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## Keynote Address: Stalemate or Statesmen: What is Needed to Move Forward Constructively With the Balancing of America's IP System?

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KEYNOTE ADDRESS: STALEMATE OR STATESMEN  
WHAT IS NEEDED TO MOVE FORWARD CONSTRUCTIVELY WITH THE BALANCING  
OF AMERICA'S IP SYSTEM

BY DAVID J. KAPPOS\*

The one indisputable truth that participants in the current patent litigation reform debate have demonstrated in the last year is that we can achieve a stalemate—not a particularly fine achievement for the long term. In fact, the current bid for patent reform in Washington is all but dead unless we are able to step back from the political fray and reconsider both the content and form of the legislative debate. To position our nation for a future of continued innovation leadership, we need to work purposefully and strategically to build solutions that can move beyond stalemate and bring diverse (while not wholly divergent) interests together to fix the patent litigation system so that Americans in all industries can focus their full attention on innovation, with a manageable level of disputes that can be resolved at a lower, reasonable cost. And the stakes are high—according to a 2012 study by the USPTO and the Economics and Statistics Administration, in 2010 alone IP-intensive industries accounted for 34.8 percent of U.S. GDP<sup>1</sup> and 27.1 percent of all jobs.<sup>2</sup>

Our country accomplished something analogous three years ago with the America Invents Act (“AIA”)<sup>3</sup>—a piece of legislation that many said would/could never get done. So how do we do it again, this time for patent litigation?

The solution is at hand—in the form of refinements to many of the provisions already under discussion as part of the current legislative debate.

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1. ECONOMICS AND STATISTICS ADMINISTRATION & UNITED STATES PATENT AND TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE US ECONOMY: INDUSTRIES IN FOCUS 16 (2012) available at [http://www.uspto.gov/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf).

2. *Id.* at 9.

3. Leahy-Smith America Invents Act Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

But before we discuss solutions, we must start with a reality check regarding a reasonable goal consistent with our culture, history, and expanding, diverse innovation environment. There are no perfect solutions that will stop all aggressive tactics completely, without also marginalizing the patent system to the point of irrelevance. It is an unavoidable reality that one person's "abuse" is another's defense of her rights. But this is why we have judges and trials. In addition, Americans have always been a litigious lot. We use our great court system as a private ordering mechanism, because it is fair and impartial, and because it provides forcing functions that resolve disputes and move business forward. So Americans are not going to stop suing one another over patents as long as patents are relevant. And finally, our country and our world are becoming more focused on innovation and more dependent on it as a driver of economic value. This means more investment in innovation and in the IP that protects it across a wide range or disciplines in which innovation takes place, and therefore more disputes. And all of the foregoing points together lead us to a baseline principle: to start any discussion about realistic, achievable patent litigation reform, we must accept that we will not make disputes go away (indeed, they will probably continue to increase), and any solution deemed complete and airtight by one constituency will almost certainly be perceived as toxic by a multitude of others. The consequent reality is that in order to move forward, various elements of the provisions debated in the last year must be scaled back.

The second point of order we can take from the AIA debates is that the courts can, will, and do step in and solve some of the most vexing problems facing the patent system. In many patent-related instances, the judicial system does its job, and does it well. Some will remember the hot debates, during the mid and late years of the last decade, about the standards for obviousness, willful infringement, granting injunctions, transferring venue, and even reasonable royalty damages in patent cases. We labored to address these challenges in legislation but ultimately found ourselves at an all-too-familiar impasse. Fortunately, the courts stepped in with major decisions and completely fresh lines of jurisprudence that solved these problems—*KSR* for obviousness,<sup>4</sup> *Seagate* for willful infringement,<sup>5</sup> *EBay* for injunctions,<sup>6</sup> *Volkswagen* for venue transfer<sup>7</sup>—and a series of CAFC and

4. *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007).

5. *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007).

6. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

7. *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008).

district court decisions that have substantially improved the law pertaining to reasonable royalty damages.<sup>8</sup>

One of the most positive and reassuring takeaways from our journey with the AIA is that once some thorny issues were resolved by the courts and fell away from the legislative debate, we were able to reclaim crucial maneuvering room within which to reach agreement on the remaining issues, ultimately leading to a viable accord.

The same scenario is playing out in real time this year with the courts stepping in to address major challenges, including the test for attorney fee shifting. Of course, as was the case in the past and as is always the case, participants in the debate want more. Even while lauding judicial action, advocates for legislation often voice concern that court-fashioned decisions are less durable than statutory changes. This brings us to another lesson we learned from the AIA debates: concerns over the permanence of court decisions will subside as the district and circuit courts refine and strengthen the new direction set by the Supreme Court, more decisions issue, and a sturdy foundation of judicial precedent takes shape.

With one of today's most important and thorniest IP litigation issues—attorney fee shifting—now significantly addressed by the courts, what is left to do through legislation? The answer is that several issues remain that can be met most effectively through legislation. The resolution of these issues may not thrill constituents on either side of the debate; however, as was the case with the AIA, addressing them will produce major improvements for all stakeholders. Critically, solutions must be considered and implemented with deliberate circumspection and balance, while accepting that some amount of contention is both healthy and inevitable in our legal system, especially when important rights and economic outcomes are at stake. And we must bear in mind another key lesson from the AIA: flexibility is a virtue in our legal system generally and for our patent system in particular, but with flexibility comes ambiguity, and with ambiguity there will be a measure of intrinsic dispute. While all of this is a healthy feature of our dynamic innovation ecosystem and our legal system, it returns us to the reality check with which we began: the goal cannot possibly be to “stop all the lawsuits” without risking the ultimate price to our economy and American innovation leadership.

8. Martha K. Gooding & William C. Rooklidge, *Reasonable Royalty Patent Infringement Damages After Lucent v. Gateway and Uniloc v. Microsoft: Reports of the Dearth of Patent Infringement Damages Are Greatly Exaggerated*, 83 PTCJ 235 (2011).

With the baseline points above—most representing fresh lessons learned from our journey with the AIA—in mind, we can pick up the pieces and achieve meaningful and timely patent litigation reform. Here is how.

Fee shifting. The Supreme Court has addressed this topic just this past term, in two decisions.<sup>9</sup> In these circumstances there is a natural line of reasoning that the issue can still benefit from codification, at least simply as a means to fortify the Court's ruling. But we have already seen helpful decisions issue from lower courts since the Supreme Court's *Octane Fitness* and *Highmark* rulings,<sup>10</sup> such as a California federal judge ordering hardware manufacturer Action Star Enterprise to pay attorneys' fees to KaiJet Technology International after Action Star filed an "unreasonable" patent infringement suit against KaiJet.<sup>11</sup> The judge's deliberations included a number of ancillary points such as whether the plaintiff's attorneys should be personally sanctioned for pursuing the unreasonable suit.<sup>12</sup> Now that the Supreme Court has spoken, the better part of valor is to step back and let the judicial system work, with the district courts and CAFC applying the broad, flexible, reasonable parameters the Supreme Court laid out. If legislative reinforcement or adjustment becomes necessary, let's make it in response to a real and demonstrated need under the Supreme Court's newly announced framework and not prescriptively in anticipation of a problem that may no longer exist.

Demand letters. The pending TROL bill<sup>13</sup> substantially addresses this issue. Will it stop all arguably aggressive demand letters? No. But again, one person's "aggressive" demand letter is another person's zealous defense of her property. The TROL bill does what reasonably can be done, and accepts that if we want an inclusive system that permits property holders to protect their assets without fear of violating the law in doing so, the goal cannot possibly be to stop all aggressive demand letters.

Discovery and Pleadings. This area has been particularly controversial. No surprise here, as changes in discovery can cause radical

9. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014); *see also Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S.Ct. 1744 (2014).

10. *Id.*

11. Order Granting Defendant's Motion for Attorneys' Fees [91], *Action Start Enterprise v. Kai Jet Technology International*, No. CV 12-08074 BRO (MRWx) (C.D. Cal. 2014).

12. *Id.* at 6–8.

13. Targeting Rogue and Opaque Letters Act of 2014, H.R. Discussion Draft, 113th Cong. (2014), *available at* <http://democrats.energycommerce.house.gov/sites/default/files/documents/Bill-Text-Targeting-Rogue-Opaque-Letters-2014-7-7.pdf>.

changes to the entire system of patent litigation generally. Here, the importance of respecting the separation of powers must be emphasized. The separation of powers is fundamental to our constitutional system, permitting the judiciary to self-regulate without micromanagement from Congress or anywhere else. Over time—though perhaps not with exceptional speed—the judiciary, with the tools already available to them, can make necessary changes to discovery practice that will preserve crucial flexibility while significantly reducing expense.

Accordingly, the best way forward for discovery and pleading reform is to set forth a legislative provision that articulates the goals—consistency, appropriate staging to cut costs, and heightened pleading requirements where deemed sensible—while simultaneously exhorting the Judicial Conference to see to the implementation. Again, this approach is not a panacea for those who “just want the lawsuits to go away,” but it would prove significantly beneficial over time, and has the major virtue of leaving sufficient decision-making authority with those best suited to make good decisions based on the particular circumstances in front of them: the judges themselves.

While it is doubtlessly true that the courts have been given both time and opportunity, but have not yet dealt with their judicial process issues, it is also fair to say the courts are far more focused on the issues recently than at any time in the past. With Congressional exhortation there is every prospect the courts will do their work, and do it well.

Covered Customer Stays. This is another area that has attracted significant controversy. Understandably, innkeepers, retailers, and coffee shop proprietors want to be left out of patent infringement suits involving their off-the-shelf information technology products. At first pass, it seems logical that “mere users” of potentially infringing technologies should be dismissed from such litigation. However, many technologies are intended to be highly customizable, providing additional value for users. It is difficult for a fixed statute to establish whether a particular case of infringement is inherent in an acquired IT solution (meaning that a stay from litigation would be warranted) or caused by aftermarket user modifications (in which case the user of the technology should rightfully be required to defend against the infringement complaint).

To illustrate this distinction, consider two of the most publicized IP litigation topics of the past decade—smartphone patent litigation and online copyright infringement. Though many of us use the products central to the smartphone wars on a daily basis—or, in reality, every minute of the day—we would hardly expect Apple and Samsung

to sue each other's smartphone users for infringing one another's patents. However, we would absolutely expect to hold an iPhone or Galaxy user accountable for using his device to intentionally download copyrighted content without obtaining the appropriate rights.

The solution here, once again, is to identify what is unambiguous: the mere retailer or innkeeper, either selling or using a product unaltered from its original manufacturer, should be presumed to have the right to obtain a stay excusing it from patent infringement litigation involving the product it is merely selling or using. Beyond that group, around which a bright line can be drawn, combinations, alterations, and customer-added value are simply too complex and varied, requiring decisions best suited to the judgment of courts.

Fortunately, the courts have once again stepped in. In a case decided in June of this year, Japanese consumer electronics powerhouse Nintendo, along with eleven retailers of its goods, won a writ of mandamus from the Court of Appeals for the Federal Circuit, instructing a district court to sever and stay claims of patent infringement against the group of retailers while the case against Nintendo proceeds in court.<sup>14</sup> The Federal Circuit drew a distinction between the manufacturer of the potentially infringing game and mere retailers of it.<sup>15</sup> This decision demonstrates that the courts generally know how to deal with customer stay petitions, and indeed the laws already provide for proper handling of these situations. In fact, "mere retailers" have been successful in a large majority (18 out of 24) of the motions to stay filed in the past 15 years having facts similar to *In re: Nintendo*.<sup>16</sup> Indeed, in

14. *In re Nintendo of Am., Inc.*, No. 2014-132 (Fed. Cir. June 24, 2014).

15. *Id.* at 4

16. *Am. Vehicular Sciences LLC v. Toyota Motor Corp.*, 612CV404MHSJDLLEAD, 2014 WL 3385149 (E.D. Tex. 2014); *Ambrose v. Steelcase, Inc.*, 02 C 2753, 2002 WL 1447871 (N.D. Ill. 2002); *Brown Mfg. Corp. v. Alpha Lawn & Garden Equip., Inc.*, 219 F. Supp. 2d 705, 710 (E.D. Va. 2002); *Calmedica, LLC v. Novoste Corp.*, 03 C 3924, 2004 WL 413296 (N.D. Ill. 2004); *Digitech Image Technologies, LLC v. Agfaphoto Holding GmbH*, 8:12-CV-1153-ODW, 2012 WL 4513805 (C.D. Cal. 2012); *Gibson Guitar Corp. v. Wal-Mart Stores, Inc.*, 3:08CV0279, 2008 WL 3472181 (M.D. Tenn. 2008); *Gucci Am., Inc. v. Big M Inc.*, 02 CIV. 3191 (RO), 2002 WL 31619039 (S.D.N.Y. 2002); *In re Nintendo of Am., Inc.*, 2014-132, 2014 WL 2889911 (Fed. Cir. 2014); *Indianapolis Motor Speedway Corp. v. Polaris Industries, Inc.*, IP99-1190-C-B/S, 2000 WL 777874 (S.D. Ind. 2000); *Inline Connection Corp. v. Verizon Internet Services, Inc.*, 402 F. Supp. 2d 695, 704 (E.D. Va. 2005); *Innovative Automation, LLC v. Audio Video and Video Labs, Inc.*, 6:11-CV-234 LED-JDL, 2012 WL 10816848 (E.D. Tex. 2012); *Koh v. Microtek Intern., Inc.*, 250 F. Supp. 2d 627, 632 (E.D. Va. 2003); *LG Electronics, Inc. v. First Intern. Computer, Inc.*, 138 F. Supp. 2d 574 (D.N.J. 2001); *MGT Gaming, Inc. v. WMS Gaming, Inc.*, 978 F. Supp. 2d 647 (S.D. Miss. 2013); *Oplus Technologies, Ltd. v. Sears Holding Corp.*, 11-CV-8539, 2012 WL 2280696 (N.D. Ill. 2012); *Richmond v. Lumisol Elec. Ltd.*, CIV.A. 13-1944 MLC, 2014 WL 1716447 (D.N.J. 2014); *Shifferaw v. Emson USA*, 2:09-CV-54-TJW-CE, 2010 WL 1064380 (E.D. Tex. 2010); *Spread Spectrum Screening, LLC v. Eastman Kodak Co.*, 10 C 1101, 2010 WL 3516106 (N.D. Ill. 2010); *Star CoLED Technologies, LLC v. Sharp Corp.*, 2:13-CV-416-JRG, 2014 WL 1998051 (E.D. Tex. 2014); *ThermaPure, Inc v. Temp-Air, Inc.*, 10-CV-4724, 2010 WL 5419090 (N.D. Ill. 2010); *Toshiba Corp. v. Hynix Semiconductor, Inc.*,

view of the facts—a 2/3 success rate—it hardly seems worth either panicking on the one hand, or scrapping progressive legislation on the other hand, based on the covered customer stay issue.

*CLS Bank and Myriad*. While we are fixing important aspects of our patent system, let us take the opportunity to include issues where the courts have plainly struggled with economic and industrial policy, and provide them clear guidance in what plainly is legislative territory. Other than for the most egregious situations involving abstract subject matter and laws of nature or natural phenomena, Congress has declined for over 200 years to enact limits on patentable subject matter.<sup>17</sup> The Supreme Court has heard no fewer than nine statutory subject matter cases in the last half century, creating a hash of decisions that simply cannot be reconciled.<sup>18</sup> The Court's four decisions in the last four years—*Bilski*,<sup>19</sup> *Prometheus*,<sup>20</sup> *Myriad*,<sup>21</sup> and *CLS Bank*,<sup>22</sup> finally appear to be circling around an appropriate standard: abstractness.

Admittedly, abstractness is not a highly objective standard; indeed it is a highly subjective one. Abstractness may be an imperfect talisman, but it is time for us to admit there is no perfect talisman. The decision of whether an invention constitutes statutory subject matter is inherently subjective and judgment prone—just like the standard for obviousness. What is paramount though, and where Congressional action can be very helpful, is recognition that the test for statutory subject matter is meant to be, and was always meant to be, a coarse test—a filter meant to eliminate only the most egregious of oversteps.

An over-reliance on section 101<sup>23</sup> as a silver bullet is uncalled for, contrary to good policy, and downright dangerous to our country's economic health. By simply codifying the “abstract subject matter”

CIV.A.3:04-CV-2391-L, 2005 WL 2415960 (N.D. Tex. 2005); *Ultra Products, Inc. v. Best Buy Co., Inc.*, CIV.A.09-1095MLC, 2009 WL 2843888 (D.N.J. 2009); *Heinz Kettler GMBH & Co. v. Indian Industries, Inc.*, 575 F. Supp. 2d 728, 729 (E.D. Va. 2008); *Tracy v. Jewel Food Stores Inc.*, United States District Court for the Northern District of Illinois, July 16, 1999.

17. See generally Peter S. Menell, *Forty Years of Wondering in the Wilderness and no Closer to the Promised Land: Bilski's Superficial Textualism and the Missed Opportunity to Return Patent Law to its Technology Mooring*, 63 STAN. L. REV. 1289, (2011).

18. *Alice Corp. v. CLS Bank Int'l*, No. 13-298 (U.S. June 19, 2014); *Association for Molecular Pathology v. Myriad Genetics*, 133 S. Ct. 2107 (2013); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S.Ct. 1289 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010); *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001); *Diamond v. Diehr*, 450 U.S. 175 (1981); *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Parker v. Flook*, 437 U.S. 584 (1978); *Gottschalk v. Benson*, 409 U.S. 63 (1972).

19. *Bilski v. Kappos*, 561 U.S. 593 (2010).

20. *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S.Ct. 1289 (2012).

21. *Association for Molecular Pathology v. Myriad Genetics*, 133 S. Ct. 2107 (2013).

22. *Alice Corp. v. CLS Bank Int'l*, No. 13-298 (U.S. June 19, 2014).

23. *Inventions Patentable*, 35 U.S. Code § 101 (1956).



doctrine as it has been applied in recent case law by the Supreme Court, Congress can, in one act, steer away from dangerous overreliance and reassure innovators that their efforts to break new ground in dynamic fields like biotech, big data, and 3D visualization are every bit as important, and will be afforded every bit as much respect under the patent system, as the groundbreaking innovations of the great innovators who helped build this nation—Cyrus McCormick, Eli Whitney, Samuel Morse, Thomas Edison, and those who came before them.

*Nautilus*. While further labor over the test for statutory subject matter would be fruitless, with *Nautilus*,<sup>24</sup> the Supreme Court has taken decisive action where it is needed, to re-energize the doctrine requiring clear disclosures and claims as part of the bargained-for exchange at the heart of the patent system. In *Nautilus*, the Court replaced the previous test for indefiniteness with a sturdier requirement that claims are indefinite if they fail to inform with reasonable certainty those skilled in the art about the scope of the invention.<sup>25</sup> This decision can prove a watershed in areas plagued by vague patents that act as fodder for abusive threats and litigation. Simple codification of the Supreme Court's decision on claim definiteness will do as much or more to curb abuse as any of the proposals under debate in the past year.

PTO Funding. Finally, it is of the utmost criticality that Congress once and for all put the issue of U.S. Patent and Trademark Office ("USPTO") fee diversion to rest. The repeated stripping of funds from the federal agency responsible for granting patents is the root cause of many of our patent system's troubles. One of the most decisive steps Congress can take towards safeguarding the future of innovation is to enact legislation like the House bill introduced by Congressmen John Conyers and Darryl Issa in late 2013,<sup>26</sup> or the analogous Senate bill introduced by Diane Feinstein earlier this year, requiring that all fees paid by American innovators be retained by the USPTO to process patent applications.<sup>27</sup> This straightforward measure would do more for job creation and economic growth than any other patent reform proposal currently on the table.

Fully funding the USPTO would improve patent quality, reduce the backlog of patents waiting to be processed, and curb frivolous litigation while also allowing the implementation of the AIA to further play

24. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120 (2014).

25. *Id.* at 2130.

26. Innovation Protection Act, H.R. 3349, 113th Cong., (2013).

27. Patent Fee Integrity Act, S. 2146, 113th Cong., (2014).

out and solidify its positive impact. Fully funding the USPTO is a rare item that enjoys a consensus of support across a wide range of constituents, from the smallest independent inventor to the most sprawling Silicon Valley tech giant. Especially at a time when both the Executive Branch and the Congress are scraping the national budget for any reclaimable revenue to address the nation's long-term fiscal woes, an ironclad prohibition against USPTO fee diversion is necessary to protect this nation's best source for sustained economic growth: the U.S. innovation engine.

It may appear straightforward—even trivial—to suggest that user fees should be used to fund the work for which the fees are paid. In fact, many quite logically assume our system operates that way. Unfortunately this is not the case. Rather, it has been routine for the U.S. government to divert hundreds of millions of dollars from USPTO's fee collections to fund unrelated government programs. The work remains in the agency without the funds required to address it, necessitating double-charging in order to eventually handle the work. Unfortunately, hundreds of thousands of patent applications—covering cures for diseases, breakthroughs in robotics and nanoparticles, and bright new gadgets that can enrich our lives—are caught up in this unproductive cycle, waiting in line at the USPTO to be analyzed.

If granted access to its user fees, the USPTO is well positioned to hire, train, equip, and retain a workforce with a focus on quality to ensure the patents it grants are clear and defensible—and not easily made the tools of abuse. Simply making the USPTO's own resources available to the agency would not only increase the speed of its analysis, but also allow it to more carefully screen patent applications. The corresponding increase in patent examination rigor would boost the quality of issued patents, significantly reducing the strain on the judicial system. This positive step would send the right signal to our trading partners around the world that the U.S. is committed to maintaining the strength of the world's oldest and best intellectual property system for years to come.

#### CONCLUSION

We have before us a clear path to move past the current stalemate. We now possess not only the knowledge, but also the judicial precedent and the legislative readiness for an improved, well-balanced, re-fortified patent litigation system poised to safeguard the future of American innovation for all participants in our nation's great and diverse innovation ecosystem.

Whether you are a creator of new technology or an implementor of it, whether you are a start-up or a large incumbent, the proposals outlined above will advance your ability to succeed in the global marketplace. By applying a few basic principles rooted in our constitutional system and in lessons learned from our journey with the AIA, we can drive to completion sensible legislative reforms without sacrificing potency, prudence, or fairness.

We'll all have to accept that we won't get our parochially perfect solution. That solution would either hobble our patent system, or leave it too vulnerable to abuses that benefit only abusers. What we will get is a solution that benefits all legitimate participants, and damages none.

The future is coming on fast. It is complex, but rich with opportunity. A large share of that opportunity will be captured by the best innovators. The only question is whether America will retain our position as the global innovation leaders, on the basis of a patent system that rewards the risky business of innovation, encourages investment in innovation, and fosters marketplace success for those who implement and use innovation. Two out of three isn't good enough. The system must work for everyone if we are to lead in realizing innovation's endless opportunities.