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Does the Supreme Court Still Matter?

Timothy B. Dyk

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FOREWORD

DOES THE SUPREME COURT STILL MATTER?

THE HONORABLE TIMOTHY B. DYK*

Late last year, *Time Magazine*'s cover featured a picture of Chief Justice Roberts with the headline: "Does the Supreme Court Still Matter?"[1] The general answer is: of course. This is particularly and increasingly evident in our own, previously obscure, field of patent law. However, this development has not been entirely welcome to the patent bar. At any gathering of the bar, no tag line of a speech has more assurance of applause than one that importunes the Supreme Court to keep its hands off the patent law. This concern is not new. Our predecessor, the Court of Customs and Patent Appeals, sometimes viewed Supreme Court review as inimical because of the risk that the Supreme Court would misunderstand and misapply patent doctrine.[2]

Hostility to Supreme Court review is, in my view, misguided. Among other things, Supreme Court review is essential to prevent patent law from ossification and to ensure that appropriate policy considerations play a role in the development of the law. Like it or not, however, the Supreme Court's role in this area will continue, and the bar must heed the Greek proverb—to accept that which we

* Circuit Judge, United States Court of Appeals for the Federal Circuit. The author is grateful to his current clerk, Dennis J. Abdelnour, and his former clerk, Jessica R. Hauser, for their excellent research assistance in the preparation of this Article.

1. David Von Drehle, *Does the Supreme Court Still Matter?*, TIME, Oct. 22, 2007, at Cover.

2. *See, e.g.*, Application of Bergy, 596 F.2d 952, 966 (C.C.P.A. 1979), *aff'd*, 447 U.S. 303 (1980) (referring to the unintended negative effect in patent law resulting from the Supreme Court's decision in *Parker v. Flook*, 437 U.S. 584 (1978)).

cannot change.[3] I will begin by explaining why I think the Supreme Court will stay at the party long after some of the guests might have wished it gone, and then discuss what the Supreme Court is likely to contribute to the festivities.

I

My colleagues in recent forewords,[4] along with various other scholars[5] have noted the Supreme Court's recent increased interest in patent cases. Since the creation of the Federal Circuit in 1982, the Supreme Court has agreed to hear twenty patent or patent-related cases coming from our court.[6] In the first ten years, the Supreme Court only reviewed three Federal Circuit patent decisions, and one of those was decided summarily without oral argument.[7] In our court's second decade, the pace increased a bit, with the Supreme Court's agreeing to hear nine cases—still an average of less than one case a year.[8] That pace, however, has substantially accelerated in the past five years and particularly in the last three, in which the Supreme

3. *See* EPICTETUS, ENCHIRIDION, *reprinted in* GREAT TRADITIONS IN ETHICS 74 (Theodore C. Denise et al. eds., 1996) ("There are things which are within our power, and there are things which are beyond our power.").

4. Honorable Arthur J. Gajarsa & Dr. Lawrence P. Cogswell, III, *Foreword: The Federal Circuit and the Supreme Court*, 55 AM. U. L. REV. 821 (2006); Honorable Jay S. Plager, *Foreword: The Price of Popularity: The Court of Appeals for the Federal Circuit 2007*, 56 AM. U. L. REV. 751 (2007).

5. *E.g.*, John F. Duffy, *The* Festo *Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 278 (2002).

6. I do not include in the total so-called grant, vacate, and remand ("GVR") cases, where the Supreme Court granted certiorari to remand in light of another decision, or the *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), decision addressing issues of preemption in a case coming from the Florida Supreme Court.

7. *See* Eli Lilly & Co. v. Medtronic Inc., 496 U.S. 661, 661–62 (1990) (interpreting the pharmaceutical safe harbor under the Patent Act); Christianson v. Colt Indus., 486 U.S. 800, 801 (1988) (applying the "well-pleaded complaint" rule to determine the scope of Federal Circuit jurisdiction); Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809, 811 (1986) (per curiam) (summarily vacating and remanding with instructions for the Federal Circuit to reconsider its decision in light of Federal Rule of Civil Procedure 52(a)).

8. *See* Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) (Federal Circuit jurisdiction over patent law counterclaims); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002) (doctrine of equivalents); J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124 (2001) (patentable subject matter of plant breeds); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (state sovereign immunity involving patent suits); Dickinson v. Zurko, 527 U.S. 150 (1999) (the applicability of the Administrative Procedure Act to decisions of the Patent and Trademark Office); Pfaff v. Wells Elecs., Inc., 525 U.S. 55 (1998) (on-sale bar); Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17 (1997) (doctrine of equivalents); Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (patent claim construction); Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83 (1993) (mootness of invalidity cross-appeals).

Court has granted certiorari in eight cases (one of which was later dismissed as improvidently granted).[9] Eight cases would represent about 3.4% of all cases decided by the Supreme Court in the last three terms.[10] Last term, the Supreme Court decided sixty-seven cases after argument, of which three were patent cases, or 4.5%. The Court's interest in patent cases is even more significant when we consider that all of the courts of appeals together decide approximately 35,000 cases per year.[11] The chance that the Supreme Court would hear an individual case is therefore negligible. Our court in 2006 decided 276 patent cases, both precedential and non-precedential,[12] so the Supreme Court hears as much as 1% of the patent cases decided by the Federal Circuit.

II

Numbers alone, however, do not begin to capture the importance of the Supreme Court's present and future role in the development of the patent law. I suggest that there are several reasons why the role of the Supreme Court in the future is likely to be pivotal.

The first reason for continued Supreme Court interest lies in the importance of intellectual property, particularly patents, to the

9. *See* Quanta Computer, Inc. v. LG Elecs., Inc., 128 S. Ct. 28 (2007) (granting certiorari in a case involving implied licenses); Microsoft Corp. v. AT & T Corp., 127 S. Ct. 1746, 1747 (2007) (extraterritorial application of U.S. patent law); KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1731 (2007) (obviousness); MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764, 764 (2007) (scope of declaratory judgment jurisdiction); Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc., 126 S. Ct. 2921, 2921 (2006) (dismissing as improvidently granted); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 388 (2006) (test for injunctive relief in patent cases); Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 28 (2006) (relationship between patent tying and market power); Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193, 193 (2005) (statutory drug-research safe harbor).

10. The Supreme Court issued 210 opinions (not including GVRs) in the last three terms combined, with sixty-seven opinions in the 2006 term, sixty-nine opinions in the 2005 term, and seventy-four opinions in the 2004 term. JOHN G. ROBERTS, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2006), http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf; JOHN G. ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2007), http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf; JOHN G. ROBERTS, 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2008), http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf.

11. U.S. Courts of Appeals—Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2006, http://www.uscourts.gov/judbus2006/tables/s1.pdf (last visited Feb. 20, 2008) (indicating that the U.S. courts of appeals heard a total of 34,580 cases during 2006).

12. United States Court of Appeals for the Federal Circuit; Appeals Filed and Terminated, by Category, FY 2006, http://www.cafc.uscourts.gov/pdf/TableAppealsFiledTerminated06.pdf (last visited Feb. 20, 2008). The court adjudicated 259 cases originating in the district courts and seventeen cases originating in the Patent and Trademark Office. *Id.*

American economy. It has been estimated that thirty years ago intellectual property represented only 20% of the value of American corporate enterprises, with 80% represented by hard assets. Today the proportions are the reverse, with 80% of value now attributable to intellectual property.[13] As the American manufacturing sector has declined, American economic leadership in the global market is now in the area of intellectual property. Appropriate protection for that property has thus become a central issue.

The second reason is that the scope of that protection has largely been left to the courts to define. The Constitution confers, in very general language, authority on the Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[14] Since the very beginning of our nation, Congress has provided a system for the granting of patents. However, up to now, the implementing legislation has not been a great deal more specific than the Constitution itself, with rare exceptions, such as the Hatch-Waxman Act.[15] To borrow a phrase Judge Rich used so famously in another context, the patent statutes provide few blaze marks to mark the trail.[16]

This landscape is a familiar one to practitioners of administrative law. In the modern era, Congress has frequently legislated in general terms because it simply lacks either the ability or the inclination to provide detailed guidance. In most areas, the solution lies in the familiar *Chevron* doctrine, under which administrative agencies receive rulemaking authority and are charged with the task of defining statutory requirements with greater specificity.[17] The courts, in turn, are to defer to agencies if the statutory language is ambiguous and the agency's interpretation is reasonable.[18] The agencies are seen as more qualified than the courts to fill the gaps and to determine appropriate policy.[19]

13. *See* Ocean Tomo 300® Patent Index, http://www.oceantomo.com/index_ot300.html (last visited Feb. 20, 2008) ("[I]n 1975 more than eighty percent of corporate value reflected in the S&P® 500 was tangible assets, while intangible assets comprised less than twenty percent of market capitalization. Today, the ratio of tangible to intangible assets has inverted—nearly eighty percent of corporate value resides in intangible assets.").

14. U.S. CONST. art. I, § 8, cl. 8.

15. 21 U.S.C. § 355 (2000).

16. In re Ruschig, 379 F.2d 990, 994–95 (C.C.P.A. 1967).

17. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 837–38 (1984).

18. *Id.* at 843–44.

19. *See id.* at 865–66.

The solution in the patent area is quite different. Unlike the situation with many federal administrative agencies, the United States Patent and Trademark Office ("PTO") has no substantive rulemaking authority, at least under our decisions, and accordingly we have afforded no *Chevron* deference to its interpretation of the substantive provisions of the patent statute.[20] Moreover, Congress has not so far created a significant role for the PTO in the infringement litigation process, either with respect to issues of claim construction, validity, or enforceability, though the reexamination process is perhaps becoming increasingly significant as an adjunct to litigation. This is not to suggest that the PTO does not play a critical role in the patent system. However, the courts, rather than the PTO, have the responsibility under the statute with developing the substantive law of patents—a kind of common law of patents—much as in the area of antitrust.[21] In this environment, Supreme Court review is even more important than in areas where the statutes are more detailed or *Chevron* applies and the courts have a less central role.

This situation appears likely to continue. Congress is presently considering significant patent legislation.[22] However, even if that legislation passes, it would make changes in only a few areas, and, even then, would leave to the courts the obligation to flesh out the meaning of the general language. In fact, if Congress does act, it will likely result in even more Supreme Court patent cases because the Court has historically acted to provide guidance as to the meaning of new patent legislation.[23] In other words, whether Congress enacts new patent legislation or not, the Supreme Court will have a significant role to play.

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20. *See* Merck & Co. v. Kessler, 80 F.3d 1543, 1549 (Fed. Cir. 1996) (explaining that the PTO does not have the rulemaking authority associated with certain regulatory agencies).

21. *See generally* Rhone Poulenc Agro, S.A. v. DeKalb Genetics Corp., 284 F.3d 1323, 1327 n.1 (Fed. Cir. 2002) ("[I]n the area of patent law, as in the area of antitrust, 'the [Erie] doctrine . . . is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.'") (citing Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176, (1942)).

22. Patent Reform Act of 2007, H.R. 1908, 110th Cong. (2007) (as passed by House of Representatives and placed on Senate Calendar), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01908:@@@D&summ2=m&.

23. *See, e.g.*, Graham v. John Deere Co., 383 U.S. 1 (1966) (addressing what effect the 1952 Patent Act had upon the traditional statutory and judicial tests of patentability with respect to obviousness); *see also* Microsoft Corp. v. AT & T Corp., 127 S. Ct. 1746, 1747 (2007); Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005); J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124 (2001); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990).

Supreme Court participation is also crucial because it is the only appellate court, other than our own court, with a significant role to play in the development of the patent law. In 1982, Congress created the Federal Circuit and placed responsibility for the development of the patent law primarily in our court.[24] Because of the Federal Circuit's near-exclusive jurisdiction, the other circuits have little to contribute. Under *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*,[25] which held that the assertion of patent counterclaims does not create § 1338 jurisdiction, there is a sliver of jurisdiction in the other circuits, and at least one member of the Supreme Court has expressed hope that other courts will become involved in the development of patent law.[26] However, it seems unlikely for several reasons. The exception that *Vornado* created is a narrow one, applying only when a party first raises the patent issue in a counterclaim.[27] The power of the plaintiff to frame the original case as one for the Federal Circuit probably means that few cases will be filed in the jurisdiction of the regional courts. And, even if a case is heard by another circuit, the other circuits may in any event be bound to apply Federal Circuit law. Moreover, now that we are celebrating our twenty-fifth anniversary, the pre-1982 law from the other circuits is rarely relevant. To be sure, the assignment of patent law to a single circuit, and the avoidance of inter-circuit conflicts, makes it unnecessary for the Supreme Court to resolve circuit conflicts. However, the lack of conflict means that the law is less likely to develop in new directions without Supreme Court review.

Supreme Court review is also essential because much of the Court's existing patent jurisprudence is old, out of date and difficult to apply to modern conditions, or even, in some instances, somewhat confusing. At the same time, the stare decisis effect of both Supreme Court decisions and our court's own decisions significantly constrains panels of our court from changing existing doctrine. In other words, except to the extent that we consider cases en banc, only the Supreme Court can change existing law. The Supreme Court necessarily plays a critical role in reinterpreting, or even overruling, earlier Supreme Court decisions and in altering our jurisprudence to keep up with the demands of a changing world.

24. 28 U.S.C. § 1295 (2000).
25. 535 U.S. 826 (2002).
26. *See id.* at 839 (Stevens, J., concurring) ("An occasional conflict in decisions may be useful in identifying questions that merit this Court's attention. Moreover, occasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias.").
27. *Id.* at 831–32 (majority opinion).

Continued Supreme Court review is also likely because the current Court has barely begun to address the substantive law of patents. Despite the number of patent cases decided by the Court in the past few years, in the twenty-five years of the Federal Circuit, the Supreme Court has only rarely granted review to consider what some might call the substantive common law of patents. Of the twenty granted cases, seven have involved procedural or jurisdictional issues—the standard for review of the PTO in *Dickinson v. Zurko*,[28] the scope of declaratory judgment jurisdiction in *MedImmune, Inc. v. Genentech, Inc.*,[29] the standard for injunctive relief in *eBay Inc. v. MercExchange, L.L.C.*,[30] the scope of our appellate jurisdiction in *Vornado*[31] and *Christianson v. Colt Industries Operating Corp.*,[32] Rule 52 of the Federal Rules of Civil Procedure in *Dennison Manufacturing Co. v. Panduit Corp.*,[33] and mootness in *Cardinal Chemical Co. v. Morton International, Inc.*[34] One addressed antitrust (*Illinois Tool Works, Inc. v. Independent Ink, Inc.*[35]) and another addressed the Eleventh Amendment (*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*).[36] The Supreme Court's role in these cases has often been to bring patent-related jurisprudence into conformity with rules applicable in other areas.[37] Four of the cases involved the interpretation of specific federal legislation: relating to FDA approval of drugs in *Eli Lilly & Co. v. Medtronic, Inc.*[38] and medical devices in *Merck KGaA v. Integra Lifesciences I, Ltd.*,[39] relating to the Plant Variety Protection Act in *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred*,[40] and relating to § 271(f) concerning infringement liability for acts directed to foreign countries in *Microsoft Corp. v. AT & T*.[41]

Only seven times in twenty-five years has the Court agreed to consider basic common-law substantive patent law issues: in *Pfaff v. Wells Electronics, Inc.*[42] concerning the on-sale bar, in *Markman v.*

28. 527 U.S. 150 (1999).
29. 127 S. Ct. 764 (2007).
30. 547 U.S. 388 (2006).
31. 535 U.S. 826 (2002).
32. 486 U.S. 800 (1988).
33. 475 U.S. 809 (1986).
34. 508 U.S. 83 (1993).
35. 547 U.S. 28 (2006).
36. 527 U.S. 627 (1999).
37. *See, e.g.*, Dickinson v. Zurko, 527 U.S. 150, 150–51 (1999) (applying the standards associated with the Administrative Procedure Act to the review of Patent and Trademark Office decisions).
38. 496 U.S. 661 (1990).
39. 545 U.S. 193 (2005).
40. 534 U.S. 124 (2001).
41. 127 S. Ct. 1746 (2007).
42. 525 U.S. 55 (1998).

Westview Instruments, Inc.[43] concerning claim construction, in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*[44] and *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*[45] concerning the doctrine of equivalents, in *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*[46] concerning patentable subject matter, and, more recently in *KSR International Co. v. Teleflex Inc.*[47] concerning obviousness and in *Quanta Computer, Inc. v. LG Electronics, Inc.*[48] concerning implied licenses. In the last quarter century, there are many important issues that the Court has not addressed.

Finally, the Supreme Court bar has turned its attention to patent cases, and the patent bar itself has become increasingly sophisticated about the potential for Supreme Court review in these cases. This dynamic has increased the ability of the bar to present patent cases to the Supreme Court in a way that increases the likelihood of a grant of certiorari.

III

If, then, the Supreme Court will continue to play a major role in the development of the patent law, what will be the characteristics of the Supreme Court's approach?

First, where Congress has spoken, the Court will defer to the congressional judgment. In the area of intellectual property, there will be little room to invalidate congressional legislation on constitutional grounds.[49] At the same time, as I suggested earlier, the Court will continue to recognize that Congress has largely decided to leave the development of the patent law to the courts. If major legislative change occurs, the Court is likely to consider itself obligated to interpret the terms of the statute.

Second, unlike some areas of the law, and in contrast to the Supreme Court of the 1930s and 1940s, there does not seem to be, and there is unlikely to be, a great philosophical division within the Court as to the direction that patent law should take.[50]

43. 517 U.S. 370 (1996).
44. 520 U.S. 17 (1997).
45. 535 U.S. 722 (2002).
46. 126 S. Ct. 2921 (2006).
47. 127 S. Ct. 1727 (2007).
48. 128 S. Ct. 28 (2007).
49. Eldred v. Ashcroft, 537 U.S. 186, 186 (2003).
50. *See* Timothy B. Dyk, *The* Graver Tank *Litigation in the Supreme Court*, 30 J. SUP. CT. HIST. 271, 280 (2005) (indicating that some of the institutional problems associated with the Supreme Court during the *Graver Tank* decision are absent from today's Court).

Third, if recent experience is any guide, I think we can anticipate change from the Supreme Court whether the issues are substantive or procedural. Whether in rejecting our doctrinal approach, or approving new doctrine developed by our court, change has been the hallmark of virtually every case that the Supreme Court has heard involving longstanding doctrine. The effect has been to expand the scope of obviousness in *KSR*, to restrict the scope of the doctrine of equivalents in *Hilton Davis* and *Festo*, to create greater opportunity to raise issues of invalidity by declaratory judgment in *MedImmune*, to require adjudication of invalidity counterclaims on appeal in *Cardinal Chemical*, and to restore the application of recognized equitable standards in the injunction context in *eBay*. In *Illinois Tool*, as I noted above, the Supreme Court revised the law of patent antitrust tying.

Change is the result of the Court's greater willingness to perform the central function of a common-law court—to reexamine doctrine in the light of changed circumstances and to make the law better serve the interest of all concerned. The fact that the mandate here is statutory should not alter this basic responsibility. In the somewhat similar area of antitrust, the Supreme Court and the lower federal courts beginning in the 1970s felt quite free to change antitrust law without specific congressional authorization.[51] *Illinois Tool*, in which the Court revised the law of tying, is an example in the patent area of the Court's willingness to reexamine established antitrust law.[52] In patent law, as in antitrust law, the Supreme Court recognizes its responsibility to make the law respond to modern conditions, particularly in view of the importance of patent law to the American economy.

Fourth, the Solicitor General will continue to play an important role in the process. The Supreme Court routinely requests the views of the Solicitor General in determining whether to grant certiorari in patent cases, and carefully considers those views when it reaches the merits.[53] Although the PTO has no role in developing the substantive law through rulemaking or adjudication, it does have a role to play

51. *See, e.g.*, 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 305c (2d ed. 2000) (discussing the stare decisis treatment of antitrust per se rules); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 398–99 (2003).

52. *Illinois Tool*, 547 U.S. at 28.

53. *See, e.g.*, Rebecca S. Eisenberg, *The Supreme Court and the Federal Circuit: Visitation and Custody of Patent Law*, 106 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2007), http://www.michiganlawreview.org/firstimpressions/vol106/eisenberg.pdf (noting that "the Supreme Court has increasingly sought and sometimes heeded the views of the Solicitor General before granting certiorari in patent cases").

through the office of the Solicitor General.[54] To be sure, our predecessor court was less than thrilled with the Solicitor General's role. In *In re Bergy*,[55] the court directly criticized the Solicitor General's role in the Supreme Court decision in *Parker v. Flook*,[56] stating that, because of "misrepresentations" of the Solicitor General, the Supreme Court had become "confused" due to "an unfortunate and apparently unconscious, though clear, commingling of distinct statutory provisions."[57] Today, the Solicitor General is generally viewed as having a more positive influence.

Fifth, the Supreme Court will likely continue to rely on our court in reaching its decisions and to recognize that our court plays an important role in interpreting and applying the Court's ultimate decisions. The Supreme Court has repeatedly confirmed that the Federal Circuit has useful expertise in patent law, and that the Supreme Court benefits from having its views.[58] Frequently, the Supreme Court in patent cases articulates a general principle and leaves it to our court to both administer the rule and apply it to the individual case.[59] One may anticipate that this will likely continue.

Sixth, the Supreme Court is a policy-oriented court. In all areas of the law, it is interested in the purpose and policy behind the rules that it interprets or articulates. The Court wants to know the reasons for the rule, why this situation is the same as or different from other facially similar situations, the appropriate stopping place for the proposed rule, and the adverse consequences that will flow from adopting or rejecting a particular approach. In other words, the Supreme Court requires a different approach than has characterized patent litigation historically, and litigants can only ignore this at their own peril. The problem, in general, is that the academy goes too far in urging a reshaping of the patent law to respond to perceived policy, while the bar does not go far enough. This leaves the Supreme Court and the lower federal courts with little assistance in sorting out the relevant policy concerns.

54. *See id.* (noting that the Solicitor General utilizes the input of the PTO).
55. 596 F.2d 952 (C.C.P.A. 1979), *aff'd*, 447 U.S. 303 (1980).
56. 437 U.S. 584 (1978).
57. *Bergy*, 596 F.2d at 959.
58. *E.g.*, KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1743 (2007); Lab. Corp. of Am. Holdings v. Metabolite Lab. Inc., 126 S. Ct. 2921, 2926 (2006); Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 40 (1997); Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809, 811 (1986) (per curiam).
59. *E.g.*, eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1841 (2006); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 742 (2002); *Warner-Jenkinson*, 520 U.S. at 40.

Finally, the influence of the Supreme Court is reflected not only in its specific decisions, but also in its communication of the approach the courts should adopt. There is a penumbra to the Court's decisions. The Supreme Court will continue to define for our court, in particular, the lens through which we should view the patent law, including the extent to which existing doctrine should be judicially reexamined (without congressional action), the extent to which reliance interests should be protected, the role of the PTO in the process, the balance to be struck between strong patent protection to encourage innovation, and the interest in fostering the development of competing technologies. I think it is not an overstatement to predict that the Supreme Court's role will be even greater in its impact on the general approach to patent law than in its impact on specific decisions by the lower federal courts.