Only in Your Dreams: Patent Stakeholders Share Their IP Wishes for the New Year
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Editors
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[Link]

It's New Year's Day 2022, and as we do each year at this time, we asked our readers to weigh in on their "wildest dreams" for IP in the upcoming year (though I tend to agree with one commenter below who said, "I don't dream about IP…if you do, seek immediate professional help.") Responses this year ranged from the practical (that Kathi Vidal and Leonard Stark will be confirmed to their respective nominations) to the fantastical (the invention of a teleporting machine) – and we even got a poetry submission! Read on for more of our readers' wildest IP dreams, and Happy New Year!

Alden Abbott
Mercatus Center, George Mason University

Playing Dr. Pangloss and wishing for the best of all possible worlds, I hope that Biden Administration officials take a second look before finalizing their 2020 anti-IP initiatives. Perhaps the realities of international geopolitical competition (especially from China) and the need to revive a vibrant growing economy will cause them to better appreciate the importance of maintaining strong IP rights to preserve and enhance American innovation. In Dr. Pangloss's ideal world, the Administration would recede to the traditional understanding of Bayh-Dole; support legislation to restore the presumption in favor of injunction when patent infringement is found; endorse the New Madison Approach in all respects; oppose any weakening of IP protections for COVID-19 vaccine patents; and endorse patent reform legislation introduced by Congressman Massie that (among other things) would eliminate the PTAB, clarify Section 101 patent eligibility, and restore "first to invent" patent eligibility in the United States. The world not being ideal, however (and the near-term elimination of PTAB being a non-starter), I would set aside my wish list and settle in the near term for a recognition that the legitimate interests of both patent holders (and, in particular, SEP holders) and implementers need to be weighed in setting IP policy. One small ray of hope is that Kathi Vidal, the presumptive new head of PTO, has a very strong IP law background and experience representing parties on both sides on patent eligibility questions. Let us hope that Ms. Vidal may bring to bear her understanding of the patent system to support Administration policies that remain mindful of the importance of strong patent rights to a vibrant and innovative American economy.

Nick Aries
Bird & Bird

The invention of a teleporting machine to be able to see friends and family around the world in the blink of an eye. Or more seriously, continued innovation in COVID-19 treatment and vaccine development leading to a global and equitable end to the pandemic.

Megan Bannigan
Debevoise & Plimpton

My wildest dream for 2022 is that courts will clarify the *Rogers v. Grimaldi* test for application of the First Amendment to Lanham Act claims. Both trademark holders and creators of expressive works incorporating others' trademarks need predictability as to when the unauthorized use of a trademark will receive heightened protection, but courts apply the *Rogers* test unevenly and with significant variation. The *Rogers* test is inherently vague, defendants in the Second Circuit face a more rigid and burdensome standard than defendants in courts like the Ninth Circuit, and certain other courts do not apply the *Rogers* test at all. The Supreme Court had an opportunity to clarify the appropriate test in *VIP Products v. Jack Daniel's*, but it denied cert in early 2021. *Rogers* arose again in April 2021 with Nike's challenge to MSCHF's Satan Shoes, but that case settled before my team could fully litigate the issue. I

wish that, when this issue arises in 2022, as it inevitably will, courts take the opportunity to lend clarity and consistency for brands and artists alike

Aziz Burgy
Axinn

If I could ask IP Santa Claus for one wish in 2022, it would be for sensible and pragmatic legislative reform on patent eligibility. Lack of clarity and consistency on patent eligibility has plagued the patent system since at least the two-part test mandated in *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014). Unless SCOTUS can provide clarity in the upcoming *American Axle & Manufacturing Inc. v. Neapco Holdings* case, many stakeholders believe that legislation is needed to rectify the problem. Although congressional efforts have been proposed over the last few years, there has been no consensus to move things forward. What's more is that patent eligibility affects just about all technology areas and, thus, reform is desperately needed.

Julie Burke,Ph.D.
IP Quality Pro

In 2022, let's adopt the Patent Cooperation Treaty's Unity of Invention standard for the USPTO's Patent Prosecution Highway (PPH) applications.

The USPTO's PPH program builds upon international work sharing efforts to expedite examination of >65,000 applications. While PPH expedited examination comes with some associated risks, the benefits—higher allowance rates, fewer Office actions, lower pendency—make PPH an attractive option for applicants pursuing US and international patent rights.

Concurrent examination of all claims under the Unity of Invention standard and acceptance of applications into the PPH program are both predicated on a determination that the claims are novel and unobvious. The PPH program already includes national stage applications filed in compliance with 35 U.S.C. 371 which are reviewed under the Unity of Invention standard.

However, other PPH applications filed under 35 U.S.C. 111(a) are subject to US-style restriction practice based on MPEP 802.01 "independent ***or*** distinct" criteria. This re-interpretation of 35 U.S.C. 121's "independent ***and*** distinct" criteria uniquely permits the USPTO to restrict examination to product claims and to postpone examination of claims corresponding to processes of making and using the product in additional, divisional applications.

Support and further rationale for "jumpstarting harmonization" by making a move towards unity of invention has been provided by the Intellectual Property Owners Association in August 13, 2010, the American Bar Association in August 11, 2010, and byAndrew Baluch and this author in their 2016 proposed Survey.

James DeVellis
Foley & Lardner

My wildest IP dreams would be to see an explosion of cleantech and biotech patent filings in 2022. In this coming decade a whole new economy will be built, this will be a foundational and generational shift. We have rarely if ever had such open space in front of us. For example, the world will transition its vehicle fleet from internal combustion to electric, with an overlay of automation. National power grids will need to be rebuilt – not just retrofitted – to get renewable energy from source to consumer. Whole new energy storage ecosystems will be created, including closed loop systems that account for secondary battery use or recycling. Not to mention other de-carbonization and carbon-neutral technology. All this, plus vaccine developments, genetic engineering, and agtech developments to feed a growing population in an efficient, resilient, and environmentally sustainable manner.

The innovators of this foundational new technology will be the leaders of tomorrow's economy. More broadly, the countries and regions that invest in, nurture, and protect this innovation will be the countries that lead and set international agendas in 2022 and beyond. Time is of the essence, now more than ever. Let's get started!"

Marla Grossman
American Continental Group

Big radio is a multi-billion dollar industry, yet these multi-national conglomerates do not pay a dime to the hardworking musical performers whose works make up the music that these radio stations play. In 1978, the Register of the U.S. Copyright Office recommended that Congress enact a public performance right for sound recordings, stating, "[t]o leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified. " For decades, the Copyright Office and every Administration – Democrat and Republican – has consistently supported such a right.

Of all the ways we listen to music in the US, terrestrial radio is the only one that doesn't pay anything to the performers that bring the music to life. Terrestrial radio's competitors – Internet, satellite, and cable radio – all pay artists and rights owners when they play their music. In addition, every industrialized country except the US recognizes a copyright for the performance of sound recordings for terrestrial transmissions. That means when American-made music is played overseas, other countries collect royalties for, but don't pay American artists, because we don't collect for their artists here.

Thus, my IP wish for 2022 is that Congress finally ends the decades-long loophole that has enabled AM/FM radio broadcasters to use the music of hard-working performers without compensating them for their work. The failure of terrestrial radio to compensate the performing artists, whose sound recordings drive the success of broadcast radio, remains one of the few remaining injustices in music law. Hopefully this will be the year that Congress recognizes the value of the creators of the music that provides the soundtrack of our lives.

Thomas Isaacson
Polsinelli

My wildest dream for 2022 includes improving the basic obviousness analysis in the particular instance where conflicting disclosure is found between two references. The MPEP requires that all the teachings of the prior art must be considered when combining two or more references, including the parts that conflict with each other. In some cases, the blending of the references would change the reference being modified away from its intended purpose or change its principle of operation. Though I often point this out to the Patent Office when it applies, the conflicting part of the reference is consistently ignored. The Patent Office should reason through what one of skill in the art – without knowledge of the invention – would do with the conflicting material and how it would be perceived. I'm not sure I've ever seen a fair and proper analysis in those cases where actual conflicting disclosure exists between two or more references that might urge away from the combination. Many patents go abandoned because the argument is deemed "moot" – simply because the Patent Office is not focusing on the conflicting part of the disclosure. I would love to see the Patent Office require a detailed response explaining whether an artisan might not make the combination of two references given the conflicting disclosure. Then, if the Patent Office maintains the rejection, it must explain that the preponderance of the evidence outweighs the conflicting material and that the artisan would still be motivated to make the combination.

BlairJacobs
McKool Smith

'Twas the night before 2022, when all through the IP bar
Not a creature was stirring, not even an ITC ALJ resolving a discovery dispute concerning why a component is different from a car;
I was tasked with the question of idealistic wishes for the year,
And sat down to my computer with a sliver of fear;
Visions of sugar-plums had long ago faded,
Most patent practitioners had become sadly jaded.
But 2022 was different, dreams drew appeal,
Hopes became focused, predictability real.
First on the list was Federal Circuit panels viewing Section 101 with parity,
But would only a fool hope for such clarity?
Ask as they might for Supreme Court eligibility assistance,
The Federal Circuit receives only resistance.
2022 is different, certainty will thrive,

And 101 challenges have a clear test to determine which patents survive.
When down in Waco arose such a clatter,
I sprang from my research to see what was the matter.
Mandamus venue rulings appearing every day,
But wasn't this procedure only for incurable delay?
2022 provides certainty and patent parties know where to work,
Clients rejoice, but turn with a jerk.
And what to their wondering eyes did appear,
But a case called *Fintiv* that evokes much fear.
Some have called PTAB's Fintiv policy a chaotic mess,
But patent practitioners know it's little more than a wild guess.
Wonders cease, 2022 brings certainty to Fintiv questions big and small,
And petitioners can advise on institution chances with more than a crystal ball!

Efrat Kasznik
Foresight Valuation Group

In my wildest dreams, there will be *greater transparency* as it relates to reporting the value of company's IP (intangible assets) on the balance sheet. This has been a recurring dream, as very little has been done to make it a reality. The most significant obstacle are accounting rules which do not require the disclosure of intangible assets at their fair value on the balance sheet. There are many reasons for that, but the bottom line is lack of visibility into the value of these key corporate assets, which causes intangible assets to be under-managed at the corporate level. The IP valuation gap is not a new phenomenon, but if this was something companies could live with even a decade ago, it is becoming more acute as the relative value of intangibles within the corporation is increasing to very close to 100% in some industries. Since accounting rules are not likely to change anytime soon, I would urge corporations to take more leadership and initiate some sort of disclosure that will give the market visibility into the valuation of their intangible assets. This will also result in better dealmaking, as less resources will go towards unearthing the value of assets that have been there all along.

Steve Kunin
Maier & Maier
My main wishes for 2022 are that Kathi Vidal and Leonard Stark are confirmed and contribute significantly to the mission and goals of the USPTO and Federal Circuit. Both individuals are highly credentialled and have the experience, knowledge and ability to strengthen the Office and the Court. Both will face daunting challenges in strengthening IP law and policy in the U.S., but have the wherewithal to help our country move forward during these trying times.

Professor Daryl Lim
Center for Intellectual Property, Information and Privacy Law, University of Illinois Chicago School of Law

First, that the US and China will reach a détente. Both countries see technology as strategic assets, and by implication, the patents and trade secrets tied to them through a zero-sum lens. 2021 has not done much to ease tensions or build trust. There are many technology-related issues that both countries' leadership could cooperate in – climate change, the digital economy, and the Covid-19 pandemic, to name three crucial ones. While it is easy to see progress as a top-down initiative, there is much that we can do at the grassroots level to collaborate through "big-tent" IP conferences, institutional partnerships between IP stakeholders, and perhaps most importantly, through a resilient and proactive network of people-to-people ties.

Second, a copyright exception for text and data mining. As an affirmative defense, fair use is too case-specific and therefore unpredictable to ensure reliable access to a pipeline of text and data that is the lifeblood of the AI industry. As a country with a widely respected IP regime, Singapore's recent legislative amendments introducing a commercial exception for text and data mining warrants careful study.

Third, multilateral and regional organizations will regain their relevance in helping establish relevant, responsive, and balanced worldwide IP norms. Key issues like access to vaccines and treatments, cross-border forum shopping in standard-essential patent litigation, the protection and enforcement of AI-related technologies, and emerging issues like non-fungible tokens and virtual spaces like Facebook's metaverse demand coherent and balanced answers on a global scale.

Scott McKeown
Ropes & Gray

I don't dream about IP…if you do, seek immediate professional help. Sure there are plenty of potential changes to be made to the IP laws in 2022, but I leave that to the eggheads.

On the other hand, I frequently dream of reforming the attorney profession for the greater good. For example, any patent attorney using the terms; "out of an abundance of caution"; "elegant solution"; "*ipse dixit* (or any Latin terms of that matter); and "adduced or proffered" will be subject to immediate "reeducation." Ideally, every Judge would have a button on their bench that would open the courtroom floor to a dark place of rehabilitation, like Jabba's Great Pit of Carkoon in the Tatooine desert (if you don't get this reference surrender your USPTO reg# immediately). The pit's maw would be lined with aggressive legal vendors that have been unable to go to live events since 2019, and they would pelt you with USB drives, pens, and mugs until you started speaking plain English again. Otherwise, you fall down to the next to the pit of dreaded attorney advertising, here you would be forced to chant the words like "preeminent," "leading," and "go-to" as you sit in a room lined with video monitors that are fed in real-time with generic LinkedIn humble brags and Chambers quotes. Finally, if you still don't repent, you go to the last level in the pit, the Zoom, virtual happy hour….and nobody, and I mean NOBODY, wants to go there.

Happy Holidays; may your new year be a preferred embodiment.

John Rogitz
Rogitz & Associates

That Section 101 law is cleansed of its judicial encrustations to conform to Article I, Section 8, Clause 8 of the Constitution (promote the useful arts and sciences) and 35 USC 101 (*any* new and useful process, machine, manufacture, or composition of matter, or *any* new and useful improvement thereof, is patent-eligible).