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## Chevrons Demise and Its Effect on Intellectual Property & Its Governing Agencies

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For many, the demise of *Chevron*<sup>[1]</sup> the doctrine by which agencies enjoy deference in interpreting ambiguous statutes has long been coming. While *Chevrons* demise, and the resulting resurgence of *Skidmore*,<sup>[2]</sup> is likely to lead to numerous challenges to previous agency decisions, its effect on intellectual property, namely patent law may be limited. Yet certain decisions by both the United States Patent and Trademark Office (USPTO), and its Patent Trial and Appeals Board (PTAB), and the United States International Trade Commission (ITC) have been afforded *Chevron* deference, and thus may be subject to post-*Chevron* challenges. This article examines three such examples: (i) the ITCs interpretation of 19 U.S.C. 1337 (Section 337) in *Suprema, Inc. v. International Trade Commission*;<sup>[3]</sup> (ii) Director Vidals guidance on discretionary denials at the PTAB; and (iii) the USPTOs proposed rule change for terminal disclaimers.

### *Chevrons* Demise and *Skidmores* Resurgence

In *Loper Bright Enterprises v. Raimondo*,<sup>[4]</sup> the Supreme Court overruled the longstanding *Chevron* deference standard, whereby courts defer to permissible agency interpretations of a statute if the statute is silent or ambiguous and Congress did not address the issue.<sup>[5]</sup> Instead, courts must exercise independent judgment to decide whether an agency has acted within their statutory authority, rather than defer to an agency's interpretation of an ambiguous statute. Importantly, *Looper* did not blanketly overrule agency deference all together. Rather, it marked the resurgence of *Skidmore*.

While courts must now make their own judgment about a statutes meaning, the *Looper* Court explained that in exercising such judgment, though, courts may as they have from the start seek aid from the interpretations of those responsible for implementing particular statutes.<sup>[6]</sup> Quoting *Skidmore*, the Court explained that [s]uch interpretations constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance consistent with the [Administrative Procedure Act] APA.<sup>[7]</sup> Thus, agency interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statutes meaning.<sup>[8]</sup> An agency's interpretation may, for example, be especially informative to the extent it rests on factual premises within the agency's expertise.<sup>[9]</sup>

In sum, *Looper* instructs that while an agency's interpretation of a statute cannot bind a court, it can, depending on the circumstances, be informative.

### **Will *Suprema* and the ITCs Jurisdiction over Articles that may Infringe After Importation Survive?**

Since the Supreme Courts decision in *eBay v. MercExchange*,<sup>[10]</sup> the ITC has become the primary venue for patentees to obtain injunctive relief. And in *Suprema*, the *en banc* Federal Circuit deferred to the ITCs interpretation of 19 U.S.C. 1337 (Section 337), which prohibits the importation of articles that infringe a valid and enforceable United States patent. The ITC interpreted Section 337 not to include a temporal requirement and thus prohibiting articles that do not infringe at importation but are *later* infringed by inducement. The *en banc* Federal Circuit concluded that because Section 337 does not answer the question before us, the Commissions interpretation of Section 337 is entitled to *Chevron* deference, and held that the ITCs interpretation is reasonable because it is consistent with Section 337 and Congress mandate to the Commission to safeguard United States commercial interests at the border.<sup>[11]</sup>

*Chevrons* demise may mean that the ITCs interpretation that Section 337 prohibits the importation of articles that may be found to infringe after importation cannot be upheld. For example, even before *Looper* was the law of the land, Google argued that *Suprema* cannot survive an abolition or substantial narrowing of *Chevron* deference because this Courts analysis depended on the *Chevron* framework.<sup>[12]</sup> But this alone may not dispose of the issue because, while *Chevron* deference may be dead, *Skidmore* lives on. And under *Skidmore*, courts determine the amount of deference to give an agency depending on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.<sup>[13]</sup>

In its affirmance, the Federal Circuit reasoned that [n]othing in nearly a century of US trade law enactments is inconsistent with the Commission's interpretation.<sup>[14]</sup> The court also found that the ITC reasonably determined that its interpretation would further the purpose of the statute because, for example, an opposite reading effectively eliminate[s] trade relief under Section 337 for induced infringement and potentially for all types of infringement of method claims.<sup>[15]</sup> Thus, even if the Federal Circuit were to revisit *Suprema*, the ITCs interpretation may be found considered, well-reasoned, and persuasive and afforded deference under *Skidmore*.

### **Director Vidals Guidance on Discretionary Denials**

Another post-*Chevron* question arises with respect to Guidance issued by the Director of the USPTO. An example of such Guidance may be Director Vidals Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation issued on June 21, 2022 (*Fintiv* Guidance). There, Director Vidal stated that the PTAB will not rely on the *Fintiv* factors to discretionarily deny institution in view of parallel district court litigation where a petition presents compelling evidence of unpatentability.<sup>[16]</sup> Instead, compelling, meritorious challenges will be allowed to proceed at the PTAB even where district court litigation is proceeding in parallel.<sup>[17]</sup> Similarly, Director Vidal clarified that [t]he PTAB will not discretionarily deny petitions based on applying *Fintiv* to a parallel ITC proceeding.<sup>[18]</sup>

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This Guidance, according to Director Vidal, is consistent with 35 U.S.C. 314, 324 and Congress intent to provide quick and cost-effective alternatives to litigation for challenging issued patents.[19] As for decisions not to grant discretionary denials for parallel ITC litigation, for example, Director Vidal reasoned that [u]nlike district courts, the ITC lacks authority to invalidate a patent and its invalidity rulings are not binding on either the Office or a district court and therefore an ITC determination cannot conclusively resolve an assertion of patent invalidity, which instead requires either district court litigation or a PTAB proceeding to obtain patent cancellation.[20]

Director Vidals *Fintiv* Guidance, at least in part, has resulted in a decreased rate of discretionary denials at the PTAB. Patentees, because they stand to benefit from discretionary denials so that their patents can live to fight another day, are likely keen to find their resurgence. But a post-*Chevron* challenge may not be the answer because PTAB institutions are inherently discretionary. Moreover, a determination of whether to institute an inter partes review under this section shall be final and nonappealable, rendering post-*Chevron* review of the Guidance procedurally troublesome.[21] Procedural issues notwithstanding, this, and other similar forms of Guidance from the PTAB are now more open to challenge.

#### **The USPTOs Proposed Rule on Terminal Disclaimers**

In May, the USPTO issued a notice of proposed rule changes to terminal disclaimers that has been the subject of much fervor. Current terminal disclaimer practice simply requires disclaimants to agree that the term of a patent that claims obvious variants over a previous patent will contemporaneously expire with the previous patent, and that the patent will only be enforceable while both patents are commonly owned. But under the USPTOs proposed rule change, patentees would also be required to agree that the patent in which the terminal disclaimer is filed will be enforceable only if the patent is not tied and has never been tied directly or indirectly to a patent by one or more terminal disclaimers filed to obviate nonstatutory double patenting in which: any claim has been finally held unpatentable or invalid as anticipated or obvious by a Federal court in a civil action or by the USPTO. Put simply, the proposed rule would require patentees to agree that all terminally disclaimed patents rise and fall together.

Patentees have generally met the proposed rule changes with skepticism in part because the proposal impacts the scope of one patent or patent application based on validity determinations in another. Moreover, the proposed rules could render unenforceable *entire* patents if just a *single* claim in a different patent is found invalid. Thus, should the proposal take effect, challenges to its legality seem all but certain. The success of any challenge remains to be seen. But with *Chevron*, and the deference it afforded, gone, any rule changes should come with a thorough and considered reasoning to be upheld.

#### **What can we Expect?**

What does a landmark change in administrative law mean for the USPTO and the ITC? As with any shift in the law, it will take time to know for sure. So, more of the same at least for now. But challenges and creative arguments to overturn problematic agency interpretations are likely forthcoming. Expect the law to change in some fashion. Keep apprised of changes in the USPTOs and the ITCs statutory interpretations, and any challenges thereto. This is particularly important when litigation is ongoing, as any post-*Chevron* issues must be timely raised (*i.e.*, during the underlying agency action) because issues first raised on appeal may be

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waived, even if there is a subsequent change in the law.[22]

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[1] *Chevron U.S.A. Inv. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

[2] *Skidmore v. Swift & Co.*, 323 US 134 (1944)

[3] 796 F.3d 1338 (Fed. Cir. 2015).

[4] 603 U.S. \_\_ (2024)

[5] *Chevron*, 467 U.S. at 843.

[6] *Looper*, 603 US \_\_, at \* 16.

[7] *Id.*

[8] *Id.* at \* 17.

[9] *Id.* at \* 25 (internal quotation marks omitted).

[10] 547 U.S. 388 (2006).

[11] *Id.* at 1340-41 (Fed. Cir. 2015)

[12] Intervenor and Cross-Appellant Google LLCs Petition for Rehearing *En Banc* in Case No. 2022-1421, p. 9.

[13] *Skidmore*, 323 US at 140 (1944).

[14] *Suprema*, 796 F.3d at 1350

[15] *Id.* at 1352.

[16] *Fintiv* Guidance, p. 2.

[17] *Id.* at p. 4.

[18] *Id.* at p. 7.

[19] H.R. Rep. No.112-98, pt. 1

[20] *Fintiv* Guidance, p. 6

[21] 35 U.S.C. 314(d)

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[22] *E.g., Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1352 (Fed. Cir. 2008) (holding that a litigant cannot invoke intervening Supreme Court case law to correct its own procedural misstep of failing to raise an invalidity defense until appeal).

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