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# Recent Developments in Intellectual Property Law - A 2014 Retrospective

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## RECENT DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW—A 2014 RETROSPECTIVE

W. Keith Robinson<sup>†</sup> and David O. Taylor<sup>††</sup>

*The year 2014 was an eventful one for intellectual property law. Every branch of government affected intellectual property law in one way or another. The Supreme Court ruled on several important intellectual property law cases; federal and state legislatures contemplated and enacted various new statutes that changed the intellectual property law landscape; and the U.S. Patent and Trademark Office continued to implement new procedures governing the issuance and reconsideration of intellectual property rights. These events captured the consciousness of the American public and garnered significant media attention, more so than any year in recent memory. As these events proved, technological advancements will continue to test the limits of intellectual property law. Courts will seek to clarify and refine intellectual property laws where complexity and confusion persist. Lawmakers will attempt to create or refine laws that respond to social and market pressure. And agencies will work toward full implementation of all of the changes that courts and lawmakers mandate. In sum, these events show that intellectual property law is and will continue to be an exciting and complex field. This essay provides an overview of these events and considers their importance and immediate impact.*

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## INTRODUCTION

Intellectual property law has seen dynamic changes in recent months in all four of its primary areas—copyright, patent, trademark, and trade secret law. Indeed, courts and legislatures made, or are considering making, significant decisions affecting both fundamental aspects of the law in these areas and particular doctrines important to unique situations, all of which deserve close analysis and appreciation. This essay will highlight developments in all four of the primary areas of intellectual property law. With respect to copyright law, it will consider the Supreme Court’s recent decision in *American Broadcasting Cos. v. Aereo, Inc.*,<sup>1</sup> one of the most watched copyright cases since the Supreme Court recognized the time-shifting fair-use defense associated with use of videocassette recorders.<sup>2</sup> In the area of patent law, this essay will highlight four developments: (1) new procedures used by the United States Patent and Trademark Office (USPTO) to reconsider the validity of issued patents; (2) two Supreme Court decisions affecting fee-shifting in patent-infringement litigation; (3) the Supreme Court’s decision in *Alice Corp. v. CLS Bank International*<sup>3</sup> on the issue of the eligibility of computer software for patenting; and (4) new approaches for dealing with so-called bad-faith patent-license demand letters.<sup>4</sup> Related to trademark law, this essay will examine a decision that garnered significant attention in the media: the USPTO’s cancellation of several Washington Redskins trademark

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1. 134 S. Ct. 2498 (2014)  
 2. See *infra* Part I.  
 3. 134 S. Ct. 2347 (2014)  
 4. See *infra* Part II.

registrations.<sup>5</sup> In relation to trade secret law, this essay will consider two recent developments: (1) Texas's recent enactment of the Texas Uniform Trade Secrets Act;<sup>6</sup> and (2) federal legislation seeking to create a federal cause of action for trade secret misappropriation.<sup>7</sup> Finally, this essay will take a brief look at developments in intellectual property law in 2015.<sup>8</sup>

## I. COPYRIGHT LAW

From the perspective of copyright law, one of the most significant, recent developments was the Supreme Court's decision in *American Broadcasting Cos. v. Aereo, Inc.*<sup>9</sup> In it, the Supreme Court held that the plaintiffs were entitled to a preliminary injunction prohibiting Aereo from rebroadcasting copyrighted television shows.<sup>10</sup>

To understand the significance of the Supreme Court's decision, it is important to understand Aereo's technology. Television broadcasters transmit television signals, now in digital form, over the air.<sup>11</sup> Aereo set up banks of tiny digital antennas to receive those signals, and Aereo would allow its customers to rent individual antennas and to receive, over the Internet, retransmissions of the signals those antennas received.<sup>12</sup> As a result, Aereo's customers could view broadcasted television shows on their own non-television devices using the Internet, such as wireless devices or wired computers.<sup>13</sup> Aereo did not pay the broadcasting companies for these retransmissions, even though the television shows were copyrighted.<sup>14</sup> Aereo, however, did charge its customers for providing its services.<sup>15</sup>

In response to the plaintiffs' argument that they were entitled to a preliminary injunction due to Aereo's infringement of their copyrights, Aereo argued that it was not infringing because there was no "public

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5. See *infra* Part III.

6. Texas Uniform Trade Secrets Act, ch. 10, 2013 Tex. Gen. Laws 12 (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 134A.001–.008 (West 2013)).

7. See *infra* Part IV.

8. See *infra* Part V.

9. 134 S. Ct. 2498 (2014).

10. *Id.* at 2518–19.

11. See Daniela Cassorla, *Copyright Cowboys: Bringing Online Television to the Digital Frontier*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 783, 792 (2013).

12. *Aereo*, 134 S. Ct. at 2503.

13. *Id.*

14. *Id.*; see also Brent Kendall & Keach Hagey, *Supreme Court Rules Aereo Violates Broadcasters' Copyrights*, WALL ST. J. (June 25, 2014, 8:15 PM), <http://www.wsj.com/articles/supreme-court-rules-against-aereo-sides-with-broadcasters-in-copyright-case-1403705891>.

15. *Aereo*, 134 S. Ct. at 2503.

performance” of the copyrighted works.<sup>16</sup> The district court denied the plaintiffs’ motion for a preliminary injunction, finding that the plaintiffs had no likelihood of success on the merits because there was no “public performance.”<sup>17</sup> This holding rested on three main subsidiary factual findings. First, Aereo’s system created a unique, separate copy of each television show for every user.<sup>18</sup> Second, Aereo’s transmissions were all generated from unique, stored copies of the relevant television show.<sup>19</sup> And third, each transmission was sent to a single user only.<sup>20</sup> The U.S. Court of Appeals for the Second Circuit affirmed.<sup>21</sup>

The Supreme Court reversed and remanded by a vote of six to three based on a legislative amendment to the Copyright Act that covered community antenna television (CATV) systems.<sup>22</sup> These systems were developed originally to serve people who were unable to receive over-the-air television transmissions—for example, people living in hilly areas.<sup>23</sup> These people would share a common antenna that received the over-the-air television transmissions, and then each person would receive the transmissions through a wire connected to the common antenna.<sup>24</sup> CATV systems are what we think of today as cable systems.<sup>25</sup>

Justice Breyer wrote the majority opinion for the Supreme Court. Focusing on whether Aereo “publicly performed” copyrighted works—and based on the fact that Congress amended the Copyright Act to cover CATV systems—the Court concluded that: (1) Aereo “performed” by transmitting;<sup>26</sup> and (2) Aereo’s performance was “public” because, “when Aereo streams the same television program to multiple subscribers, it ‘transmits . . . a performance’ to all of them.”<sup>27</sup>

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16. See *id.* at 2504 (citing Brief for Respondent at 41, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13-461)).

17. See *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 396 (S.D.N.Y. 2012).

18. *Id.* at 386.

19. *Id.*

20. *Id.*

21. *Aereo*, 134 S. Ct. at 2508 (citing *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013)).

22. *Id.* at 2505–06, 2511.

23. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391–92 (1968), superseded by statute, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), as recognized in *Aereo*, 134 S. Ct. 2498.

24. See *Fortnightly Corp.*, 392 U.S. at 391–92.

25. See Cassorla, *supra* note 11, at 792.

26. *Aereo*, 134 S. Ct. at 2506–07.

27. *Id.* at 2509.

Justices Scalia, Thomas, and Alito dissented. They found a lack of “volitional conduct” by Aereo because its subscribers initiated the transmissions.<sup>28</sup> To the dissenting Justices, the fact that Aereo’s customers initiated the transmissions was dispositive given that the plaintiffs asserted a direct rather than an indirect-infringement claim during the preliminary injunction proceeding.<sup>29</sup> The dissenting Justices criticized the majority opinion, characterizing the majority’s reasoning as “guilt by resemblance” to cable.<sup>30</sup>

It is true that *Aereo* case addressed a fact-specific and ultimately failed non-infringement argument based on a unique technological approach to the retransmission of copyrighted content.<sup>31</sup> But one thing that the case highlights are consumers’ appetite for this copyrighted content and the ability of new technological solutions to meet that appetite. It also highlights the decoupling of content from the traditional delivery mechanisms of cable and satellite. What we are already seeing is the replacement of these traditional delivery mechanisms—now with the copyright owners’ permission—with modern delivery mechanisms involving the Internet.<sup>32</sup> This case also highlights the question of whether some long-standing non-Supreme Court opinions remain good law; those opinions, for example, protected cable companies that allow their customers to use digital video recorders (DVRs) housed in their central office to record and playback copyrighted content.<sup>33</sup>

## II. PATENT LAW

Patent law has experienced significant changes in recent years. This past year was no different, with important developments on four fronts in patent law: (1) the USPTO began using new procedures created by the Leahy–Smith America Invents Act for considering the validity of issued patents; (2) the Supreme Court issued two decisions affecting fee-shifting in patent-infringement litigation; (3) the Supreme Court decided *Alice Corp. v. CLS Bank International* and in the process

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28. *Id.* at 2511 (Scalia, J., dissenting).

29. *Id.* at 2512, 2514.

30. *Id.* at 2515.

31. *See id.* at 2503–04, 2511 (majority opinion).

32. *See* Andrew Fraser, Note, *Television A La Carte: American Broadcasting Cos. v. Aereo and How Federal Courts’ Interpretations of Copyright Law are Impacting the Future of the Medium*, 20 B.U. J. SCI. & TECH. L. 132, 142–47 (2014) (discussing new, legal forms of transmitting television programs over the Internet, including Hulu and Netflix).

33. *See, e.g.,* *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2008) (holding that playback transmissions recorded by digital video recorders do not infringe copyright laws).

clarified the law governing the eligibility of computer software for patenting; and (4) various state attorneys general and even the Federal Trade Commission have taken new approaches dealing with so-called bad-faith patent-license demand letters.

#### A. *New USPTO Procedures*

When President Obama signed the Leahy–Smith America Invents Act into law in 2011,<sup>34</sup> it was the most significant amendment to the Patent Act since 1952.<sup>35</sup> One of the many things that the Act did was expand existing procedures and create new ones geared toward improving patent quality.<sup>36</sup> In 2014, the impact of these procedures on patentees—in terms of how companies enforce their patents and defend against infringement suits—became clearer.

One such procedure is preissuance submissions.<sup>37</sup> This procedure allows any interested third party to submit prior art to the USPTO that could be used to reject patent claims.<sup>38</sup> This procedure is, in part, a solution to a question frequently posed by competitors—How do we stop them from getting a patent on *x*? One answer is to submit information via the preissuance-submission procedure to the patent examiner. Hypothetically, the submission would assist them in conducting a more informed and higher-quality examination.

Another new procedure is one conducted by the newly formed Patent Trial and Appeal Board (PTAB): inter partes review (IPR).<sup>39</sup> During this proceeding, the PTAB reviews the patentability of patent claims on limited grounds—whether the challenged patent claims are

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34. Leahy–Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C. (2013)); *see also* Presidential Remarks on Signing the Leahy–Smith America Invents Act in Alexandria, Virginia, 2011 DAILY COMP. PRES. DOC. 1 (Sept. 16, 2011).

35. Patricia E. Campbell, *Coping with the America Invents Act: Patent Challenges for Startup Companies*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 355, 355 (2013).

36. *See* 155 Cong. Rec. S2,706 (daily ed. Mar. 3, 2009) (statement of Sen. Leahy) (asserting that the Leahy–Smith America Invents Act would improve patent quality); *see also* Enhancing Patent Quality, 80 Fed. Reg. 6475 (proposed Feb. 5, 2015) (to be codified at 37 C.F.R. pt. 1) (announcing the launch of the USPTO’s enhanced patent quality initiative and publishing several proposals for public comment); *Enhanced Patent Quality Initiative*, USPTO, <http://www.uspto.gov/patent/initiatives/enhanced-patent-quality-initiative> (last visited June 26, 2015) (explaining the USPTO’s initiatives concerning patent quality and the metrics used to measure patent quality).

37. *See* 35 U.S.C. § 122(e) (2013); Campbell, *supra* note 35, 370–71.

38. Campbell, *supra* note 35, at 370–71.

39. *See* Andrei Iancu et al., *Inter Partes Review Is the New Normal: What Has Been Lost? What Has Been Gained?*, 40 AIPLA Q.J. 539, 541–42 (2012).

novel and nonobvious based on patents and printed publications.<sup>40</sup> To initiate the proceeding, a third party must file a petition at least nine months after the patent has been granted.<sup>41</sup> The PTAB will issue a final determination within one year (extendable for good cause by six months) of the date it grants such a petition.<sup>42</sup>

Due in part to its speed and streamlined procedures, the popularity of this process has continued to grow at an unexpected rate.<sup>43</sup> The USPTO seemingly cannot hire PTAB judges fast enough to handle the volume.<sup>44</sup> One reason for the popularity of IPR is its cost; it costs approximately \$300,000–\$500,000 to litigate an IPR,<sup>45</sup> compared to the approximate \$2 million–\$6 million it would cost to litigate a patent in district court.<sup>46</sup>

### B. Fee Shifting

Fee shifting has been a recent topic of debate both in Congress and at the Supreme Court. In 2014, Congress considered passing the Innovation Act,<sup>47</sup> which among other things would have essentially flipped the presumption that attorney's fees *should not* be awarded to prevailing parties absent exceptional circumstances (the so-called "American rule") in favor of a presumption that attorney's fees *should* be awarded to prevailing parties absent exceptional circumstances.<sup>48</sup>

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40. See Eric C. Cohen, *A Primer on Inter Partes Review, Covered Business Method Review, and Post-Grant Review Before the Patent Trial and Appeal Board*, 24 FED. CIR. B.J. 1, 3 (2014).

41. See Iancu et al., *supra* note 39, at 545–46.

42. *Id.* at 560.

43. See, e.g., Joseph M. Potenza, *The America Invents Act: One Year Later*, LANDSLIDE, Jan.–Feb. 2013, at 63.

44. See Eric J. Rogers, *Ten Years of Inter Partes Patent Reexamination Appeals: An Empirical View*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 305, 355 (2013); Press Release, USPTO, No. 13-33, U.S. Patent and Trademark Office Selects San Jose City Hall as Permanent Space for Silicon Valley Satellite Office (Nov. 19, 2013), <http://www.uspto.gov/news/pr/2013/13-33.jsp>.

45. See Erin M. Dunston & Philip L. Hirschhorn, *The New America Invents Act Post-Grant Procedures: IPRs, CBMs, and PGRs—Effective Complements to or Alternative for Traditional IP Litigation Strategies*, in LITIGATION STRATEGIES FOR INTELLECTUAL PROPERTY CASES: LEADING, LEADING LAWYERS ON ANALYZING KEY DECISION AND EFFECTIVELY LITIGATING IP CASES 101, 105 (2014); Laura A. Sheridan & Matthew L. Cutler, *A Fair and Efficient Litigation Alternative: Two Years of Inter Partes Review*, ACC DOCKET, Nov. 2014, at 82, 88.

46. Steven M. Haines et al., *A Table Two New PTO Proceedings*, ACC DOCKET, Sept. 2012, at 36, 48.

47. Innovation Act, H.R. 3309, 113th Cong. (2013). See generally Jeff Becker, *The Latest in Patent Reform: The Innovation Act*, 26 INTELL. PROP. & TECH. L.J. 34 (2014) (discussing the proposed Innovation Act).

48. Becker, *supra* note 47, at 35–36 (citing Innovation Act § 3(b)(1)).



The Senate, however, ultimately did not pass the Innovation Act, even though the House of Representatives did.<sup>49</sup>

In the Supreme Court, the Justices considered two cases addressing the proper interpretation, application, and standard of review for trial courts to award attorney's fees in patent cases. Fee shifting in patent litigation is governed by statute, in particular 35 U.S.C. § 285, which provides that "the court in exceptional cases may award reasonable attorney fees to the prevailing party."<sup>50</sup> Considering the interpretation and application of the statutory language, in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.* the Supreme Court rejected the U.S. Court of Appeals for the Federal Circuit's test for when attorney's fees are allowable.<sup>51</sup> In place of a stringent, two-part test that required objective recklessness and subjective bad faith,<sup>52</sup> the Supreme Court set forth a new, less rigid test that requires district courts to find cases "uncommon," "rare," or "not ordinary" with respect to either the strength of the parties litigating position or the unreasonable manner in which the case was litigated.<sup>53</sup> In addition, in *Highmark Inc. v. Allcare Health Management System, Inc.* the Supreme Court rejected the Federal Circuit's de novo standard of review for district court fee awards in favor of an abuse of discretion standard of review.<sup>54</sup>

It is too soon to tell, but the natural response to these cases is to think that district courts will use these new holdings to order shifting of attorney's fees in more cases, orders that will, more likely than not, be affirmed on appeal. Consistent with this line of thinking, after these decisions the Federal Circuit has affirmed a fee award granted to an accused infringer.<sup>55</sup> The affect of these two Supreme Court cases, however, has extended beyond the narrow issue of whether attorney's fees should be awarded at the conclusion of patent infringement

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49. See Timothy B. Lee, *Patent Reform Bill Passes the House 325 to 91. Here's What You Need to Know*, WASH. POST (Dec. 5, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/05/the-house-votes-on-patent-reform-today-heres-what-you-need-to-know/>; Dan D'Ambrosio, *Patent Reform Fight Ends in Retreat—For Now*, USA TODAY (July 9, 2014, 11:14 AM), <http://www.usatoday.com/story/money/business/2014/07/08/patent-troll-legislation-fight/12392453>.

50. See 35 U.S.C. § 285 (2013).

51. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1752–53, 1755 (2014).

52. *Id.* at 1754 (citing *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378 (Fed. Cir. 2005)).

53. *Id.* at 1756.

54. See *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1744 (2014).

55. See *Homeland Housewares, LLC v. Sorensen Research & Dev. Trust*, 581 F. App'x 877 (Fed. Cir. 2014).

litigation. One Federal Circuit judge has indicated that these decisions may affect the law governing *enhanced damages* in patent-infringement cases; Judge O'Malley issued a concurring opinion calling for the en banc Federal Circuit to modify its standards governing enhanced damages in light of these cases.<sup>56</sup> The Third Circuit, moreover, has indicated that the Supreme Court's interpretation of 35 U.S.C. § 285 "controls [the] interpretation of § 35(a) of the Lanham Act," which governs awards of attorney's fees in trademark cases.<sup>57</sup> In short, the reach of these holdings may extend well beyond the confines of motions for attorney's fees in patent-infringement litigation.

### C. Eligibility of Software

The eligibility of software inventions for patenting continues to be controversial. In *Alice Corp. v. CLS Bank International*, the Supreme Court was asked to determine whether a specific software invention was eligible for patenting.<sup>58</sup> The patent claims at issue in *Alice* were directed to a method and system for mitigating the risk that only one party in an agreed-upon financial transaction will satisfy its obligation.<sup>59</sup> The defendant argued that the claims were ineligible because, even though they required implementation on a computer, they were directed to an abstract idea.<sup>60</sup>

The Supreme Court agreed.<sup>61</sup> Laws of nature, natural phenomena, and abstract ideas are generally not patentable.<sup>62</sup> If a claim is directed to one of these concepts, it must contain additional features that transform it into a patentable invention.<sup>63</sup> In the case of *Alice's* patent, the Court said that the claimed process was abstract because mitigating risk was a fundamental economic practice.<sup>64</sup> Further, using a generic computer to implement this fundamental practice did not make the subject matter patent eligible.<sup>65</sup>

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56. See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1384 (Fed. Cir. 2014) (O'Malley, J., concurring).

57. *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 315 (3d Cir. 2014).

58. See *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2352 (2014) ("The question presented is whether these claims are patent eligible under 35 U.S.C. § 101, or are instead drawn to a patent-ineligible abstract idea.").

59. *Id.* at 2352.

60. See *id.* at 2353.

61. *Id.* at 2354.

62. *Id.* at 2354, 2355.

63. *Id.* at 2354–55.

64. *Id.* at 2356–57.

65. *Id.* at 2357.

Several commentators have predicted that the Supreme Court's decision in *Alice* will end the patenting of software.<sup>66</sup> While the Supreme Court found that the particular invention in *Alice* was ineligible for patenting, the sentiment that this case somehow ended the patenting of software is an exaggeration. While this decision recalibrates the law, by no means does it herald the end of software patents. Patents granted before *Alice* are clearly the most vulnerable, but patent prosecutors are already adjusting to this new case law and strengthening their new patent applications against potential eligibility challenges.<sup>67</sup>

#### D. *Bad Faith Demand Letters*

A rapidly developing area of patent law concerns the regulation of demand letters, where patent owners seek licensing fees from users of patented technology. States are increasingly interested in regulating patent owners' ability to send these letters. In particular, states have targeted so-called bad-faith demand letters. While it is difficult if not impossible to provide a succinct explanation of when such a letter makes a bad-faith assertion of patent infringement, several factors inform the analysis, including: whether identical letters were sent to targets whose primary business is unrelated to the patented technology; whether the patent owner engaged in little or no previous research regarding whether the targets actually infringe the patent; whether the letters request nuisance settlements (or less); whether the letters include false statements regarding the value of the technology, the number of licensees, the existence of lawsuits, etc.; whether the letters threaten litigation unless the patent owner is paid by a certain deadline, where the patent owner does not have any actual intent to file a patent infringement lawsuit if the target does not pay by the deadline.<sup>68</sup>

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66. See Robert D. Fish, *The Tragedy of the Anticommons (Is It Time for Compulsory Licensing?)*, ORANGE COUNTY LAW., Dec. 2014, at 18, 21 (noting that recent Supreme Court cases have "eliminated some patent fences altogether, and lowered the height of others"); Hannibal Travis, *Patent Alienability and Its Discontents*, 17 TUL. J. TECH. & INTELL. PROP. 109, 110–11 (2014) (stating that there are indications the USPTO might wipe out Internet-related patents through broad readings of recent Supreme Court cases).

67. See, e.g., Stephen T. Schreiner & Brendan McCommas, *The Patentability of Financial Processes After the Supreme Court's Alice Decision*, 131 BANKING L.J. 777, 783–85 (2014) (providing advice for how financial-services institutions can mitigate the risk of patent ineligibility under *Alice*).

68. See, e.g., VT. STAT. ANN. tit. 9, § 4197 (2014) (prohibiting bad-faith assertions of patent infringement and listing factors that courts should consider).

The most significant developments in this area occurred at the state level.<sup>69</sup> Indeed, there have been three forms of state action related to these types of demand letters. First, state attorneys general have issued cease-and-desist letters.<sup>70</sup> Second, states have brought enforcement actions under existing consumer-protection statutes.<sup>71</sup> Third, states have enacted statutes regulating patent licensing in particular. By the middle of 2014, no less than eighteen states had acted such legislation: Alabama, Georgia, Idaho, Illinois, Louisiana, Maine, Maryland, Missouri, New Hampshire, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, Vermont, and Wisconsin.<sup>72</sup>

For attorneys seeking to negotiate patent licenses on behalf of patent owners, these developments require the consideration of new standards governing their conduct. And for targets of bad-faith licensing, these new statutes provide avenues to seek and obtain relief.

### III. TRADEMARK LAW

One of the most talked-about developments in trademark law in 2014 was the controversy surrounding the Washington Redskins professional football team and its registered trademarks. The Redskins are a franchise of the National Football League (NFL).<sup>73</sup> The Redskins were originally formed in Boston in 1932 and called the Braves.<sup>74</sup> They were renamed the Boston Redskins in 1933 before the team moved to Washington, D.C. in 1937.<sup>75</sup> “Washington Redskins” has been the team’s name since the move to Washington, D.C.<sup>76</sup> While the team has

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69. Notably, however, in 2014, the Federal Trade Commission took action to combat deceptive demand letters, entering into a consent decree with one notable patent owner and law firm. Press Release, Fed. Trade Comm’n, FTC Settlement Bars Patent Assertion Entity from Using Deceptive Tactics (Nov. 6, 2014), <http://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive>.

70. See, e.g., *Activision TV, Inc. v. Pinnacle Bancorp, Inc.*, 976 F. Supp. 2d 1157, 1161 (D. Neb. 2013) (granting preliminary injunction against state attorney general on First Amendment and preemption grounds in absence of allegation of bad faith).

71. See, e.g., *Vermont v. MPHJ Tech. Invs., LLC*, 111 U.S.P.Q.2d (BNA) 1614, 1615 (D. Vt. 2014) (remanding case for adjudication of alleged violations of Vermont Consumer Protection Act).

72. See Lisa Shuchman, *States Fight Patent Trolls, Oppose Anti-Troll Bill*, CORP. COUNSEL (Aug. 7, 2014), <http://www.corpcounsel.com/id=1202665974485?slreturn=20150023180957>.

73. See Mark S. Nagel & Daniel A. Rascher, *Washington “Redskins”—Disparaging Term or Valuable Tradition?: Legal and Economic Issues Concerning Harjo v. Pro-Football, Inc.*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 789, 791 (2007).

74. *Id.* at 792

75. *Id.*

76. See *id.* at 792–93.

not won a playoff game in ten years, the franchise is widely followed, and *Forbes* recently named the Redskins as the NFL's third most-valuable team, worth approximately \$2.4 billion.<sup>77</sup>

Five Native Americans brought a cancellation proceeding before the Trademark Trial and Appeal Board (TTAB), seeking to cancel several trademark registrations consisting of the term "Redskins" that were issued between 1967 and 1990.<sup>78</sup> The petitioners argued that the name "Redskins" was disparaging to Native Americans,<sup>79</sup> and one of the key issues in this case was whether the term "Redskins" was disparaging at the times these marks were registered.<sup>80</sup>

In a 2–1 decision, the TTAB held that "Redskins" was disparaging and, as a result, cancelled the registrations.<sup>81</sup> The majority relied upon dictionaries and expert reports in linguistics and lexicography as evidence that directly reflects the sentiment of Native Americans to conclude that the term "Redskins" was derogatory and therefore disparaging to Native Americans.<sup>82</sup> The dissent highlighted two points that commentators think could be winning arguments on appeal.<sup>83</sup> The dissent argued, first, that there was little evidence that the term "Redskins" was offensive at the time of the registrations,<sup>84</sup> and, second, there was no evidence the term was considered offensive when used in connection with the name of a football team.<sup>85</sup>

Despite the media attention, the legal impact of this case is widely misunderstood. The Redskins still have the right to use their trademarks and, given that they have appealed the decision, they still hold valid trademarks until their appeal is resolved.<sup>86</sup> Further, in a different case, the Federal Circuit will rehear en banc a case challenging the bar on registration of disparaging marks as a violation of the First Amendment.<sup>87</sup> Thus, the legal landscape for trademarks such as "Redskins" remains in flux.

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77. Mike Ozanian, *The NFL's Most Valuable Teams*, FORBES (Aug. 20, 2014, 10:01 AM), <http://www.forbes.com/sites/mikeozanian/2014/08/20/the-nfls-most-valuable-teams>.

78. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 1082 (T.T.A.B. 2014).

79. *Id.* The trademark statute prohibits federal registration of marks that are disparaging. 15 U.S.C. § 1052(a) (2013).

80. *Blackhorse*, 111 U.S.P.Q.2d at 1089.

81. *Id.* at 1080.

82. *See id.* at 1092–98.

83. *See id.* at 1114–15.

84. *Id.* at 1118–19.

85. *Id.* at 1115–17.

86. Michael C. Cannata, *Trademark Trial and Appeal Board Cancels Six Trademark Registrations Owned by the Washington Redskins*, 26 INTELL. PROP. & TECH. L.J. 25 (2014).

87. *See In re Tam*, No. 2014-1203, 2015 WL 1883279, at \*1 (Fed. Cir. Apr. 27, 2015).

However, other organizations are taking notice of the social impact of potentially offensive trademarks. For example, the Cleveland Indians are demoting Chief Wahoo (a caricature of Native Americans widely thought offensive) and replacing him with the letter “C” on variations of their uniform and merchandise.<sup>88</sup>

#### IV. TRADE SECRET LAW

The first significant development in trade secret law actually began in 2013 when Texas enacted the Texas Uniform Trade Secrets Act.<sup>89</sup> This new law governing trade secret misappropriation claims became effective on September 1, 2013 for any new activity.<sup>90</sup> Thus, courts only recently began applying the Texas Uniform Trade Secrets Act in lawsuits.

Compared to prior Texas law governing trade secrets, the Texas Uniform Trade Secrets Act includes some significant changes to Texas trade secret law. First, the new Act includes a definition of trade secrets that focuses on reasonable efforts to maintain secrecy.<sup>91</sup> Under Texas common law, courts applied various factors to determine whether a trade secret existed.<sup>92</sup> Second, it is now easier to obtain injunctive relief for threatened misappropriation, as the statute now expressly identifies threatened misappropriation as conduct that may be enjoined.<sup>93</sup> Third, attorney’s fees now are available in trade-secret cases if plaintiffs can prove willful and malicious misappropriation, or if defendants can prove that a trade-secret-misappropriation claim was brought in bad faith.<sup>94</sup> Compared to the Uniform Trade Secrets Act upon which it is based, differences are more minor. For example, the Texas Uniform Trade Secrets Act more specifically identifies “financial data” and “list of actual or potential customers or suppliers” as qualifying as trade secrets.<sup>95</sup>

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88. Paul Lukas, *Is Chief Wahoo Being Demoted*, ESPN (Jan. 9, 2014), [http://espn.go.com/mlb/story/\\_/id/10270450/mlb-cleveland-indians-de-emphasize-chief-wahoo-logo](http://espn.go.com/mlb/story/_/id/10270450/mlb-cleveland-indians-de-emphasize-chief-wahoo-logo).

89. Texas Uniform Trade Secrets Act, ch. 10, 2013 Tex. Gen. Laws 12 (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 134A.001–.008 (West 2013)).

90. *Id.* § 4, 2013 Tex. Gen. Laws at 14; Joseph F. Cleveland Jr. & J. Heath Coffman, *Protecting Trade Secrets Made Simple: How the Recently Enacted Texas Uniform Trade Secrets Act Provides a Legislative Framework for Litigating Cases*, 76 TEX. B.J. 751, 751–52 (2013).

91. CIV. PRAC. & REM. § 134A.002(6)(B); Cleveland & Coffman, *surpa* note 90, at 752.

92. Cleveland & Coffman, *surpa* note 90, at 752.

93. *See* CIV. PRAC. & REM. § 134A.003; Cleveland & Coffman, *surpa* note 90, at 754.

94. CIV. PRAC. & REM. §§ 134A.004–.005.

95. *See* CIV. PRAC. & REM. § 134A.002(6).

The second significant development in the area of trade secret law was the introduction of federal legislation seeking to create a federal cause of action for trade secret misappropriation.<sup>96</sup> Trade secret law is primarily state law.<sup>97</sup> On the one hand, as of this writing, every state but Massachusetts, New York, and North Carolina has adopted the Uniform Trade Secrets Act.<sup>98</sup> On the other hand, federal law directed to the protection of trade secrets is limited. The Economic Espionage Act is a federal criminal statute focusing on corporate espionage by foreign governments,<sup>99</sup> and the Computer Fraud and Abuse Act allows for civil cases focusing on misuse of computers.<sup>100</sup> Neither of these existing federal laws, however, provides an avenue to bring a trade secret claim under federal law. That would change if legislation pending in 2014 is resubmitted, passed by Congress, and signed into law by the President.

In the House of Representatives, the legislation on point was the Trade Secrets Protection Act of 2014.<sup>101</sup> In the Senate, the legislation was the Defend Trade Secrets Act of 2014.<sup>102</sup> Both largely followed the provisions of the Uniform Trade Secrets Act and state that they would not preempt state law.<sup>103</sup> Both, however, would provide an additional remedy of *ex parte* seizure.<sup>104</sup>

Some law professors oppose these legislative proposals.<sup>105</sup> They cite a lack of need for a federal cause of action given existing state laws.<sup>106</sup> They also think that lack of preemption would lead to unnecessary duplication and inconsistencies.<sup>107</sup> And, finally, they do

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96. See Trade Secrets Protection Act of 2014, H.R. 5233, 113th Cong. (2014). See generally Eric Goldman, *Congress Is Considering a New Federal Trade Secret Law. Why?*, FORBES (Sept. 16, 2014, 12:14 PM), <http://www.forbes.com/sites/ericgoldman/2014/09/16/congress-is-considering-a-new-federal-trade-secret-law-why>.

97. See, e.g., Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401, 1407 (2014).

98. See Cleveland & Coffman, *supra* note 90, at 751; Trade Secret Act *Enactment Status Map*, UNIF. L. COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Trade%20Secrets%20Act> (last visited Jan. 28, 2015).

99. Robin L. Kuntz, *How Not to Catch a Thief: Why the Economic Espionage Act Fails to Protect American Trade Secrets*, 28 BERKELEY TECH. L.J. 901, 901 (2013).

100. Stephanie Greene & Christine Neylon O'Brien, *Exceeding Authorized Access in the Workplace: Prosecuting Disloyal Conduct Under the Computer Fraud and Abuse Act*, 50 AM. BUS. L.J. 281, 287–88 (2013).

101. Mark L. Krotoski, *The Time Is Ripe for New Federal Civil Trade Secret Law*, BLOOMBERG BNA (Dec. 3, 2014), <http://www.bna.com/time-ripe-new-n17179917951>.

102. *Id.*

103. Goldman, *supra* note 96.

104. Krotoski, *supra* note 101.

105. See, e.g., Goldman, *supra* note 96.

106. See *id.*

107. See *id.*

not see the need for the remedy of ex parte seizure and, moreover, fear it might be abused in practice.<sup>108</sup>

## V. A BRIEF LOOK AT 2015

While this Essay focuses on 2014, the new year holds the potential for similarly significant changes in the area of intellectual property law. Again this year, the Supreme Court is hearing several cases in the area of intellectual property, and all signs point to Congress considering new legislation related to intellectual property law.

The Supreme Court has already decided two trademark cases. The Supreme Court decided the first case, *Hana Financial v. Hana Bank*, in January of 2015, holding that juries rather than courts determine whether the use of older trademarks may be tacked to newer trademarks to maintain priority of use.<sup>109</sup> In the second case, *B&B Hardware v. Hargis Industries*, decided in March of 2015, the Court decided that the TTAB's finding of a likelihood of confusion may preclude the relitigation of the same issue in infringement litigation.<sup>110</sup>

The Supreme Court is also hearing three patent cases in its current term. The Supreme Court resolved the first patent case, *Teva Pharmaceuticals USA v. Sandoz*, in January of 2015, rejecting the Federal Circuit's de novo standard of appellate review in the context of claim construction decisions in favor of clear error review of factual findings made by district courts.<sup>111</sup> In the second patent case, *Commil USA, LLC v. Cisco Systems, Inc.*, the Court decided (6–2) that an accused infringer's belief that a patent is invalid is not a defense to a claim of inducement of infringement.<sup>112</sup> And in the third patent case, *Kimble v. Marvel Enterprises Inc.*, the Court will reconsider the often-criticized precedent of *Brulotte v. Thys Co.*, which holds that it is per se illegal patent misuse for patent licensing arrangements to require the payment of fees beyond the expiration date of the last to expire of the licensed patents.<sup>113</sup>

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108. *See id.*

109. *See Hana Financial, Inc. v. Hana Bank*, No. 13-1211, slip op. (U.S. Jan. 21, 2015), available at [http://www.supremecourt.gov/opinions/14pdf/13-1211\\_1bn2.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1211_1bn2.pdf).

110. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, No. 13-352, slip op. (U.S. Mar. 24, 2015), available at [http://www.supremecourt.gov/opinions/14pdf/13-352\\_c0n2.pdf](http://www.supremecourt.gov/opinions/14pdf/13-352_c0n2.pdf).

111. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, No. 13-854, slip op. (U.S. Jan. 20, 2015), available at [http://www.supremecourt.gov/opinions/14pdf/13-854\\_o7jp.pdf](http://www.supremecourt.gov/opinions/14pdf/13-854_o7jp.pdf).

112. *See Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1928 (2015).

113. *See Kimble v. Marvel Enters.*, 727 F.3d 856 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 781 (2014).



Beyond the various intellectual property law cases before the Supreme Court, Congress appears primed to attempt a comprehensive reform of laws governing patent-infringement litigation. While the Innovation Act failed last term,<sup>114</sup> this term the House of Representatives has resurrected it in an attempt to eliminate the proliferation of so-called “patent trolls”—entities that seek nuisance value settlements of claims of patent infringement based on the high expense of patent infringement litigation and the poor quality of their patents.<sup>115</sup> Moreover, Congress may reconsider the trade secret legislation that stalled last term.<sup>116</sup>

### CONCLUSION

The laws governing intellectual property changed significantly in 2014. More changes are likely to occur in 2015. As technology advances and cultural attitudes change, so too will the law. In short, stay tuned—just not by renting a digital antenna from a company that does not pay broadcasting companies for the right to retransmit copyrighted television newscasts.<sup>117</sup>

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114. See D’Ambrosio, *supra* note 49.

115. See, e.g., Kellan Howell, *House Committee Advances Patent Reform Bill in Bipartisan Vote*, WASH. TIMES (Jun. 11, 2015), <http://www.washingtontimes.com/news/2015/jun/11/house-committee-approves-patent-reform-innovation/>.

116. See Brian R. Garrison, *Federal Trade Secrets Legislation: What Does it Mean for Employers*, IND. EMP. L. LETTER (Bus. & Legal Resources, Brentwood, Tenn.), Nov. 2014, at 1 (discussing federal legislation aimed at protecting trade secrets during the last Congressional term); Brian Hammond, *Trade Secrets: President’s Nominee for IP Enforcement Coordinator Would Back Trade Secret Legislation*, INTELL. PROP. L. DAILY (Wolters Kluwer L. & Bus., New York, N.Y.), Jan. 22, 2015, at 1.

117. See generally *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).