likely to hold plaintiffs to their initial description. In Massachusetts and California, for example, where state law requires prediscovery trade secret identification, amendments can only be made "for good cause shown," which is considered a pretty high bar for plaintiffs, Keller says.

While there is hope for more clarity and consistency across jurisdictions, the issue will always be complicated by the fact that trade secret cases are highly fact dependent. "Black-and-white lines are unlikely," says Keller, "but better-defined gray areas should be expected."

For plaintiffs, the uncertainty means it is especially important to plan to define their trade secrets with increasing specificity from the outset of litigation. If they suspect trade secret misappropriation, there needs to be careful deliberation about where to file suit as well as how much they should disclose and when, depending on how much they can expect to go back and amend later.

"It's essential to think creatively and strategically, because these trade secrets are often among a company's most valuable assets," says Keller.

Non-Compete Rates by Industry



SOURCE: "NEW DATA ON NON-COMPETE CONTRACTS AND WHAT THEY MEAN FOR WORKERS," FEDERAL RESERVE BANK OF MINNEAPOLIS, JUNE 21, 2023

FTC move on non-compete ban to be watched closely

Businesses with valuable confidential information will be watching closely for an expected April decision from the Federal Trade Commission on a proposed rule banning non-compete provisions in future employment contracts and invalidating such provisions in existing contracts.

If the rule is approved by the commission, it would make rock-solid trade secret protection all the more important for those businesses when employees leave to go to work for their competitors.

"You'll now have to look more carefully at all the measures you're taking to protect confidentiality," says Keller, "because you won't be able to rely on that non-compete."

Specifically, such a ban would likely increase the importance of the "inevitable disclosure" doctrine, which allows trade secret plaintiffs to make a claim based on the premise that there is a high degree of probability that a former employee will use the plaintiff's trade secrets in their new job. In several jurisdictions the doctrine is not recognized, however, nor is it included in the DTSA. The DTSA does provide that a plaintiff may seek an injunction for "threatened" misappropriation, though the meaning of threatened misappropriation has not been widely adjudicated.

If the FTC approves the rule, it will likely be challenged in court. The commission received 27,000 comments in reaction to the proposal in early 2023, with 18 state attorneys general in favor of it, and with the U.S. Chamber of Commerce and many businesses opposed.

Even if the FTC does not pass the new rule, the current trend among both courts and state legislatures away from enforceability of non-compete clauses will likely continue, on the grounds that they reduce wage growth and hurt competition. At least four states have banned non-compete clauses completely, and several others have imposed restrictions, such as allowing non-compete clauses only for employees with a salary above a certain threshold. Some courts have held that certain non-compete clauses are unreasonable and therefore unenforceable.

Copyright

The contours of copyright law in the age of AI are just coming into focus

After the recent barrage of lawsuits filed by copyright owners against artificial intelligence platforms, it will likely take a few years for the dust to settle on multiple legal issues surrounding the new technology and intellectual property rights, says Crowell & Moring partner David Ervin, who co-leads the firm's Advertising & Brand Protection Group.

Authors, artists, software developers, and other creators have filed numerous complaints against multiple AI companies, including OpenAI, Meta, Stability AI, Midjourney Inc., and others, claiming that they illegally used copyrighted works to train AI to respond to human prompts. The AI companies have said that their AI training amounts to "fair use" of copyrighted material.

The first big test of those arguments is expected to come in 2024 when a lawsuit brought by Thomson Reuters against Ross Intelligence is scheduled to go to trial in a Delaware federal court. Thomson Reuters says the legal start-up company illegally used material from Reuters's Westlaw legal research platform by feeding it into a machine-learning model to create an AI-based legal search engine.

Rulings against the AI platforms could have broader implications for end users because they could raise questions about whether the works generated using those platforms are also infringing. To quell such concerns, at least two American tech giants announced in late 2023 that they would defend users of their AI tools if they are ever faced with copyright infringement claims associated with their output.

However, even if the AI platforms prevail against complaints filed by copyright holders, Ervin says their end users still face a secondary issue: Can you use works generated by AI?

In August, a federal district court judge sided with the U.S. Copyright Office in its refusal to grant a copyright for artwork created by AI. The plaintiff, computer scientist Stephen Thaler, who created a pixelated but provincial scene of train tracks running through a tunnel via his AI generator, has vowed to appeal. (The U.S. Patent and Trademark Office also denied Thaler's application to patent an AI invention.)

The Copyright Office has released guidance for submitting works that were created using AI. In it, the office states that "AI-generated content that is more than *de minimis* should be explicitly excluded from the application."

But it's unclear how to measure the human contribution and how much human contribution is sufficient to make a work copyrightable, says Ervin. In its guidance, the Copyright Office has said that the answer to that question "will depend on the circumstances of how AI was used to create the final work," and that the issue will necessitate a "case-by-case inquiry."

Ervin says that, given the current uncertainty, companies need to assess the risk of making big investments in AI-generated content. For example, if a company develops a product or an advertising campaign with significant contributions from AI, they might not be able to protect it from being copied by competitors.

"In certain contexts—say, for internal training materials or other tools—the risks may be minimal," says Ervin. "But if you're using AI-generated content in commercial products or services that you sell, it's important to be aware of the uncertainty in the law right now and the potential risks."

Resolution to bicoastal copyright damages split could be coming

A U.S. Supreme Court decision expected this year could have a huge impact on the magnitude of damages that copyright plaintiffs can collect for infringement when it occurs over the course of many years, Ervin says.

The high court agreed last fall to hear the case of *Nealy v. Warner Chappell Music*, in which the Atlanta-based Eleventh Circuit Court of Appeals ruled that a copyright plaintiff could collect damages from a period beyond copyright law's three-year statute of limitations for filing complaints.

Adopting the "discovery rule," that ruling is consistent with those of the California-based Ninth Circuit, but at odds with New York-based Second Circuit, which limits the look-back for damages to three years from the date of complaint filing.

In the Eleventh Circuit case, music producer Sherman Nealy filed suit against Warner Chappell Music in December 2018 for infringement dating back to 2008. Nealy, who had been in and out of prison since the 1980s, said he was not aware of the alleged infringement until January 2016.

While Warner Chappell argued that Nealy should only be able to collect for damages dating back three years from his complaint filing in December 2018, the court sided with Nealy, saying that the discovery rule should have been applied by the lower court, and that a claim "accrues when the plaintiff learns, or as a reasonable person should have learned, that the defendant was violating his" rights.

“If you’re using AI-generated content in products or services you sell, it’s important to be aware of the uncertainty in the law right now and the potential risks.”

DAVID ERVIN

The split is significant because the Ninth and Second circuits together hear the largest volume of copyright infringement appeals. This inconsistent standard encourages forum shopping, with the Ninth Circuit perceived as more artist-friendly and the Second Circuit more business-friendly, Ervin says. A definitive ruling from the Supreme Court is expected, but there is great uncertainty as to which standard will be adopted.

Supreme Court: “Orange Prince” is no “Pretty Woman.”

The U.S. Supreme Court’s 2023 decision that Andy Warhol’s “Orange Prince” did *not* amount to “transformative use” may trigger a series of follow-on decisions about what *does*.

A majority of the Court agreed with Lynn Goldsmith, who took the photograph of the musician Prince that Warhol later used to create a pumpkin-hued silk screen portrait. Goldsmith argued that Warhol’s work was not sufficiently transformed from the photograph on which it was based and therefore did not qualify for “fair use” protection under the copyright laws.

While some were surprised by the decision, Ervin says its factor-based analysis is in line with court precedents that set the bar higher for finding “transformative use” when the new work negatively impacts the market for or the value of the original work. In the case of *Warhol v. Goldsmith*, Warhol’s silk screen was licensed by the Warhol Foundation to *Vanity Fair* magazine, which used it as cover art *instead* of Goldsmith’s original photograph.

In the famous 1994 *Acuff-Rose* case in which the rap music group 2 Live Crew sampled Roy Orbison’s “Pretty Woman” on one of their songs, the court found there was transformative use, because the rappers had altered the original to offer commentary on social and cultural issues. And there was no evidence in that case that the new expression impaired the market value of Orbison’s original song.

“That’s one of the baselines for transformative use,” says Ervin. “The *Warhol* case gets us back to that.”

Was photographer Lynn Goldsmith’s photo of Prince (right) sufficiently transformed in the Andy Warhol orange silk-screen version (left) to qualify for “fair use” protection under the copyright laws? “No,” said the Supreme Court in 2023.

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IP LITIGATION

Trademarks

Two landmark decisions from 2023 will continue to raise questions in 2024 and beyond

A 2023 U.S. Supreme Court decision limiting the reach of U.S. trademark law outside of the country could lead to further litigation by trademark holders looking to push back on those boundaries, says Crowell & Moring partner Preetha Chakrabarti, a member of the firm's Technology & Intellectual Property Department and the Advertising & Brand Protection Group.

In *Abitron v. Hetronic*, the high court vacated $96 million of a $115 million jury award for an American manufacturer that had sued former distributors who sold knockoff versions of its industrial radio remote controls—using its distinctive yellow-and-black design—primarily in foreign countries.

The overall decision was a unanimous one, with all justices agreeing that Congress did not intend the U.S. trademark statute—the Lanham Act—to apply extraterritorially. That's consistent with the court's recent holdings that, in general, statutes should only apply domestically, absent explicit instruction by Congress that they should apply overseas.

However, the justices split on exactly how to determine whether trademark infringement occurred domestically or overseas. The majority opinion held that the U.S. statute applies to a trademark's unauthorized "use in commerce" in the U.S.

A concurrence, signed by three justices, said the Lanham Act should apply whenever "there is a likelihood of consumer confusion in the U.S."

Did Hetronic's knock-off version of Abitron's devices create "consumer confusion?"

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Finally, Justice Ketanji Brown Jackson issued her own opinion, agreeing with the majority but raising the issue of how to determine where the "use in commerce" occurred, which can be complicated in today's global marketplace, where a single good could be manufactured, sold, purchased, used, and resold, all in different countries.

When the Supreme Court first agreed in late 2022 to take up *Abitron v. Hetronic*, there was hope that its decision would finally clear up the issue of how U.S. trademark law applies in an international context, says Chakrabarti. At the time, federal appeals courts were deeply split, with at least three different tests being applied to determine extraterritorial application among the circuits.

"In some ways, though, the Supreme Court's decision leaves some important, unresolved questions," Chakrabarti says. "I think we're going to see more litigation over the phrase 'use in commerce' going forward."

Trademark holders with global footprints can still seek protection under foreign trademark laws. But registering, maintaining, and enforcing a trademark around the world can be burdensome and expensive, especially for small- and medium-size companies. Additionally, damages under the Lanham Act are generally much more favorable to trademark holders than those available under foreign laws, says Chakrabarti.

So while *Abitron v. Hetronic* certainly reins in application of the Lanham Act overseas, it's likely that trademark holders will try to argue for an expansive interpretation of what it means to "use [a mark] in commerce" in the United States.

For example, they could assert that a defendant that manufactured a counterfeit product overseas should

“With the right case and the right set of facts, a brand may very well decide to test the metes and bounds of the Supreme Court’s decision.” PREETHA CHAKRABARTI

be liable under the Lanham Act even though they did not sell the product in the U.S., but a third party did. Whether the manufacturer knew or should have known the third party was going to sell the product in the U.S. might—or might not—be a relevant factor.

“With the right case and the right set of facts, a brand may very well decide to test the metes and bounds of the Supreme Court’s decision,” says Chakrabarti.

Who’s laughing now?

Big-name brands may get the last laugh against those who seek to profit off making fun of them, following a recent U.S. Supreme Court ruling on the parody exception in trademark law.

In a unanimous decision, the Court sided with Jack Daniel’s Properties against VIP Properties, which sold a “Bad Spaniel” squeaky rubber dog toy that looked strikingly similar to a bottle of Jack Daniel’s whiskey, but with a bit of bathroom humor added.

For example, while the Jack Daniel’s label indicates that it is “40% ALC. BY VOL.,” Bad Spaniel is “43% POO BY VOL.” Where Jack Daniel’s says it is “Old No. 7 Tennessee Sour Mash Whiskey,” Bad Spaniel is “The Old No. 2 on Your Tennessee Carpet.”

The Ninth Circuit Court of Appeals found that VIP did not infringe or dilute Jack Daniel’s trademarks because, as a parody, it was protected by the First Amendment. The Supreme Court disagreed, saying the court should have looked at whether there was “likelihood of confusion” among consumers that the dog toy was a Jack Daniel’s product, says Chakrabarti.

While at one time it might have been unthinkable for an alcoholic beverage brand to put its name on a dog toy, that may no longer be the case, as brand collaborations of all kinds have become extremely common. For example, Jack Daniel’s currently has its name on a limited-edition Indian motorcycle and a pair of Shoe Surgeon high-top sneakers.

The *Jack Daniel’s* case is somewhat similar to a 2007 case brought by luxury goods maker Louis Vuitton against a company that was (and still is) hawking plush dog toys shaped like tiny handbags. Bearing the name “Chewy Vuiton,” the toy also sports a “CV” logo similar to Louis Vuitton’s famous “LV” mark.

But that case was decided by the Fourth Circuit Court of Appeals in favor of the dog toy seller on First Amendment grounds. However, unlike in the Bad Spaniel case, the Chewy Vuiton dog toy seller did not concede that it was using Louis Vuitton’s trademark for “source identification,” or to somehow imply that the toy was made by Louis Vuitton. In addition, that case was never appealed to the Supreme Court.

The *Jack Daniel’s* decision is a big win for major name brands such as Nike, Patagonia, Campbell Soup, and Levi Strauss, which have all seen their trademarks used in parodies—sometimes in clearly offensive ways. They all filed amicus briefs in support of Jack Daniel’s in this case.

“Big brands have gotten ripped off a lot under the auspices of the First Amendment,” says Chakrabarti. “In the past, there’s been the feeling that pursuing those cases was going to be a dead end. But maybe not anymore.”

Did Bad Spaniel’s squeaky dog toy sow confusion among fans of Jack Daniel’s whiskey?

AP PHOTO/JESSICA GRESKO

Class Action

Tracking *TransUnion*'s ongoing ripple effects

The Supreme Court's 2021 ruling in *TransUnion LLC v. Ramirez* put a renewed focus on "injury in fact" as a key jurisdictional question in class action lawsuits—and the ramifications of that decision continue to unfold in litigation.

Citing *TransUnion*, a number of courts have been extending the focus on concrete injury to the settlements of class action lawsuits—and in many cases, their reviews have led them to invalidate settlements based on plaintiffs' lack of Article III standing. "Some courts have taken the unusual step of deciding on their own—without either of the settlement parties bringing it to their attention—to rule on the standing issue in the context of a settlement," says Mohamed Awan, a partner in Crowell & Moring's Litigation and Mass Tort, Product, and Consumer Litigation groups.

Endorsement of Some Form of the *De Minimis* Rule

CIRCUIT	ACTION TAKEN
First	Endorsed
Second	Endorsed
Third	Not addressed
Fourth	Not addressed
Fifth	Endorsed
Sixth	Not addressed
Seventh	Endorsed
Eighth	Not addressed
Ninth	Rejected
Tenth	Endorsed
Eleventh	Not addressed
DC	Endorsed
Federal	Not addressed

For example, in *Williams v. Reckitt Benckiser LLC* (2023), the U.S. Court of Appeals for the Eleventh Circuit vacated a class settlement that had been approved by the district court. The plaintiffs had alleged that Reckitt Benckiser had provided misleading statements about a supplement's effectiveness in improving brain function, and the settlement had included not only compensation but also injunctive relief that required the company to change its product labeling. However, the court noted that the plaintiffs had only alleged past harm, meaning that they lacked standing to seek injunctive relief that would only affect the future. This invalidated the previous class certification, and therefore the settlement. Such *sua sponte* actions, says Awan, "have been something of an unseen result of *TransUnion*."

New ways to allege harm

Meanwhile, courts continue to wrestle with the *TransUnion*-driven issue of unnamed and uninjured class members when certifying a class. In particular, they differ in their approach to the *de minimis* rule that says a class must have more than a minimum number of injured class members in order to be certified—without saying what that number is. "If there's just one plaintiff that did not have a concrete injury, is that enough to unravel the class? Or should it be some higher number or a percentage?" asks Awan. "The question has been challenged enough in the district courts that it's made its way to various courts of appeal—and there is a split among those courts. That raises the possibility of more litigation, and eventually the Supreme Court taking it up."

"Plaintiffs are now claiming that companies have harmed them by using their copyrighted material or their personal information to feed into AI systems."

MOHAMED AWAN

As *TransUnion* has made concrete injury central to class actions, plaintiffs have been finding new ways to allege harm in situations where they have not experienced direct economic injuries. This has included the citing of emotional injuries that might become manifest in the future or informational injuries in which plaintiffs claim they were not given enough information by a company to make sound purchasing decisions. As plaintiffs continue to search for new approaches to claiming harm, artificial intelligence is likely to be an attractive field. "Plaintiffs are now claiming that companies have harmed them by using their copyrighted material or their personal information to feed into AI systems," says Awan. "While at least one federal appeals court has rejected this theory, plaintiffs' lawyers will no doubt continue to get creative here—and given the exponential growth in the use of artificial intelligence, a wave of AI class actions seems all but certain."

Employment

Employer recruiting and retention under the microscope

Most companies acknowledge that a robust pipeline of qualified, diverse talent is critical. Recent legal developments in the areas of diversity, equity, and inclusion (DEI) and artificial intelligence (AI) are creating potential new challenges for employers trying to maintain those pipelines. The result is likely to be an increase in employment lawsuits in 2024 and beyond.

In June 2023, the Supreme Court's landmark decision in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* effectively ended the practice of making college-admission decisions on the basis of race. "While the *Harvard* decision did not apply directly to employment decision-making, we have already seen, and expect to continue seeing, litigants argue for expansion of *Harvard's* holding and rationale to employment-related decisions," says Trina Fairley Barlow, a partner at Crowell & Moring and co-chair of the firm's Labor and Employment Group.

Indeed, after the *Harvard* decision, plaintiffs filed a number of lawsuits seeking to apply *Harvard* outside of the education context. For example, in August 2023, American Alliance for Equal Rights sued two private law firms, attacking their paid fellowship programs, which had been historically awarded to students from underrepresented minority groups. "These lawsuits sought to test the extent to which private employers can consider race when administering their DEI programs," says Barlow. Even before the decision, there had been an uptick in "reverse discrimination" lawsuits claiming that companies' DEI programs had resulted in discrimination against "non-diverse" employees. The decision has given such litigants another potential line of attack.

Meanwhile, lawsuits attacking companies' DEI programs will continue to be brought under Title VII of the Civil Rights Act and/or Section 1981 of the Civil Rights Act of 1866, which have historically been used to challenge race-based discrimination in employment. Under both statutes, plaintiffs must prove that they suffered an "adverse employment action" from a DEI program, but there is a split in the federal circuit courts over this issue. The majority view is that an adverse employment action must "materially" and "significantly" disadvantage an employee. However, the Fifth Circuit, DC Circuit, and Sixth Circuit have set lower bars for establishing an adverse employment action. Barlow notes that the Supreme Court's expected 2024 decision in *Muldrow v. City of St. Louis* may shed additional light on the question. If the Court interprets adverse employment action broadly to include lesser workplace harms and inconveniences, she believes it could open the door to new challenges to DEI programs.

The impact of AI

The use of AI and other technologies in employment decision-making is expanding rapidly. However, says Barlow, "in many ways, the technology is advancing faster than the laws, and that is creating enhanced employment-law risks for companies."

In 2021, the Equal Employment Opportunity Commission launched an Artificial Intelligence and Algorithmic Fairness Initiative, and it has since been "working hard to catch up with fast-moving technology," says Barlow. In 2022, the EEOC issued guidance saying that technology in the hiring process could result in discrimination under the Americans with Disabilities Act (ADA), and in 2023 it warned specifically that the use of AI in recruiting might result in disparate impact discrimination.

"We have already seen, and expect to continue seeing, litigants argue for expansion of *Harvard*'s holding and rationale to employment-related decisions." TRINA FAIRLEY BARLOW

In September 2023, the EEOC reached a first-of-its-kind settlement with iTutorGroup after bringing a lawsuit alleging that the company's AI software rejected applicants on the basis of their age. In February 2023, a private plaintiff brought a class action lawsuit against the Workday software company alleging that its hiring tool included input from humans that reflected their unconscious bias, and thus discriminated on the basis of age.

These types of lawsuits are likely to be just the tip of the iceberg. The use of AI in the recruiting process is frequently centralized within companies and is often used company- or division-wide. This may make companies more vulnerable to pattern-or-practice discrimination lawsuits claiming that hiring practices discriminate against individuals on the basis of categories like age, race, and disability.

Overall, both *Harvard* and AI are making sound hiring practices something of a moving target—and corporations need to track and understand these unfolding litigation risks as they hire and retain talent.

Hot Topics, Cooling Litigation

Intellectual property has been in the spotlight this past year, from a landmark Copyright Fair Use case in the U.S. Supreme Court, to the more than 100 AI-related lawsuits working their way through the legal system. Despite the publicity surrounding intellectual property, patent litigation filings were down roughly 25 percent in 2023, due in part to a large decline in IP Edge filings, which normally account for hundreds of cases each year. The number of new trademark cases stayed about the same while copyright filings increased slightly.

Overall, filings in federal district court and U.S. courts of appeal declined this past year. In district courts, this change occurred largely because of a reduction in multidistrict litigation (MDL) cases directly filed in a single district. At the same time, terminations of cases rose greatly, most, again, being a subset of MDL cases. Because MDL cases disproportionately affect both the new filings this past year and skew the time to termination, they have been excluded from the calculation of the average number of months from filing to disposition shown in the map to the right.

The federal appellate courts likewise saw a drop in filings, however, not as severe, at a 5 percent decrease across the board. The U.S. Court of Appeals for the Federal Circuit, however, saw an overall 7 percent increase in filings and a 38 percent increase in appeals from U.S. District Courts.

MARIA SOKOVA

WA
OR
CA
NV
ID
MT
WY
UT
CO
AZ
NM
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HI
9
10

CD CALIFORNIA
Most copyright filings, followed by ND Illinois, then SD New York.

WD TEXAS
Since a 2022 order randomly assigned patent cases in WD Texas, the number of cases before U.S. District Judge Alan Albright has dropped.

UNITED STATES COURTS OF APPEALS

Circuit	Notice of Appeal to Disposition (in Months)	S. Ct. Reversal Record
1st	8.3	2 of 3
2nd	6.1	4 of 7
3rd	5.7	1 of 2
4th	4.6	2 of 3
5th	5.4	5 of 8
6th	6.9	1 of 3
7th	4.9	1 of 2
8th	4.2	1 of 3
9th	8.4	10 of 13
10th	4.9	2 of 2
11th	5.1	0 of 1
DC	9.5	0 of 0
FED.	10.2	1 of 4

D NORTH DAKOTA
At over 13 months, the longest trip from filing to disposition for a continental United States district.

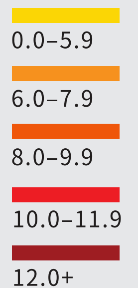
ND ILLINOIS
The most popular venue for filing design patent cases.

D VERMONT
At just under 3 months, the quickest trip from filing to disposition.

D DELAWARE
Delaware's Chief Judge Colm F. Connolly received extensive attention when he issued a set of standing orders calling for litigation funding transparency; other districts are starting to adopt similar rules. The district maintained third place in the most filed patent cases.

District Courts for Civil Cases

Average number of months from filing to disposition



ND FLORIDA
Most cases filed in 2023, making up 23% of all filed cases. This is in large part due to a massive set of MDL cases.

SD FLORIDA
Fell from first to second fastest from filing to disposition, at 3.9 months, when discounting MDL cases. If MDL cases are included, the median time to termination is 0 days, due to the incredibly short lifespans of these cases.

5TH CIRCUIT COURT
Following other district court judges, the 5th Circuit issued proposed rules aimed at regulating the use of generative AI tools that would require attorneys to certify that, to the extent an AI program was used to generate a filing, citations and legal analysis were reviewed for accuracy.

ED TEXAS
Slightly surpassed WD Texas for most filed patent cases, with U.S. District Judge Rodney Gilstrap receiving the most recently filed cases.

GUAM

Northern Mariana Islands

PR

VIRGIN ISLANDS

Product Liability

The upside of recalls and greater industry oversight

In the field of product liability, recent developments are bringing new challenges to defendants—and creating new avenues for fighting litigation.

For example, when companies face complaints about their products, they often resist the idea of a recall because of the potential for bad publicity and recall-triggered lawsuits. But in some cases, says Rachel Raphael, a partner in Crowell & Moring's Mass Tort, Product and Consumer Litigation, and Product Risk Management groups, "a recall may actually be an effective tool for dispensing with product-liability lawsuits early in the proceedings.

"There have been a number of recent court decisions where voluntary recalls have led to the dismissal of class action lawsuits, based on either prudential mootness or the primary jurisdiction doctrine," Raphael continues. For example, in 2022, plaintiffs filed a class action against Ford Motor Co. for an alleged engine defect in certain vehicles. However, a month before the suit was filed, Ford had issued a voluntary recall under the supervision of the National Highway Traffic Safety Administration that instructed customers to bring their vehicles into dealerships for free repairs or reimbursement of any costs they had incurred. As a result, in *Pacheco, et al., v. Ford Motor Co.*, the U.S. District Court for the Eastern District of Michigan granted Ford's motion to dismiss in its entirety based on the prudential mootness doctrine because the recall was already addressing the plaintiffs' claims.

Similarly, in *Charlton v. LG Energy Solutions Michigan Inc.*, LG Energy Solutions Michigan faced a class action suit in California federal court for potential problems with its residential storage batteries—but it had conducted a voluntary recall nearly a year earlier, overseen by the U.S. Consumer Product Safety Commission. The court ruled that because the recall program remedied the battery defects in question, there was no live case or controversy, and the plaintiff therefore had no Article III standing.

The recent spate of such rulings suggests that product liability defendants should at least consider product recalls as a defensive weapon. Most circuit courts have now adopted the prudential mootness doctrine, and as of yet, no circuit or district court has rejected it in such cases.

New challenges on the regulatory front

Although voluntary recalls may benefit product liability defendants in the face of litigation, recent regulatory developments may create new challenges. At the end of 2022, Congress passed the Modernization of Cosmetics Regulation Act (MoCRA), which gives the U.S. Food and Drug Administration more regulatory power over the cosmetics industry. "This is the most significant expansion of the FDA's authority to regulate cosmetics in nearly 85 years," says Raphael.

Under MoCRA, the FDA will have the power to require cosmetics companies to register their manufacturing and processing facilities, meet certain labeling standards, submit lists of products and ingredients, and conduct recalls—actions that could increase the likelihood of litigation in various respects. MoCRA also requires cosmetics companies to maintain records of adverse events, report serious adverse events to the FDA, and provide access to safety records.

Rulemaking for MoCRA is still underway, but it is clear that the act's requirements will open the door to potential litigation. "Things like the mandatory reporting of serious adverse events will mean that product safety information is publicly available under the Freedom of Information Act that ordinarily would not be revealed until discovery. Consumers [and more specifically, their attorneys] are likely to take advantage of this access to information to figure out what their next lawsuit is," says Raphael.

MoCRA should also have significant upside for cosmetics companies. For example, once the FDA releases its guidance, companies should have a clearer road map for what suffices in terms of safety and substantiation testing. With the FDA having more regulatory authority over the cosmetics industry, companies facing product-related lawsuits might be able to turn to the primary jurisdiction doctrine as a defense, asking courts to dismiss or stay proceedings pending FDA review.

Cosmetics companies might also consider voluntary recalls (and the doctrine of prudential mootness) as a defensive tactic. "With MoCRA, there is now an agency that they can coordinate with to oversee a recall or remedial action," says Raphael. "As a result, courts may be more willing to defer to the FDA and moot the litigation."

"[MoCRA] is the most significant expansion of the FDA's authority to regulate cosmetics in nearly 85 years."

RACHEL RAPHAEL

White Collar

Regulators make the shift from carrots to sticks

"There is a global arms race for data and technology, including artificial intelligence, and that has been leading the U.S. government to look at cybersecurity and sanctions through the lens of national security," says Jennie Wang VonCannon, a partner at Crowell & Moring. "Because of these high stakes, regulators are building more 'sticks' rather than 'carrots' into enforcement regimes—and making it clear that companies need to take these things very seriously. And more rigorous enforcement generally leads to waves of litigation."

That shift can be seen in the Justice Department's launch of its Civil Cyber-Fraud Initiative in October 2021. "For too long, companies have chosen silence under the mistaken belief that it is less risky to hide a breach than to bring it forward and to report it," DOJ Deputy Attorney General Lisa Monaco said at the time. "Well, that changes today."

That move was followed by the passage of the Cyber Incident Reporting for Critical Infrastructure Act of 2022. This called for companies in 16 critical infrastructure sectors to report ransomware attacks to the Department of Homeland Security within 72 hours. Then, in October 2022, Uber's chief security officer was convicted on felony charges relating to the cover-up of data breaches. "That was a real shock, because it was the first time the government had prosecuted a company executive for their handling of a breach," VonCannon says. Another shock came in October 2023, when the SEC sued the SolarWinds software company and its chief security executive for misleading investors about the company's cybersecurity protocols.

In July 2023, the SEC released its own finalized cybersecurity reporting rules, which among other things require companies to report cyber breaches within four days. "That was important, because the SEC sets the bar for what publicly traded companies need to tell stakeholders," says VonCannon. The SEC's rules can be expected to lead to more litigation from the SEC, as well as shareholder class actions. In addition, she adds, "experience has shown that SEC enforcement actions are often followed by DOJ enforcement actions and, ultimately, more litigation."

Here, being proactive can help companies. The SEC requires reporting on "material aspects" of a breach. "Historical securities case law says materiality is about the total mix of information available to investors," says VonCannon. "So one strategy is to get more information out before a breach—the controls you have in place, encryption, backups, air-gapped systems that are off the network, and so forth. That way, if there's a breach, you can take that information into account when determining materiality. Generally speaking, the more security protocols you have in place—and the more you tell investors about them—the better off you will be in terms of avoiding or defending against litigation."

'Sanctions are the new FCPA'

Meanwhile, the DOJ has put companies on notice that it is increasing its focus on sanctions violations, which often target the sharing of key technologies with other nations. The DOJ's Monaco has said repeatedly that "sanctions are the new FCPA [Foreign Corrupt Practices Act]," and the DOJ is putting more resources into sanctions, export controls, and money laundering, as well as collaborating with the Treasury and Commerce departments on investigations. As a result, Monaco has said that sanctions were "once a technical area of concern for select businesses," but "should now be at the top of every company's risk compliance chart."

"Experience has shown that SEC enforcement actions are often followed by DOJ enforcement actions—and more litigation."

JENNIE WANG VONCANNON

In this environment, "companies need to make sure they're dotting their i's and crossing their t's with exports and payments," says VonCannon. To do that, they can build on their FCPA experience. "Companies have become more sophisticated at FCPA compliance, so they don't have to reinvent the wheel for sanctions. They can expand those compliance reviews to include sanctions, export controls, and money laundering."

Ultimately, with both cyber incidents and sanctions, she says, "the government is battening down the hatches and increasing enforcement efforts—and companies need to be aware of that because that exponentially increases litigation risk."

Privacy

A growing focus on privacy raises the stakes

Broader privacy laws are proliferating throughout U.S. states. At the same time, federal and state regulators are pursuing more rigorous enforcement of data breaches. The interplay between these two trends is increasing the risk of privacy-centered litigation for businesses operating in all sectors.

Historically, state privacy legislation focused on specific aspects of privacy, such as the processing of biometric information, health information, children's online data, etc. Recently, legislatures have moved away from this sectoral approach and have been increasingly turning to comprehensive privacy laws that regulate the way that businesses gather, use, and disclose personal data. These comprehensive laws typically give consumers certain rights, such as being able to access, correct, and delete their data, or they require businesses to implement procedures and agreements intended to protect such data. Under such laws, "privacy is not just a concern when a data breach has occurred," says Matthew Welling, a partner in Crowell & Moring's Privacy and Cybersecurity Group. Instead, Welling suggests that "you now have to think about how you collect, store, and handle data throughout your business."

This legislative shift began in 2018, when California passed the California Consumer Privacy Act and became the first state to enact this type of comprehensive law. Other states gradually followed suit, and, by the end of 2022, four more states—Colorado, Connecticut, Utah, and Virginia—had comprehensive privacy laws on the books. This trend continued throughout 2023. The National Conference of State Legislators reported that by September 2023, at least 25 states had considered comprehensive privacy laws during the previous nine months and eight had enacted them—Delaware, Florida, Indiana, Iowa, Montana, Oregon, Tennessee, and Texas. Absent comprehensive privacy legislation at the federal level, more states can be expected to join that lineup in the near future, opening the door to more privacy-related enforcement and litigation against companies.

While these state laws are similar, there are some important differences. Many companies are likely to be subject to these laws in states where they don't have facilities but do keep personal information about customers and have remote workers. "Suffice it to say, a lot of businesses are going to need multistate compliance, which adds a pretty significant layer of complication for those companies' data-privacy programs," says Welling.

The public and governments are increasingly focused on protecting personal data in general, and "there is a broad agreement on a nonpartisan basis that this is a priority," says Welling. This is leading not only to new state privacy laws but also to increased regulatory scrutiny of data breaches. Data breach laws are essentially a specific type of privacy law. Thus, Welling says, "there is a natural progression to use the resources devoted to data breach enforcement for privacy enforcement as well. We are seeing a lot of state and federal regulators, who historically focused more on data breach laws, start to lean in on the comprehensive privacy laws."

Indeed, from a litigation perspective, data breaches and the rapidly expanding state privacy regimes are closely related. All 50 states now have laws requiring disclosures of data breaches. These disclosures are public in almost all states and are often available online. Thus, data breach information "is very findable now; notification is no longer just a company letter to a state attorney general," says Welling. "With so much of the information public, it doesn't take a lot of work for regulators in other states or at the federal level to tie it to their privacy enforcement efforts." Plaintiffs' attorneys also pay attention to those disclosures, and the growing number of privacy laws provides them with another avenue for shareholder and class action lawsuits.

Much of this is new territory. "Some of these laws are not even in effect yet, and the field is fairly nascent in terms of regulations and precedent," says Welling. In this environment, companies need to keep track of growing state legislative efforts and the emerging strategies of regulators around privacy—and remain vigilant. "Companies are in that spot under the law where they don't know what they don't know," he says, "and that's a challenge for legal departments."

"Some of these laws are not even in effect yet, and the field is fairly nascent in terms of regulations and precedent."

MATTHEW WELLING

Tax

Tax credits face increased enforcement activity

The IRS has been underfunded for many years, but that changed significantly with the landmark Inflation Reduction Act of 2022 (IRA), which gave the agency an additional $80 billion to be spent over 10 years. Unlike annual congressional allocations, this has allowed the IRS to make long-term investments and plans. And it is clear the agency's strategy includes heightened scrutiny for various corporate tax credits.

One target of this scrutiny will be the research and development credits given to companies under Section 41 of the IRS code. These have long been a focus of the IRS, but that focus is now growing more intense. In 2020 the IRS added "Research Issues" to its list of Large Business and International Campaigns, "a clear signal that there is going to be additional IRS activity in the area," says Crowell & Moring partner Carina Federico. "Problems with R&D credits are often resolved through the audit and IRS appeals processes, but a lot of corporations end up litigating these issues in court, and we'll be seeing more of that in the near future as these cases work their way through the system."

Meanwhile, the Employee Retention Credit, created to help companies through the pandemic, was placed on the IRS "Dirty Dozen" list in March 2023, marking it as an area in which the IRS plans to increase its enforcement and audit efforts to identify fraud. Since 2020, the agency has uncovered a number of cases of ERC fraud and of vendors running scams offering to help companies obtain the credit. In addition, applications for the ERC—which can be filed through 2025—spiked dramatically in 2023, with hundreds of thousands coming in. All of this has created concerns that many claims might be fraudulent, and in September, the IRS ordered a moratorium on new claims for at least three months. "This pause is allowing them to conduct more extensive audits and reviews on ERC claims, which will likely lead to litigation of fraudulent claims in both Tax Court and U.S. District Courts in the coming months and years," Federico says.

"Some members of Congress have expressed concern in the media about the potential for fraud with such large dollar amounts at stake."

CARINA FEDERICO

Finally, the IRA provided $300 billion across 24 clean energy tax credits, including tax credits for producing and using clean energy, a figure that is worrying to some. "Some members of Congress have expressed concern in the media about the potential for fraud with such large dollar amounts at stake," says Federico. At the same time, Treasury and the IRS are still working on guidance for the credits. Because of this, she says, "the IRS is likely to put substantial efforts into clean energy tax credit audits in the upcoming years to ensure compliance and combat fraud."

One area of focus will be a change in who can use clean energy tax credits. Previously, companies were limited to taking them for their own actions, but the IRA now allows them to sell them to other companies wanting to offset their tax liabilities.

Overall, the IRA's tax credits are complicated and new. "That means there's going to be a lot of learning about how they work," says Federico. "And some of that learning is going to take place in court."

Eligible Credits

Credit		Transferability	Direct Pay
30C	Alternative fuel vehicle refueling property	Y	Y
45	Electricity produced from renewable resources	Y	Y
45Q	Carbon capture sequestration	Y	Y
45U	Zero-emission nuclear power production	Y	Y
45V	Production of clean hydrogen	Y	Y
45W	Commercial clean vehicles and incremental costs	—	Y
45X	Advanced manufacturing production	Y	Y
45Y	Clean electricity production	Y	Y
45Z	Clean fuel production	Y	Y
48	Clean electricity investment	Y	Y
48C	Advanced energy project	Y	Y
48E	Clean electricity investment	Y	Y

The direct pay and transferability provisions in the IRA are intended to spur growth and create new opportunities in the clean energy market by allowing some developers to build projects at a faster pace and more affordably. Taxpayers eligible for the credits listed in this chart (with the exception of § 45W) may transfer credits to unrelated third parties. Taxpayers who fall within the definition of "applicable entities" may receive a cash payment from the government for the credits listed above, rather than apply the credit on their tax return.

Antitrust

Artificial intelligence moves into the realm of antitrust litigation

Throughout history, businesses have used new technologies to make themselves more efficient and competitive. Some of these technologies—operating software, internet search, social media—have led to antitrust litigation in varying contexts.

The same fate is likely for artificial intelligence, says Sima Namiri-Kalantari, a partner in Crowell & Moring's Antitrust and Competition Group. "AI, particularly generative AI, is exposing its providers and users to potential antitrust violations," she says. "There are a lot of questions about AI in an antitrust context and no bright-line answers. Litigation is just getting started, and the courts will have to sort it all out."

Price fixing: The most usual suspect

Generative AI uses generative models to produce new content, including text, images, or other media. The models learn the patterns and structure of their data inputs and then generate new data that has similar characteristics.

Perhaps the most usual suspect for AI antitrust enforcement is price fixing. Using generative AI software, companies could potentially be on the hook by exploiting the database that collects their data to set prices in their market.

That's precisely the conduct alleged in several class action suits in district courts across the United States against AI software companies and their users in a number of industries.

For example, class actions have been filed against hotel operators in Las Vegas and Atlantic City concerning their use of algorithms that generate room-specific pricing recommendations. A district court judge in Nevada recently dismissed one of the complaints (albeit with leave to amend) because the plaintiffs failed to allege an agreement.

Namiri-Kalantari notes that some companies' use of generative AI has prompted antitrust investigations by the Justice Department and the Federal Trade Commission. "Between the class action lawsuits and the government investigations," she says, "there will be more clarity about how AI may create antitrust liability and who could be on the hook for violations. The antitrust bar is watching closely."

The class actions underscore how plaintiffs may accuse businesses of using AI as a tool for collusion. But collusion isn't always overt, says Namiri-Kalantari. Programmers and users of AI might be accused of colluding where they allow their data to be used in a pooled database encompassing many users—even if all data is anonymous. The key unresolved question is whether use of the database by multiple parties constitutes information sharing or an agreement among the parties to collude in violation of antitrust laws.

AI as a tool for monopolization

Individual parties also could potentially use generative AI to create or perpetuate a monopoly in violation of antitrust laws: It could allow businesses to engage in hyper-targeted predatory or exclusionary conduct to obtain or maintain a monopoly. For example, an AI tool could use data to target less brand-loyal customers with predatory pricing offers or rebates.

While the manner in which businesses may use AI in an exclusionary or predatory manner remains to be seen, it's top of mind for enforcement officials.

Be proactive and preventive

AI-related antitrust litigation is likely to grow. The volume of cases is rising, driven by a powerful mix of few legal precedents, a generative AI market that's exploding, and increasing scrutiny for violations by federal authorities and the plaintiffs' bar.

Companies that use AI should implement proactive and preventive steps to minimize antitrust exposure. The key is to know exactly what AI is being used for, who has access to your data, and to understand how the AI works. Prevention becomes much tougher without this fundamental knowledge.

Namiri-Kalantari urges companies to take a number of measures. The first seems self-evident, yet many companies don't do it: Use all available tools reasonably at your disposal to comply with antitrust laws. More specifically, companies should closely review contracts for AI tools to determine potential exposure and revise them accordingly, and thoroughly cover AI in annual antitrust compliance training for employees.

"Between the class action lawsuits and the government investigations, there will be more clarity about how AI may create antitrust liability and who could be on the hook for violations."

SIMA NAMIRI-KALANTARI

Government Contracts

When it comes to *qui tam* cases, it's time to buckle your seat belt

If your company receives any funding from the federal government, you'd better buckle your seat belt. You may be in for a very bumpy—and costly—litigation ride.

According to Jason Crawford, a Crowell & Moring partner with a focus on the False Claims Act, "Whistleblower complaints filed under the FCA, known as *qui tam* actions, are numerous now and likely to keep increasing. Any company that receives federal funding is vulnerable to these complaints. Settlements can run into the hundreds of millions of dollars."

Crawford cites several factors driving the growth of *qui tam* filings.

- **Money:** The biggest driver, not surprisingly, is money. The FCA allows for private-party whistleblowers (known as relators) to file complaints in the name of the United States in actions alleging fraud against the federal government. *Qui tam* complaints are filed under seal so that the Department of Justice can investigate the allegations and decide whether to join the suit by intervening. The FCA provides for treble damages, and the relator receives between 15 and 30 percent of the recovery, depending on whether the DOJ intervenes.

  This can add up to serious dollars for defendants and whistleblowers alike. In 2022, for example, a large pharmaceutical company agreed to pay the government and several states a total of nearly $1 billion. The whistleblower received a staggering one-third of that total.
- **Technology:** Recent advances in data gathering and analysis have enabled relators' counsel to analyze huge volumes of data (e.g., for Medicare claims and pandemic relief funds, which are publicly available). Their goal is to find patterns and anomalies that might identify FCA violations.
- **Awareness:** The general public is much more familiar with the idea of whistleblowers than in the past, as cases have received widespread publicity through social media and other channels. Huge settlements and payouts such as in the pharma case are rare, but they provide a tantalizing example of the rewards that a successful *qui tam* complaint might generate.

Follow the money

To get a sense of where *qui tam* complaints are going, Crawford says, "Follow the money and look to areas of high federal spending because that is where FCA enforcement is most likely to occur." With the current high levels of military aid, Crawford expects that Department of Defense contracts will remain an area of high focus.

More cases are coming from newer directions as well. These notably include the $1.2 trillion Infrastructure Investment and Jobs Act and the multiple federal pandemic relief programs. Crawford says that enforcement of the latter has barely begun and that Congress has extended the statute of limitations on pandemic-related claims from six years to 10.

Action steps

"An ounce of prevention is worth a pound of cure" sums up Crawford's general advice to potential FCA defendants. He recommends taking these steps.

- **Remediation:** Most FCA complaints allege that a recipient of federal dollars has failed to comply with an underlying statutory, contractual, or regulatory requirement. Accordingly, companies should take immediate remedial steps when they identify issues of noncompliance.
- **Transparency:** When a company uncovers an internal problem, transparency with the government is often the best antidote for future allegations of fraud. As companies investigate issues of noncompliance, they should consider whether to make a disclosure to the government. This transparency can help form the basis of a potential defense. Proactive and voluntary disclosure of a problem, moreover, can help position the company to receive cooperation credit when settling an FCA case.
- **Early engagement with the DOJ:** The biggest FCA settlements typically arise from cases in which the DOJ joins in the *qui tam* action—a decision that typically is made while the complaint is still under seal. Companies should retain counsel at the early stages of the investigation with the goal of persuading the DOJ to decline intervention or negotiate a favorable resolution.

To get a sense of where *qui tam* complaints are going, "follow the money and look to areas of high federal spending because that is where FCA enforcement is most likely to occur."

JASON CRAWFORD

Environmental

Litigating the Biden climate agenda

When it comes to environmental laws and regulations, the only question is when—not if—the courts will be asked to resolve contentious issues. Such is the case with a rule proposed by the Environmental Protection Agency, under the Clean Air Act, to limit the greenhouse gas emissions of fossil fuel-fired power plants.

The EPA proposed the rule, which is part of the Biden administration's agenda to address climate change, in May 2023 and aims to finalize it by April 2024. Doing so could help ensure that the rule would withstand scrutiny under the Congressional Review Act before the 2024 elections, while Democrats control the Senate.

"Significant federal efforts regarding the environment almost inevitably end up in court," says Elizabeth Dawson, a partner in Crowell & Moring's Environment & Natural Resources Group. "It's reasonable to assume that that's what will happen with the power plant rule."

A key ruling will affect the rule

Any challenge to the power plant rule will likely involve the Supreme Court's decision in 2022's *West Virginia v. EPA*. The Court broadly applied its "major questions doctrine," which states that courts should presume that Congress doesn't delegate issues of major political or economic significance to federal agencies unless the statutory text is clear.

In *West Virginia*, the Court used this principle to hold that Congress didn't authorize the EPA to set standards of performance based on "generation shifting" (i.e., the forced closing of coal-fired power plants in favor of cleaner generation methods). As a result, the decision rejected the Obama-era Clean Power Plan—a move that prompted the EPA to craft a new power plant rule proposal attempting to overcome the concerns raised in *West Virginia*.

Dawson notes that a challenge to the power plant rule would automatically be heard by the U.S. Court of Appeals for the District of Columbia Circuit, which thus far has generally taken a narrower view of the major questions doctrine.

IRA-based disputes, too

The Biden administration's most ambitious legislative climate measure—the Inflation Reduction Act of 2022—likely will drive other types of disputes, according to Dawson. Potential examples include False Claims Act enforcement, administrative law disputes over regulations implementing IRA programs, disputes regarding the IRS and tax incentives, and those between commercial parties about allocation of benefits from the different IRA programs.

Three other pending federal proposals will probably drive litigation as well. These are the Securities and Exchange Commission's proposed rules regarding greenhouse gas (GHG) emissions and climate-related financial risk; the Federal Acquisition Regulatory Council's proposal that certain government contractors must disclose GHG emissions and climate-related financial risk; and the Council on Environmental Quality's recommended requirement that federal agencies take into account climate change-related and environmental justice effects of a proposed federally funded or permitted activity.

What to do

Dawson, who helps clients express their views on environmental matters to federal decision-makers, has some practical suggestions for those who want to provide input on environmental rulemaking or any other federal rulemaking. (Note: The rule's official comment period has ended, but parties still can try to have meetings with EPA officials or submit new responses if EPA reopens the comment period.)

Above all, Dawson says, make your written comments as relevant and thorough as possible. In addition to respecting rulemakers' time, doing so communicates to them that you and your views are serious and should be heard. Attach any documents that support your positions to the comments so that the record reflects that the agency had the opportunity to review them.

It's also critical to keep in mind that your written comments and in-person meetings will be included in the rule's administrative record. Having your detailed comments in the record preserves your arguments for potential litigation.

"Significant federal efforts regarding the environment almost inevitably end up in court."

ELIZABETH DAWSON

Health Care

Private equity + health care = lawsuits

Private equity firms have been increasingly active in the health care provider space in recent years—which, in turn, has increased the prevalence of health care litigation.

This trend is still in an early stage, says Rochelle-Leigh Rosenberg, a partner in Crowell & Moring's Litigation and Health Care groups. "While PE-backed health care entities have already been aggressively pursuing plaintiff-side litigation—especially against health insurers—the volume of PE-related involvement in commercial and other types of health care litigation is very much on the rise."

It's not surprising that PE firms see health care providers as fertile ground to grow their investments. Health care accounts for nearly 20 percent of the U.S. economy, offers ample opportunity for cost-cutting (a PE specialty), and is a very complex enterprise with abundant legal gray areas. As a result, PE sponsors have been big acquirers of nursing homes, emergency medicine staffing services, and ancillary medical practices such as anesthesia, dermatology, radiology, and lab testing.

Reimbursement disputes

Perhaps the most active type of litigation thus far involves PE-backed provider practices suing health insurers for higher reimbursement rates.

In an increasingly common scenario, PE entities purchase providers and then have them terminate existing insurance contracts so the providers can bill out of network. Reimbursement for out-of-network providers tends to be less defined—the typical legal standard is that provider fees must be "usual, customary, and reasonable"—which offers more room for litigation.

"The dollar amounts in dispute can be staggering when they involve tens or hundreds of thousands of individual service claims," Rosenberg says. "It's a difficult decision whether to roll the dice at trial when the dollars at stake are so high."

Additional types of cases

It's likely that PE firms will be involved in additional types of litigation as their health care presence grows. Rosenberg sees these as the most likely case types:

- **Whistleblower claims:** Health care-related whistleblower claims under the False Claims Act are attracting attention from state and federal agencies. Questions about PE's impact on the quality of provider care—combined with rising general awareness of whistleblower suits—suggest that such cases, with and without government interveners, will increase. Recent case law indicates that both provider portfolio companies and PE sponsors are being named in these suits.
- **Corporate practice of medicine:** Thirty-three states have CPOM laws, which allow only licensed medical professionals to own or control profits in medical practices or businesses. In a closely followed California case, *American Academy of Emergency Medicine Physician Group Inc. v. Envision Healthcare Corporation, et al.,* a group of emergency medicine practitioners accused a PE-owned emergency room staffing company of violating the state's CPOM law.
- **Antitrust claims:** Some PE firms have created "aggregator" companies that acquire multiple players in the same service line and geographic area. Antitrust enforcers are concerned that such accumulation can harm competition. In September 2023, in *Federal Trade Commission v. U.S. Anesthesia Partners Inc. et al*., the Federal Trade Commission sued an aggregator for buying anesthesiology practices in Texas, allegedly to drive up prices.

"The dollar amounts in dispute can be staggering when they involve tens or hundreds of thousands of individual service claims."

ROCHELLE-LEIGH ROSENBERG

Anticipating suits

Rosenberg advises potential defendants to take several steps in anticipation of suits brought against them.

First, make sure to know the applicable state and federal laws governing health care claim payments, particularly regarding out-of-network providers. Insurers should document their reimbursement policies and practices so that, in the event of litigation, they can clearly explain their methodology and why it's fair.

In addition, potential defendants should determine whether a suing provider is owned by a PE firm, and analyze claims and medical coding to spot potentially problematic trends.

SPECIAL COVERAGE

Supply Chain Recovery

Increasing results while minimizing risk

In today's tightly interwoven supply chains, a problem with the timely delivery or performance of components and parts provided by a supplier can have a big impact on a manufacturer, potentially causing production disruptions, reputational harm, costly recalls, and warranty claims. This is leading to more disputes over contract terms, the price and performance of parts and, in some cases, litigation. But a manufacturer need not shoulder the burden of these disputes alone. It can seek, and often achieve, the recovery of funds, all while taking care to manage its often delicate and valuable supplier relationships.

Faced with those realities, some companies are establishing formal "supply chain recovery" capabilities, typically spearheaded by the legal department. These groups take a systematic approach to supplier disputes, from the initial stages of the dispute with the supplier to the attempted negotiation of the issues and, if necessary, through to litigation. They are focused on two main goals: gaining compensation for the costs created by faulty parts or other supply chain problems and maintaining solid relationships with key suppliers to keep critical parts flowing—and, ultimately, manufacturing operations up and running.

Rethinking contracts

Today's dynamic supply chain relationships are shaped by everything from disruptions among upstream suppliers to rising costs and growing competition—all of which is further complicated by the constantly shifting regulatory and legal landscape. For example, in July 2023, the Michigan Supreme Court issued a decision in *MSSC Inc. v. Airboss Flexible Products Co.* that will have a profound impact on the purchase of manufactured components under contracts subject to Michigan law—and, quite possibly, elsewhere. Traditionally, product manufacturers and their suppliers have worked under blanket purchase orders that typically cover several years corresponding to that product's life cycle—and which do not contain a specified quantity of parts required. The quantity is provided later when the manufacturer periodically orders specific numbers of parts as needed in a series of production releases sent to the supplier. In 2013, MSSC, a large Tier 1 automotive assembly supplier, and Airboss, a Tier 2 supplier of rubber-based products, agreed to such a blanket purchase order for the delivery of Airboss parts.

However, in 2019, Airboss asked to increase its prices. MSSC refused, and Airboss said that it would stop supplying parts to MSSC, which responded by suing the supplier for breach of contract. Reversing prior Michigan law on this issue, the Michigan Supreme Court ultimately ruled in Airboss's favor. In its decision, the court said that a blanket purchase order without a quantity term did not provide sufficient information about the quantity of parts required to satisfy the statute of frauds and was accordingly unenforceable. Therefore, such an arrangement "only constituted an obligation binding Airboss as to each individual release if Airboss accepted—not a promise to fulfill all future releases."

In essence, the *MSSC* ruling limits the enforceability of contracts subject to Michigan law that do not contain a quantity- of-parts term sufficient to comply with the statute of frauds. This represents a "sea change" from previous law and common industry practice, says Crowell & Moring partner Rebecca Chaney, co-chair of the firm's Transportation Group as well as its Supply Chain Recovery Practice. "This will likely lead to more supply chain litigation—which means that more companies will be looking for ways to recover funds from their supply chains," she says. "Manufacturers and suppliers doing business where Michigan law applies would be wise to review their existing agreements in light of *MSSC*—not only to prepare for potentially more recovery efforts but to make sure their contract terms comply with newly established law and are therefore enforceable." The court's ruling only applies in Michigan, but because of the state's long history of automotive manufacturing, supply chain-contract case law there is well-developed, "and courts in other states may consider *MSSC* in other manufacturing contract cases," Chaney says.

Understanding today's supply chain relationships

MSSC is just one aspect of the increasingly complicated challenge of managing the supply chain. In many industries, the nature of manufacturer-supplier relationships has been evolving for years. With the growing technical complexity of products, large manufacturers have increasingly relied on fewer suppliers—or even a sole supplier—to provide sophisticated and often

"As finished products become more complex, there's a need for closer integration between the manufacturer and the suppliers." JOE LINES

> **“You can approach a supplier and say, ‘We need to sit down and professionally figure out a way to make us whole that works for both of us.’”**
>
> REBECCA CHANEY

cutting-edge parts and components. “As finished products become more complex, there’s a need for closer integration between the manufacturer and the suppliers, and a lot of suppliers don’t have the breadth or technical expertise to supply those products,” says Joe Lines, senior counsel in Crowell & Moring’s Affirmative Recovery Practice and co-chair of the firm’s Supply Chain Recovery Practice. “The result is a more concentrated supply chain base, which presents challenges of its own.”

Having a smaller number of suppliers tied tightly to the company means that a quality problem or delivery interruption with one supplier is more likely to have a significant impact on a manufacturer’s operations. It also gives suppliers more leverage. Traditionally, large manufacturers tended to dictate terms to suppliers, and if the supplier objected, the manufacturer could move the work to another supplier. Now however, the pool of replacement suppliers with the required capabilities is smaller, and taking time to find an alternative qualified supplier could disrupt operations.

Recovery Machine

- **Establish centralized system to identify potential losses**
- **Identify dollar threshold “trigger”**
- **Involve purchasing, legal, finance**
- **Identify opportunities quickly**
- **Evaluate approach to resolution**
- **Protect rights**

Getting results while reducing risk

In this environment, some manufacturers are taking a more sophisticated approach to managing the recovery of funds. Instead of dealing with supplier problems on a case-by-case basis, they are establishing supply chain recovery groups that manage recovery from a centralized, consistent perspective. “This should be a multidisciplinary group involving the legal staff, purchasing, and finance,” says Chaney. “It can look holistically at factors such as the commercial relationships, the company’s supply needs, and, in the case of disputes, the strength of its position with the supplier.” Such a group can also be proactive and strengthen the company’s position by helping to manage and update contractual language in light of new developments—such as the *MSSC* decision. And when a lawsuit does seem to be the best way to address problems, it can help shape litigation strategies.

“A supply chain recovery capability lets you take a systematic, rather than episodic, approach to supply chain recovery,” says Lines. It enables the company to pursue recovery in a way that reflects the needs of the overall business, as opposed to the targets of one function or department. Without this kind of holistic view, he says, “You can wind up with purchasing, for example, handling the problem and thinking, ‘This is a sole source supplier and we really need that part. It would be difficult to replace, so let’s just eat the loss and move on—it’s not worth the potential dispute.’” In that case, the company would be potentially forgoing an appropriate recovery and sending the wrong message to the supplier about performance expectations.

This systematic approach also provides a focal point for working with suppliers to explore alternatives to litigation. “You can develop strategies for making the company whole while recognizing the need for a good long-term relationship with the supplier,” says Chaney. “You can approach a supplier and say, ‘We have a loss here; we don’t want to punish you or disrupt your operations. But we have $25 million in excess warranty costs because of the product you supplied us. So, we need to sit down and professionally figure out a way to make us whole that works for both of us.’” This discussion can lead to alternatives to resolve the matter, including those that don’t necessarily require litigation or even an adversarial proceeding of any sort (although numerous alternate dispute resolution options exist and can be successful). A manufacturer might take creative approaches to partly offset suppliers’ recovery payments: For example, it might agree to increase volume in its future orders or extend the existing contract term. Or rather than an all-cash payment, it might accept future discounts.

As case law evolves and we continue to see concentrated supply chains and more intertwined, complicated relationships between purchasers and suppliers, we can expect to see more business disputes. In the end, effective supply chain recovery efforts can give companies a more sophisticated and nuanced approach to recouping costs that can help them balance financial recovery with the health of increasingly critical supply chain relationships.

International Litigation

Litigating patents in Europe: A whole new ball game

It's a whole new ball game for European patent ligation: The Unified Patent Court opened for business on June 1, 2023.

U.S. companies and other patent holders doing business in Europe—and their lawyers—stand to benefit greatly. "Previously, patent cases had to be filed in individual countries," says Kristof Roox, a Brussels-based partner in Crowell & Moring's Intellectual Property Group. "The establishment of the UPC means that cases are filed in one court whose jurisdiction extends to all countries that are signatories to the UPC Agreement (UPCA). One set of laws applies instead of many, and costs are lower."

Pre-UPC: A patchwork system

European patents are granted by the European Patent Office under the 1973 European Patent Convention. Patents granted by the EPO are known as classic European patents, or EPs.

This system has considerable limitations, however. Chief among them is that an EP is a bundle of national patent rights and, consequently, patent litigation takes place on an individual-country basis. Each country not only has its own laws and courts, but also has its own patent renewal fees and official language(s) for proceedings and translation. The outcome of litigation in any one country has little to no impact on litigation in any other country.

The result is a fragmented, patchwork system governing European patents that is inconsistent, costly, and highly impractical. It favors deep-pocketed parties that can afford to litigate potentially lengthy matters in multiple jurisdictions.

What is UPC?

The UPC is an international court whose legal basis is the UPCA, which is an intergovernmental treaty that was signed by 25 EU members in 2013. Only EU members can participate in the UPC; all have signed the UPCA except Croatia, Poland, and Spain. Of the 27 EU members today, 17 have ratified the UPCA (see table, page 27) and the remaining seven members are expected to do so eventually.

As part of the new system, the EPO can now also grant European patents with unitary effect known as UPs (unitary patents).

The UPC's structure is simultaneously simple and complex, notes Roox. The simplicity lies in the fact that there are two levels of courts, the Court of First Instance (i.e., lower court) and the Court of Appeal. But things get complicated with the Court of First Instance, which has three divisions.

There are 13 local, country-specific divisions in 10 countries (Germany has four local divisions due to the historically large volume of patent cases in its courts). The regional division comprises Estonia, Latvia, Lithuania, and Sweden, which have agreed to have their cases heard in Stockholm. Infringement claims can be brought in the local/regional divisions of the UPC where the infringement has occurred or where the defendant is located.

The central division adjudicates patent revocations (i.e., invalidations), with certain exceptions. Its main seat is in Paris, with additional seats in Munich and Milan, and its work is divided according to the subject matter of the patent in dispute. Three countries that aren't in a local or regional division—Bulgaria, Luxembourg, and Malta—bring actions in the central division.

The Court of Appeal is in Luxembourg and hears appeals of decisions by the Court of First Instance. Both the Court of First Instance and the Court of Appeal can file requests for preliminary ruling on questions about EU law with the Court of Justice of the European Union.

Jurisdiction and transitional period

The UPC has exclusive jurisdiction over EPs and UPs. During a seven-year transitional period that started when the UPCA went into force (and which may be extended by up to seven years), actions relating to EPs may alternatively be brought before national courts or other competent national authorities.

EPs can be opted out of the UPC's jurisdiction in the transitional period. Patent holders can even opt out EPs and then opt back in if they want to take advantage of the UPC system. Once national proceedings related to an opted-out EP have started, however, the opt-out cannot be withdrawn. The UPC has exclusive jurisdiction over UP applications, which cannot be opted out of.

A bright future

Given the UPC's brief existence, it's difficult to draw solid conclusions about its effectiveness. There is limited case law, of course, and low transparency, as technical problems have prevented the UPC registry from publishing many cases and rulings.

Roox nonetheless is optimistic about the court's viability and prospects.

"We've seen fair, well thought-out,

> **“There was concern among potential plaintiffs that the court would set high standards for granting injunctions, but that doesn’t seem to be happening.”**
>
> KRISTOF ROOX

quality judgments so far,” he says. “Trials and judgments have also been speedy. There was concern among potential plaintiffs at first that the court would set high standards for granting injunctions, but that doesn’t seem to be happening.

“Because defendants seem to find the judgments well balanced, companies might reconsider their opt-outs and nonparticipating EU member states may decide to ratify the UPCA. All of these are important factors that should help attract a much higher volume of litigation,” he says.

Compelling for U.S. parties

The fact that the UPC combines legal uniformity with large size and scale is especially compelling for U.S.-based parties, Roox adds. Patent holders now have a straightforward, cost-effective way to seek protection and to access the huge European market. Smaller parties that have shied away from the country-by-country system can bring or defend cases with greater ease and confidence.

While U.S. (i.e., non-EU) lawyers cannot appear in UPC proceedings, they can play a much larger and more important role in European patent litigation than before. This is because parties can choose the languages in which actions are conducted and translated.

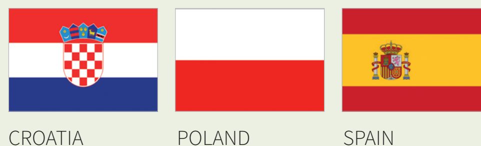
Assuming—as many observers do—that English will usually be one of the languages, U.S. firms will be able to draft substantive arguments and know that their writing will be accurately understood. There likely will be an increase in the number of U.S. firms that are partnering with EU firms on UPC cases.

UPC Status of EU Member States

Ratified

Expected to ratify

Won’t/might ratify



SOURCE: UNIFIED-PATENT-COURT.ORG

Evolving to Serve a Changing Litigation Landscape

Over the past year, Crowell attorneys have had many internal discussions to help us better collaborate across practices, industries, and geographies to address the needs of our clients. The output of those discussions is loosely reflected in the structure of this year's *Litigation Forecast,* in which we've organized our coverage into categories such as IP Litigation, U.S. Litigation, and Regulatory Litigation, along with a section on International Litigation. We also include a robust discussion on supply chain recovery as we continue to see massive disruption coming out of COVID and other sources of business interruption.

Like you, we also have seen that the once linear timeline of litigation has been broken, with the genesis of litigation stemming from an unpredictable range of sources; now a class action can make a regulator take notice, or a state attorney general may fire the first shot against a company or industry with private plaintiffs on their heels. As a result, companies are often managing risk on multiple fronts with higher and higher stakes. With that in mind, our focus as a firm is to help our clients address risk, whether at the earliest stage of rulemaking, the onset of compliance and enforcement inquiries, filed litigation, during the appeals process, or through a resultant push to change laws on their behalf. In short, we work with clients to identify and manage risk as their needs evolve, and this *Forecast* reflects our commitment to looking around corners to do just that.

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

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