

INTELLECTUAL PROPERTY UPDATE AND YEAR IN REVIEW

The Intellectual Property Newsletter of Dykema
January 2024

The Dykema logo features a small green square to the left of the word "Dykema" in a white, sans-serif font. The background of the entire page is a dark blue cityscape at night, with numerous skyscrapers and a digital overlay of vertical light trails in shades of blue and purple, each ending in a small glowing dot.



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Patent and Trademark Office Roundup

Big and significant developments and practice changes are underway at the Patent and Trademark Office (PTO). After a recent meeting at the International Trademark Association (INTA) Leadership Meeting on behalf of the Trademark Office Practice Committee, Dykema member Jennifer Fraser reports on the committee meeting with PTO Commissioner David Gooder, Deputy Commissioner for Examination Policy, Amy Cotton, and other representatives from the Trademark Trial and Appeal Board and the Solicitor's Office. Many of the changes shared and reported below reflect efforts to combat fraud, address filing surges and other filing behaviors, and update IT systems. These changes are expected to impact both practitioners and brand owners alike.

BACKLOG

The Trademark Office is still behind on examination with average pendency to first examination over eight months, but Commissioner Gooder reports filing surges have stabilized to more normal levels and the PTO is hiring to address the pending backlog. Examiners will no longer be responsible for fraud issues, which will soon be handled by the newly formed Registration Protection Office, and this is expected to provide more time for standard examination issues.

FEE CHANGES

After the notice and comment period in June 2023 related to proposed fee changes, the PTO expects to issue proposed rules for additional comments in late January/early February 2024. After additional comments, fee changes are scheduled to take effect in October/November 2024. On behalf of the Intellectual Property Owner's Organization, Dykema Member Jennifer Fraser provided testimony at the Trademark Public Advisory Committee Public Hearing. While many fees were proposed to address costs and inflation, other fees were proposed to influence desirable and undesirable filing behavior, including improper claims of use, lengthy descriptions of goods and services, and the failure to provide complete information in an initial application.



MAJOR IT CHANGES

Many of you have probably noticed the PTO has replaced “TESS,” the Trademark Electronic Search System. Many practitioners are adjusting to the new database, different search strategies, and usability for preparing reports and submitting evidence from TDSR, the Trademark Document and Status Retrieval database, which is more cumbersome and cluttered.

Related to this, the PTO is retiring “TRAM,” the backbone of its IT systems. TRAM was over 40 years old, did not interface with other systems and was no longer supported by the vendor. TRAM should be fully retired in 2024, and this will enable the PTO to make other changes (for example, changes to post-registration deadlines, discussed below).

MAJOR SANCTIONS AND INVESTIGATIONS INTO IMPROPER FILINGS CONTINUE

In recent years, the PTO has issued sanctions of an unprecedented scale related to trademark filings to address a surge of improper applications, bogus claims of use and other ethical violations. A supplemental Show Cause Order was issued in November 2023 to Seller Growth, a Chinese filing entity, whereby the PTO could terminate approximately 50,000 applications/registrations due to this entity filing applications and “providing false, fictitious, or fraudulent information in trademark submissions.” The company “improperly entered the electronic signatures of at least three U.S.-licensed attorneys.” Prior to this order, another significant sanction involved an attorney in 2022, when prolific filer Jonathan Morton was suspended from practicing at the PTO for over two years and the validity of over 30,000 applications was jeopardized. The PTO determined Morton worked with Chinese filing agencies and Morton did not properly review applications and signed declarations of use in commerce, and/or submitted specimens or use, without performing a reasonable inquiry regarding the accuracy of such claims.

OTHER ISSUES TO COMBAT FRAUD

The PTO is working to improve identification verification, due to efforts to abuse filing privileges and the myUSPTO terms of use.

ATTORNEY RECOGNITION

The PTO is still considering the duration of attorney recognition in trademark applications/registrations, which currently lasts until a registration issues or a revocation of attorney/withdrawal is filed, and the PTO is leaning toward a rule change. In that case, an attorney would have to take action to be an attorney of record or to revoke being an attorney. Any changes would be implemented slowly and the PTO suggested an 18-month time frame for implementation.

OTHER DEVELOPMENTS

A three-month deadline will be implemented for post-registration office actions in April or May of 2024.



Federal Circuit Narrowly Reverses TTAB Decision Canceling Registration Due to Fraud but Sanctions and Lower Standard of Proof Remain

Issues related to fraud in connection with trademark filings at the PTO are a hot topic, and a recent decision at the Federal Circuit added some guidance, albeit limited, on the implications related to allegations of fraud. In a narrow decision, a divided Federal Circuit panel held that a trademark cancellation proceeding was “not available as a remedy for a fraudulent Section 15 incontestability declaration,” overturning a prior decision at the Trademark Trial and Appeal Board (TTAB) and remanding the case for further proceedings before the TTAB. Importantly, the Federal Circuit majority did not abrogate the legal standard that fraud before the PTO may be committed when a declarant makes a statement with a reckless disregard for the truth thereof in procuring or maintaining a registration. The Federal Circuit also specifically mentioned the TTAB could still pursue sanctions in other ways.



Great Concepts, LLC, registered the mark “DANTANNA’S.” Dan Tana, the predecessor of Chutter, Inc., asked the TTAB to cancel the registration. The cancellation proceeding was suspended during a pending federal district court case by Mr. Tana against Great Concepts for trademark infringement. The federal court granted summary judgment for Great Concepts, and the TTAB later dismissed Mr. Tana’s cancellation proceeding. During the pendency of Mr. Tana’s federal case and cancellation proceeding, Great Concepts’ then-attorney filed with the PTO a Combined Declarations of Use and Incontestability for the DANTANNA’S registration. The Declaration of Incontestability claimed there was no ongoing proceeding involving the registration in either the PTO or federal court. This statement was false because the federal court case appeal and the cancellation proceedings were both still pending. Chutter later asked the TTAB to cancel the DANTANNA’S registration based on Great Concepts’ false incontestability declaration. The TTAB found the declaration was fraudulent and canceled the registration, and Great Concepts appealed.

Statutory and precedential authority provide that fraud in connection with procuring or maintaining a trademark registration is a basis for its cancellation. The Federal Circuit had previously left open the question of whether making a statement to the PTO with reckless disregard of its truth or falsity satisfied the intent requirement for fraudulent activity (as compared with the general

requirement that fraud requires an actual intent to deceive). However, in this narrow situation, the Federal Circuit indicated that a Declaration of Incontestability itself does not relate to procuring or maintaining a registration, but only provides additional benefits, and thus the false statement in the incontestability declaration could not provide a basis for cancellation. Despite this, the Federal Circuit did not directly counter the TTAB’s application of the lower reckless disregard standard put forth in the TTAB decision. The court echoed the sentiments of the TTAB, acknowledging that, although fraud generally requires a finding of intent to deceive, “direct evidence of deceptive intent is rarely available,” so “such intent can be inferred from indirect and circumstantial evidence.”

Despite the court’s decision in favor of Great Concepts, its mark is still at risk of losing incontestable status and trademark owners should remain wary. Great Concepts as well as its former attorney may also face sanctions from the TTAB, as it was undisputed that Great Concepts’ incontestability declaration was submitted with a false statement (even if there was no intent to deceive). Extra care should be taken to make sure there is a reasonable inquiry into the facts when submitting any filings to the PTO that relate to procuring or maintaining a registration. The case was reversed and remanded to the TTAB for it to decide this issue and consider sanctions for the attorney who submitted the declarations for Great Concepts.



Dykema Tips for Incorporating or Republishing Online Content

You have found something interesting or helpful online you would like to share, repurpose or include in your own content. But what are the rules? How can you safely do that without infringing somebody's copyright or exposing your company to liability? Here are some tips, facts and dispelled myths to guide you.

FAIR USE ISN'T WHAT YOU THINK IT IS...

How many times have you heard someone you work with say, "Oh we can use that — it's fair use!" But what seems "fair" to the average person is not what it means under copyright law. It is important to know that, first and foremost, "fair use" under copyright law depends on the particular facts and circumstances of each individual situation. There are no easy rules.

FAIR USE UNDER THE COPYRIGHT ACT HAS FOUR FACTORS:

- 1.** The purpose and character of the use, including whether the use is commercial or for nonprofit/educational purposes
- 2.** The nature of the copyrighted work
- 3.** The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- 4.** The effect of the use on the potential market for or value of the copyrighted work

All the factors must be considered and balanced against one another. You can see, then, that it probably will be a rare circumstance where a layperson can assess these factors and determine on their own that they are making a fair use of content over which copyright is claimed. Particularly if your use is in connection with a commercial/for-profit product, business or venture, and/or you are reproducing all or substantially all the copyrighted work, there is a high risk the fair use defense will not be available.

On the other hand, if your use is purely educational/nonprofit, and you are using only a small, fairly insignificant part (as regards the whole) of the copyrighted work, which will not adversely affect the market for the copyrighted work, you might be on the safe side of fair use. But there are no guarantees — again, it is largely a question of fact for each particular circumstance.

BUT IS IT EVEN COPYRIGHTABLE?

Even if you cannot rely on fair use, there are may be some elements of a copyrighted work you may freely reproduce and use. These include:

- Facts (but the particular selection and arrangement of those facts may be copyrightable)
- Common property, lists or tables taken from public domain or other common sources (but a word of caution: Copyright protection lasts a long time — decades — so do not assume just because the source is quite old that it is now in the public domain)
- Mere lists of contents or ingredients
- Blank forms
- Blank graphs, charts, tables and figures that are designed for recording information and do not in themselves convey information, as well as the ideas for graphs, charts, tables and figures or the overall design of a graphing, charting, or tabling method or template

Another word of caution: Graphs, charts and tables may be protected by copyright insofar as the particular compilation of data, facts or information is concerned. Thus, copying verbatim or drawing your own version — as opposed to extracting only the individual bare facts and data and presenting it in your own table/compilation — still might get you on the wrong side of infringement. And if it is sufficiently expressive text that describes, explains and/or interprets a particular graphing, charting or tabling method (the bar for qualifying as “expressive text” is quite low), it is copyrightable.

THAT’S OK — IT’S CREATIVE COMMONS LICENSED!

Well maybe...or maybe not. There are many different types of Creative Commons (CC) licenses, and what they permit you to do varies. Therefore, first and foremost, read the fine print. First, currently there are six different versions of the CC license, which each allow different uses. And if it is not in the particular license you have, your use is not covered.

Second, make sure you follow the very specific rules for attribution — that is, identifying the copyright holder, including proper copyright notice, as required by the license. A lot of “licensees” have been caught up in copyright infringement litigation (particularly with photographs and artwork found on the internet) due to the lack of — or incomplete or inaccurate — copyright attribution. This particular trap has ensnared even those using one of the many private services that offer copyrightable content access for use and licensing.

Many copyright owners are taking the position that if the attribution requirements are not strictly followed, it is not licensed and instead constitutes an infringement. And it can be a double whammy, because intentional “removal” of such “copyright management information” (CMI) can implicate the Digital Millennium Copyright Act (DMCA), which has its own statutory damages, separate and apart from those for copyright infringement.

ONE FINAL TIP..

When in doubt, ask an expert. Because the Copyright Act and DMCA include statutory damages and attorneys’ fees, these can give less-than-scrupulous actors incentive to sue even for minor infractions. This is one circumstance where it is better to ask for permission than forgiveness.

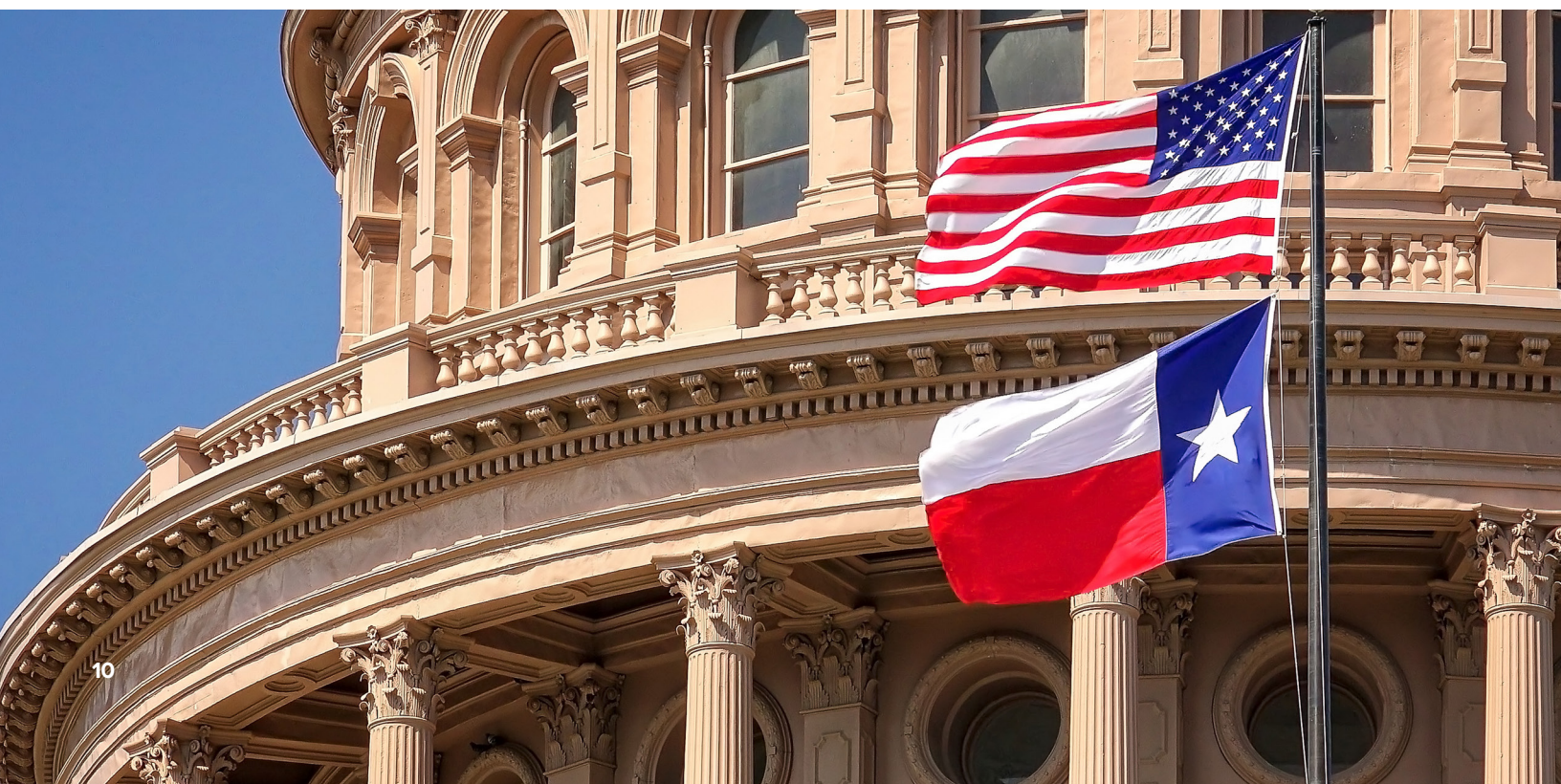
The Eastern District of Texas Experiences a Rise in Patent Case Filings, While the Western District of Texas Remains a Favored Jurisdiction

A recent Lex Machina report (from the period of January 1 to September 30, 2023) underscores the enduring influence of Chief Judge Orlando Garcia's July 2022 directive in the Western District of Texas. This mandate shifted the automatic assignment of patent cases in the Waco Division from Judge Alan Albright to a random assignment within the Western District. At the time, Judge Albright was the most-sought-after judge for patent case filings in the United States. While Judge Albright and the Western District of Texas remain popular among patent plaintiffs, Judge Rodney Gilstrap and the Eastern District of Texas have experienced a resurgence in patent case filings during the first nine months of 2023.

Out of the 2,276 patent cases filed in the U.S. during this period, 418 cases were filed in the Western District of Texas, and 417 cases were filed in the Eastern District of Texas. The District of Delaware ranked third, with 338 patent case filings.

- Notably, the Eastern District of Texas, which traditionally held the third position in patent case filings, has now risen to be on par with the Western District of Texas.
- The majority of patent case filings in the U.S. remain concentrated in three district courts: the Western District of Texas, the Eastern District of Texas and the District of Delaware. In 2022, these three courts represented 52 percent of all patent case filings in the U.S. In the first nine months of 2023, they collectively accounted for 51 percent of all case filings.

Although Gilstrap has overtaken Albright in Tyler as the district judge with the highest number of new patent filings, both judges are closely matched in terms of cases filed by high-volume plaintiffs. In the initial three quarters of this year, Gilstrap handled 316 cases, while Albright had 182 cases, and Judge Maryellen Noreika of the District of Delaware recorded 96 cases, as per Lex Machina's tally.



Nearly 20 Nations Enter Into Agreement Concerning the Safety of Artificial Intelligence

Law enforcement and intelligence agencies from 18 countries signed an international agreement on artificial intelligence (AI) safety, focusing on making new AI technology “secure by design.” This initiative follows the European Union’s AI Act, which banned certain AI technologies and categorized high-risk AI systems. The agreement stresses the need for secure and responsible development, deployment and operation of AI systems, emphasizing that security should be integrated throughout the AI life cycle. The rapid pace of AI development makes security a crucial consideration to prevent novel vulnerabilities and the exploitation of adversarial machine learning.

Notably, the agreement was signed by agencies from various countries, including the U.S. and EU members, but China, a major AI developer, did not participate. In the U.S., President Biden signed an executive order in October to regulate AI development. The agreement,

although nonbinding, provides general recommendations and doesn’t address complex issues such as AI applications or data collection methods. It also does not cover ongoing civil litigation in the U.S. concerning AI models’ data ingestion and compliance with copyright law. Lawsuits against OpenAI and Microsoft highlight concerns about AI’s impact on creative and journalistic industries, with the future of AI litigation considered uncertain.

Securing copyright and patent protection for works and inventions created by AI faces obstacles as the U.S. Copyright Office and patent offices globally have declined to recognize AI as either the author or the inventor. These challenges, though not surprising, persist without a resolution. The increasing prevalence of AI-generated inventions in several sectors amplifies the urgency for a viable solution.

WIPO Revises Deadlines for Responding to Provisional Refusals

The World Intellectual Property Office (WIPO) has introduced a significant update impacting businesses seeking international trademark registrations through the Madrid System. As of November 1, 2023, local intellectual property (IP) offices must provide a minimum period of 60 days (or two months) for holders of Madrid System international trademark registrations (IR Holders) to respond to provisional refusals. This change aims to address concerns about varying and often short response deadlines set by local offices, providing greater clarity and efficiency in the international registration process. Despite this, engaging an intellectual property professional remains crucial for navigating the trademark registration process effectively within the stipulated two-month time frame.



WIPO also reported that while IP filings braved the pandemic, trademark applications are on the decline while patent application filings have seen a rise — the 11th consecutive year with an increase in patents. While China, the US, Japan, South Korea and the European Union led the pack, India accounted for the largest jump, moving into sixth place for the largest number of patent applications globally.

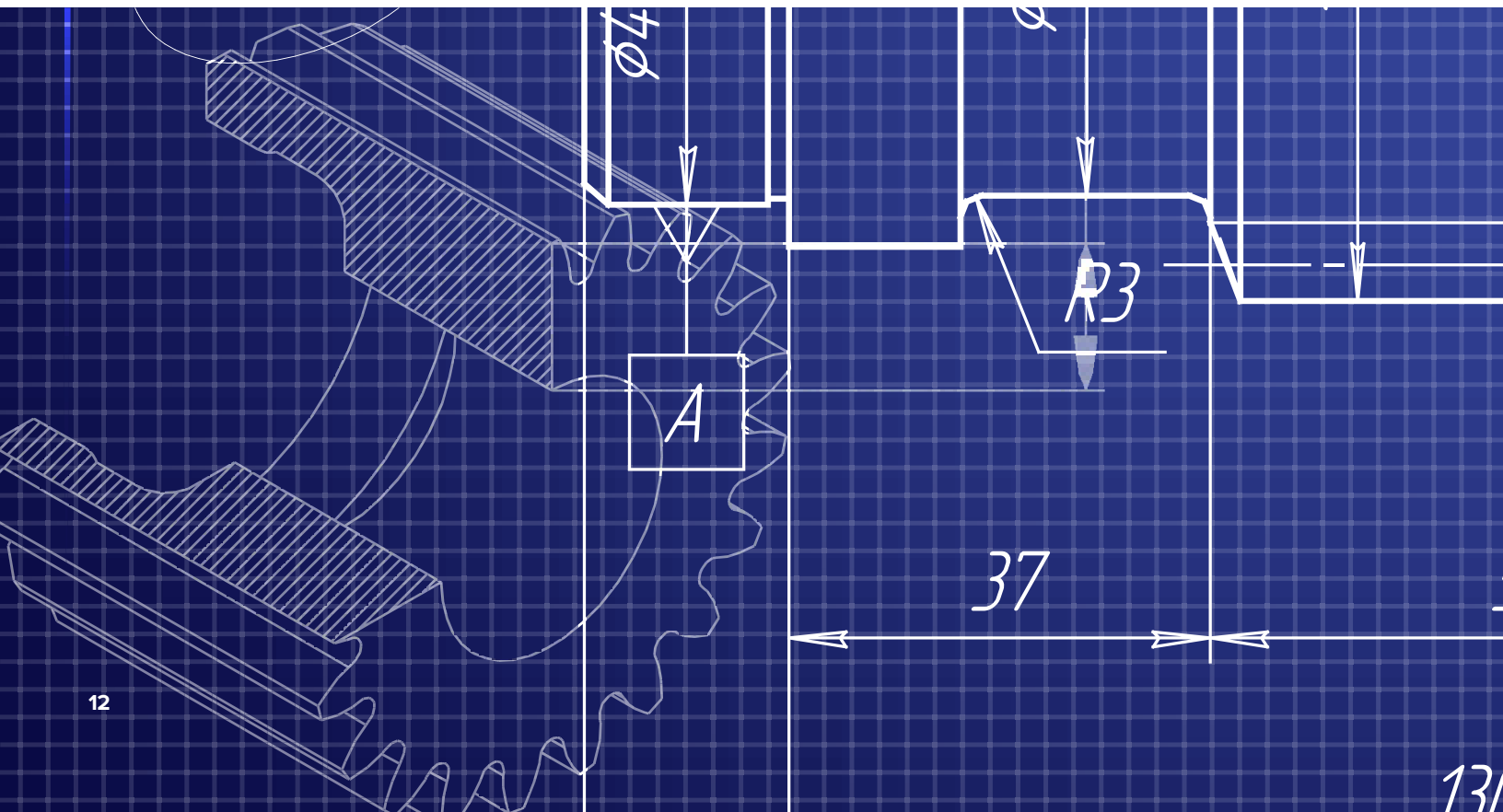
China Improves Its Design Patent Landscape — Mostly

China's first modern Patent Law was introduced in 1985. The law included design patents as well as invention patents (similar to U.S. utility patents) and utility model patents (without parallel in the U.S.). Design patents in China can protect new designs, shapes, patterns or colors. Since its introduction almost 40 years ago and through four sequentially enacted amendments to the Patent Law, many aspects of China's patent system have undergone significant change, including design patent protection.

Today, this form of protection remains a potentially useful and cost-effective approach to protecting your company's product in China. According to Article 23 of the Patent Law, "[a]ny design for which a patent right may be granted shall significantly differ from a prior design or the combination of prior design features." Unfortunately, this definition does not convey the versatility of China's design patent system. Perhaps the most important feature of China's design patent practice for many industries is the ability of applicants to secure protection for functional features through a design patent. For example, vehicle components, including gear boxes and exhaust systems, may be protected by a design patent in China. This same sort of protection is generally not available in other countries for similarly functional components.

Another improvement in design patent protection that took place over the past couple of years in China has been the expansion of the term of protection from 10 years from the date of filing to 15 years. This term expansion provided significant added protection for the patentee without any additional expense. However, the protection only applies to patent applications filed after June 1, 2021. Design patents that existed before that date are not grandfathered in.

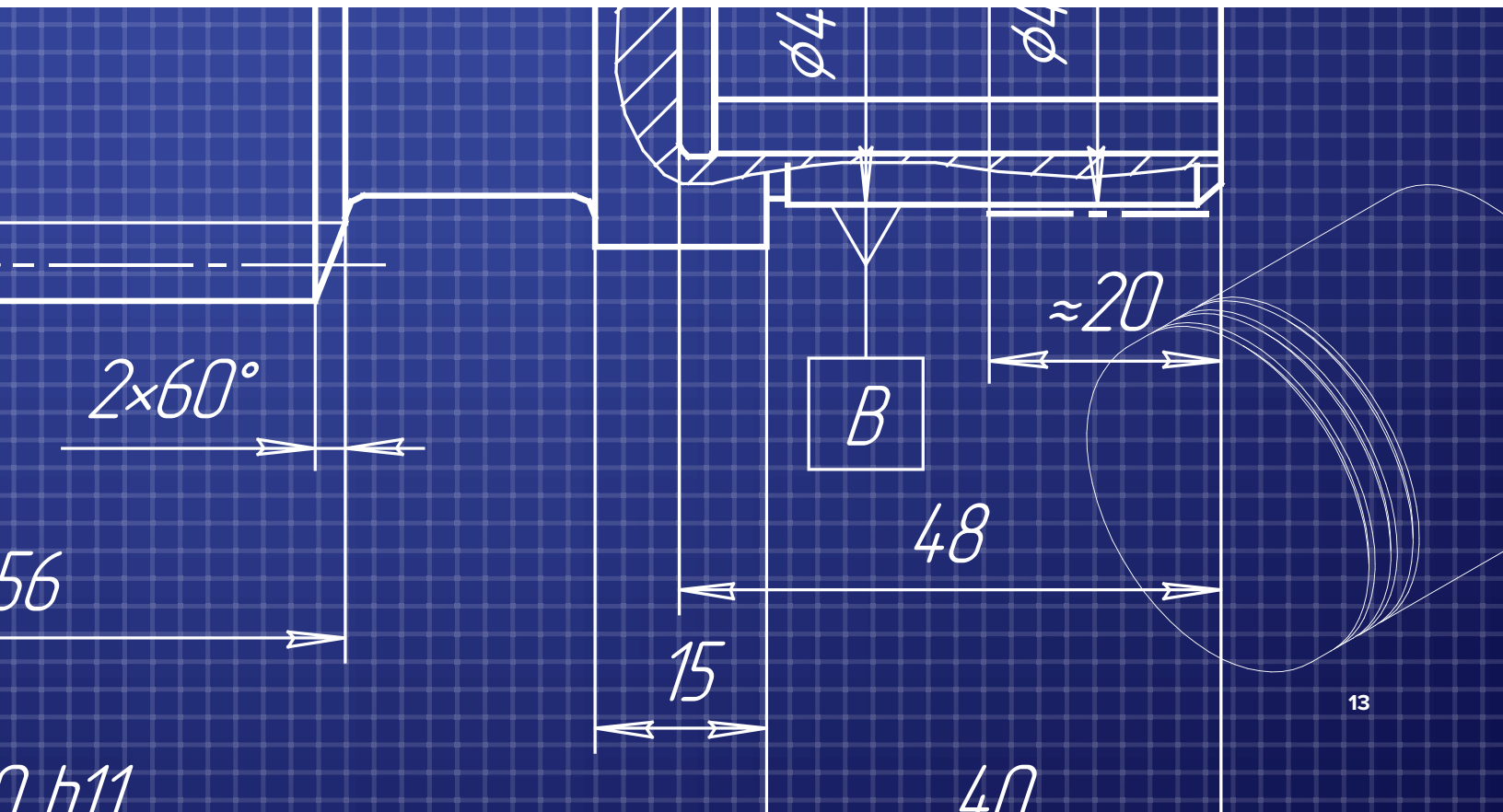
A more recent significant improvement in China's design patent system has been the allowance of partial design patent protection. In the past, only whole articles could be patented. However, today an applicant can obtain design patent protection on a portion of the design while disclaiming a portion or portions the applicant does not want claimed.

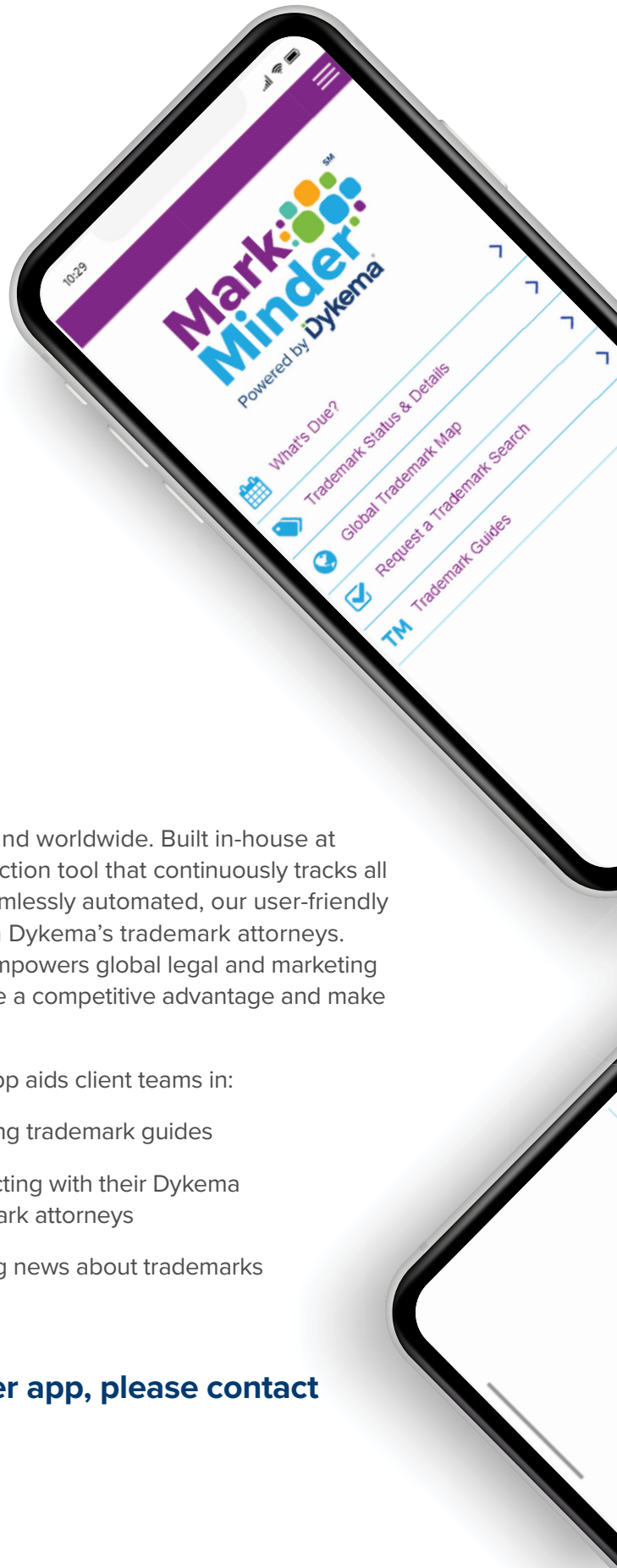


Improving on this change, in late December 2023, China enacted its revised Patent Examination Guidelines. According to Chapter 3, Section 9.1, of the revised guidelines, an applicant can file both whole and partial designs in a single application. This is an improvement over prior practice in which whole and partial designs could not be filed in the same application.

A question often arises regarding the reliability of China's court system when infringement actions are involved. Much to the relief of design patent holders, courts in China have more recently taken a broader approach to finding infringement. At one time, Chinese courts required the allegedly infringing article to be a virtual photocopy of the figures of the design patent. The exactness requirement has been relaxed more recently, thus effectively expanding the design patent scope. Perhaps the most significant change in the past several months for foreign design patent holders has been China's accession to the 1961 Hague Convention abolishing the Requirement of Legalization for Foreign Public Documents. This change is welcome news to foreigners seeking to enforce their patent rights before courts in China by reducing the burden involved in authenticating and legalizing documents and other articles required for litigation.

Some problems, unfortunately, persist. Because design patents are not substantively examined, no comparison with the prior art is made during ordinary prosecution of a design patent application. Instead, applications are examined only for formality prior to grant. In this sense, China's design patent system is similar to the U.S. copyright registration. Prompt issuance of the design patent application in China is a plus, but the system also invites abuse and the possible issuance of invalid patents.





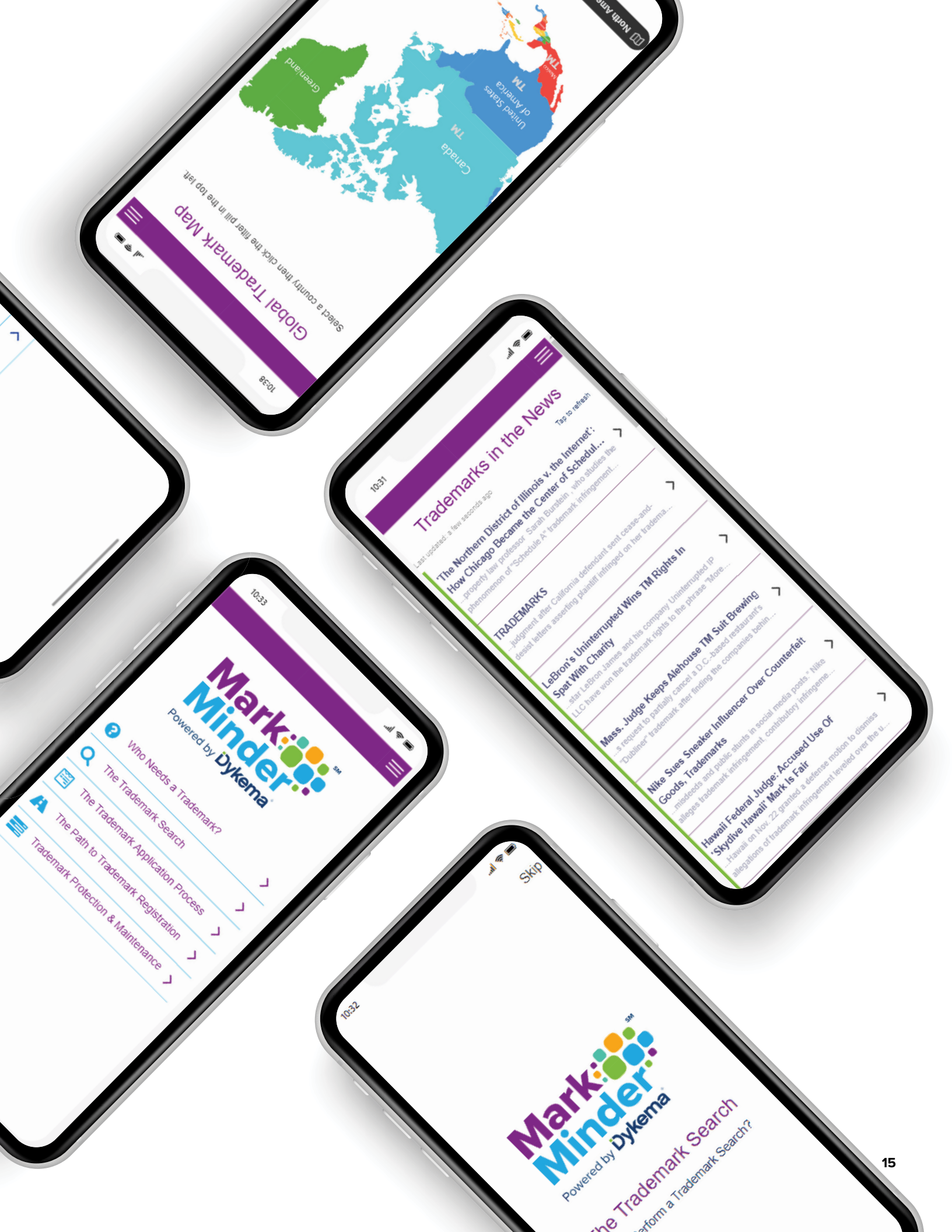
Your Worldwide Brand Manager

We are proud to announce an app to help manage your brand worldwide. Built in-house at Dykema, MarkMinder is a powerful customized brand protection tool that continuously tracks all your worldwide trademark portfolio in a centralized hub. Seamlessly automated, our user-friendly app platform also enables brand owners to collaborate with Dykema's trademark attorneys. With instant access and powerful resources, MarkMinder empowers global legal and marketing teams to collaborate and leverage their portfolio data to have a competitive advantage and make strategic decisions around their brand.

As a value-add service to Dykema clients, the MarkMinder app aids client teams in:

- Tracking USPTO office actions and other deadlines
- Managing your portfolio of trademarks around the globe
- Requesting a trademark search
- Providing trademark guides
- Connecting with their Dykema trademark attorneys
- Reading news about trademarks

For more information about the MarkMinder app, please contact your Dykema relationship attorney.



Global Trademark Map

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Trademarks in the News

Last updated: a few seconds ago
The Northern District of Illinois v. the Internet:
How Chicago Became the Center of Scheduling...
...property law professor Sarah Burstein, who studies the phenomenon of "Schedule A" trademark infringement...

TRADEMARKS

Judgment after California defendant sent cease-and-desist letters asserting plaintiff infringed on her trademarks...

LeBron's Uninterrupted Wins TM Rights In Spat With Charity

...star LeBron James and his company Uninterrupted IP LLC have won the trademark rights to the phrase "More..."

Mass. Judge Keeps Alehouse TM Suit Brewing Goods, Trademarks

...mediocre and public shunts in social media posts. * Nike alleges trademark infringement, contributory infringement...

Hawaii Federal Judge: Accused Use Of 'Skydive Hawaii' Mark Is Fair

...Hawaii on Nov. 22 granted a defense motion to dismiss allegations of trademark infringement leveled over the U...

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- Who Needs a Trademark?
- The Trademark Search
- The Trademark Application Process
- The Path to Trademark Registration
- Trademark Protection & Maintenance

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- The Trademark Search
- Perform a Trademark Search?



Supreme Court Recap

As we discussed at the end of last year, the most recent term of the U.S. Supreme Court featured four intellectual property cases. The four rulings included a patent case, two trademark cases and a copyright case. Three out of the four decisions were unanimous, relying on well-established legal precedents. The sole dissent occurred in a copyright dispute related to Andy Warhol's use of a third-party photograph of Prince in his artwork. This case sparked a spirited debate between Justices Sotomayor and Kagan, specifically questioning whether Warhol's copying could be considered transformative fair use.

- [Amgen v. Sanofi](#) involved patents for cholesterol-lowering antibodies. Amgen claimed a genus of antibodies but only specified sequences for 26, providing two methods for discovering the rest. Sanofi, facing an infringement lawsuit, argued the patent didn't enable the entire genus, succeeding at the Federal Circuit. The Supreme Court appeal attracted attention, with support from major pharmaceutical companies and law professors, who argued for allowing genus claims in life sciences. Justice Gorsuch, in a unanimous opinion, cited an 1840 patent to caution against overly broad claims. The Court rejected the methods in the patent specification for finding effective antibodies as mere "research assignments," making life science genus claims vulnerable.
- In [Jack Daniel's Properties Inc. v. VIP Products LLC](#), the whiskey maker sued the creator of a dog toy resembling its famous bottle. Initially, Jack Daniel's won, citing survey evidence showing consumer confusion. On appeal, the Ninth Circuit invoked the First Amendment, referencing *Rogers v. Grimaldi*, but the Supreme Court clarified that this protection applies only when confusion is unlikely. In cases like this, where confusion exists, neither the First Amendment nor humor can shield the infringer. The unanimous opinion was accompanied by a concurrence from Justices Sotomayor and Alito, cautioning skepticism toward consumer surveys in parody cases. Conversely, Justices Gorsuch, Thomas and Barrett expressed doubts about the validity of *Rogers v. Grimaldi* in their concurrence.

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- In [Abitron Austria v. Hetronic International](#), the Court ruled that the Lanham Act doesn't cover infringing conduct occurring solely abroad, even if it causes confusion in the United States. The 9-0 decision had a concurrence from Justice Sotomayor, joined by Justices Roberts, Kagan and Barrett, resembling a dissent. While agreeing with vacating the 10th Circuit decision, Justice Sotomayor disagreed with the majority's framework. She argued that the Lanham Act should apply globally when there's a likelihood of consumer confusion in the U.S. However, the majority found no clear evidence of Congress intending extraterritorial application, stating that absent such evidence, the law shouldn't extend beyond U.S. borders.
 - The [Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith](#) revolved around copyright's fair use doctrine. Warhol exceeded the limits of his license from photographer Lynn Goldsmith when using a photograph of Prince in 1984. The AWF later licensed Condé Nast to reproduce a print on a Vanity Fair cover, leading to an infringement suit by Goldsmith, countered by the AWF claiming fair use. The 7-2 Supreme Court decision focused on whether Warhol's print was transformative enough for fair use, considering Condé Nast's commercial use. The majority opinion concluded that Condé Nast's use was not fair, infringing Goldsmith's copyright, emphasizing the commercial aspect. In dissent, Justice Kagan accused the majority of disregarding expert opinions on aesthetics, prompting a sharp rebuttal from Justice Sotomayor, dismissing Kagan's dissent as a series of misstatements and exaggerations.

The Court also concluded its session with a few cases it declined to take up. Some of those cases included:

- [Nike, Inc. v. Adidas, AG](#)
A more than 10-year dispute initiated by Adidas over a Nike footwear stitching patent.
- [Apple v. Caltech](#)
Seeking to invalidate Caltech patents that had been the subject of a \$1.1 billion jury verdict against them.
- [Genius v. Google](#)
Whether the Copyright Act's preemption clause allows a business to invoke traditional state-law contract remedies to enforce a promise not to copy and use its content.
- [Thaler v. Vidal](#)
Challenging a ruling from the USPTO that an AI engine could not be named as an inventor.

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