# *Intellectual Property Alert*: 2020 Intellectual Property Primer: *Cases to Watch this Year*

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2020 is likely to be a busy and influential year for intellectual property cases before the United States Supreme Court. The Court is expected to make a number of rulings and decisions that are likely to impact the future landscape of copyright, patent, and trademark law.

**Copyright's Fair Use Doctrine:** In what is shaping up to be the main event of this year's Supreme Court calendar—at least for intellectual property practitioners—the Court will hear oral argument in *Google v. Oracle* later this year. The case is the culmination of a decade's worth of litigation involving two of world's largest tech companies.

Oracle has accused Google of stealing copyrighted pieces of Java source code for use in Google's Android smartphones. Google has argued that the Java software language Oracle accuses it of stealing is: (1) too functional to be protected by copyright law; and (2) is subject to copyright's fair use doctrine.

The Supreme Court will consider both issues. The case is particularly noteworthy because the Court has never issued binding precedent related to the copyrightability of software and it has not issued a fair use decision in over twenty-five years.

**State Sovereign Immunity and Copyright Infringement:** The Supreme Court heard oral argument in November in the case of *Allen v. Cooper*, which involves the question of whether copyright owners may sue a state for copyright infringement in federal court. While states enjoy broad immunity, the 1990 Copyright Remedy Clarification Act (the CRCA) purported to abrogate the state's sovereign immunity and provide an avenue for copyright owners to sue states in federal court for copyright infringement. Lower courts have ruled the CRCA unconstitutional and the Department of Justice no longer enforces it. However, Allen is asking the Supreme Court to rule the CRCA constitutional and provide copyright owners a venue to hold states responsible for their copyright infringement.

**Patent Eligibility:** The Supreme Court wasted no time diving into the issue of patent eligibility this year. Earlier this month, the Court rejected five cases[1] asking the Court to revisit and clarify its prior rulings. The issue will again be before the Supreme Court later this month, when the Court is scheduled to hear and consider whether to grant *certiorari* in a handful of other patent eligibility matters.

The Supreme Court's rulings in *Mayo v. Prometheus* in 2012 and *Alice v. CLS Bank* in 2014—which collectively held that laws of nature and abstract ideas are not eligible for patent protection—have been a source of confusion and frustration for inventors, practitioners, and judges alike.

**Appealability of Patent Trial and Appeal Board's Decisions:** The Supreme Court heard oral arguments in *Thryv, Inc. v. Click-To-Call Technologies, LP* in December of 2019 on the issue of whether a party can appeal the Patent Trial and Appeal Board's (the PTAB) decision to institute an *inter partes* review upon finding that the request to institute an *inter partes* review was not time barred. The decision may have broad implications for patent litigation strategy, especially if the Court provides additional guidance regarding what aspects of PTAB institution decisions are and are not appeal.

**Which Patents Are Subject to *Inter Partes* Review:** Collabo Innovations, Inc. has asked the Supreme Court to issue a ruling on whether patents pre-dating the America Invents Act[2] are immune from *inter partes* review. If the Court takes the case, its ruling will have a profound impact on whether millions of patents are subject to being invalidated by the PTAB's *inter partes* review procedures. The case is *Collabo Innovations, Inc. v. Sony Corp*.

**Trademark Damages and Profit Sharing:** When and under what circumstances a trademark owner is entitled to recover the infringer's profits has been an issue that has plagued practitioners and judges for a number of years. Unlike copyright law, the Lanham Act has no statutory damages provisions and actual damages can often be difficult to prove. Accordingly, the uncertainty of whether some form of monetary relief exists at the end of prolonged and expensive litigation makes it difficult for clients to make educated and informed business decisions about their litigation strategy.

That difficulty will hopefully be clarified later this year after the Court issues its ruling in *Romag Fasteners, Inc. v. Fossil, Inc.* The Court heard oral arguments earlier this month and should be resolving the question of when can a court order a trademark infringer to disgorge its profits to the trademark owner.

**Domain Names and Generic Terms:** The Supreme Court is scheduled to hear the case of *United States Patent and Trademark Office v. Booking.com BV* later this year. The issue presented to the Court is whether the combination of an otherwise generic term and an otherwise generic top-level domain, such as ".com," can create a protectable trademark. Although the Trademark Trial and Appeal Board refused to register Booking.com's name, the Fourth Circuit upheld the trial court's ruling that the addition of .com could turn a generic word into a source designator for consumers.

Please contact your Vorys attorney if you have any questions about the impact any of these cases has on your intellectual property portfolio or litigation strategy.

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[1] The five cases the Supreme Court of the United States rejected are: *Athena Diagnostics Inc. et al. v. Mayo Collaborative Services LLC*, case number 19-430; *Hikma Pharmaceuticals USA Inc. et al. v. Vanda Pharmaceuticals Inc.*, case number 18-817; *HP Inc. v. Steven E. Berkheimer*, case number 18-415; *Garmin USA Inc. v. Cellspin Soft Inc.*, case number 19-400; and *Power Analytics Corp. v. Operation Technology Inc. et al.*, case number 19-43.

[2] The America Invents Act went into effect on September 16, 2012.