INTELLECTUAL PROPERTY

This Season's Greatest IP Hits by "The Supremes"

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It's October! This is the month we celebrate the height of football season, the World Series, Halloween, and – of interest to every U.S. attorney – the start of the next term of the U.S. Supreme Court.

Each year, our Supreme Court receives requests to hear about 8,000 cases. In the 1980s, the court usually heard about 150 cases each term. Lately, it has heard arguments in about 75 cases each year. Now more than ever, it seems that "deciding what to decide" may be even more important than the court's actual decisions.

With that in mind, contemplate for a moment what happened last year at the U.S. Supreme Court. Sixty-nine cases were decided, and 10 of those decisions related to intellectual property law! Wait. What? Over 14 percent of the U.S. Supreme Court's 2013-2014 decisions dealt with IP? Yes, to "The Supremes," intellectual property is "Hot, Hot, Hot!" Any way you spin it, IP is more important now for you (and your clients) than ever before.

Here's a quick breakdown of those 10 cases – six patent cases, two copyright cases and two Lanham Act cases.

The Patent Cases

Alice Corp. Pty. Ltd. v. CLS Bank Int'l – the court limited the patent eligibility of computer-implemented patent method claims

Medtronic, Inc. v. Mirowski Family Ventures, LLC – the court held that a patent owner always bears the burden of proving infringement, even when the owner is a defendant in a declaratory judgment action for infringement.

Nautilus, Inc. v. Boisig Instruments, Inc. – the court decided that a patent claim is indefinite (and thus invalid) if it does not inform those skilled in the art "with reasonable certainty" about the scope of the patented invention.

Highmark Inc. v. Allcare Health Management Systems, Inc. and ***Octane Fitness, LLC v. ICON Health & Fitness, Inc.*** - in these cases, the court clarified the standards for awarding attorneys' fees in patent cases and the amount of deference that should be given to a trial court's "exceptional case" determination on appeal.

Limelight Networks, Inc. v. Akami Technologies, Inc. - the court determined that in order for there to be liability for induced infringement of a patent, there must be direct infringement by a single person or entity.

The Copyright Cases

Petrella v. Metro Goldwin-Mayer, Inc. – the court clarified the relationship between laches and the statute of limitations for bringing an action for copyright infringement

American Broadcasting Companies, Inc. v. Aereo, Inc. - the court found that an antenna/Internet based system that allowed subscribers to watch broadcast TV on their computers was copyright infringement (as an unauthorized public performance of the copyrighted work)

The Lanham Act Cases

Lexmark Int'l, Inc. v. Static Control Components, Inc. – the court clarified the test for standing to assert a false advertising claim under the Lanham Act

POM Wonderful LLC v. Coco-Cola Co. – the court held that liability could arise under the Lanham Act for unfair competition by allegedly false and misleading descriptions on product labelling, even if such labelling is in compliance with FDCA regulations

Fundamentally, all this IP activity at the Supreme Court level means that IP protection presents significant commercial and legal concerns for our business clients. On the patent side, it continues and increases the Supreme Court's interest in reviewing – *and correcting* – the Federal Circuit Court of Appeal's attempts to develop tests related to patent validity and infringement (remember, the Federal Circuit was created in 1982 and granted exclusive jurisdiction over patent cases in order to create judicial review uniformity). Clearly, the Supreme Court is sending a message of discontent to the Federal Circuit and, the Supreme Court has already accepted three IP cases for review for the new term starting this month.

Congress and the President

Congress recently enacted major revisions to our patent law (the America Invents Act) and is now flirting with the enactment of a federal trade secrets protection act. President Obama has also initiated efforts to directly address IP issues, using his executive office powers. In June 2013, the president announced five executive actions "to help bring about greater transparency to the patent system and level the playing field for innovators." In February 2014, the president announced three initiatives "aimed at encouraging innovation and strengthening the quality and accessibility of the patent system."

We are currently in the midst of an unprecedented level of federal activist interest in IP issues. IP law and protection is indeed, a big deal as these recent events show. We are paying close attention, as should you and your business clients.