
Patent Law at the Supreme Court October 2021

October 27, 2021 Dennis Crouch



The Supreme Court has not granted a writ of certiorari in any patent cases this term, and has now denied certiorari in two dozen. Still, there are a number of important cases pending that could be transformative if granted.

Two leading petitions before the court are:

- *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*, No. 20-891 (eligibility); and
- *PersonalWeb Technologies, LLC v. Patreon, Inc.*, No. 20-1394 (issue and claim preclusion).

In both of these cases, the Supreme Court has requested that the Solicitor General offer the views of the U.S. Gov't on whether the court should grant certiorari. Although I am not privy to the exact timeline, I believe that there is a good chance that the SG's brief in *American Axle* will be submitted by the end of December 2021. The *PersonalWeb* brief is unlikely to be submitted until later in the spring. American Axle clearly has the largest potential impact if the Supreme Court were to either (1) change course on eligibility; or (2) double-down on an expansive doctrine.

Two petitions will be considered by the court in upcoming days:

- *ENCO Systems, Inc. v. DaVincia, LLC*, No. 21-457 (eligibility); and
- *Ultratec, Inc. v. CaptionCall, LLC*, No. 20-1700 (R.36 and retroactive IPR).

I believe that *American Axle* is a better vehicle for Section 101 issues rather than *ENCO*, and I expect that the Supreme Court will not give much consideration to the *ENCO* petition. It will likely be denied even before any action is taken on *American Axle*. *Ultratec* is interesting to me personally because it relates to some of my prior academic work, and the Supreme Court called for responsive briefing in the case. That said, the Gov't brief in opposition is extremely dismissive of *Ultratec*'s arguments. This suggests that the Supreme Court will *not* hear the case.

The Supreme Court has requested responsive briefing in three additional cases:

- *Warsaw Orthopedic, Inc. v. Sasso*, No. 21-540 (on petition from the Indiana Supreme Court; arising under jurisdiction)
- *Infinity Computer Products, Inc. v. Oki Data Americas, Inc.*, No. 21-413 (indefiniteness); and
- *Olaf Sööt Design, LLC v. Daktronics, Inc.*, No. 21-438 (using claim construction to overturn a jury verdict).

Responsive briefs are expected in the next couple of weeks for these cases. Although a request for responsive briefing is indicative of some interest in the case, the threshold is quite low and so it is much too early to suggest that these cases are likely to be granted certiorari. *Infinity* could be quite big if the Supreme Court took the case and again recalibrated the doctrine of indefiniteness. In *Nautilus*, the Supreme Court found that the lower court was too easy on patentees; *Infinity* argues that the court is not being too hard on patentees.

The remaining four patent petitions are listed roughly in order of their likelihood of being granted certiorari (in my opinion). I expect that the *Mylan* and *Apple* petitions would be granted as a pair, if granted at all.

1. *Mylan Laboratories Ltd. v. Janssen Pharmaceutica, N.V.*, No. 21-202 (*NHK-Fintiv* rule for denying petitions; appealability of IPR petition denial);
2. *Apple Inc. v. Optis Cellular Technology, LLC*, No. 21-118 (mandamus review of IPR petition denial);
3. *Infineum USA L.P. v. Chevron Oronite Company LLC*, No. 21-350 (mid-Arthrex issue, potential for GVR with instructions for PTO Director to place his imprint on the decision); and
4. *Bongiorno v. Hirshfeld*, No. 21-6050 (pro se; eligibility).

There is one final case that has some filings at the Supreme Court:

- *Apple Inc., v. Qualcomm Inc.*, No 21A39 (Standing of portfolio licensee to challenge individual patents in court).

Apple has not yet filed its petition but did indicate its plan to do so in a request for extension of time. Its initial petition is now due November 17, 2021.