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Chevron's End May Put Target On ITC And Patent Office Policy

By **Ryan Davis**

Law360 (June 28, 2024, 10:38 PM EDT) -- The U.S. Supreme Court's decision Friday striking down precedent that gave deference to the legal interpretations of government agencies could spur new attacks on patent office rules and decisions governing U.S. International Trade Commission patent disputes, attorneys said.

The high court overruled the 1984 decision that created the Chevron doctrine, holding that courts no longer need to defer to agencies' "reasonable" legal interpretations of ambiguous laws in litigation over rulemaking. Chevron was not as prominent in patent law as in other fields, but its demise may inspire challenges to policies that could have been more difficult when deference was available.

The precedent had not often been explicitly applied to U.S. Patent and Trademark Office decisions, and the law was murky about when the office was entitled to deference. The patent law fallout from Friday's decision may therefore first play out in ITC cases, where courts have deferred to the commission's views on key patent issues.

"There are some instances at the ITC where it could matter, but in general, this is going to have a relatively small impact on IP matters, compared with lots of other areas of federal law," said Nicholas Matich of McKool Smith.

ITC Issues

The first potential case has already been teed up at the Federal Circuit. With the justices seemingly poised to end Chevron deference, Google LLC urged the full court in late June to revisit a 2015 en banc decision about the type of patent cases the ITC can hear.

In the earlier case, known as Suprema v. ITC, the Federal Circuit cited Chevron in deferring to the ITC's reading of Section 337 of the Tariff Act, which authorizes it to bar imports of "articles that infringe a valid and enforceable United States patent." The commission said that includes items that don't infringe when they are imported, if the manufacturer later induces infringement.

In the current case, the ITC barred imports of Google smartphones and speakers found to infringe Sonos audio patents after they are imported when users download apps or configure them. The tech giant told the Federal Circuit that the ITC's reading "cannot survive an abolition or substantial narrowing of Chevron deference," because "articles that infringe" should not include products that might infringe in the future.

That is one area where "without owing the ITC Chevron deference, there could be major shifts in what the correct interpretation of Section 337 is," said Libbie DiMarco of Wolf Greenfield & Sacks PC.

Subsequent cases have built on the 2015 holding, so if the appeals court takes the case and applies its own reading of the statute, without deferring to the commission, "the entire line of cases over the last nine years building off of that could be rendered totally moot, if the Federal Circuit thinks that Suprema was actually not the most correct interpretation of the phrase 'articles that infringe,'" she said.

A different reading could restrict the ITC from hearing disputes over products unless they infringe at the time of importation. That could foreclose cases over products that need software or other components to operate, which would have to be filed in district court.

"That could have a substantial impact on a number of ITC cases out there, especially in the hardware and software realm," said Matt Rizzolo of Ropes & Gray LLP. It could also give producers a way to avoid ITC exclusion orders, by redesigning products so they don't infringe when they are imported, he said.

The Federal Circuit has also given Chevron deference to the ITC's interpretations on other patent issues that could now be open to challenge, including how a company bringing a case can meet the requirement of showing that it has a domestic industry of products protected by the patent.

The ITC's view that it has the authority to impose civil penalties, and its position that it has jurisdiction over cases where there was a contract for a sale but the product had not been delivered, have also been reviewed with Chevron deference.

However, getting such decisions overturned could still be challenging. The Supreme Court said it was not calling into question decisions relying on Chevron, and that previous findings that agency actions are lawful "are still subject to statutory stare decisis despite our change in interpretive methodology."

Overturning a decision citing Chevron would thus likely require a decision from an en banc appeals court or the Supreme Court, which is "going to put a relatively high burden on anyone who wants to change the legal regime going forward," McKool Smith's Matich said.

Patent Office Issues

The USPTO's legal interpretations have usually not been expressly given Chevron deference, and Federal Circuit decisions have not clarified when it might be available. But now that the Supreme Court has overruled the precedent, those who object to the office's rules and decisions could be emboldened to call them into question, attorneys said.

Because the justices indicated that courts should be making interpretative decisions instead of agencies, lower courts are "going to take a closer look at agency actions and rulemaking, and challengers are naturally going to be bolstered by that decision and think this is a good time to do that," said Andrew Strabone of Irell & Manella LLP.

In a fractured en banc ruling in 2017, the Federal Circuit was unable to reach a consensus on when it should defer to the patent office's interpretation of laws. Some judges said USPTO regulations need to go through formal rulemaking to get deference; others said deference could be given to rules set by Patent Trial and Appeal Board decisions.

The Supreme Court's decision making it clear that even regulations that have gone through notice-and-comment rulemaking will not be given deference came down just as the USPTO has initiated the process on several contentious issues.

Those include the PTAB's discretion to refuse to review patents and a proposed policy that would make some patents unenforceable if a claim of a related patent is found invalid.

The latter proposal "has generated some controversy and may well be challenged if and when it is put into place," said Will Milliken of Sterne Kessler Goldstein & Fox PLLC. "So [the Supreme Court's ruling] does change the landscape of that potential dispute in a significant way."

The Federal Circuit also had not definitively decided if precedential opinions by the PTAB were entitled to Chevron deference. In 2020, a panel confronted with the issue concluded that it did not need to reach it, but said that if it had, it would have found that deference was not warranted.

Now that Chevron is off the table, litigants could be more inclined to take aim at PTAB precedential opinions. While such decisions did not have the weight of regulations, they likely had persuasive value on appeal, but "now a PTAB precedential decision is worth no more than any other brief," said David Boundy of Potomac Law Group PLLC.

There is one notable instance in which Chevron deference was given to a patent office decision, though the issue is now effectively moot. In 2016, the Supreme Court deferred to the USPTO's interpretation that the PTAB could use a different claim construction standard than the one used in district court.

The office began using the district court standard two years later. Friday's decision cited that case in a way that indicates that if a future patent office director wanted to revert to the previous rule, it would likely be undone by the courts, said Matich, a former acting general counsel for the USPTO.

However, the USPTO's interpretation of substantive patent law issues, such as when a patent is invalid as obvious, has historically not been given deference. The office issues guidance expressing its opinion on such issues, but courts "never say, 'The PTO said that, and therefore it's absolutely binding on us,'" Matich said.

"The PTO in some ways is actually kind of a model of what the post-Chevron world might look like," he said.

The cases are Loper Bright Enterprises et al. v. Gina Raimondo, case number 22-451, and Relentless Inc. et al. v. Department of Commerce et al., case number 22-1219, in the Supreme Court of the United States.

--Editing by Kelly Duncan and Brian Baresch.
