
Supreme Court – Looking Forward to 2022-2023

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Dennis Crouch

By Dennis Crouch

The Supreme Court has closed-out its 2021-2022 term without deciding or granting certiorari in any patent cases. Overall, the court denied certiorari in 40+ patent cases, including the biggest case of *American Axle*. I'll post a review of those denied cases later this month. Meanwhile we can start a preview for the 2022-2023 term.



Eight patent cases are now pending before the Supreme Court. Several focus on the written description and enablement requirements of 35 USC 112(a).

The current most-likely big case is *Amgen Inc., et al. v. Sanofi*, No. 21-757. Amgen asks fundamental questions of how the enablement doctrine should operate and whether enablement is a question-of-fact or a question-of-law. These are important issues fundamental to patentability that also touch on some of the same principles as the eligibility cases. The Court has requested an amicus filing from the Solicitor General. *Interactive Wearables, LLC v. Polar Electro Oy*, No. 21-1281, is a patent eligibility case, but it asks a related question about the extent that principles of Section 112 are applicable to the eligibility analysis. In *Juno Therapeutics, Inc. v. Kite Pharma, Inc.*, No. 21-1566 focuses on “full scope” written description – arguing that the Federal Circuit’s application goes too far beyond the statutory text. *Biogen International GmbH, et al. v. Mylan Pharmaceuticals Inc.*, No. 21-1567, also focuses on the written description requirement – asking what level of disclosure is necessary for a claim limitation requiring a therapeutic treatment to be “effective.”

The one other case that I would suggest has a good chance of certiorari is *Hyatt v. USPTO*. But, that case focuses on the summary judgment standard for APA cases and so would in reality have very little impact on the patent system.

The final three cases are all well written briefs, but I expect that they have a very low chance of being heard because of intervening events:

1. *Apple Inc. v. Qualcomm Incorporated*, No. 21-1327 (appellate standing – same question as the already denied parallel Apple v Qualcomm petition);
2. *CustomPlay, LLC v. Amazon.com, Inc.*, No. 21-1527 (can the same PTAB judges both institute and decide IPR – I believe that *Arthrex* implicitly solved this issue, at least from a Constitutional perspective); and
3. *Worlds Inc. v. Activision Blizzard Inc., et al.*, No. 21-1554 (eligibility same question as the already denied petition in *American Axle*).

The court takes a summer break and then returns in the fall for the October 2022 term.

