

## IP Cases To Watch At The Supreme Court

By Ryan Davis

*Law360, New York (September 27, 2017, 4:22 PM EDT)* -- The U.S. Supreme will soon hear two patent cases, including a potential game-changer that could abolish America Invents Act reviews, and might take up several other intellectual property cases this term dealing with patent damages and injunctions. Here's a look at the high court's IP docket for the upcoming term.

### **Oil States Energy Services LLC v. Greene's Energy Group LLC**

The justices agreed in June to consider whether AIA reviews, which have been used to challenge thousands of patents since they were created in 2012, violate the U.S. Constitution. Attorneys say a decision striking down the proceedings would be an immediate and dramatic shock to the patent landscape.

"Oil States is really the blockbuster," said Andrew Pincus of Mayer Brown LLP. "It's highly important to the patent system and to administrative law generally. It's a really big deal."

Oil States, which had its hydraulic fracturing patent declared invalid by the Patent Trial and Appeal Board in an inter partes review, or IPR, argues that patents are private property rights that can only be revoked by a federal court under Article III of the U.S. Constitution, not by an executive branch agency like the PTAB.

The U.S. Patent and Trademark Office maintains that patents are public rights derived from a federal regulatory system, and there is thus no constitutional impediment to the board invalidating patents. The justices will have to decide which characterization of patents is correct.

The case involves a clash between two policy issues: the goal of Congress to create a system to weed out invalid patents blamed for abusive patent litigation and the extent to which patents should be considered property rights that cannot be taken away without a court ruling. A slew of amicus briefs have already been filed, with more on the way.

"It's close. There are definitely arguments on both sides and legitimate concerns," said Sangeeta Shah of Brooks Kushman PC.

AIA reviews have become a critical part of patent litigation since they were created in 2012, and a finding that they are unconstitutional would cut off an avenue for accused infringers to challenge

patents, leaving all validity disputes to district courts.

Striking down the proceedings "would definitely take away what for the last five years has been part of virtually every patent case," said Sarah Guske of Baker Botts LLP.

The justices have not yet set a date for oral arguments in the case, but briefing is scheduled to be completed by Nov. 20.

The case is *Oil States Energy Services LLC v. Greene's Energy Group LLC*, case number 16-712.

### **SAS Institute Inc. v. Matal**

The PTAB is also at the center of the second patent case the Supreme Court will hear this term, which challenges the board's process for instituting AIA reviews of patents. Provided the proceedings are not abolished in *Oil States*, the case, which the justices agreed to hear in May, could reshape the AIA process by ending the board's practice of selecting only some grounds to review.

SAS challenged all 16 claims of a ComplementSoft LLC computer code patent in an inter partes review, but the PTAB only agreed to review some claims and found most of those invalid. SAS told the justices that the AIA makes clear that the board must issue a final decision on all the challenged claims so that the review can serve as an alternative to litigation.

The USPTO disagreed, telling the high court that the law gave the PTAB broad discretion to decide which parts of a patent to review in order to streamline the process.

Under the current system, if the PTAB decides not to institute review of certain grounds, that decision cannot be appealed and those grounds can later be raised by the petitioner in litigation over the patent. But if the Supreme Court rules that the board must issue a final decision on every claim, every aspect of the board's decision would become appealable.

"That would add a new factor to the strategic analysis when looking at IPRs," Guske said. "By and large, it would benefit the losing side since there's an appeal aspect to it."

The case requires the justices to interpret the language of the AIA and to determine if the USPTO's own interpretation is entitled to any deference.

The effect of a decision that the patent office's current practice is incorrect "would be to cabin in a little more what the patent office can do in these proceedings," said Stuart Meyer of Fenwick & West LLP. "It would change the manner in which the PTAB is operating."

The court has not yet scheduled oral arguments in the case.

The case is *SAS Institute Inc. v. Matal*, case number 16-969.

### **WesternGeco LLC v. Ion Geophysical Corp.**

The high court asked the U.S. solicitor general in May to weigh in on this case concerning the availability of lost profits damages in patent cases when infringing actions take place outside the U.S.

Ion was found to have infringed WesternGeco's patents by shipping parts of a system for underwater oil and gas exploration from the U.S. to be combined overseas. While a jury initially awarded WesternGeco \$93 million in lost profits damages, the Federal Circuit said such damages were not available because Ion's infringement took place "on the high seas, outside the jurisdiction of U.S. patent law."

WesternGeco argued that when Congress enacted a law making it an act of infringement of U.S. patents to ship components to other countries to be combined there, it was "absolutely clear" that there were no such limits on damages.

The issue is important because there are many infringement cases under the law with similar facts, said Kenneth Parker of Haynes and Boone LLP.

"That is a case that seems arcane, but it's actually happening a lot," he said.

The case is WesternGeco LLC v. Ion Geophysical Corp., case number 16-1011.

### **Samsung Electronics Co. Ltd. v. Apple Inc.**

The justices indicated they could be interested in yet again wading into the epic patent clash between the smartphone rivals when they asked the solicitor general in June to file a brief addressing Samsung's argument that a ruling in the case makes invalidating patents too hard and winning injunctions too easy.

Samsung argued that a Federal Circuit decision upholding a \$120 million jury verdict that it infringed Apple's patents flouts key patent precedents. It maintains that the Federal Circuit set new rules for proving that a patent is invalid as obvious that are "virtually impossible" to meet and wrongly made injunctions available in "virtually any case" involving competitors.

The justices already ruled once in the sprawling dispute in December, when they vacated a \$400 million verdict that Apple won against Samsung at an earlier stage of the dispute.

The case is Samsung Electronics Co. Ltd. v. Apple Inc., case number 16-1102.

### **Other cases**

In addition to the cases the justices have either agreed to hear or signaled an interest in, several pending certiorari petitions raise intellectual property issues that could catch the court's attention.

Google Inc. v. Unwired Planet LLC and PNC Bank NA v. Secure Access LLC: A pair of September petitions urged the court to strike down limits the Federal Circuit has placed on which patents are subject to review under the AIA's covered business method review program, which the petitioners say render the program "toothless."

Openet Telecom Inc. v. Amdocs (Israel) Ltd.: In this July petition, Openet argued that a Federal Circuit ruling that an Amdocs network monitoring patent is not invalid for claiming only abstract ideas is a "stark and troubling departure" from the high court's Alice ruling.

Elliott v. Google Inc.: An August petition urged the justices to hold that "Google" has become a generic verb that cannot be protected by trademark law.

Louis Vuitton Malletier SA v. My Other Bag Inc.: Louis Vuitton Malletier SA asked the Supreme Court in July to examine the limits of the parody defense for trademark infringement, following a ruling that cheap canvas totes reading "My Other Bag" with a drawing of a Louis Vuitton bag are protected parodies.

--Editing by Christine Chun and Aaron Pelc.

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