



**Statement of**  
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**Before the**  
**HOUSE SUBCOMMITTEE ON COURTS, THE INTERNET, AND**  
**INTELLECTUAL PROPERTY**

**on**  
**“EXAMINING RECENT SUPREME COURT CASES IN THE PATENT ARENA”**

Thursday, February 12, 2015  
1:00 p.m.

## Intellectual Property Owners Association (IPO)

Mr. Chairman and Members of the Subcommittee:

My name is Herbert C. Wamsley. I appreciate the opportunity to be here today to speak on behalf of Intellectual Property Owners Association (IPO). I am the Executive Director of the association.

### INTRODUCTION

IPO is a diverse association, representing members that include more than 200 companies in industries ranging from pharmaceuticals and biotechnology to electronics and information technology. We believe IP rights drive innovation, which creates economic prosperity. One of the principles adopted by our 50-member corporate board of directors is to promote improvements and eliminate abuses in the IP system. We want to eliminate abusive patent suits and litigation misconduct by all plaintiffs and defendants – large and small companies, independent inventors, universities, and others. At the same time, we do not want to make it more difficult for patent owners to enforce valid patents.

My comments are based on positions adopted by the IPO Board of Directors in *amicus* briefs filed in the U.S. Supreme Court and on legislation introduced in the last Congress. We are continuing to study the impact of recent developments and look forward to working with the subcommittee as litigation reform legislation moves forward.

### **HAVE SUPREME COURT PATENT DECISIONS ISSUED SINCE THE INNOVATION ACT PASSED THE HOUSE ALTERED THE NEED FOR PATENT LITIGATION REFORM LEGISLATION?**

Since the U.S. House of Representatives passed the Innovation Act on December 5, 2013, the U.S. Supreme Court has rendered decisions that have altered the patent system. Cases have been decided involving the standard for determining attorney fee

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awards and the standard of review for those determinations, patent eligibility, patent claim definiteness, the standard of review for district court claim construction, and induced infringement. I will discuss each of these cases and whether they might have affected the need for legislation.<sup>1</sup>

### ***Octane Fitness, LLC v. Icon Health & Fitness, Inc. and Highmark, Inc. v. Allcare Health Management Systems, Inc.***

35 U.S.C. § 285 provides that courts “in exceptional cases may award attorney fees to the prevailing party.” The purpose of this and other fee shifting statutes is to prevent abuses of the legal system by deterring frivolous litigation. According to Federal Circuit precedents before *Octane*, the bringing or maintenance of a frivolous suit or frivolous arguments or misconduct during litigation was sufficient to form the basis of an exceptional case finding.<sup>2</sup> The position of the nonprevailing party, however, had to be objectively unreasonable and asserted in bad faith.<sup>3</sup>

At issue in *Octane* was the standard for determining when positions taken by nonprevailing parties in litigation should result in fee shifting under § 285.<sup>4</sup> In *Octane* the Supreme Court rejected the Federal Circuit two-part test, stating that “exceptional” means the case “stands out from others with respect to the substantive strength of a party’s litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.”<sup>5</sup> *Octane* also lowered the evidentiary burden for parties to establish entitlement to attorney fees from a clear and

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<sup>1</sup> This testimony does not address *Medtronic Inc. v. Mirowski Family Ventures*, which involved the question of which party has the burden of proving infringement in declaratory judgment suits.

<sup>2</sup> *Beckman Instruments, Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed. Cir. 1989) (citing *Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 455 (Fed. Cir. 1985)).

<sup>3</sup> See, e.g., *Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).

<sup>4</sup> *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. \_\_\_, \_\_\_ (2014); 134 S. Ct. 1749, 1752-53.

<sup>5</sup> *Id.* at 1756.

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convincing standard to a preponderance of the evidence standard.<sup>6</sup> The companion decision, *Highmark*, held that abuse of discretion, not *de novo* review, is the proper standard of review for all aspects of district court exceptional case determinations because the inquiry is “rooted in factual determinations.”<sup>7</sup>

IPO supported the Supreme Court’s holding in *Octane*.<sup>8</sup> Our *amicus* brief in the Supreme Court argued that whether a case is “exceptional” should turn only on the objective reasonableness of the position taken by the nonprevailing party and not on any subjective intent.<sup>9</sup> Despite the changes in the interpretation of § 285 on attorney fee awards in *Octane* and *Highmark* and reports that judges are awarding fees in higher numbers of cases after these decisions, we conclude that legislation is still needed. The existing statute still requires a case to be “exceptional” for an attorney fee award. *Octane* fails to provide a clear, objective test for lower courts to apply. It will require more lower court cases to determine the meaning of a case that “stands out from others.” *Highmark* commits more discretion to district court judges by adopting the abuse of discretion review standard, which will require more time to achieve uniformity in the law. Some judges will not be inclined to award fees despite this lower standard.

Strong patent protection can stimulate the economy, driving investment in research and development and assuring the capital necessary to bring new products to market. The assertion of frivolous or nuisance claims or defenses, which serve neither the patent system itself nor the public interest, should never be tolerated.

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<sup>6</sup> *Id.* at 1758.

<sup>7</sup> *Highmark, Inc. v. Allcare Health Management Systems, Inc.*, 572 U. S. \_\_\_\_ (2014); 134 S. Ct. 1744, 1749.

<sup>8</sup> Brief of Intellectual Property Owners Association as Amicus Curiae in Support of Petitioner at 8, *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. \_\_\_\_ (2014) (No. 12-1184).

<sup>9</sup> *Id.*

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IPO still supports legislation that would provide for awarding fees to a prevailing party *unless* the position and conduct of the non-prevailing party were objectively reasonable and substantially justified or exceptional circumstances made an award unjust. In addition to addressing abuses, presumptive fee shifting will more effectively deter abusive litigation in the first place than simply relaxing the standard for discretionary fee shifting. Such legislation will promote consistency, uniformity, and predictability. Legislation will address abuses in jurisdictions where judges may be less inclined to award fees. Legislation can provide objective criteria for parties to avoid paying fees, which will provide a stronger deterrent to patent litigation abuse.

### *Alice Corp. v. CLS Bank*

*Alice* unsettled the law on patent-eligible subject matter. The case addressed the patent eligibility of computer-implemented inventions under Section 101 of the Patent Act, upholding a Federal Circuit decision that *Alice*'s patent claims were directed to an abstract idea, which is ineligible subject matter.<sup>10</sup>

35 U.S.C. § 101 defines patent eligible subject matter as encompassing any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. By judicial interpretation, patent eligible subject matter cannot include laws of nature, physical phenomena, and abstract ideas.<sup>11</sup> IPO's *amicus* brief to the Supreme Court argued that a computer-implemented invention involving an

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<sup>10</sup> *Alice Corp. v. CLS Bank*, 572 U.S. \_\_\_, \_\_\_ (2014); 134 S.Ct. 2347, 2360.

<sup>11</sup> See *Alice* at 2354 (citing *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. \_\_\_, \_\_\_; 133 S. Ct. 2107; 186 L. Ed. 2d 124, 133 (2013)).

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abstract idea was patent eligible if it described a specific, practical application of the idea.<sup>12</sup>

The Supreme Court held that courts must distinguish patents that claim the “building blocks” of human ingenuity, which are patent ineligible, from “those that integrate the building blocks into something more.”<sup>13</sup> First, the court should determine whether claims are directed to a patent-ineligible concept.<sup>14</sup> Then the court should ask whether the claim’s elements, considered individually and in combination, transform the nature of the claim into a patent-eligible application.<sup>15</sup> This step in the analysis has been described as searching for “an inventive concept” such that any resulting patent amounts to “significantly more” than a patent on only the ineligible concept.<sup>16</sup>

*Alice* did not articulate a clear test, and the “significantly more” inquiry may have confused the issue by conflating subject matter eligibility with the § 102 novelty and § 103 obviousness inquiries. This contributes to uncertainty and a lack of clarity and creates risk that the courts will apply *Alice* incorrectly. Post-*Alice* Federal Circuit opinions addressing patent eligibility of computer-implemented inventions have reached different outcomes. *DDR Holdings v. Hotels.com* upheld district court denial of Hotels.com’s motion that DDR’s claims were directed to patent-ineligible subject matter.<sup>17</sup> The claimed solution was rooted in computer-technology in order to overcome a problem specifically arising in the realm of computer networks.<sup>18</sup> *Ultramercial, Inc. v. Hulu, LLC* upheld district court dismissal of Ultramercial’s infringement suit for failing

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<sup>12</sup> Brief of Intellectual Property Owners Association as Amicus Curiae in Support of Neither Party at 12-15, *Alice Corp. v. CLS Bank*, 572 U.S. \_\_\_\_ (2014) (No. 13-298).

<sup>13</sup> *Alice* at 2354.

<sup>14</sup> *Id.* at 2355.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *DDR Holdings LLC v. Hotels.com LP*, 773 F.3d 1245, 1249 (Fed. Cir. 2014).

<sup>18</sup> *Id.* at 1257.

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to claim eligible subject matter.<sup>19</sup> Ultramercial claimed a method of providing copyrighted works over the Internet free in exchange for viewing advertising.<sup>20</sup> The problem of reconciling cases is likely to occur frequently at the USPTO and the district courts, which decide far more cases than the Federal Circuit.

The test for patent eligibility articulated in *Alice* is not limited to computer-implemented inventions. A Federal Circuit opinion issued in December in *In Re BRCA1- & BRCA2-Based Hereditary Cancer Test Patent Litig., Univ. of Utah Research Found. v. Ambry Genetics Corp.*, held that method claims related to the BRCA1 and BRCA2 genes were ineligible under the *Alice* framework as merely reciting “the patent-ineligible abstract idea of comparing BRCA sequences and determining the existence of alterations.”<sup>21</sup>

We conclude that it is too early to tell what long-term effect *Alice* will have on deterring or decreasing abusive behaviors in patent litigation. *Alice* was decided only 6 months ago. Reports suggest a significant increase in district courts invalidating patents on software-related inventions as lacking eligible subject matter. However, there is too little data to say whether this is a trend or a temporary spike. Some say reports of the death of software patents have been greatly exaggerated. Reportedly, the USPTO has slowed-down issuance of business method patents and some medical diagnostic patents following *Alice*. Further, because the Supreme Court test is unclear, there is no assurance the USPTO and the courts are applying the case correctly.

Anecdotally, patent abusers are said to assert patents that are overly broad, which include patents directed to abstract ideas. Arguably *Alice*, by causing more patents to be

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<sup>19</sup> *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 711-12 (Fed. Cir. 2014).

<sup>20</sup> *Id.* at 714.

<sup>21</sup> 774 F.3d 755, \_\_\_ (Fed. Cir. 2014); 113 U.S.P.Q.2D (BNA) 1241, 1246.

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invalid, could strengthen the power of defendants in frivolous suits. Defendants may be able to get suits dismissed before costly discovery and thus may not be as willing to settle.

It will take a while to determine the impact of *Alice*. The long-term effect will depend on how the lower courts, particularly the Federal Circuit, interpret and apply *Alice*. Courts have had problems for years with consistency and predictability in making determinations about patent eligibility. The lack of clarity in *Alice* makes it more difficult for innovators to determine when it is appropriate to invest in patent protection, and casts the shadow of uncertainty on all patents, even good ones.

### ***Nautilus, Inc. v. Biosig Instruments, Inc.***

35 U.S.C. § 112(b) requires patents to particularly point out and distinctly claim the subject matter the applicant regards as the invention. This is known as the “definiteness” requirement. Patent rights are property rights; their boundaries must be clear so the owner must know what he owns and others should know what they do not.<sup>22</sup>

Indefiniteness is one of the invalidity defenses.<sup>23</sup> An accused infringer can overcome the presumption of definiteness by showing “by clear and convincing evidence that a skilled artisan could not discern the boundaries of the claim based on the claim language, the specification, and the prosecution history, as well as her knowledge of the relevant art area.”<sup>24</sup> IPO’s *amicus* brief in the Supreme Court supported a “reasonable

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<sup>22</sup> *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002).

<sup>23</sup> 35 U.S.C. § 282(b)(3)(A).

<sup>24</sup> *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244, 1249-50 (Fed. Cir. 2008); *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. \_\_\_, \_\_\_ (2011); 131 S. Ct. 2238, 2242.

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clarity” standard that would require claims to be reasonably understandable to a person having ordinary skill in the art in light of the specification and prosecution history.<sup>25</sup>

In *Nautilus* the Supreme Court adopted a reasonable certainty standard and overruled a Federal Circuit holding that an ambiguous claim was definite under § 112 as long as the ambiguity was not “insoluble.”<sup>26</sup> The “insolubly ambiguous” standard failed to satisfy the definiteness requirement.<sup>27</sup> It was difficult to apply,<sup>28</sup> tolerated “some ambiguous claims but not others,”<sup>29</sup> and failed to discourage applicants from obscuring the scope of claimed inventions.<sup>30</sup> The Supreme Court articulated a new test: a patent’s claims, viewed in light of the specification and prosecution history, must inform those skilled in the art about scope of invention with “reasonable certainty.”<sup>31</sup> Writing for the Court, Justice Ginsburg said that “to tolerate imprecision ... would diminish the definiteness requirement’s public-notice function and foster innovation-d discouraging “zone of uncertainty.”<sup>32</sup>

Post-*Nautilus* it should be easier for a defendant to challenge the validity of a vague patent. We conclude that *Nautilus* may have a long-term effect on abusive litigation. We cannot find evidence yet of a significant increase in patents invalidated for indefiniteness since *Nautilus*. The long-term impact will depend on how the lower courts apply *Nautilus*, and how the Federal Circuit resolves inconsistencies across jurisdictions. Claim definiteness is an area where the USPTO has an opportunity to have an impact by

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<sup>25</sup> Brief of Intellectual Property Owners Association as Amicus Curiae in Support of Neither Party at 9-12, *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. \_\_\_\_ (2014) (No. 13-369).

<sup>26</sup> *Nautilus*, 572 U.S. \_\_\_\_, \_\_\_\_ (2014); 134 S.Ct. 2120, 2124.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.* at 2130.

<sup>29</sup> *Id.* at 2124.

<sup>30</sup> *See id.* at 2129.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2130.

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indicating how it will implement *Nautilus*, possibly by an undertaking similar to its efforts to address changes in the law on subject matter eligibility, where the Office published enhanced examination guidance for public comment, held public roundtables to solicit additional input, provided examiner training, and published updated examples.

### *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*

*Teva* vacated a Federal Circuit indefinite patent claim ruling.<sup>33</sup> At issue was the proper standard of review for the district court's claim construction.<sup>34</sup>

Claim construction is a matter of law and until *Teva* it was always reviewed *de novo* by the Federal Circuit.<sup>35</sup> Federal Rule of Civil Procedure 52(a)(6) sets forth that findings of fact must not be set aside unless they are "clearly erroneous." In *Teva*, the Supreme Court held that the Federal Circuit must apply a "clear error," not *de novo*, standard of review of factual findings in support of claim construction (e.g., findings based on expert testimony).<sup>36</sup> When the court reviews only evidence intrinsic to the patent, i.e., the claims, specification and prosecution history, the court reviews that construction *de novo*.<sup>37</sup>

IPO's *amicus* brief supported the result reached in *Teva*, arguing that the ultimate conclusion of what a claim term means should remain reviewable *de novo* by the Federal Circuit.<sup>38</sup> Where a district court resolves questions of fact based on extrinsic evidence, we argued such factual findings should be afforded deference.<sup>39</sup>

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<sup>33</sup> *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. \_\_\_, \_\_\_ (2015); No. 13-854, slip op. at 16 (U.S. Jan. 20, 2015).

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *See id.* at 5-6.

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.* at 11-12.

<sup>38</sup> Brief of Intellectual Property Owners Association as Amicus Curiae in Support of Neither Party at 2-3, *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S.C. \_\_\_ (2015) (No. 13-854).

<sup>39</sup> *Id.* at 5-6.

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While *Teva* applies broadly to all cases with claim construction review, we conclude that any effect this particular case may have on curbing abusive litigation will be minimal. The new framework better aligns appellate review of claim construction with Supreme Court precedent and the Federal Rules of Civil Procedure. The framework allows the Federal Circuit to benefit from the district courts' superior fact-finding position with respect to extrinsic evidence, while fostering consistent claim construction rulings.

### *Limelight Networks, Inc. v. Akamai Technologies, Inc.*

The issue in *Limelight* was whether a defendant could be liable for inducing infringement of a patent under 35 U.S.C. § 271(b) when no one directly infringed the patent under § 271(a) or any other provision.<sup>40</sup> Supreme Court precedent requires that liability for inducement be predicated on direct infringement.<sup>41</sup> Earlier, in *Muniauction, Inc. v. Thomson Corp.*, the Federal Circuit held that direct infringement under § 271(a) requires all steps of a method patent to be attributable to a single party, either because the defendant actually performed the steps or because the defendant directed or controlled others who performed them.<sup>42</sup> *Limelight* was not liable for induced infringement even though *Limelight* provided directions to customers for performing the missing step of the patent claim.<sup>43</sup> IPO's *amicus* brief supported this outcome.<sup>44</sup>

We conclude that *Limelight* may foreclose some patent suits where different entities perform different steps of a method. Its impact will depend particularly on how

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<sup>40</sup> *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. \_\_\_\_ (2014); 134 S.Ct. 2111, 2115.

<sup>41</sup> *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961).

<sup>42</sup> 532 F. 3d. 1318, 1329-30 (Fed. Cir. 2008).

<sup>43</sup> *Limelight* at 2115-17.

<sup>44</sup> Brief of Intellectual Property Owners Association as Amicus Curiae in Support of Neither Party at 9-10, *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. \_\_\_\_ (2014) (No. 12-786).

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courts analyze whether “direction or control” exists for purposes of direct infringement. The inquiry is likely to depend on a number of factors that will be different in each case, particularly given the opportunities for collaboration among companies.<sup>45</sup> Some facts to consider might include the closeness of the accused direct infringer and the third party that performed some of the steps of the claim, or the extent to which the relationship between the accused infringer and third party establishes the manner, timing, or other features that lead to the performance of the missing steps.<sup>46</sup>

Post-*Limelight* it will be more difficult to prove that a defendant is liable based on the induced infringement theory, and thus more difficult to sue on patents that require the completion of steps by a third party. Infringement will be foreclosed unless a plaintiff shows that a defendant exercises “control or direction” over end users. This might constrain the ability of patent owners to hold upstream suppliers or manufacturers liable for independent acts of downstream third-parties. The case might have implications for legislative proposals for stays of patent infringement suits against downstream suppliers or end users while litigation proceeds against manufacturers.

### RELATED ISSUES

#### USPTO Must Issue Quality Patents

Some patents asserted in court should never have been issued by the USPTO. For many years IPO has supported improvements in USPTO administration to increase the quality of patent examination and speed up the processing of patent applications. A few specific measures likely to increase quality include upgrading IT systems for patent examiners, providing ongoing, timely examiner training on changes in the law and about

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<sup>45</sup> *Id.* at 17.

<sup>46</sup> *Id.*

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developments in technology, development and implementation of metrics to measure quality and, above all, to assure the issuance of patents that clearly define the scope of the rights they protect. We support the USPTO's new patent quality initiative for improving the reliability of patents and look forward to making suggestions to the USPTO about where we see room for improvements.

### **The USPTO Must Have Funding to Conduct High Quality, Timely Patent Examination**

Our members all agree that the United States needs a fully-funded USPTO to keep our nation competitive, encourage innovation and create new jobs. User fees paid to the USPTO by patent and trademark applicants and owners are paid with the expectation that the money will be used to examine their applications and provide other services to them. However, close to \$1 billion was sequestered or diverted to unrelated government programs between 1992 and 2013. This was one of the major causes of the large backlog of unexamined patent applications that the USPTO is still struggling with today.

The USPTO must have sufficient funds to hire and retain a nationwide workforce, and to train and supervise its workforce particularly to respond to emerging technologies and the evolution of case law. The patent system is a critical component of the U.S. economy and contributes greatly to U.S. leadership in innovation and technological advancement. It is imperative that the USPTO, which is fully funded by user fees and uses no taxpayer money, have full access to all of the user fees it collects. We urge Congress to revisit the issue of secure USPTO funding.

### **CONCLUSION**

We continue to believe fee shifting legislation is needed despite the *Octane* and *Highmark* decisions, but the effects of the other decisions on frivolous litigation are more

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difficult to assess. The number of new patent suits filed in U.S. district courts decreased substantially in 2014, from 6,107 new cases filed in 2013 to 5020 new cases filed in 2014.<sup>47</sup> While it is too early to conclude whether this is a trend or just a temporary lull, some speculate that this is a result of the cumulative effect of the recent Supreme Court patent decisions. Other factors, however, may be contributing to this decline in litigation. We recommend that the committee continue to monitor the possible impact of these Supreme Court decisions as it considers the scope of legislation to deter abusive litigation.

Another development since the House passed the Innovation Act may affect the patent landscape. Last year the U.S. Judicial Conference approved and forwarded to the Supreme Court for consideration proposed amendments to Federal Rules of Civil Procedure.<sup>48</sup> Among other changes, the new rules will delete Form 18 and thus heighten the pleading standard for patent infringement cases.<sup>49</sup> The new rules will also provide judges with more discretion and encouragement to more actively manage discovery, as well as enhanced guidance about when to shift fees with regard to discovery.<sup>50</sup> The new rules are scheduled to take effect December 1, 2015.<sup>51</sup> We suggest that the committee consider how these rule changes will affect patent litigation, with the goal of keeping patent law consistent with the rest of civil litigation to provide consistency, certainty, and predictability.

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<sup>47</sup> Docket Navigator Year in Review 2014 at 5 (*available at* <http://home.docketnavigator.com/year-review>).

<sup>48</sup> Press Release, Judicial Conference of the United States, Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court (Sept. 16, 2014) (*available at* <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>).

<sup>49</sup> Memorandum from the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States B-4-11 (June 14, 2014) (*available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>).

<sup>50</sup> *Id.* at B-19.

<sup>51</sup> Judicial Conference Press Release.

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In addition to the recent case law and other considerations discussed above, we note that the changes made by the America Invents Act are difficult to discern so soon after the law's implementation. We urge the committee to consider the implications of the AIA's impact along with all other developments as it considers legislation to address abusive patent litigation practices.

It is crucial not to undermine strong patent rights by disturbing incentives undergirding the patent system. The law must deter frivolous litigation but must not penalize legitimate patent owners simply seeking to enforce their rights.

I will be happy to answer any questions.

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