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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# 3 Potential Developments That May Alter US Patent Rights

By **Kevin Schubert and Steve Pollinger** (February 19, 2025, 6:48 PM EST)

Kevin Schubert

Steve Pollinger

The U.S. is at a pivotal point with respect to patent rights.

Some contend that patent rights have been eroded in the last decade, including by the U.S. Supreme Court, legislation and direction at the U.S. Patent and Trademark Office, and should be strengthened so that the U.S. fosters a culture of innovation and can compete on the world stage, including against China.

Others contend that the patent system makes it too easy for those to assert weak patents with questionable damages amounts and efforts should be taken to weaken patent rights.

Whichever side of the debate you fall within, it is wise to keep an eye on three developments this year that may significantly affect U.S. patent rights: (1) the U.S. Court of Appeals for the Federal Circuit's en banc decision in EcoFactor v. Google; (2) pending legislation before Congress (PERA, PREVAIL Act and RESTORE Act); and (3) the appointment of a new USPTO director.

**EcoFactor v. Google**

EcoFactor v. Google, which will be heard en banc by the full Federal Circuit in the coming months, has potential to be one of the more influential Federal Circuit decisions in years.

The Federal Circuit rarely sits en banc, and even more rarely does so on issues of patent damages. Google, after losing at the U.S. District Court for the Western District of Texas and on appeal to a panel of three Federal Circuit judges, asked the full Federal Circuit to consider whether the district court erred in "failing to rigorously scrutinize a patentee's reliance on supposedly comparable licenses," resulting in an "artificially inflated damages award that is divorced from market realities and devoid of connection to the patent's incremental improvement to the art."

Google contends, among other things, that EcoFactor's damages expert's opinion is unreliable because it does not properly account for the fact that three comparable licenses he relied on were to EcoFactor's entire portfolio of 30 patents, not just the one patent that EcoFactor proved to be infringing.

Under the Daubert Supreme Court standard, district courts must act as gatekeepers to ensure unreliable evidence is not presented to the jury to skew the damages analysis. That said, once this relatively low bar is cleared, it should be up to juries, not judges, to decide whether the evidence is credible.

Comparable licenses in patent cases where the license covers a portfolio of patents, or more than just the patents in the litigation, is not uncommon, and the en banc decision may affect the extent to which such licenses may be used in litigation.

Perhaps more significantly, the Federal Circuit may provide guidance on how large of a gatekeeping role district courts should take in scrutinizing an expert's opinions on patent damages, as opposed to leaving it to the jury to hear the evidence and the competing experts' views and decide which is more credible.

**Pending Legislation**

Three significant pieces of proposed litigation are currently pending before Congress: the PERA, PREVAIL Act and the RESTORE Act. Each of these acts could significantly alter the patent landscape.

Patent owners are optimistic about the potential for passage of the Patent Eligibility Restoration Act, or PERA, with the selection of Sen. Thom Tillis, R-N.C., on Feb. 4 to chair the Senate Judiciary Subcommittee on Intellectual Property.

Tillis, an author of the PERA, expressly mentioned it in his statement upon being selected:

> I look forward to ushering in meaningful change within the IP space. This change includes reforming patent eligibility via the [PERA], reforming the Patent Trial and Appeal Board, ensuring that the U.S. Patent and Trademark Office delivers on its mission to deliver high-quality and timely patents and trademarks.[1]

The PERA, introduced in 2024, would make it easier to obtain and enforce patents that currently are under a cloud of uncertainty as to whether they are patent eligible under Title 35 of the U.S. Code, Section 101, and valid following the Supreme Court's decisions in Mayo Collaborative Services v. Prometheus Laboratories Inc. in 2012 and Alice Corp. v. CLS Bank International in 2014.

Under the Supreme Court's Mayo/Alice precedent, Title 35 of the U.S. Code, Section 101, renders unpatentable "laws of nature, natural phenomena, and abstract ideas," even though those words do not expressly appear in the text of the statute.[2]

According to the authors of the PERA, there is a lack of clarity as to what falls within these categories of unpatentable subject matter, particularly with respect to what types of claims are abstract ideas.

The PERA would more expressly and specifically define what categories of patents are unpatentable, for example a mathematical formula standing alone or unmodified gene as it exists in the body. The PERA would provide more consistency, and eliminate, or narrow, Title 35 of the U.S. Code, Section 101, rejections for categories of patents that are not expressly listed as unpatentable.

Tillis was also an author of the Promoting and Respecting Economically Vital American Innovation Leadership, or PREVAIL, Act, which was introduced in 2023.

The PREVAIL Act addresses the inter partes review process at the patent office that allows a challenger to petition to invalidate a patent.

The PREVAIL Act would, among other things, limit duplicate IPR petitions, impose a higher clear and

convincing burden of proof, and limit standing in IPR petitions to only those sued or threatened by a patent.

The PREVAIL Act would significantly alter the IPR process, including by reducing the number of attacks on a patent and by making it harder for a challenger to invalidate a patent because of the higher burden of proof.

The RESTORE, or Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive Patent Rights, Act, which was introduced in 2024, would make it easier to obtain an injunction in U.S. patent cases, which have been difficult to obtain following the high bar set in the Supreme Court's eBay Inc. v. MercExchange LLC decision in 2006.

The RESTORE Act, if passed, would make it easier for patent owners to settle with infringers, as the accused infringers would fear the removal of their products or services from the U.S. market if infringement is shown, and would strengthen the remedies available to patent owners if settlement does not occur.

**New Patent Office Director**

The recent departure of USPTO Director Kathi Vidal leaves open an opportunity for a new director to significantly affect patent rights.

Under Vidal, the Patent Trial and Appeal Board's all claims invalidation rate with IPRs soared to a staggering 70%.[3] This means that when there is a final written decision in an IPR, 70% of the time all challenged claims in the patent are found invalid. This is up from 55% in 2019, just before Vidal assumed her post.[4]

Perhaps more concerning for patent owners is that under Vidal's direction, the IPR institution rate climbed to 67% in 2024[5] from around 52% in 2021 just before she assumed her post.[6]

One factor in the increased IPR institution rate under Vidal was the all but elimination of the so-called Fintiv denials, in which IPR petitions may be denied based on the advanced state of contemporaneous district court litigation between the petitioner and the patent owner.

The appointment of the next USPTO director is likely to have a significant impact on U.S. patent rights. If a new director in the vein of Vidal is appointed, the IPR process will likely continue to invalidate patents at the current rates.

On the other hand, a new director could reverse the current direction of the USPTO and make it more difficult to institute IPRs and invalidate patents, which would strengthen patent rights and enforcement efforts.

**Conclusion**

The U.S. is at a crossroads with respect to patent rights. Depending on what happens this year with the EcoFactor v. Google en banc Federal Circuit decision, pending legislation and the appointment of a new USPTO director, patent rights could be substantially strengthened or weakened.

Patent practitioners are wise to keep abreast of ongoing developments in these areas.

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*Kevin Schubert and Steve Pollinger are principals at McKool Smith.*

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[1] Tillis to Chair Senate Judiciary Subcommittee on Intellectual Property for the 119th Congress, available at https://www.tillis.senate.gov/2025/2/tillis-to-chair-senate-judiciary-subcommittee-on-intellectual-property-for-the-119th-congress.

[2] Mayo Collaborative Services v. Prometheus Laboratories, Inc., 566 U.S. 66 (2012).

[3] Schreiner, Stephen, The PTAB's 70% All-Claims Invalidation Rate Continues to Be a Source of Concern, IPWatchDog, January 12, 2025, available at https://ipwatchdog.com/2025/01/12/ptab-70-claims-invalidation-rate-continues-source-concern/id=184956/.

[4] Id.

[5] Ritchie, Tom, PTAB Statistics Through Seven Months of FY2024, available at https://www.ptablitigationblog.com/ptab-statistics-through-seven-months-of-fy2024/.

[6] Institution Rates Continue Their Downward Slide as NHK-Fintiv Rule Limits IPR Access, October 20, 2021, available at https://www.rpxcorp.com/data-byte/institution-rates-continue-their-downward-slide-as-nhk-fintiv-rule-limits-ipr-access/.