Intellectual Property

2014 FALL BULLETIN

To Join or Not to Join: When Membership in a Standard-Setting Organization Is the Question

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Participation in standard-setting organizations (SSOs) can be a productive way for companies in a particular industry to influence technical standards that enable interoperability between products. Recently, however, there has been more focus in patent and other litigation on the commitment that companies involved in standard-setting make to license their intellectual property under fair, reasonable, and non-discriminatory terms (FRAND or RAND). For companies, then, is it worthwhile to have employees participate in a standard-setting activity? This article briefly outlines some of the key factors involved in deciding whether to participate in an SSO, focusing in particular on the Institute of Electrical and Electronics Engineers (IEEE) and the International Telecommunication Union (ITU), and on the potential benefits and pitfalls to a company's patent strategy.

As a starting point, the standard-setting process has the risk of "patent hold-up." When SSOs set a technical standard with a single method of compliance, they are ensuring that most, if not all, industry members will use a particular set of technologies. Patents necessary to practice such a standard are known as "standard-essential patents." Other patents on optional or preferable features to the practice of the standard do not present the same set of issues. Because it is rarely clear whether or not new technologies fall within the scope of a patent, whether a given patent's claims are essential, optional, or only preferable to the standard is often a grey area. Therefore, when industry participants agree to a standard, a holder of a potentially essential patent gains a great deal of power. Absent further contractual requirements, industry members must either pay whatever the patent holder demands or find a way to work around the standard.

On the other side of the spectrum, the standards-setting process generates antitrust concerns because competitors in an industry work together to agree on requirements for an entire technical area. The standard-setting organization must therefore tread carefully to prevent the standard-setting process from becoming anticompetitive.

To walk the line between antitrust issues and the risk of patent hold-ups, SSOs take several tactics. Most commonly, an SSO first attempts to have participants identify patents that are essential to proposed standards. Once these patents are identified, the SSO seeks a F/RAND commitment for the essential patents, requiring the member to commit to negotiate licenses for the essential patents with adopters of the standard on F/RAND terms. The non-specific nature of the F/RAND commitment protects the SSO from antitrust violations like price-fixing, but leaves a number of issues for later determination. During subsequent licensing negotiations or litigation, a patent holder's F/RAND commitment may come into question, for example, because employees of the patent holder did not disclose a relevant patent, or the patent owner failed to comply with its F/RAND commitment, either by seeking a non-F/RAND royalty or an injunction.

In This Bulletin

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Despite the challenges involved in navigating the F/RAND commitment, there is a large upside for companies who become involved in the standard-setting process: their technology could be adopted by all implementers of the standard on a worldwide basis. A F/RAND rate is not necessarily small, but it is likely a lower rate than a rate negotiated outside the shadow of a F/RAND commitment. However, if the standard becomes widespread, there may be many potential licensees—often a much larger licensing base than would have been available otherwise. At the very least, members can find it useful to have input into which technology to ultimately adopt as part of a technical standard, even if it isn't covered by the member's own patents.

Thus, companies may want to consider the following points when deciding whether to join an SSO:

Who Is a Member of an SSO?

Members of an SSO can be individuals, individuals representing or affiliated with private organizations, private organizations, or even state governments. Each SSO is different, and some allow multiple types of members. The IEEE, for example, allows only individual engineers as members, who liaise on behalf of their employers and must disclose their affiliation. On the other hand, the ITU, an agency of the UN, has members consisting of private companies and state governments (including all UN member states).

What Is the Obligation to Disclose IP?

Most SSOs require participants in standard-setting to disclose patents that are or might become essential to a standard being developed. The scope of the disclosure obligation is contractually defined by the SSO's policy, and varies across SSOs. The IEEE, for example, has no explicit disclosure requirement. The ITU, on the other hand, requires participants to disclose known essential patents or pending applications.

The SSOs must strike a balance between obtaining useful disclosures of patents that may impact the ability to practice the standard and imposing an undue burden on participants. Searching and assessing essentiality across multiple iterations of proposals could be prohibitively expensive for members. Some organizations, like the IEEE, solve the problem by not explicitly requiring disclosure. Some corporate members of SSOs expressly disclaim any obligation to conduct an internal search for essential claims. For example, the ITU's Common Patent Policy explicitly states "there is no requirement for patent searches."

As a contractual duty, the obligation to disclose patents and other IP is personal to each member, whether the member is an individual or an organization. When the member is an individual participating on a company's behalf, the personal nature of the obligation to disclose means that unless that individual is familiar with relevant patents, they may not be considered during the standards process.

In addition, disclosure of IP is not the same as—and need not be accompanied by—a F/RAND commitment. Disclosure simply allows the SSO to make an informed decision to include that technology in the ultimate standard or to locate a different technological solution to the same problem.

Finally, SSOs typically do not specify whether individual patents must be disclosed or whether a global F/RAND commitment for all IP that may read on the standard satisfies this obligation. Global F/RAND commitments are a matter of common practice because they solve two problems. First, since many companies have large patent portfolios, it eliminates the burden of searching for and assessing essential patent claims. Second, the SSO will usually not, and with a global F/RAND commitment need not, undertake an essentiality analysis itself. *See, e.g.*, ITU Common Patent Policy § 5 ("[H]owever the Technical Bodies may not take position regarding the essentiality, scope, validity or specific licensing terms of any claimed Patents."); IEEE Standards Board Bylaws § 6.2 ("The IEEE is not responsible for identifying Essential Patent Claims for which a license may be required…."). However, global F/RAND commitments may exceed the scope of the member's contractual obligations and may subject the patent holder to later contentions that nonessential patents are impacted by the commitment. Accordingly, they are a blunt instrument.

When Does a F/RAND Obligation Arise?

SSOs typically do not require F/RAND commitments of all members or affiliated companies. Instead, the F/RAND commitment is a separate obligation, which typically allows companies to make a desired level of F/RAND commitment. Both the IEEE and ITU ask for a statement, called a letter of assurance (LOA), of the company's commitment and outline permissible forms of the statement:

- The LOA required by the IEEE can be of two different types: (1) a disclaimer against enforcement of the patent; or (2) a statement that licensing of the patent will be available on F/RAND terms. The LOA may also include a capped rate, a sample agreement, or material licensing terms. Alternatively, the company can indicate that it is not aware of any IP that is or might become essential.
- The LOA required by the ITU can take several forms: (1) a commitment to negotiate licenses *free of charge* on F/RAND terms; (2) a commitment to negotiate licenses on F/RAND terms; or (3) an indication that the patent holder is unwilling to comply with the F/RAND commitments, in which case the ITU will exclude standards provisions that would depend on the patent.

Participating companies may provide an LOA to encourage adopting their technology as a standard (for use by everyone) rather than refusing so that their technology is not adopted (and used by no one). In some cases, LOAs may accompany specific standards proposals. When a company or affiliated member makes a proposal for a technical standard, the company will typically come forward with F/RAND commitments at the same time. These commitments may be conditioned upon adoption of the proposal, stating, for example, "if this proposal is adopted, we will license any essential patents on F/RAND terms." Conditional F/RAND commitments may not work in every SSO; the IEEE's Standards Board Bylaws, for example, prohibit discussion of LOAs at a standards working group meeting.

What Is the F/RAND Obligation?

Although specific to each SSO and each LOA, typically the F/RAND commitment is to *negotiate* a F/RAND license in good faith. *See, e.g., Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014). F/RAND negotiations may yield different rates for different entities. Although F/RAND obligations often state that the rate must be non-discriminatory, this does not require that all licensees receive identical terms. Different potential licensees are differently positioned, and their products may make different uses of a standard and to different extents.

What Are F/RAND Rates?

SSOs will not set F/RAND rates due to both concerns over price-fixing and the flexible nature of F/RAND. Because rates are not set in advance, F/RAND rates for a license depend upon many factors. The success of the standard, its importance in the marketplace, the licensee's position, the importance of the individual patents to the standard, and the number of patents held by the licensor are just some of the factors that will affect the F/RAND rate and may not be known *ex ante*.

The case law on F/RAND rates is evolving. The two primary questions—whether a litigant in patent litigation is limited to a contract damages award if the patent is subject to a F/RAND commitment, and whether a litigant can obtain a better contract rate and/or additional damages by suing for breach of contract—have not yet been addressed by appellate courts, although ongoing matters should soon provide some additional clarity in this area. *See, e.g., Microsoft Corp. v. Motorola, Inc.,* No. C10-1823JLR, 2013 U.S. Dist. LEXIS 60233 (Apr. 25, 2013).

Who Has Standing to Enforce the F/RAND Commitment?

Although F/RAND commitments are made by contract, it is not a straightforward process to enforce that contract in the event of breach. It is a matter of state or national contract law whether third-parties have a cause of action when the patent holder fails to make a F/RAND offer. The SSO may select the applicable law in its policy, and that law may define who can enforce a contract. The appellate courts have yet to address this issue, but there may be a difference under both state law in the U.S. and the laws of other countries between the rights of a co-participant in the standards effort and a nonparticipant who subsequently implements the standard.

F/RAND commitments may also be raised in litigation as antitrust causes of action for monopolization or in patent litigation as theories of unenforceability. *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007); *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004 (Fed. Cir. 2008). The Federal Trade Commission and the United States Department of Justice Antitrust Division have also both taken an interest in conduct during standardization efforts. *See, e.g.*, *Rambus Inc. v. Fed. Trade Comm'n*, 522 F.3d 456 (D.C. Cir. 2008). Most commonly, however, the alleged infringer in patent infringement cases attempts to enforce the F/RAND commitment by using it to oppose the grant of an injunction or to support a lower reasonable royalty as damages.

What Is the Effect of the F/RAND Obligation on Injunctions?

Although no SSO bars a F/RAND licensor from seeking an injunction, the F/RAND obligation is often seen by competitors and courts as undermining the patent holder's need for an injunction against patent infringement. Because the patent holder has committed to licensing the patent on reasonable terms, the argument goes, the patent holder is unjustified in seeking to bar use of the technology. The Federal Circuit, however, has taken a more reasoned view, instead finding that a F/RAND commitment does not create a *per se* bar against granting an injunction. In *Apple Inc. v. Motorola, Inc.*, the court reversed a determination by Judge Posner who, sitting in district court by designation, held that the F/RAND commitment was inconsistent with injunctive relief. The court stated that F/RAND commitments might create challenges when the patent holder attempts to show irreparable harm, as the F/RAND commitment implies that monetary remedies would be adequate, but an injunction may be appropriate against an unwilling licensee as long as the patent holder engaged in good faith negotiation. The Federal Circuit further noted that a *per se* bar of injunctions could discourage participation in SSOs.

When faced with the opportunity to join an SSO, companies should carefully weigh what technology they may bring to the table and the chance of its adoption against the potential risks that come with a F/RAND commitment. Membership in an SSO tends to be longer-term than standard-by-standard, so companies should assess what role they imagine playing in a particular industry over the following years or even decades. They should also closely read the patent policy, which in the end will define the scope of obligations. In the end, the decision to join an SSO depends on many factors and should be considered carefully.

Highmark and *Octane* Helped, But Legislation on Fee Shifting Still Necessary

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There is a continued need for patent reform to address the asymmetrical costs that patent litigation imposes on defendants. Given the substantial costs imposed on U.S. technology companies by the number of suits brought by Patent Assertion Entities (PAEs), the standards for award of attorneys' fees have been a focus of patent reform. The White House's June 2013 Report on Patent Assertion and U.S. Innovation suggested that it is important to reduce "disparity in the costs of litigation for patent owners and technology users."

However, just "fixing" the rules associated with attorneys' fees is not enough. Action should also be taken to prevent PAEs from being able to simply walk away from cases where there is about to be an assessment of litigation costs or attorneys' fees, either by dissipating all of their assets so they are effectively judgment proof or by filing for bankruptcy.

Last term, proposed legislation contained fee-shifting provisions that would make it easier for a prevailing party—either a plaintiff or a defendant—to obtain attorneys' fees in a patent infringement suit. That legislative effort died last May, in the wake of the U.S. Supreme Court's decisions in *Octane Fitness, LLC v. Icon Health & Fitness, Inc.,* 134 S. Ct. 1749 (2014) and *Highmark Inc. v. Allcare Health Management System, Inc.,* 134 S. Ct. 1744 (2014).

According to some, these cases essentially mooted the need for fee shifting legislation. *Octane* may make it easier for district courts to award attorneys' fees when a PAE brings a meritless patent infringement claim or one is defended in bad faith. *Highmark* makes it more difficult for the Federal Circuit to reverse such awards, because the Federal Circuit is reviewing the awards for abuse of discretion.

However, nothing in these cases addresses the proposed reforms to make the real parties in interest who are managing PAEs responsible for fees and costs. In lieu of legislation that permits real parties in interest to be joined in an action, patent defendants are left with the somewhat unsatisfactory remedy of the state-by-state provisions for bonding. For example, in Texas, a defendant can, within 90 days of appearing, move the court for a determination that the plaintiff is a vexatious litigant. If it is determined that the plaintiff is a vexatious litigant, the court may require the plaintiff to post a security to assure payment to the defendant of reasonable expenses incurred in or in connection with the litigation.

Recent decisions from the California district courts may be instructive with respect to how useful such a remedy may be. Section 1030 of the California Code of Civil Procedure allows a defendant to force the plaintiff to file a bond to secure an award of costs and fees when (1) the plaintiff resides out of state or is a foreign corporation and (2) there is a "reasonable possibility" that the defendant will prevail. The purpose of section 1030 is to help California defendants "secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not within the court's jurisdiction."

Section 1030 may also be applied by a California federal court, as federal courts "[t]ypically . . . follow the forum state's practice in considering a motion regarding security for costs." The statute is also consistent with a Northern District of California Civil Local Rule that provides that "the Court may require any party to furnish security for costs which can be awarded against such party in an amount and on such terms as the Court deems appropriate."

A handful of defendants in patent litigation brought by PAEs have sought relief under section 1030. The first such recent motion was brought in *IPVX Patent Holdings, Inc. v. Voxernet LLC,* No. 5:113-cv-01708 HRL, 2014 U.S. Dist. LEXIS 83860 (N.D. Cal. June 18, 2014), where the defendant requested that the court require the plaintiff to post a $749,000 undertaking to cover anticipated attorneys' fees and costs. The defendant claimed that the plaintiff was a patent troll and should be required "to put its money where its mouth is." The defendant was also concerned that when it prevailed, the plaintiff would just disappear, leaving the defendant without recourse to recover fees and costs.

On June 18, 2014, the Court denied the defendant's motion, noting that section 1030 requires a separate basis for fees and that 35 U.S.C. § 285 provides that basis by allowing an award of attorneys' fees to the prevailing party in exceptional patent cases. The court observed that while the plaintiff bore some hallmarks of a patent troll, it was not automatically the villain simply because it had brought infringement actions against multiple defendants. The court also concluded that the defendant had failed to demonstrate a reasonable possibility that it would prevail because this appeared to be a matter in which the parties simply held strongly divergent views as to the scope of the patent claims.

Similarly, in *GeoTag, Inc. v. Zoosk, Inc.,* No. C-13-0217 EMC, 2014 U.S. Dist. LEXIS 24782 (N.D. Cal Feb. 26, 2014), the defendant brought a motion to require an undertaking of $750,000 to cover anticipated attorneys' fees and costs. The plaintiff had filed similar causes of action against numerous defendants in multiple district courts throughout the country. In denying the motion, the court held that while the defendant had shown a reasonable possibility that it would prevail, the defendant had not shown a reasonable possibility of establishing an exceptional case pursuant to 35 U.S.C. § 285.

The same courts that denied the undertaking motions in these patent litigations have directed that they be provided in copyright matters. In a trio of cases—*AF Holdings LLC v. Trinh,* No. C 12-02393 CRB, 2012 U.S. Dist. LEXIS 161394 (N.D. Cal Nov. 9, 2012), *AF Holdings LLC v. Navasca,* 106 U.S.P.Q.2D (BNA) 1429 (N.D. Cal Feb. 5, 2013) and *AF Holdings, LLC v. Magsumbol,* 106 U.S.P.Q. 2d (BNA) 1586 (N.D. Cal. March 18, 2013)—the courts held that the defendants had met the requirements of section 1030 and required the plaintiffs to post a bond (in the amount of $48,000 in two of the actions and $50,000 in the other).

This difference—the district courts' willingness to conclude that it is likely to shift fees in copyright litigation but not in patent litigation—suggests that it may continue to be difficult to get a bond early in a patent case, before the courts have made substantial decisions on the merits and can determine what claims are least meritorious. It is at that point, when a defendant has already incurred substantial fees and costs defending against a claim that proves to lack merit, that the PAE is most likely to unwind its operations. For example, in *Kelora v. Target*, No. C 11-1548 CW, U.S. Dist. LEXIS 70636 (N.D. Cal. May 21, 2012), the Court granted defendants' summary judgment on invalidity and awarded costs to the defendants. However, Kelora filed for bankruptcy before it ever paid a dime to the defendants.

Therefore, even with the recent Supreme Court decisions of *Octane Fitness* and *Highmark*, in order to curb the abusive patent litigation by PAEs, we still likely need legislative remedies to address collection concerns.

One approach would be to make bonding more readily available early in an action. Another approach would be to ensure that real parties in interest are identified to the court so that it is easier to use the usual debt collection tools. This has limited usefulness where the PAE is set up by entities themselves that are foreign, making discovery of assets and collection difficult. A third approach, the subject of discussion in the last session, was to not only require that these parties be identified but also make sure that, where possible, they are before the court handling the patent litigation matter; then the court could take steps to prevent those entities from disposing of assets that would make the patent holder judgment proof.

Quick Updates

Are LinkedIn Connections Trade Secrets?

It is well established that an employer's customer list may constitute a protectable trade secret, but if the customer information is maintained in employees' social media platforms, does this preclude trade secret status? A lawsuit currently pending in the Central District of California, *Cellular Accessories for Less, Inc. v. Trinitas, LLC,* No. CV 12-06736 DDP, 2014 U.S. Dist. LEXIS 130518 (C.D. Cal. Sept. 16, 2014), addresses the novel issue of whether a terminated employee may be liable for misappropriation of trade secrets for retaining LinkedIn contacts that were created during the duration of employment. The district court judge determined that there were sufficient triable issues of material fact on this issue to deny defendants' motion for summary judgment.

Plaintiff Cellular Accessories for Less ("Cellular") sold mobile phone accessories to businesses. Cellular fired the defendant, David Oakes, who then started his own competing business, co-defendant Trinitas, LLC. Cellular sued Oakes for multiple tort claims, including a claim that he misappropriated Cellular's trade secrets when he: 1) Emailed himself a customer information file with 900+ personal and business contacts; 2) Emailed himself contact information for the company's purchasing agents, detailed billing preferences, pricing and at least one client strategy document; and 3) Maintained his LinkedIn contacts after termination.

Defendants argued that Oakes' LinkedIn contacts could not possibly be considered trade secrets, because all of his contacts would have been viewable to any of his other LinkedIn connections. Defendants further argued that anyone could have identified these customers by simply searching LinkedIn or another online business directory; in fact, Oakes had located many of his contacts in response to suggestions made by LinkedIn. Defendants also asserted that Cellular had encouraged salespeople to use LinkedIn for business development and had failed to inform employees that LinkedIn contacts were proprietary or confidential.

Cellular responded by pointing out that LinkedIn information is only available to the degree that the user chooses to share it, and therefore it is not automatically the case that contact information is viewable to any other LinkedIn connection. The judge declined to take judicial notice on the functionality of LinkedIn's service and determined that the factual dispute as to whether and to what extent Oakes' contacts were made public was sufficiently material to preclude a finding of summary judgment for defendants.

Given the increasing importance of LinkedIn and other social media sites in expanding business opportunities and professional networks, it is important that employers educate their employees about the proprietary and confidential nature of customer information located in a social media platform.

U.S. Copyright Office Releases Revised Copyright Compendium

The Copyright Office released its Draft Copyright Compendium in late summer 2014 — its first revision since 1984, and it is scheduled to be final in mid-December 2014. The Compendium is the administrative manual of the Register of Copyrights relating to the mandate and statutory duties of the Copyright Office. It does not have the full force of law, but past editions have been cited in numerous copyright cases, so it is expected to have persuasive value. Some of the expressed goals of this revision include improving accessibility, navigability and clarity, and improving transparency for practitioners, scholars, the courts and the general public.

The Compendium is available online (in searchable PDF form) at http://copyright.gov/comp3/docs/compendium-full.pdf. It describes copyright procedure and sets forth fundamental principles of copyright law. It also expressly addresses topics of current public discussion, including specifying that the "Office will not register works produced by nature, animals, or plants," and listing in this regard "a photograph taken by a monkey" — a response to the recent media frenzy behind the "monkey selfie." It also features a section dedicated to online works, including a detailed discussion of the difficulties identifying authorship, recognizing the prevalence of multiple contributors and the corresponding importance of adhering to copyright formalities. Further, it clarifies which elements of websites are not protectable under copyright law, including functional design elements and domain names.

When it comes to the question of whether an online-only work is published or not, the Compendium also provides some clarity specifying that the temporary digital copying of a work solely to display it is insufficient authorization for the work to be deemed published, and that the copyright owner must clearly authorize the reproduction or distribution of that work to render it published (i.e., express authorization to download content necessarily renders the work published).

Software as a Service (SaaS) does not get clear treatment in the Compendium. Because SaaS is hosted on a remote service, and not directly available to users for download, it is not considered "published." Nor does the Compendium describe how SaaS might result in an implied license, stating only that the SaaS provider's facilitation of access "may or may not" result in an implied license which "may or may not" render the work published. As a result, providers of online-only content should consider carefully which content might be considered published or unpublished. This is particularly important in considering whether to register such online content in order to preserve the statutory benefits that come with copyright registration — including the availability of statutory damages and attorneys' fees for copyright infringement suits.

Overall, however, the Compendium will serve as a helpful reference guide for copyright practitioners.

Laches Is a Defense to Patent Infringement, for Now

Laches has long been a defense to patent infringement. Laches exists when the patent holder unreasonably and inexcusably delays in filing a patent suit to the material prejudice of the accused infringer. If the delay exceeds six years, then the delay is presumed to meet all the requirements of the laches defense. A finding of laches bars the patent holder from recovering any pre-suit damages.

The intersection of laches and statutes of limitations is at the heart of a recent Supreme Court copyright case, *Petrella v. Metro-Goldwyn-Mayer, Inc.,* 134 S. Ct. 1962 (2014). Like patent law, copyright law provides both a laches defense and a statute of limitations. Pre-*Petrella,* the laches defense would bar all pre-suit recovery, even if the delay occurred outside the statute of limitations.

In *Petrella,* the Supreme Court held that laches was an equitable defense, used by federal courts only when federal statutes did not provide a corresponding statute of limitations. The enactment of a statute of limitations eliminates the need for the laches defense and, as such, the Supreme Court abolished laches in copyright cases. However, the holding in *Petrella* was limited to copyright, and the Court noted that it has "not had occasion to review the Federal Circuit's position" regarding laches and patent law.

The Federal Circuit recently had that occasion. In *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC,* the defendants obtained summary judgment of its laches defense. No. 2013-1564, 2014 U.S. App. LEXIS 17830 (Fed. Cir. Sep. 17, 2014). The plaintiffs sought reversal of the laches finding, relying in part on the *Petrella* copyright case. The logic of *Petrella,* the plaintiffs argued, applied equally to patent and copyright law: both have statutes of limitations and, as such, laches should apply to neither body of law.

Laches has been part of Federal Circuit precedent for decades. The preeminent laches opinion — *A. C. Aukerman Co. v. R. L. Chaides Constr. Co.* — issued in 1992. 960 F.2d 1020 (Fed. Cir.) *(en banc)*. The *SCA* court noted that *Petrella* left *Aukerman* intact and held, "Because *Aukerman* may only be overruled by the Supreme Court or an *en banc* panel of this court, *Aukerman* remains controlling precedent." *SCA,* 2014 U.S. App. LEXIS 17830.

As of now, the *Laches* defense is available to accused patent infringers. But for how long? No court has examined the issue of whether the logic of *Petrella* should be applied to patent law. In October, the plaintiffs filed a petition for an *en banc* rehearing, asking the Federal Circuit to directly address this issue. The Federal Circuit has not decided whether to grant an *en banc* rehearing, but the *SCA* decision seemingly invites such an outcome. Hopefully, in the coming months we will have further clarity regarding whether *Laches* remains an available defense to patent infringement.

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