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Cross-Roads of Patent Litigation and IPR Practice

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A. Introduction

The intersection of traditional patent litigation and inter partes review (IPR) trial practice has continually evolved since the Leahy-Smith America Invents Act (AIA) first introduced administrative trial proceedings before the Patent Trial and Appeal Board (PTAB). When a patent owner files a complaint for patent infringement in district court or at the International Trade Commission (ITC), almost any accused infringer will immediately consider the possibility of filing a petition for IPR. Two critical components to that inquiry are *when* to file the IPR

petition and *how* the IPR process will impact the parallel litigation. This article discusses the latest developments at the cross-roads of traditional patent litigation and IPR trial practice, addressing considerations for litigants in district court and at the ITC.

B. Applicability of the One-Year Bar

In district court, service of a complaint for patent infringement triggers § 315(b) of the AIA, which includes a statutorily imposed time restriction for filing an IPR petition. The restriction, generally known as the one-year bar, states: “An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.”¹ Over the last several years, there have been several notable developments with respect to the scope and applicability of the one-year bar.

For example, although the statutory language does not explicitly distinguish between a district court complaint and an ITC complaint, non-precedential PTAB panels have consistently interpreted § 315(b) as limited to district court complaints, such that an ITC complaint does not trigger the one-year bar.²

On the issue of privity, the PTAB determined in a precedential opinion that a petitioner's customer can be its privy, subjecting the petitioner to the one-year bar based on a complaint alleging infringement that was served on that privy more than one year to the petitioner's filing date.³ In mid-2019, the Federal Circuit held that a privity or real party in interest relationship invoking the one-year bar can arise after the date on which the district court complaint is served.⁴

In 2018, after a series of appeals that initially turned on the issue of appellate jurisdiction, the Federal Circuit determined in *Click-to-Call Technologies v. Ingenio Inc.* that the one-year bar applies even if the patent owner voluntarily dismisses the underlying litigation without prejudice.⁵ Prior to the Federal Circuit decision

in *Click-to-Call*, non-precedential PTAB panels had reached the opposite conclusion, finding that the one-year bar did not apply when an IPR petitioner was served with a complaint for patent infringement more than one year before filing its petition, but the district court action in which the petitioner was so served was voluntarily dismissed without prejudice.⁶ Following the Federal Circuit *Click-to-Call* decision, there has been a growing body of determinations applying the one-year bar regardless of whether the complaint is legally sound. For instance, the PTAB has determined in precedential decisions that the one-year bar applies even if the complaint is dismissed for lack of personal jurisdiction⁷ or if the complaint is legally deficient for lack of standing.⁸

Most recently, however, the Supreme Court vacated the Federal Circuit decision in *Click-to-Call* after ruling that the PTAB's application of § 315(b) is a final and non-appealable administrative decision.⁹ The Supreme Court noted that any other interpretation of the relevant statutory provisions (§ 315(b) and § 314(d)) would undermine the AIA's objective to "weed out bad patent claims efficiently" because allowing § 315(b) appeals would "wast[e] the resources spent resolving patentability and leav[e] bad patents enforceable."¹⁰

The Supreme Court's decision in *Click-to-Call* potentially abrogates all prior Federal Circuit decisions interpreting § 315(b), creating the possibility for the PTAB to reconsider the proper interpretation of the one-year bar. Already, petitioners are urging the PTAB to do exactly that. For instance, in *Roku, Inc. v. Universal Electronics*, the petitioner argued that the Supreme Court's decision in *Click-to-Call* "constructively abrogates" the Federal Circuit's decision in *Facebook, Inc. v. Windy City Innovations*, which issued in March 2020.¹¹ The PTAB

did not reach the issue, and instead based its conclusion on alternate reasoning. Petitioners are likely to continue raising these arguments until the PTAB takes a position on how, if at all, the Supreme Court *Click-to-Call* decision will impact the PTAB's treatment of the Federal Circuit's past interpretation of § 315(b).

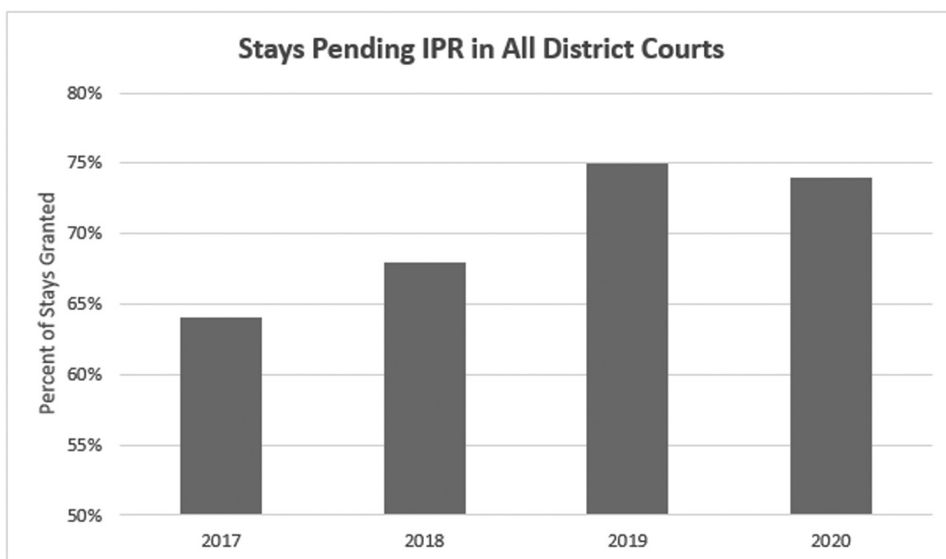
C. Timing Considerations for District Court Litigants

For district court litigants, there are several factors that impact the defendant's evaluation of the "best" time to file an IPR, and there are considerations that a patent owner can take into account to counteract those factors.

The One-Year Bar. One driving factor relevant to the timing of a defendant's IPR petition is the § 315(b) one-year bar discussed above. Because the defendant in a district court lawsuit must file an IPR within one year of service of the complaint on itself or any of its privies, one of the first steps that a defendant can and should take is determining the date of the one-year bar. A defendant should examine the asserted patent to determine whether it has been asserted in prior litigation and, if so, whether any of the earlier accused infringers could be considered a privy. A proactive approach that allows potential petitioners to make an informed decision at the earliest possible juncture is to monitor companies likely to be considered a privy and stay abreast of patent infringement lawsuits filed against those companies.

The Status of the Litigation. The status of district court litigation influences IPR timing in a variety of ways.

At the PTAB, filing an IPR petition when district court litigation is at "an advanced state" increases the risk



that the PTAB will rely on its discretion under 35 U.S.C. § 314(a) to deny institution.¹² This is in stark contrast to how the PTAB treats ITC investigations. Although ITC investigations generally conclude well before a related IPR will reach a final written decision, the PTAB routinely declines to exercise its discretion to deny institution, often relying at least in part on the fact that “the ITC does not have the power to cancel a patent claim, even if that claim is demonstrated to be invalid.”¹³

The status of the district court litigation at the time an IPR is filed or instituted also affects the likelihood that the district court will stay the litigation pending the PTAB’s resolution of the IPR, which is often an important objective for defendants. As district court litigation progresses toward trial, district court judges are less likely to grant a motion to stay. Even so, the average percentage of litigation stays granted pending IPRs over recent years is higher than 70% across all district courts. Significantly, the overall average rate of stay has recently increased to approximately 75% since the Supreme Court’s decision in *SAS Institute*, which precluded the PTAB from allowing partial institution on fewer than all challenged claims. *SAS Institute Inc. v. Iancu*, 138 S.Ct. 1348 (2018).

The District Court Venue

Over the last two years, the PTAB has demonstrated a marked increase in discretionary denials of institution based on the status of parallel district court litigation.¹⁴ This creates tension for potential IPR petitioners balancing the potential strategic benefits gained from continued litigation against the need to file an IPR petition promptly. Filing an IPR petition in the early stages of litigation can be difficult and inefficient for defendants involved in multi-patent litigation with hundreds of possible asserted claims that will eventually be narrowed down to 30 asserted claims or even fewer later in the litigation.¹⁵

The PTAB has designated several precedential decisions addressing discretionary denial (under § 314(a)) in view of parallel district court litigation, all of which discuss the importance of the state of the district court litigation and, in particular, whether the scheduled trial date falls before or after the PTAB’s final written decision would be due.¹⁶ In the most recent precedential PTAB decision—*Apple v. Fintiv*—the PTAB specifically identifies the “proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision” and “whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted.”¹⁷

The pace of district court litigation varies substantially by district and even by the judge. As a result, the particular district in which a patent infringement complaint is

filed can have a significant impact on how long a defendant can wait to file a petition for IPR and still have a reasonable chance at the institution. One district (and one judge) in particular has a widely known reputation for setting an early trial date and a low rate of granting stays pending IPR: Judge Albright in the Western District of Texas.

Because of those district (and judge) specific practices, IPR petitioners who have been sued in the Western District of Texas are far more likely to have an IPR petition discretionarily denied than an IPR petitioner who has been sued in a district with a slow docket or a high percentage of granting stays.¹⁸ Yet district court trials are notorious for encountering delays. For example, *NHK* is the earliest precedential PTAB decision related to discretionary denial in view of parallel district court litigation. There, the PTAB agreed with the patent owner that IPR would be inefficient in view of the district court scheduling order, which had a trial date scheduled six months prior to the PTAB’s statutory deadline for a final written decision.¹⁹ The trial date in the district court litigation, however, was delayed multiple times after the PTAB’s denial of institution decision.²⁰ Moreover, the ongoing COVID-19 pandemic is forcing courts to delay patent trials even further, including in the Western District of Texas. On June 15, 2020, Judge Albright delayed a patent jury trial involving Roku from June to August in view of the COVID-19 public health emergency.²¹

At the same time, there has been at least some indication that Judge Albright in the Western District of Texas is purposefully setting his trial dates in advance of expected final written decision deadlines, with the effect of potentially diminishing the defendant’s chances of institution. For instance, in *Castlemorton Wireless LLC, v. Charter Communications, Inc., et al.*, Judge Albright held a conference after learning that defendants had filed an IPR petition, and he then scheduled a trial date two months earlier than he typically would under his own practices.²² At the same time, more than 80% of the patent lawsuits filed in the Western District of Texas in the first quarter of 2020 were brought by non-practicing entities.²³

As long as the PTAB continues to deny institution based primarily on the scheduled date, patent owners will likely continue to flock to the Western District of Texas as the venue of choice to minimize a defendant’s chances of success in a petition for IPR.

Some petitioners are urging the PTAB to recognize the potential influence that forum shopping could have on IPR institution rates and asking the PTAB to reduce its focus on the district court’s scheduled trial date. Petitioners are reminding the PTAB of the inherent unpredictability of district court trial dates, which are

being delayed even further right now in view of COVID-19 exacerbating delays. Another recent petitioner with a pending case before Judge Albright reminded the PTAB that “Judge Albright has not yet conducted a single patent trial” and argued that his scheduled trial date likely “will not hold.”²⁴ Apple also recently addressed these issues, asserting that “*Fintiv’s* focus on trial also allows so-minded courts to artificially influence institution” and specifically mentioning Judge Albright and advocating to entirely abolish the discretionary denial rules set forth by the PTAB in *NHK* and *Fintiv*.²⁵ In another recent IPR matter, a non-precedential panel granted rehearing, agreed with that reasoning, and instituted review. There, the parties had jointly modified the trial date multiple times, and the panel on rehearing determined “that the trial date of the related district court litigation is uncertain.”²⁶

For now, panels applying the PTAB’s precedential decisions on discretionary denial will continue at least considering the district court’s scheduled trial date, and the PTAB has indicated that it generally takes courts’ trial schedules “at face value,” but it is unclear whether more panels will appreciate that scheduled trial dates may be unlikely to hold.

D. The Intersection of IPRs and ITC Litigation

The intersection of IPRs and ITC litigation differs from how IPRs interact with district court litigation. As discussed above, other than a few outlier judges (such as Judge Albright in the Western District of Texas), the average percentage of litigation stays granted pending IPRs over the past couple of years is approximately 75% across all district courts. By contrast, the administrative law judges at the ITC generally refuse to stay ITC investigations pending IPR proceedings.²⁷ Indeed, to date, the ITC has never granted an opposed motion to stay an ITC investigation due to a pending IPR.

The ITC’s statutorily-imposed and expedited schedule is the primary reason for this disparate treatment of stays at the Commission. Under Section 337, the ITC must complete its investigations “at the earliest practicable time.” 19 U.S.C. § 1337(b)(1). The vast majority of ITC investigations have a 15- to 16-month schedule to a Final Determination by the ITC, with the ALJ bench hearing occurring at about 10 months after institution. The Commission’s mandate for speed is what drives it forward despite pending IPRs on the same patents.

Given this dynamic, and that a stay pending institution of an IPR is extremely unlikely to occur under the

Commission’s view of the current statutory framework, ITC Respondents sometimes question the value in pursuing IPRs. Because it typically takes 18 months after filing an IPR for the PTAB to issue a final written decision, it is extremely rare that a PTAB final decision of invalidity would ever issue *before* the Commission issues its Final Determination and an ITC remedial order goes into effect.

And, even if an ITC Respondent successfully obtains a PTAB final decision of invalidity *after* the Commission’s remedial order has gone into effect, the Commission is still unlikely to suspend its remedial orders. For example, recent ITC litigation confirms that the Commission will both institute investigations (e.g., *Certain Hybrid Electric Vehicles and Components Thereof*, Inv. No. 337-TA-1042 (2017)), and ALJs will refuse to stay investigations (e.g., *Certain Memory Modules*, Inv. No. 337-TA-1089 (2019)), even where the PTAB has already issued a final written decision of invalidity on the patents at issue.

More recently, however, the Commission has acknowledged that PTAB final decisions of invalidity that issue before an ITC Final Determination *may* affect enforcement of a remedial order. For example, in *Magnetic Tape Cartridges*, Inv. No. 337-TA-1058 (2019), the Commission noted that it has “broad discretion in selecting the form, scope, and extent of the remedy” and determined that it was appropriate to partially suspend enforcement of its remedial orders *pending the appeal* of the PTAB final written decision.²⁸

Regardless, under current Commission practice, absent an unopposed motion or agreement between the parties (which is what happened, e.g., in *Certain Integrated Circuits*, Inv. No. 337-TA-1024 (2018)), the Commission likely will *not* stay an ITC investigation or suspend a remedial order unless the Respondent is successful in obtaining a Federal Circuit affirmance of a final PTAB decision of invalidity. This sets up the common scenario of an ITC Respondent’s “race to the Federal Circuit,” with the goal of obtaining an affirmance of a PTAB’s invalidity decision before any affirmance of the ITC’s Final Decision.²⁹

Notwithstanding the timing and procedural considerations, it is often still advisable for ITC Respondents to quickly pursue IPRs. As compared to the Commission, the PTAB continues to have a significantly higher rate of invalidating patent claims, due in part to the lower burden of proof and lack of presumption of validity. The IPR proceedings may lead to helpful documents (e.g., expert declarations, expert deposition testimony, etc.) that can be used in the ITC investigation. Moreover, filing an IPR will increase pressure and leverage on the Complainant/patentee, and will require the Complainant to separately defend its patent with written filings and depositions,

often at the same time that parties are preparing for trial/hearing in the ITC investigation.

E. IPR Procedural and Timing Considerations at the ITC

At a high level, conventional wisdom suggests that an ITC Respondent should prepare and file an IPR petition as quickly as possible. Unless a Respondent had knowledge of the asserted patents before the ITC investigation was brought, it is highly unlikely that the PTAB would render a final decision of invalidity prior to the ITC hearing. Though, some recent investigations with somewhat later Target Dates have allowed for circumstances where a PTAB final written decision of invalidity comes before the Commission Final Determination.

Accordingly, it is important to appreciate that the impact of a PTAB final decision at the ITC depends on the stage of the ITC investigation. The following illustration depicts how the impact of a PTAB decision will be treated differently at different stages of the ITC investigation:

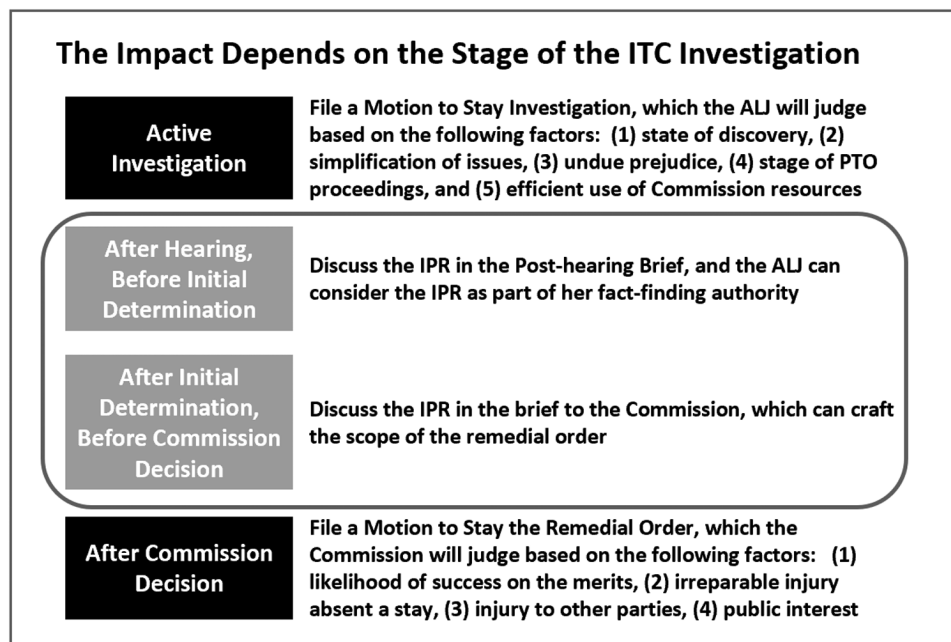
IPR Decision before the ITC Hearing. If the PTAB decision comes early enough in the ITC investigation (*i.e.*, before the hearing), the Respondent can file a Motion to Stay that would be decided by the ALJ under the five-factor test. However, as discussed above, no ALJ has ever applied these factors to stay an investigation based solely on institution of an IPR. And even where a final PTAB decision of invalidity of all claims

came *before* the hearing, the ALJ only stayed the investigation because it was an unopposed motion where the Complainant was “in favor of a stay pending resolution of the appeal.” *Certain Integrated Circuits*, Inv. No. 337-TA-1024 (2018).

After the Final Determination. At the other end of the spectrum, what happens if the PTAB final decision comes *after* the Commission Final Determination (and after the remedial order is in effect)? In that situation, the Respondent could file a motion with the Commission to Stay Enforcement of the Remedial Order, which is decided by the Commission (not the ALJ) under a somewhat different test. The Commission, however, has denied motions brought at this juncture in multiple cases, including by reasoning that a PTAB final decision of invalidity does not constitute the “changed circumstances” that are necessary to rescind a remedial order. *See, e.g., Certain Network Devices*, Inv. No. 337-TA-945 (2017).

Accordingly, based on some recent Commission decisions, it seems that there may be an optimal time window for the Commission’s consideration of whether a PTAB final decision of invalidity should affect the Commission’s enforcement of an otherwise-to-be-granted remedial order.

As discussed above, in *Magnetic Tape Cartridges*, the Commission partially suspended the enforcement of its remedial orders pending the appeal of the PTAB final written decision. Inv. No. 337-TA-1058. A similar situation occurred in an earlier investigation, *Three-Dimensional Cinema Systems*, Inv. No. 337-TA-939 (2016), where the PTAB final written decision of invalidity of one of the patents-at-issue came *after* the ALJ’s



Initial Determination but *before* the Commission's Final Determination. There, the Commission similarly suspended enforcement of its remedial orders. Significantly, however, in both of these cases, the PTAB decision did not invalidate *all* of the patents/claims that served as the basis for the remedial orders. Indeed, in *Magnetic Tape Cartridges*, the Commission expressly acknowledged that

the suspension had “no practical effect” due to other claims that were not affected by the PTAB decision.³⁰ Thus, it remains uncertain whether the Commission would entirely suspend remedial orders in a scenario where the PTAB issues a final written decision finding that all claims at issue in the ITC investigation are not patentable.

1. 35 U.S.C. § 315(b).
2. See, e.g., *Robert Bosch Tool Corp. v. SD3, LLC*, IPR2016-01751, Paper No. 15 (Institution Decision), 13–14 (PTAB Mar. 22, 2017).
3. *Ventex Co., Ltd. v. Columbia Sportswear*, IPR2017-00651, Paper No. 148, 15–16 (Jan. 24, 2019) (Precedential).
4. *Power Integrations, Inc. v. Semiconductor Components Indus., LLC*, 926 F.3d 1306, 1315 (Fed. Cir. June 13, 2019).
5. *Click-to-Call Techs. v. Ingenio, Inc.*, 899 F.3d 1321, 1336 (Fed. Cir. 2018) (en banc), vacated and remanded sub nom. *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367 (2020).
6. *Oracle Corp. v. Click-to-Call Technologies, LP*, IPR2013-00312, Paper 52 (Final Written Decision), 12–13 (PTAB Oct. 28, 2014).
7. *Infiltrator Water Techs., LLC v. Presby Patent Trust*, IPR2018-00224, Paper 18, 7 (PTAB Oct. 1, 2018) (Precedential).
8. *GoPro Inc. v. 360Heroes Inc.*, IPR2018-01754, Paper No. 38, 13–14 (Aug. 23, 2019) (Precedential).
9. *Click-to-Call Techs., LP*, 140 S. Ct. at 1373–74 (2020).
10. *Id.* at 1374.
11. *Roku, Inc. v. Universal Electronics, Inc.*, IPR2019-01612, Paper 10, 3 (PTAB May 5, 2020) (discussing *Facebook, Inc. v. Windy City Innovations, LLC*, 953 F.3d 1313 (Fed. Cir. 2020)).
12. *NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.*, Case IPR2018-00752, Paper 8, 19–20 (Sept. 12, 2018) (precedential); see also *Intel Corp. v. VLSI Tech.*, IPR2020-00158, Paper No. 16 (Institution Decision), 8 (PTAB May 20, 2020).
13. *3Shape A/S v. Align Tech., Inc.*, IPR2020-00223, Paper No. 12 (Institution Decision), 33–34 (May 26, 2020); see also *Nichia Corp. v. Lighting Science Grp. Corp.*, IPR2019-01259, Paper No. 21 (Institution Decision), 27–28 (PTAB Jan. 15, 2020) (“As noted by Petitioner, the ITC does not have the authority to invalidate a patent in a way that is applicable to other forums, and thus ITC decisions do not preempt issues addressed in an *inter partes* review proceeding.”).
14. E.g., *Intel Corp.*, Paper No. 16 (Institution Decision) at 14.
15. See *Masimo Corp. v. Phillips Elecs. N. Am. Corp.*, 918 F. Supp. 2d 277, 284, 286 (D. Del. 2013) (“Masimo shall identify no more than thirty (30) of its presently asserted claims, from any or all of its patents-in-suit, that are representative of the claims at issue in this litigation.”).
16. *Apple Inc. v. Fintiv, Inc.*, Case IPR2020-00019, Paper 11, 5–16 (Mar. 20, 2020) (precedential); *Oticon Medical AB v. Cochlear Limited*, Case IPR2019-00975, Paper 15, 20–24 (Oct. 16, 2019) (precedential); *NHK Spring Co.*, Paper 8 at 19–20.
17. *Fintiv*, Paper No. 11 at 6 (PTAB Mar. 20, 2020) (precedential).
18. E.g., *Ethicon Inc. v. Board of Regents*, IPR2019-00406, Paper No. 27 (Institution Decision) (PTAB June 10, 2020).
19. *NHK Spring Co.*, Paper 8 at 19–20.
20. See Stipulation and Order Amending Second Amended Case Management and Pretrial Order for Jury Trial, *Intri-Plex Techs., Inc. v. NHK Int'l Corp.*, No. 3:17-cv-01097 (N.D. Cal. Aug. 7, 2019), ECF No. 254; *Sand Revolution II, LLC v. Continental Intermodal Grp.*, IPR2019-01393, Paper No. 22 (Petitioner's Supplemental Brief), 4–5 (June 16, 2020) (discussing *NHK* schedule).
21. Ryan Davis, *WDTX Judge Moves Roku Patent Trial to August Amid Virus*, Law360 (June 15, 2020, 5:52 PM), <https://www.law360.com/articles/1283085/wdtx-judge-moves-roku-patent-trial-to-august-amid-virus>.
22. *Castlemorton Wireless LLC v. Charter Communications, Inc.*, et al, No. 20-CV-000024 (consolidated), Docket No. 38 (W.D. Tex. June 8, 2020).
23. J. Stroud, Q1 2020 Patent Litigation Filings Show Western District of Texas is the New Venue of Choice, IPWatchdog (April 5, 2020), available at <https://www.ipwatchdog.com/2020/4/05/patent-filings-western-district-texas-new-venue-choice/id=120358/>.
24. *Micron Technology, Inc. v. Godo Kaisha IP Bridge 1*, IPR2020-01007, 11 (June 4, 2020).
25. *Apple Inc. v. Maxell Ltd.*, IPR2020-00408, Paper No. 8, 5–6 (June 4, 2020).
26. *Sand Revolution II, LLC v. Continental Intermodal Grp.—Trucking LLC*, IPR2019-01393, Paper No. 24 (Granting Rehearing), 8–9 (June 16, 2020).
27. See, e.g., *Certain Laser-Driven Light Sources*, Inv. No. 337-TA-983 (2016), where ALJ Shaw refused to stay an investigation even though the PTAB had instituted IPRs on the asserted patents before the Complaint was even filed at the ITC.
28. Notably, however, the Commission suspended the remedial orders only in part and expressly acknowledged that the suspension “had no practical effect” since the accused products would “still be subject to immediate exclusion” in view of other asserted claims that were not affected by the PTAB final decision on invalidity.
29. The Commission's practice of not staying remedial orders also sets up potentially significant results where injunctive relief will be enforced by the Commission's remedial orders for many months, until the Federal Circuit affirms a PTAB decision of invalidity. See, e.g., *Cisco Systems, Inc. v. Arista Networks, Inc.*, 908 F.3d 792 (Fed. Cir. 2018) (affirming PTAB decision of invalidity although ITC's remedial order had been in effect for 10 months on the patent at issue); *Nobel Biocare Servs. AG v. Instrand USA, Inc.*, 903 F.3d 1365 (Fed. Cir. 2018) (affirming PTAB's decision of invalidity although ITC's remedial order had been in effect for over 16 months on the patent at issue).
30. The Commission acknowledged the same with respect to its decision in *Three-Dimensional Cinema Systems*, which it distinguished in its opinion in *Certain Network Devices*, acknowledging that there were other patents on which the remedial orders had been based that were not affected by the PTAB decision. See *Certain Network Devices*, Inv. No. 337-TA-945, Comm'n Op. at 13–14 (July 25, 2017).

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